COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP LODGE 5	:	
	:	
v.	:	Case No. PF-C-21-40-E
	:	
CITY OF PHILADELPHIA	:	

PROPOSED DECISION AND ORDER

On May 21, 2021, the Fraternal Order of Police Lodge 5 (FOP or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Philadelphia (City or Employer), alleging that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111, by refusing to comply with a March 22, 2021 grievance settlement agreement regarding Police Officer Charles Myers.

On May 27, 2021, the Secretary of the Board issued a Complaint and Notice of Hearing, directing a hearing on July 21, 2021, if necessary. The hearing was continued multiple times at the request of both parties to pursue settlement discussions. The hearing eventually ensued on June 13, 2022, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.[1] On August 23, 2022, the City filed a Motion to Reopen the Proceedings for a Second Day of Hearing. The parties each filed separate post-hearing briefs in support of their respective positions on October 4, 2022.[2]

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 and political subdivision under Act 111, as read *in pari materia* with the PLRA. (N.T. 6)

2. The FOP is a labor organization under Act 111, as read *in pari materia* with the PLRA. (N.T. 6)

3. The FOP is the exclusive bargaining representative for a unit of police employes of the City. (N.T. 17-18; Union Exhibit 1)

4. The FOP and the City were parties to a collective bargaining agreement (CBA) effective 2017 to 2020, which was extended by the parties for an additional year through June 30, 2021. (N.T. 31-32, 71; Union Exhibit 1)

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[1] The City requested a continuance at 4:09 p.m. on Friday June 10, 2022, alleging that the City was not able to secure the necessary witnesses to testify about the settlement agreement, even though the hearing had been scheduled since February 24, 2022. The City's request for a continuance was denied.

[2] The FOP also filed a response to the City's Motion to Reopen the Proceedings for a Second Day of Hearing on October 4, 2022.

5. Charles Myers began working for the City as a police officer on April 5, 1999. In 2003, he went to the City's narcotics division and was eventually assigned to a task force with the FBI in 2010. (N.T. 38)

6. In his task force position, Myers earned regular overtime pay. He testified that through the task force, he was allotted $19,500 per year in overtime, which was paid by the City, but subsequently reimbursed by the Federal government. He also regularly earned extra overtime beyond the task force for work, which was paid by the City. (N.T. 39-40)

7. On November 20, 2019, Myers was charged with three violations of the City's Disciplinary Code and notified that he was suspended for a period of 30 days with the intent to dismiss. (N.T. 40; Union Exhibit 1)

8. Myers was then dismissed from his position as a police officer consistent with the City's notice and criminally charged with perjury. His criminal matter was dismissed by a judge, and the FOP subsequently filed a grievance on his behalf, alleging that the City violated the CBA. (N.T. 40; Union Exhibit 1)

9. On March 22, 2021, the parties entered into a settlement agreement resolving the grievance prior to the arbitration stage. The settlement agreement provides, in relevant part, as follows:

> Subject to Myers meeting the employment standards for Police Officers and for City of Philadelphia employees, including, but not limited to, fitness for duty as determined by the City's Medical Evaluation Unit, background checks, and City indebtedness verification, he will be reinstated. Myers will receive back pay only from September 11, 2020 to his reinstatement. The time between Myers' suspension and reinstatement will be treated as an unpaid leave of absence. Sick leave hours accrued by Myers prior to his discharge but not paid in his terminal leave payment shall be restored to his leave bank...

(N.T. 40-41; Union Exhibit 1)

10. Myers testified that the City reinstated him on June 1, 2021. (N.T. 40)

11. Myers received a check from the City in May 2022 which included his base pay, minus his interim earnings and unemployment compensation. Myers testified that the check did not include his overtime earnings. (N.T. 41-42, 44)

12. Myers acknowledged on cross-examination that the City restored his sick leave hours that he previously accrued to his leave bank, along with vacation and holiday pay. (N.T. 44)

DISCUSSION

The FOP has charged the City with violating Section 6(1)(a) and (e) of the PLRA[3] and Act 111 by refusing to comply with the March 22, 2021 grievance

[3] Section 6(1) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer: (a) To interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act...(e) To refuse to

settlement agreement regarding Police Officer Charles Myers. Specifically, the FOP contends that the City failed to comply with the settlement agreement because it excluded overtime earnings from the payment it issued to Myers in May 2022. The City, on the other hand, contends that the charge should be dismissed because the settlement agreement does not expressly provide for the payment of overtime as part of the back pay provision.

Where a grievance has been resolved through a settlement, a public employer violates its duty to bargain when it refuses to comply with the 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, the FOP has sustained its burden of proving that the City failed to comply with the grievance settlement agreement by excluding overtime earnings from the payment issued to Myers in May 2022. The City does not dispute that the FOP has met the first two elements of the Board's test for determining whether a violation of the PLRA occurred. Indeed, the City concedes in its post-hearing brief that a binding settlement agreement exists and that "the agreement between the parties, executed in March 2021, is completely clear and obvious in its meaning..." (*See* City post-hearing brief at p. 11). The City nevertheless maintains that it did not violate the terms of the settlement agreement because the agreement clearly provides that "Myers would receive back pay only from September 11, 2020 through the date of his reinstatement." (*See* City post-hearing brief at p. 11). The City posits that "no overtime payments were ever discussed between the FOP and the City, nor were any contemplated at the time the agreement was signed." (*See* City post-hearing brief at p. 11). Thus, the City concludes that it did not violate the settlement agreement by excluding overtime earnings from its payment to Myers in May 2022. The City's argument lacks merit.

