

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AFSCME DC 47 LOCAL 2187, AFL-CIO :  
:  
: Case No. PERA-C-17-352-E  
v.  
:  
CITY OF PHILADELPHIA :

**PROPOSED DECISION AND ORDER**

On December 13, 2017, the American Federation of State, County, and Municipal Employees District Council 47, Local 2187 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the City of Philadelphia (City or Employer), alleging that the City violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by refusing to comply with the terms of a grievance settlement agreement.

On January 5, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, directing a hearing on March 19, 2018, in Harrisburg, if necessary. The hearing was subsequently continued to June 22, 2018 at the City's request and over AFSCME's objection.

The hearing ensued on June 22, 2018, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The City filed a post-hearing brief on September 17, 2018. AFSCME filed a post-hearing brief on September 18, 2018.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

**FINDINGS OF FACT**

1. The City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 13-14)

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 14)

3. AFSCME is the certified bargaining agent for a unit of professional, administrative, and technical employes of the City. (PERA-R-1063-E)

4. AFSCME and the City are parties to a collective bargaining agreement (CBA) governing the terms and conditions of employment for the employes in the bargaining unit. (Joint Exhibit 1)

5. Lauren Glazer was employed as a sanitarian with the City Department of Health in 2015. (N.T. 16-17; Joint Exhibit 1)

6. Sanitarians are responsible for inspecting any facility within the City that holds a food license. (N.T. 18)

7. On December 9, 2015, the City discharged Glazer from employment for gross insubordination, failure to follow direction, and violation of the

City's drug/alcohol policy for an October 1, 2015 incident, during which the City alleged that Glazer purchased and consumed an alcoholic beverage while on duty. (City Exhibit 1)

8. AFSCME filed a grievance protesting the discipline and processed the grievance to arbitration. (N.T. 18)

9. The parties appeared at the American Arbitration Association on January 31, 2017 for a hearing, but reached a settlement on the day of the hearing. (N.T. 19)

10. The parties executed the settlement agreement on May 5, 2017. (Joint Exhibit 1)

11. The settlement agreement provides, in relevant part, as follows:

The City will rescind and reduce Glazer's discharge to a 30-day suspension. Glazer will be reinstated, as of the date of discharge, and receive back pay, less the 30 day suspension. There shall be no break in service for purposes of pension, seniority, longevity and/or any other benefit or emolument where a calculation of length of service is a consideration. Glazer shall be reinstated to her former position within thirty (30) days of the City's receipt of the completely executed settlement agreement, and the City shall tender all due back pay within ninety (90) days of its receipt of the completely executed settlement agreement.

In addition to the above, Glazer agrees to execute and adhere to the Agreements set forth in Appendices III and IV of the City of Philadelphia's Drug and Alcohol Policy, dated December, 2001. Appendices III and IV of the City of Philadelphia's Drug and Alcohol Policy are attached to this settlement agreement. It is understood that this is a necessary condition to the implementation of this Order and is a material term to the Agreement between the parties.

(Joint Exhibit 1)

12. The settlement agreement further provides, in pertinent part in Appendix III, as follows:

Because I have been involved in an on-the-job incident related to drug and/or alcohol abuse, the following are conditions of my continued employment with the City of Philadelphia...

I will satisfactorily complete rehabilitation and After Care treatment as determined by my Employee Assistance Program or Mental Health Provider.

I must successfully complete an appropriate course of testing established by the Medical Evaluation Unit, Health Department, prior to returning to work.

I understand that the Medical Evaluation Unit (MEU) retains the right to institute follow-up testing at its discretion during the

After Care period for one (1) year. If I test positive, I may be subject to disciplinary action up to and including discharge. I understand that any further substance abuse incident, either on or off the job, which affects my ability to perform my job safely and effectively may lead to disciplinary action up to and including discharge.

(Joint Exhibit 1)

13. The settlement agreement also provides, in relevant part, in Appendix IV, as follows:

According to the City's Drug and Alcohol Abuse Policy, participation in an After Care Treatment Program, as outlined below, is a condition of my continued employment with the City of Philadelphia...

During the first 90 days following my return to work, I am required to attend outside Alcoholics Anonymous/Narcotics Anonymous meetings or other After Care treatment, and to continue treatment by a Substance Abuse Professional (SAP).

I must attend After Care meetings according to the schedule outlined by the After Care SAP.

I must provide proof of attendance at the above to a department ADA Officer.

During the duration of this After Care period, I must remain totally drug and alcohol free.

