COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| AFSCME DC 47 LOCAL 2186 | : | |
| | : | |
| v. | : | Case No. PERA-C-20-282-E |
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| CITY OF PHILADELPHIA | : | |

**PROPOSED DECISION AND ORDER**

On November 19, 2020, the American Federation of State, County, and Municipal Employees District Council 47, Local 2186 (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 (8) of the Public Employe Relations Act (PERA or Act) by refusing to comply with an October 4, 2019 grievance arbitration award regarding Onye Osuji.

On February 26, 2021, the Secretary of the Board issued a Complaint and Notice of Hearing, directing a hearing on May 24, 2021, if necessary.[1] The hearing was continued multiple times at the request of both parties and without objection.

The hearing eventually ensued on November 17, 2021, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.[2] The parties each filed separate post-hearing briefs in support of their respective positions on March 18, 2022.

The Hearing 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. 7)

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7)

3. AFSCME is the exclusive representative for a meet-and-discuss unit of first-level supervisory employes of the City, which includes Department of Human Services employes. (N.T. 16)

4. AFSCME and the City are parties to an agreement which contains a provision requiring just cause for any disciplinary actions or discharge. (Union Exhibit 1)

[1] AFSCME amended the charge on January 6, 2021 by filing a copy of the October 4, 2019 award, as requested by the Board Secretary.
[2] The hearing was held by videoconference in light of the ongoing Covid-19 pandemic.

5. In 2018, AFSCME filed a grievance protesting the City’s March 23, 2018 discharge of Onye Osuji, who had been a Social Work Supervisor with the City since June 2008. (N.T. 16, 28; Union Exhibit 1)

6. AFSCME processed the grievance to arbitration, and the parties appeared for a hearing on June 18 and August 30, 2019. (N.T. 16-17; Union Exhibit 1)

7. On October 4, 2019, Arbitrator Lawrence Coburn issued an Opinion and Award, finding that the City did not have just cause to discharge Osuji and directing the City to reinstate Osuji to her former position with full seniority, make her whole, and remove from her personnel file all references to her discharge, to be replaced by a one-week suspension without pay. (N.T. 17-19; Union Exhibit 1)

8. On October 28, 2019, Osuji returned to work at the City pursuant to the Arbitration Award. (N.T. 30-31)

9. By email dated March 16, 2020, AFSCME’s counsel provided the City with Osuji’s W-2s for work performed during the time she was not employed with the City, along with an affidavit stating that she was not self-employed. (N.T. 22-23; Union Exhibit 2)

10. In December 2020, Osuji received a check from the City for $3,702.01. (N.T. 31-35; Union Exhibit 3, 4)

11. By email dated December 22, 2020, Osuji contacted the City to indicate that she believed the City had calculated her backpay award incorrectly and asked for clarification. Osuji stated that her earnings from her part-time job at Merakey Agency during her separation from the City should not have been included in the City’s offset. (N.T. 35-37; Union Exhibit 6)

12. By email dated January 5, 2021, Osuji contacted the City to advise that the City had not included her overtime earnings from prior to her separation in the backpay calculation. (N.T. 38-39; Union Exhibit 5)

13. By email dated January 6, 2021, Rebecca Hartz, the City’s Deputy Director of Labor Relations, responded in relevant part as follows:

> Good Morning Ms. Osuji,
>
> The City has reviewed your concerns regarding your arbitration award payment. When back pay awards are paid out, the intent is to make the employee whole. To further clarify, we deduct from the total amount of the award any outside earnings or pension payments-funds the employee would not have received if they [sic] had been working. If the employee can prove they [sic] had a second job while working for the City prior to dismissal, that portion of the deduction would be refunded. The City has no record of any outside employment for you prior to your separation.
>
> Additionally, the funds withheld were not from Deferred Comp but rather payments made from the Pension fund, which needed to be recouped once your termination was reversed and you were reinstated.

> As far as your question regarding overtime, the City does not include lost overtime in back pay awards unless it is specifically stated in the arbitration award...

(N.T. 39-40; Union Exhibit 5)

14. Osuji testified that she started working at Merakey in August 2018 after she was discharged by the City. She worked as a fee for service outpatient therapist on Saturdays only. She also took a job with the Commonwealth as an entry-level caseworker from Monday through Friday, which only paid about half of her City salary. She explained that she makes her own schedule at Merakey since they are open 8:00 a.m. to 8:00 p.m. on Saturdays. She described how she would tell Merakey what her availability was, and they would schedule clients for her during those times. (N.T. 40-42, 46, 60)

15. Osuji sometimes had to work on Saturdays in her job for the City. She testified that it would not be a conflict for her in those situations because Merakey has hours of 8:00 a.m. to 8:00 p.m., while her City hours were 8:30 a.m. to 4:30 p.m., and Merakey allowed her to create her own schedule. (N.T. 50-51)

