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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)	
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)	
)	
RONALD K. WATKINS,)	
)	
Complainant,)	PERB Case No. 99-U-28
)	
)	
)	
)	Opinion No. 655
v.)	
)	
)	
)	
DISTRICT OF COLUMBIA)	
DEPARTMENT OF CORRECTIONS,)	
)	
)	
Respondent.)	

DECISION AND ORDER

This matter involves an unfair labor practice complaint filed by Ronald K. Watkins (("Complainant"), alleging that the District of Columbia Department of Corrections ("DOC" or "Respondent") violated D.C. Code § 1-618.4 (a)(1), (3), (4) and (5) by failing to implement an arbitration award which rescinded his termination. The relief sought by the Complainant includes reinstatement, restoration of benefits and payment of attorney fees.

The Respondent denied the allegation. As an affirmative defense, the Respondent asserted that the Complainant was reinstated with backpay on June 21, 1999. Additionally, on the day of the hearing, the Respondent filed a Motion to Dismiss.

At the hearing, the Complainant admitted to the Hearing Examiner that he had, in fact, been reinstated with backpay. Nonetheless, the Complainant requested and was given a date to respond to DOC's motion. Thereafter, the Hearing Examiner issued an Order directing the Complainant to notify the Hearing Examiner by October 24, 2000 if he elected to go forward with the Complaint, even if he does not prevail on the issue of attorney fees.¹ The record closed on October 24, 2000. The Hearing Examiner did not make a finding on whether DOC violated the CMPA. The Hearing Examiner's Report and Recommendations and the various pleadings are before the Board for disposition.

I. Background:

In 1994, the Complainant, a lead legal instruments examiner with DOC, was terminated. An arbitrator's award rescinded the termination in 1995. Almost three years later, on January 23, 1998, the Respondent terminated the Complainant again. This removal was based on Mr. Watkins' failure to disclose adverse contact with the criminal justice system, in violation of Department Order 3040.6A. This termination was also rescinded by an arbitrator. As a result, DOC was ordered to reinstate the Complainant with backpay.

DOC appealed the award by filing an Arbitration Review Request with the Board. The Board denied DOC's Arbitration Review Request. See, District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee (on behalf of Grievant Ronald Watkins) 46 DCR 6284, Slip Op. No. 586, PERB Case No. 99-A-02 (1999).

Approximately one month after DOC's Arbitration Review Request was denied, the Complainant filed the present complaint. The Complainant alleges that DOC violated D.C. Code §1-618.4 (a)(1)(3)(4) and (5)² by failing to implement the award. As relief, the Complainant sought reinstatement, back pay and attorney fees. On June 14, 1999, the Complainant also filed for judicial enforcement of the arbitration award.

The Respondent argued that it complied with the Arbitrator's award and the Board's order in Slip Op. No. 586 by reinstating the Complainant with backpay on June 21, 1999. In addition, the Respondent argued that Mr. Watkins' Complaint was not timely.

¹ During the August 10, 2000 proceeding, the Complainant stated that chances were "pretty strong" that he would not pursue the unfair labor practice complaint if he did not prevail on the issue of attorney fees. (Tr. 13)

²The unfair labor practice complaint was filed on May 24, 1999.

At the August 10, 1999 proceeding, the Complainant agreed he had been reinstated to his position and had received back pay. However, the Complainant maintained that as a part of the "make whole" remedy, he was entitled to attorney fees for the 1998 arbitration proceeding and the 1999 Superior Court action.³

The parties agreed that the issue of whether the Board could award attorney fees should be resolved before proceeding with the hearing. As a result, the Hearing Examiner issued an Order on October 10, 2000 directing the Complainant to notify her if he wanted to go forward with the proceeding if he did not prevail on the issue of attorney fees. The Complainant responded in a timely manner that he "did not wish to pursue this matter further" if he did not prevail on this issue.⁴ The record closed on October 24, 2000.

II The Hearing Examiner's Report and Recommendations

Based on the pleadings and the record developed in the hearing, the Hearing Examiner identified one principle issue:

1. Should the Complainant be awarded attorney fees as part of a "make whole" remedy for fees incurred in the 1998 arbitration proceeding and the 1999 Superior Court action?