As set forth above, the settlement agreement provides that "Myers will receive back pay only from September 11, 2020 to his reinstatement..." (Union Exhibit 1). How the City reads this provision to exclude overtime earnings is a mystery. Back pay is a clear and unambiguous term when used in a labor relations context and is largely synonymous with make-whole relief. In fact, the National Labor Relations Board Compliance Manual provides in Section 10536.1 that "[b]ackpay awards are intended to make whole the person who has suffered from a violation for earnings and other compensation lost as a result of that violation."[4] Further, the National Board's Compliance Manual provides in Section 10540.1 that "[g]ross backpay must take into account all benefits and forms of compensation that [an employe] would have earned from employment, had there not been an unlawful action. All forms of wages,

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bargain collectively with the representatives of his employes, subject to the provisions of section seven (a) of this act." 43 P.S. § 211.6.

[4] The fact that the settlement agreement provides that the City denied any wrongdoing is of no consequence. The parties nevertheless agreed that Myers was entitled to back pay for a specific period of time.

including overtime, premiums, tips, bonus payments, and commissions, are to be considered in determining backpay." (Emphasis added)[5]. This Board specifically adopted and approved the use of the National Board's Compliance Manual in Corry Area Education Ass'n v. Corry Area School District, 38 PPER 155 (Final Order, 2007). As a result, the term "back pay" unequivocally includes overtime earnings that Myers had prior to his separation from the City.

The City contends that the inclusion of the word "only" following the term "back pay" in the settlement agreement proves that the parties intended to exclude overtime earnings from the settlement. However, this argument borders on the absurd. The term "only" does not in any way, shape or form limit or modify the usual and customary definition of the term back pay, such that the provision could be read to exclude overtime earnings from the settlement. Instead, the term "only" obviously refers to the back pay period, and not the actual calculation of back pay. At most, the inclusion of the term "only" would merely serve to differentiate the term "back pay" from the slightly more expansive term "make whole," such that the agreement could not be construed to include other nonmonetary relief, such as restoration of seniority. The City would have the Board read the settlement to state that "Myers will receive ***base pay only*** from September 11, 2020 to his reinstatement..." (Emphasis added). But that is not what the settlement agreement states. The simple fact remains that the parties agreed that Myers would receive back pay for the period of September 11, 2020 to his reinstatement and that includes his overtime earnings. Indeed, this is consistent with the Board's prior case law.

In AFSCME DC 47, Local 2186 v. City of Philadelphia, 54 PPER 10 (Proposed Decision and Order, 2022), the Board's hearing examiner rejected the City's argument that an arbitrator's award, which provided for make-whole relief, permitted the City to exclude overtime earnings where the record showed that the grievant regularly worked overtime prior to her separation from the City. The examiner recognized that the Board has long held that an arbitrator's make-whole remedy includes the payment of overtime in such cases, even if the award does not expressly direct such a payment, citing FOP Lodge 5 v. City of Philadelphia, 30 PPER ¶ 30105 (Proposed Decision and Order, 1999), 30 PPER ¶ 30204 (Final Order, 1999).[6] The City has not put forth any compelling or convincing argument for why the same result should not obtain here where the parties used the term back pay, which is largely synonymous with make-whole relief. As such, the City's argument must be rejected.

Finally, the City has filed a Motion to Reopen the Proceedings for a Second Day of Hearing, essentially renewing its argument that it was not able to secure the necessary witnesses to testify about the settlement agreement and including an offer of proof that the City's witnesses will testify that

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[5] The National Board uses the term gross back pay to describe the amount owed to an employe prior to an offset for interim earnings or unemployment compensation. Likewise, the National Board uses net back pay to describe the amount owed to an employe following such an offset. This distinction is not relevant to the outcome here, as this Board clearly allows public employers to take an offset for interim earnings and unemployment compensation that an employe may have received during the back pay period, which the City has already done.

[6] Obviously, the City was the respondent in both of these previous cases and advanced the same argument the City is making in the instant matter.

the City only issues overtime payments when the language of the agreement specifically directs such a payment. The FOP opposes the City's Motion. The City's Motion to Reopen the Proceedings for a Second Day of Hearing will be treated as a Motion to Reopen the Record, which is specifically authorized, albeit on exceptions from a hearing examiner's decision, by the Board's regulations. *See* 34 Pa. Code § 95.98(f)(2).

The Board will grant a request to reopen the record for the taking of additional evidence when the following five criteria are met; the evidence sought to be admitted must be evidence that: (1) is new; (2) could not have been obtained at the time of hearing through the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the purpose of impeachment; and (5) is likely to compel a different result. Teamsters Local 205 v. Peters Creek Sanitary Authority, 34 PPER ¶ 27 (Final Order, 2003). The City has not satisfied this five-part test.