16. In 2018, Osuji earned $1,733.25 for Merakey. (N.T. 47; Union Exhibit 7)

17. Osuji testified that she regularly worked overtime in her position of Social Work Supervisor for the City prior to her separation. (N.T. 48)

18. In 2013, Osuji worked 181 overtime hours at a rate of time and a half for a total gross pay of $6,134.31. (Union Exhibit 13)

19. In 2014, Osuji worked 314 overtime hours at a rate of time and a half for a total gross pay of $13,380.90. (Union Exhibit 13)

20. In 2015, Osuji worked 610 overtime hours, including 42.5 hours at double time, 28 hours at half-time, and 539.5 hours at time and a half, for a total gross pay of $29,817.18. (Union Exhibit 13)

21. In 2016, Osuji worked 865.5 overtime hours, including 652.5 hours at half-time and 213 hours at time and a half, for a total of $21,828.55. (Union Exhibit 13)

22. In 2017, Osuji worked 781 overtime hours, including 720 hours at half-time and 61 hours at time and a half, for a total of $15,511.95. (Union Exhibit 13)

23. The City conceded that it took an offset for the Merakey earnings and did not include the payment of overtime in the backpay issued to Osuji in December 2020. (N.T. 117)

24. The City conceded that it still owes interest on the backpay award. (N.T. 12)

## DISCUSSION

AFSCME's charge alleges that the City violated Section 1201(a)(1) and (8) of PERA[3] by refusing to comply with an October 4, 2019 grievance arbitration award regarding Onye Osuji. Specifically, AFSCME contends that the City failed to comply with the award by refusing to compensate Osuji for lost overtime she would have earned during the time she was separated from employment. AFSCME also maintains that the City failed to comply with the award by taking an offset for Osuji's wages at Merakey during her separation because those were supplemental earnings. The City, for its part, argues that the charge should be dismissed because the City complied with the award, which did not expressly direct the payment of lost overtime wages. The City asserts that the parties have a longstanding past practice of not including overtime unless an award specifically provides for such payment. The City further posits that the charge should be dismissed because the City properly deducted Osuji's earnings from Merakey in calculating the backpay amount.

The Board's jurisdiction includes the determination of whether an employer's alleged failure to comply with a grievance arbitration award constitutes an unfair practice. FOP Lodge 5 v. City of Philadelphia, 30 PPER ¶ 30204 (Final Order, 1999). When an unfair practice charge alleges a refusal to comply with a grievance arbitration award, the Board must determine whether an arbitration award exists, whether the appeal process has been exhausted and, if so, whether the employer failed to comply with the award. *Id.* The party alleging noncompliance with a grievance arbitration award has the burden of proof to show that the opposing party has indeed failed to comply with the arbitrator's decision. *Id.*

In this case, AFSCME has sustained its burden of proving that the City failed to comply with the October 4, 2019 award. The parties do not contest that an award exists and that the appeal process has been exhausted. *See* Union brief at 5 and City brief at 5. The only remaining issue then is whether the City failed to comply with the award, which includes a make-whole remedy. The record shows that Osuji regularly worked overtime in her position of Social Work Supervisor for the City prior to her separation. She earned overtime, at various rates, as follows: $6,134.31 in 2013; $13,380.90 in 2014; $29,817.18 in 2015; $21,828.55 in 2016; and $15,511.95 in 2017. The City does not dispute that it did not include any lost overtime in the calculation of Osuji's backpay award when it issued her a check in December 2020. Instead, the City defends the charge on the grounds that the arbitrator's make-whole remedy does not explicitly provide for the payment of lost overtime. Thus, the City reasons that the award is ambiguous relative to the backpay award, and the charge must therefore be dismissed. The City's argument, however, is unavailing.

The Board has long held that an arbitrator's make-whole remedy includes the payment of overtime, even if the award does not expressly direct such a payment, where the record supports that the employe in question earned overtime wages prior to the separation. FOP Lodge 5 v. City of Philadelphia, 30 PPER ¶ 30105 (Proposed Decision and Order, 1999), 30 PPER ¶ 30204 (Final Order, 1999). In its post-hearing brief, the City attempts to distinguish

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[3] Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(8) Refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX. 43 P.S. § 1101.1201.

City of Philadelphia on the basis that the Board's decision there involved an Act 111 bargaining unit, such that the backpay award was a mandatory subject of bargaining, whereas here, AFSCME Local 2186 is a first-level supervisory unit with only meet-and-discuss rights. However, by submitting to the arbitration process for the Osuji grievance and failing to appeal the October 4, 2019 award, the City has clearly waived any argument that it has no bargaining obligation here. Indeed, if the City's argument in this regard is taken to its logical conclusion, then the City would have no obligation to comply with any facet of the arbitrator's award. The City's argument would be well-taken if the City had simply refused to process the grievance to arbitration in the first instance.