The Hearing Examiner concluded that the Board does not award attorney fees. In her decision, she noted that "each time the Board has addressed the issue of attorney fees, it has concluded that it does not have authority to award attorney fees." See e.g., International Brotherhood of Police Officers, Local 446, AFL-CIO/CLC v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). Additionally, she relied on University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, in supporting her conclusion that the Complainant's request for fees must be denied. 38 DCR 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991). In that case, the Board concluded that it could, under certain circumstances, award costs. Id. at 5. However, the Board noted that D.C. Code §1-618.13 does not authorize it to award attorney fees. Id. at 5. The Hearing Examiner also noted that the Board has previously determined that attorney fees is not a "cost" that can be

³ The Complainant also made this argument in his Opposition to Respondent's Motion to Dismiss (filed on September 6, 2000)

⁴The Complainant filed a Response to the Order on October 23, 2000.

awarded pursuant to 1-618.13.⁵ (R & R at 5) Based on the Board's case law and the Complainant's representation that he did not wish to pursue this matter if he did not prevail on the issue of attorney fees, the Hearing Examiner recommended that the Complaint be dismissed.

We agree with the Hearing Examiner's finding. However, we disagree with the approach used by the Hearing Examiner and find that it is inconsistent with the language contained in the CMPA. Specifically, D.C. Code § 1-605.2(3) provides that the Board has the authority to determine whether an unfair labor practice has been committed and to issue an appropriate remedial order. Consistent with 1-605.2(3) of the CMPA, we believe that the Hearing Examiner should have first determined whether the Respondent had committed an unfair labor practice before considering the issue of what is an appropriate remedy. The approach used by the Hearing Examiner amounts to "putting the cart before the horse." Furthermore, the Board finds that the issues in this case should have been identified as follows:

- II *Did DOC commit an unfair labor practice by failing to implement the arbitration award immediately after its arbitration review request was denied?*

- II *If so, what is the appropriate remedy?*

In the present case, the Complainant was reinstated with full backpay approximately two months after the denial of the arbitration review request. Complainant's reinstatement occurred less than a month after the present unfair labor practice complaint was filed. The Board has held that "when a party simply refuses or fails to implement an award...where no dispute exists over its terms, such conduct constitutes... an unfair labor practice under the CMPA." AFGE, Local 872 v. D.C. Water and Sewer Authority, 46 DCR 4398, Slip Op. No. 497, PERB Case No. 96-U-23 (1996). In this case, the question that the Board must answer is whether a two month period was a reasonable time for DOC to implement the award (once the arbitration review request had been denied).

Under these circumstances, the Board finds that two months was a reasonable time period for implementing the award. Specifically, the Board's decision denying DOC's Arbitration Review Request was issued on April 28, 1999. Pursuant to the CMPA, DOC had thirty days after the denial of the Arbitration Review Request to file an appeal with the Superior Court of the District of Columbia. Assuming that DOC had taken 30 days to decide whether to appeal the Board's decision, the earliest date that DOC would have begun processing the award, would have been May 28, 1999. Furthermore, the Board is aware that certain administrative procedures must be completed before an award can be implemented. For example, the backpay must be calculated and forms must be completed to effect the reinstatement. As a result, the Board does not believe that the two month period taken in this case was unreasonable. Thus, the Board concludes that DOC did *not* commit

⁵D.C. Code §1-618.13 outlines the types of remedies that the Board may grant.

an unfair labor practice.

Pursuant to D.C. Code §1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendation of the Hearing Examiner. Notwithstanding the Board's disagreement with the Hearing Examiner's approach, the Board adopts that the Hearing Examiner's Report and Recommendations with the modifications mentioned above. As a result, the Board orders that this complaint be dismissed and that the Complainant's request for attorney fees be denied, consistent with the Hearing Examiner's Report and Recommendation.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant is dismissed.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

June 1, 2001

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 99-U-28 was transmitted via Fax and/or U.S. Mail to the following parties on this 1st day of June 2001.

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