In its Motion, the City identifies three witnesses who it would call for a second day of hearing, including its labor counsel, Cara Leheny. The City avers that Leheny will testify that overtime payments are only issued when the language of the agreement specifically provides for the same and that "back pay" does not include overtime. (*See* City's Motion at p. 3). In addition, the City indicates that Leheny will testify about reports she received from the attorney, who actually negotiated the settlement agreement, Kia Ghee.[7] The City also identifies Deputy Commissioner Christine Coulter, who would apparently testify regarding conversations she had with FOP official, John McGrody, who allegedly did not mention overtime as an issue when discussing the settlement agreement. (*See* City's Motion at p. 4). The City further identifies Melissa Lumpkin of the City's Finance Department, who would apparently testify that Myers picked up his check from the City on May 10, 2022, but allegedly did not mention any missing amounts for lost overtime. (*See* City's Motion at p. 4).

First of all, the evidence which the City seeks to introduce at another hearing is not new. Nor has the City shown that the evidence could not have been obtained at the time of the hearing through the exercise of due diligence. To be sure, the City was on notice of the FOP's averments in the charge, which expressly included an allegation stating "[c]ontrary to the terms of the [s]ettlement [a]greement, the City has failed and/or refused to reinstate or provide backpay to Myers," as early as May 2021. Likewise, the City was aware of the June 13, 2022 hearing date as early as February 24, 2022. The City cannot seriously dispute that it knew the contents of the settlement agreement would be a central issue in this litigation. Nevertheless, the City waited until the last minute on a Friday afternoon to request a continuance of the hearing scheduled for Monday June 13, 2022, despite having already confirmed its attendance at the hearing on Thursday June 9, 2022.

The City argues in its Motion that the FOP is to blame for its late request because the FOP allegedly did not notify the City that the overtime earnings were an issue until June 9, 2022. However, the City admits in its Motion that it did not issue any payments to Myers until May 10, 2022, which was well over a year since it entered the settlement agreement with the FOP relative to Myers. (*See* City's Motion at p. 2). The City should not be

[7] The City does not indicate that it intends to actually call Ghee herself as a witness, and therefore, Leheny's testimony in this regard would be inadmissible hearsay evidence.

heard to complain when it withholds payment it agreed to make for over a year and refuses to provide overtime earnings in connection with the same if the charging party then realizes that there are still outstanding amounts owed and wishes to proceed with a hearing. Simply stated, the City knew it may have to defend the charge and present witnesses with firsthand knowledge of the issues in dispute and should have either ensured the availability of those witnesses when it was notified of the June 2022 hearing in February 2022[8] or timely requested a continuance.[9]

In any event, the evidence which the City seeks to introduce at another hearing is irrelevant and not likely to compel a different result. Indeed, the City intends to call three witnesses to contradict the clear and unambiguous terms of the settlement agreement. However, the Board does not need parol evidence to glean the intent of the parties from the language of the agreement.[10] *See* Avery v. PLRB, 509 A.2d 888, 891 (Pa. Cmwlth. 1986)(where the words of a contract are clear and unambiguous, the intent of the parties is to be determined only from the express language of the agreement). Put simply, back pay does not mean base pay, regardless of the testimony of any potential City witnesses. Accordingly, the City's Motion to Reopen the Record must be denied, and the City will be found in violation of Section 6(1)(a) and (e) of the PLRA.

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 and political subdivision under Act 111 as read *in pari materia* with the PLRA.

2. The FOP is a labor organization under Act 111 as read *in pari materia* with the PLRA.

3. The Board has jurisdiction over the parties hereto.

4. The City has committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the examiner

HEREBY ORDERS AND DIRECTS

that the City shall

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111;

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[8] Notably, the City in its Motion only alleges that Leheny and Lumpkin were unavailable for the June 13, 2022 hearing, and not Coulter.

[9] The Board's Complaint and Notice of Hearing requires at least 72 hours' notice of a continuance request.

[10] On this point, the FOP's witnesses were of little value as well.

2. Cease and desist from refusing to bargain with the representatives of its employes;

3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the PLRA and Act 111:

(a) Immediately comply with the March 22, 2021 grievance settlement agreement by tendering full backpay to Myers for his lost overtime wages from September 11, 2020 to his reinstatement, together with six (6%) percent per annum interest, along with all other benefits or emoluments of employment he was entitled to pursuant to the settlement agreement, including but not limited to any out of pocket medical expenses and 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 21st day of December, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP LODGE 5	:	
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v.	:	Case No. PF-C-21-40-E
	:	
CITY OF PHILADELPHIA	:	

AFFIDAVIT OF COMPLIANCE

The City hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act; that it has immediately complied with the March 22, 2021 settlement agreement by tendering full backpay to Myers for his lost overtime wages from September 11, 2020 to his reinstatement, together with six (6%) percent per annum interest, along with all other benefits or emoluments of employment he was entitled to pursuant to the settlement agreement, including but not limited to any out of pocket medical expenses and 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.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public