**I agree to waive any confidentiality regarding my After Care attendance.**

(Joint Exhibit 1) (Emphasis in original)

14. On May 9, 2017, Glazer underwent testing with the City's Medical Evaluation Unit (MEU) prior to her return to work and allegedly tested positive for cocaine. The City refused to reinstate Glazer to her position as a sanitarian, alleging that she violated the terms and conditions of the settlement agreement. (N.T. 24-25; City Exhibit 1)

#### DISCUSSION

AFSCME's charge alleges that the City violated Section 1201(a)(1) and (5) of PERA<sup>1</sup> by refusing to comply with the terms of a grievance settlement agreement and pay Glazer back pay. Specifically, AFSCME contends that Glazer's failure to pass a drug screening was simply a breach of a condition

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<sup>1</sup> Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act... (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

subsequent to the settlement agreement, which does not excuse the City from its failure to perform its prior obligations under the agreement, including Glazer's entitlement to back pay.<sup>2</sup> The City, on the other hand, maintains that the charge should be dismissed because the City was not obligated to reinstate Glazer or tender back pay unless Glazer adhered to the requirements of Appendix III because those requirements were a condition precedent to the City's obligations.

Where a grievance has been resolved through a settlement, a public employer violates its duty to bargain under Section 1201(a)(1) and (5) of PERA when it refuses to comply with a grievance settlement agreement.

Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Department of Corrections, Rockview SCI, 47 PPER 43 (Final Order, 2015). Where there is a settlement agreement, the Board will determine (1) if a meeting of the minds on the settlement actually exists; (2) whether the parties' intent is apparent from the settlement agreement; and (3) whether the party has failed to comply with the agreement's provisions. AFSCME District Council 47 Local 2187 v. City of Philadelphia, 36 PPER 124 (Final Order, 2005). The burden is on the complainant to establish by substantial evidence that the respondent has failed or refused to comply with the terms of the settlement agreement. Rockview SCI, *supra*.

In this case, AFSCME has sustained its burden of proving that the City failed to comply with the terms of the settlement agreement by refusing to pay Glazer her back pay due pursuant to the agreement. First of all, the record clearly shows that a valid settlement agreement exists. Indeed, there is no dispute among the parties that they resolved the grievance pursuant to a May 2017 settlement agreement, duly executed by both sides, as well as the grievant herself. Similarly, the record shows that the parties' intent is apparent from the settlement agreement, which provides as follows:

The City will rescind and reduce Glazer's discharge to a 30-day suspension. Glazer will be reinstated, as of the date of discharge, and receive back pay, less the 30 day suspension. There shall be no break in service for purposes of pension, seniority, longevity and/or any other benefit or emolument where a calculation of length of service is a consideration. Glazer shall be reinstated to her former position within thirty (30) days of the City's receipt of the completely executed settlement agreement, and the City shall tender all due back pay within ninety (90) days of its receipt of the completely executed settlement agreement.

In addition to the above, Glazer agrees to execute and adhere to the Agreements set forth in Appendices III and IV of the City of Philadelphia's Drug and Alcohol Policy, dated December, 2001. Appendices III and IV of the City of Philadelphia's Drug and Alcohol Policy are attached to this settlement agreement. It is understood that this is a necessary condition to the implementation of this Order and is a material term to the Agreement between the parties...

Appendix III, Substance Abuse Agreement, City of Philadelphia

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<sup>2</sup> AFSCME does not argue that the City violated the settlement agreement by refusing to reinstate Glazer to her position as a sanitarian.

Because I have been involved in an on-the-job incident related to drug and/or alcohol abuse, ***the following are conditions of my continued employment*** with the City of Philadelphia...

I will satisfactorily complete rehabilitation and After Care treatment as determined by my Employee Assistance Program or Mental Health Provider.

I must successfully complete an appropriate course of testing established by the Medical Evaluation Unit, Health Department, prior to returning to work.

I understand that the Medical Evaluation Unit (MEU) retains the right to institute follow-up testing at its discretion during the After Care period for one (1) year. If I test positive, I may be subject to disciplinary action up to and including discharge. I understand that any further substance abuse incident, either on or off the job, which affects my ability to perform my job safely and effectively may lead to disciplinary action up to and including discharge...

Appendix IV, After Care Contract, City of Philadelphia

According to the City's Drug and Alcohol Abuse Policy, ***participation in an After Care Treatment Program, as outlined below, is a condition of my continued employment*** with the City of Philadelphia...

During the first 90 days following my return to work, I am required to attend outside Alcoholics Anonymous/Narcotics Anonymous meetings or other After Care treatment, and to continue treatment by a Substance Abuse Professional (SAP).

I must attend After Care meetings according to the schedule outlined by the After Care SAP.

I must provide proof of attendance at the above to a department ADA Officer.

During the duration of this After Care period, I must remain totally drug and alcohol free.