It is well settled that the Board is without jurisdiction to consider charges alleging an unfair practice based on a public employer's failure to arbitrate a grievance under an agreement for a meet-and-discuss unit. Independent State Store Union v. PLRB, 19 PPER ¶ 19192 (Pa. Cmwlth. 1988). "Once, however, [the public employer] does submit an employe grievance to arbitration, it is bound by the arbitrator's decision, the award being subject only to judicial review under the 'essence test' standard." *Id.* As set forth above, although AFSCME Local 2186 represents a unit of first-level supervisory employes, who are only entitled to meet-and-discuss rights under the Act, the October 4, 2019 award is nevertheless binding since the City submitted the Osuji grievance to arbitration and did not refuse to process it in the first instance. As such, the City cannot be heard to complain now that it has no bargaining obligation to the Union, and this argument must be rejected.

Likewise, the record does not show that the parties have a binding past practice of not including the payment of overtime wages in their arbitration awards when not explicitly ordered, as alleged by the City. In Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002), the Board noted that it has consistently applied the definition of past practice adopted by the Pennsylvania Supreme Court in County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849 (Pa. 1978) and stated as follows:

> [A] custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to underlying circumstances presented. *Id.* quoting County of Allegheny, at 852, n. 12. In Ellwood City Police Wage and Policy Unit v. Ellwood City, 29 PPER ¶ 29214 (Final Order, 1998), aff'd, 731 A.2d 670 (Pa. Cmwlth. 1999), the Board stated that '[t]he definition of past practice requires that the parties must develop a history of similar responses or reactions to a recurring set of circumstances.' *Id.* at 507. In Pennsylvania Liquor Control Board Officers III v. Pennsylvania State Police, Bureau of Liquor Control Enforcement, 24 PPER ¶ 24171 (Final Order, 1993), the Board held that, where evidence of

past practice revealed a divergent application of a seniority system in selecting vacation periods, there was no past practice.

In the instant case, the City submitted four previous arbitration awards and offered the testimony of its Deputy Commissioner of Human Services, Vongvilay Mounelasy, to show that the parties allegedly have a past practice of not including the payment of overtime in make-whole arbitration awards unless it is explicitly ordered by the arbitrator. However, as the Union correctly notes, the four awards offered by the City all involved AFSCME District Council 47, Local 2187, and not Local 2186, the actual complainant here. (N.T. 87, 91, 93-95; Exhibit C-1, C-2, C-3, C-4). What is more, Mounelasy readily conceded that she had no knowledge of whether any of the four grievants in those cases even earned overtime wages in the years preceding their terminations. (N.T. 88, 91-93, 95). This evidence is simply not sufficient to establish an accepted course of conduct characteristically repeated in response to a given set of underlying circumstances, as is necessary for a binding past practice. As such, it must be concluded that the City has violated the Act by failing to include Osuji's overtime wages as part of the arbitrator's make-whole award.

In its post-hearing brief, AFSCME submits that Osuji's backpay award for her overtime wages should be $17,334.58, which is the average overtime amount across the five years of wages submitted during the hearing. This is consistent with the Board's policy of remedial relief. *See* Fraternal Order of Police Lodge 5 v. City of Philadelphia, 41 PPER 181 (Proposed Decision and Order, 2010) wherein the hearing examiner held that the City should look at the overtime paid to the affected bargaining unit employe for working special events in the preceding years, and average that amount in computing his overtime. (citing City of Philadelphia, 30 PPER ¶ 30204 (Final Order, 1999)(the Board adopted the Federal standard for the computation of back pay, including overtime, as set forth in Ellis & Watts Products, 143 NLRB 1269 (1963), *enf'd* 344 F.2d 67 (6th Cir. 1965)). Accordingly, the City will be directed to pay Osuji lost overtime wages at the rate of $17,334.58 per year to comply with the award.[4]

Turning to the issue regarding the City's offset for Osuji's wages at Merakey, the Board has held that a public employer is entitled to deduct interim earnings from any backpay award, lest an employe receive a windfall over and above what she originally lost in wages. Corry Area Education Ass'n v. Corry Area School District, 38 PPER 155 (Final Order, 2007). Otherwise, such relief would make the employe more than whole and thus is punitive, and beyond the authority of the Board. *Id.* (citing In re Appeal of Cumberland Valley School District, 394 A.2d 946 (Pa. 1978)). The public employer is entitled to an offset for the wages an employe earned to replace those she lost as a result of an unfair practice. North Schuylkill Educational Support Personnel Ass'n v. North Schuylkill School District, 34 PPER ¶ 44 (Proposed Decision and Order, 2003). However, the public employer is not entitled to offset an employe's wages that are earned to supplement rather than to replace the wages she lost as a result of the unfair practice. *Id.* (citing Delaware County, 27 PPER ¶ 27039 (Final Order, 1996) *aff'd on other grounds* 28 PPER ¶ 28176 (Court of Common Pleas of Delaware County, 1997)).

In Delaware County, the Board opined as follows:

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[4] The record shows that Osuji was separated from the City for well over a year, from March 23, 2018 to October 28, 2019.

> ...we concur with the hearing examiner's assessment that [the grievant's] position with [the interim employer] is properly viewed as interim employment during litigation of his grievance, such that earnings from that employment may be used as an offset against any back pay owed by the County. As the hearing examiner noted, the most telling facts in this regard are (1) that [the grievant] never worked both jobs at once, (2) that he was not hired by [the interim employer] until after he was discharged by the County, (3) that both the County and [the interim employer] require that the positions with them be the employe's primary employment, and (4) that [the grievant's] work hours at [the interim employer] frequently overlap the regular work schedule of a County deputy sheriff.

Here, the record shows that Osuji took a job with the Commonwealth as an entry-level caseworker from Monday through Friday after her separation from the City, which AFSCME admits is subject to an offset because the wages she earned there were to replace the wages she lost with the City. However, Osuji's employment with Merakey must yield a different result. Although Osuji never worked at Merakey prior to her separation from the City, the record demonstrates that she continued working at Merakey after she returned to work for the City in October 2019 pursuant to the arbitration award. (N.T. 42). Similarly, Osuji's job at Merakey was never her primary employment, as she obtained full-time employment with the Commonwealth Monday through Friday and only worked at Merakey on Saturdays. In fact, she continues to work at Merakey while simultaneously maintaining her primary employment with the City since her return. Further, Osuji's hours rarely, if ever, overlapped with her regular schedule at the City. As the Union notes, Osuji worked at Merakey exclusively on Saturdays and had the flexibility to make her own schedule. While Osuji occasionally worked Saturdays for the City, she did so between the hours of 8:30 a.m. and 4:30 p.m., whereas Merakey allowed her to work until 8:00 p.m. As the Union argues, she could have worked both jobs on Saturdays by simply working her usual hours for the City and then working 5:00 p.m. to 8:00 p.m. for Merakey. In light of these record facts, the City was not permitted to offset the wages Osuji earned for Merakey pursuant to the arbitrator's make-whole relief, as those wages were supplemental and not replacement wages. Therefore, the City must be found in violation of the Act and will be directed to pay Osuji those monies withheld as a result of her employment with Merakey in order to comply with the award. In addition, the City will be directed to pay Osuji interest on the money it already paid her in December 2020, for the period beginning with her reinstatement on October 28, 2019 to the date of payment in December 2020, based on the City's admission that it still owes outstanding interest on that amount.

## CONCLUSIONS

The Hearing 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 (8) 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 employes in the exercise of the rights guaranteed in Article IV of the Act.

2. Cease and desist from refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX.

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

(a) Immediately comply with the October 4, 2019 arbitration award by tendering full backpay to Osuji for her lost overtime wages between March 23, 2018 and October 28, 2019 at the rate of $17,334.58 per year, as well as supplemental earnings from Merakey that were withheld from her backpay award pursuant to the City's unlawful offset, together with six (6%) percent per annum interest, from the date of her reinstatement on October 28, 2019 through the date she is ultimately paid, along with all other benefits or emoluments of employment she was entitled to pursuant to the arbitration award, including but not limited to any out of pocket medical expenses and pension contributions;

(b) Immediately comply with the October 4, 2019 arbitration award by paying Osuji six (6%) percent per annum interest on the $3,702.01, which the City has already paid, for the period of October 28, 2019 through the date she was paid in December 2020;

(c) 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;

(d) 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

(e) 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 14th day of April, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak______________
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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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 (8) of the Public Employe Relations Act; that it has immediately complied with the October 4, 2019 arbitration award by tendering full backpay to Osuji for her lost overtime wages between March 23, 2018 and October 28, 2019 at the rate of $17,334.58 per year, as well as supplemental earnings from Merakey that were withheld from her backpay award pursuant to the City's unlawful offset, together with six (6%) percent per annum interest, from the date of her reinstatement on October 28, 2019 through the date she is ultimately paid, along with all other benefits or emoluments of employment she was entitled to pursuant to the arbitration award, including but not limited to any out of pocket medical expenses and pension contributions; that it has immediately complied with the October 4, 2019 arbitration award by paying Osuji six (6%) percent per annum interest on the $3,702.01, which the City has already paid, for the period of October 28, 2019 through the date she was paid in December 2020; 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.

_______________________________
Signature/Date

_______________________________
Title

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

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Signature of Notary Public