I agree to waive any confidentiality regarding my After Care attendance.

(Joint Exhibit 1) (Emphasis added).

The dispute in this matter hinges on whether Glazer's alleged failure to pass a drug screening on May 9, 2017 excused the City's refusal to pay Glazer back pay in accordance with the terms of the settlement agreement. AFSCME concedes that Glazer's failure to pass the drug screening on May 9, 2017 excused the City's refusal to reinstate her to her prior position as a sanitarian. However, AFSCME insists that this only excused the City from its continued performance on the contract, and not its prior obligation to tender back pay under the settlement agreement. The City, for its part, points to the language contained in the second paragraph cited above, which expressly sets forth that Glazer agrees to execute and adhere to the agreements

contained in Appendices III and IV and that this represents a necessary condition and material term to the agreement between the parties. Further, the City submits that Appendix III expressly requires Glazer to successfully complete an appropriate course of testing established by the Medical Evaluation Unit prior to returning to work.

Although the City's point is well taken that Appendices III and IV were expressly designated as necessary conditions and material terms to the agreement, I must agree with the Union in this case. Indeed, there is absolutely no language whatsoever in Appendix III or IV which states that Glazer must successfully complete an appropriate course of testing prior to receiving her back pay. In fact, Appendices III and IV are completely devoid of any language which even remotely addresses the issue of back pay. Instead, these provisions relate entirely to the conditions Glazer must adhere to in order to continue her employment with the City. To that end, Appendix III states that "the following are conditions of my continued employment with the City," while Appendix IV indicates that "[a]ccording to the City's Drug and Alcohol Abuse Policy, participation in an After Care Treatment Program, as outlined below, is a condition of my continued employment with the City." Thus, the parties clearly did not condition Glazer's receipt of back pay on any obligations contained in either Appendix to the settlement agreement.

To the contrary, the obligation regarding back pay appears in the first paragraph set forth above, which provides in relevant part that "[t]he City will rescind and reduce Glazer's discharge to a 30-day suspension. Glazer will be reinstated, as of the date of discharge, and receive back pay, less the 30 day suspension...Glazer shall be reinstated to her former position within thirty (30) days of the City's receipt of the completely executed settlement agreement, and the City shall tender all due back pay within ninety (90) days of its receipt of the completely executed settlement agreement." Thus, the parties agreed that Glazer is entitled to back pay. As further part of the settlement agreement, Glazer and AFSCME agreed to withdraw the grievance and demand for arbitration with prejudice. (Joint Exhibit 1). As such, the Union and the grievant agreed to forego the remedy of back pay to which they presumably would have been entitled had they prevailed in litigating the grievance to conclusion. It does not follow that the back pay entitlement was conditioned upon any further substance abuse testing governing Glazer's continued employment with the City. Indeed, Glazer could have simply elected not to abide by the terms of such testing and severed her relationship with the City, and she still would have been entitled to receive her back pay under the agreement. As such, it must be concluded that the City has committed unfair practices in violation of Section 1201(a)(1) and (5) of the Act. Accordingly, the City will be directed to pay Glazer the back pay amounts due under the settlement agreement through May 9, 2017, the date of the alleged failure to pass the drug screening.

#### **CONCLUSIONS**

The Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The City is a public employer within the meaning of Section 301(1) of PERA.

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The City has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

**ORDER**

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Examiner

**HEREBY ORDERS AND DIRECTS**

that the City shall

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of the Act.

2. Cease and desist from refusing to bargain collectively in good faith with the employe organization which is the exclusive representative of employes in the appropriate unit, including but not limited to discussing of grievances with the exclusive representative.

3. Take the following affirmative action which the Examiner finds necessary to effectuate the policies of PERA:

(a) Immediately comply with the grievance settlement agreement by tendering full back pay to Glazer from the date of the original discharge, less the 30-day suspension, with six (6%) percent per annum interest, through May 9, 2017, along with all other benefits or emoluments of employment she was entitled to pursuant to the settlement agreement for the back pay period, including but not limited to pension contributions;

(b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

(d) Serve a copy of the attached Affidavit of Compliance upon the Union.

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 9<sup>th</sup> day of January, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner

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**AFFIDAVIT OF COMPLIANCE**

The City hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has immediately complied with the grievance settlement agreement by tendering full back pay to Glazer from the date of the original discharge, less the 30-day suspension, with six (6%) percent per annum interest, through May 9, 2017 along with all other benefits or emoluments of employment she was entitled to pursuant to the settlement agreement for the back pay period, including but not limited to pension contributions; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

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Signature/Date

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Title

SWORN AND SUBSCRIBED TO before me  
the day and year first aforesaid.

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Signature of Notary Public