

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Washington Teachers' Union, Local # 6)	
American Federation of Teachers, AFL-CIO)	
Complainant)	PERB Case No. 14-U-02
)	
v.)	Opinion No. 1657
)	Motion for Reconsideration
District of Columbia Public Schools)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Introduction

Before the Board are two Motions for Reconsideration filed by the District of Columbia Public Schools (“DCPS”) and Washington Teachers’ Union, Local 6 (“WTU”), respectively, in response to the Board’s Decision and Order in PERB Case No. 14-U-02, Slip Opinion 1642 (October 30, 2017). In Slip Opinion 1642, the Board concluded, *inter alia*, that DCPS violated section 1-617.04(a)(1) and (5) of the D.C. Official Code for failing to fully comply with the Arbitrator’s February 7, 2011 Arbitration Award. In its Motion, DCPS requests that the Board extend the amount of time it was given to comply with the Arbitration Award. WTU requests the Board to amend its Order to include benefits as part of its back pay award; to grant back pay and interest from the date of termination to the present; and to prevent DCPS from excluding any affected teachers from the remedy.

II. Standard of Review

A motion for reconsideration cannot be based upon a mere disagreement with the Board’s initial decision.¹ The Board has repeatedly held that a moving party must provide authority that

¹ *AFSCME District Council 20, Local 2921 and D.C. Pub. Sch.*, 62 D.C. Reg. 9200, Slip Op. No. 1518 at 3-4, PERB Case No. 12-E-10 (2015).

compels reversal of the Board's decision.² Absent such authority, the Board will not overturn its decision.³

III. Analysis

DCPS' Motion is granted. In the absence of an objection from WTU, the Board grants DCPS' request to extend the compliance period to 60 days. The Board acknowledges that the 14 days given in the Board's Order is not sufficient time for DCPS to comply in this case, noting that both parties acknowledge that some teachers may be difficult to locate. Therefore, the Board amends the Order to grant DCPS 60 days from the issuance of this Decision and Order to send letters to affected teachers, reinstate teachers, and change the records of teachers who waive reinstatement.

WTU's Motion for Reconsideration is denied. In this regard, WTU's request that the Board clarify the Board's Order in Slip Opinion 1642 to award benefits is denied. The Arbitrator ruled that all affected teachers "be made whole, minus any appropriate deductions."⁴ The Hearing Examiner's Report, adopted by the Board, awarded "back pay." While it is unclear whether the Hearing Examiner intended back pay to encompass benefits, after careful review, the Board declines to interpret the Arbitrator's make-whole remedy. Therefore, consistent with the Arbitrator's Award, the Board orders that all affected teachers be made whole.

WTU's request that the Board amend the remedy to award back pay and interest to the present is denied. The Board finds that the basis for WTU's arguments that back pay and interest should be extended to the present does not state adequate grounds for reversing the Board's Order.⁵ As previously noted, the Arbitrator ruled that all affected teachers "be made whole, minus any appropriate deductions."⁶ The Hearing Examiner, finding that DCPS failed to offer any teachers back pay, recommended that all affected teachers were entitled to back pay from "the date of their original termination until the end of the Award's compliance period (i.e. until April 8, 2011)."⁷ The Hearing Examiner reasoned, "[a]ny teacher for whom the original termination was upheld would, therefore, be subject to termination, *prospectively from the date of such new determination* (presumably no later than the end of the 60-day compliance period specified in the Award (or, approximately April 8, 2011))."⁸ In Slip Opinion 1642, the Board adopted the Hearing Examiner's recommendation that DCPS' failure to provide back pay was a violation of the D.C. Official Code, and awarded back pay from the date of termination until April 8, 2011.⁹ Although the Board acknowledges that back pay is typically awarded from the

² *Id.*

³ *Id.*

⁴ Hearing Examiner's Report at 2.

⁵ See *AFGE Local 1000 v. Dep't of Emp. Serv.*, 61 D.C. Reg. 9776, Slip Op.1486, PERB Case No. 13-U-15 (2014).

⁶ Hearing Examiner's Report at 2.

⁷ Hearing Examiner's Report at 21.

⁸ Hearing Examiner's Report at 19.

⁹ *Washington Teachers' Union, Local 6 v. D.C. Pub Sch.*, Slip Op. 1642 at 15, PERB Case No. 14-0U-02 (October 19, 2017).

date of termination until reinstatement,¹⁰ in the present matter, the Arbitrator and Hearing Examiner limited back pay to the end of the Award's compliance period.

In its motion for reconsideration, WTU contends that teachers are entitled to back pay to the present because DCPS has continued to refuse to grant the teachers reinstatement.¹¹ For support, WTU cites to the National Labor Relations Board ("NLRB") case, *In Re Diamond Walnut Growers, Inc.*¹² However, contrary to WTU's argument, in *In Re Diamond Walnut Growers, Inc.*¹³ the NLRB did not take the position that there is a "presumption" that back pay should continue indefinitely from the date of the employer's unfair labor practice violation. A review of that case, cited as authority for WTU's position that back pay is owed to the present, reveals that when discriminatory hiring under the National Labor Relations Act is alleged, the NLRB has traditionally applied a rebuttable presumption that back pay is owed from the date of the discrimination to reinstatement.¹⁴ No such issue is involved in the present case. The Hearing Examiner determined that the back pay period should extend to April 8, 2011 and the Board adopted the Hearing Examiner's determination in its earlier decision. Therefore, the cited case does not compel reversal of the Board's Order.

Second, WTU's reliance on *Bigelow v. RKO Radio Pictures* as authority for its position that DCPS incurs the risk of escalating back pay is misplaced. *Bigelow* involved the recovery of compensatory damages in an antitrust action where the wrongdoer's misconduct contributed to an uncertainty in calculating damages. In the present case, DCPS's conduct did not render the amount owed in back pay uncertain. Accordingly, the cited case does not compel the reversal of the Board's decision. Therefore, WTU's request that the Board modify the Order to extend back pay and interest to the present is denied.

Finally, WTU's request that the Board prevent DCPS from excluding some teachers from the remedy is denied. The Hearing Examiner here found that the Arbitrator did not identify any of the teachers by name and found that a determination of the particular teachers covered by the original grievance could not be made from the factual record at hand.¹⁵ Further, the Arbitrator determined that resolving the list of grievants was not relevant to the issue of whether DCPS committed unfair labor practices.¹⁶ The Hearing Examiner found that the issue of which teachers were affected by DCPS' actions is best resolved between the parties or during another grievance proceeding.¹⁷ The Board finds that a factual determination cannot be made without a resolution of this factual dispute. Accordingly, as the Arbitrator and Hearing Examiner have not made factual determinations as to the 74 teachers agreed upon by the parties, the Board cannot grant the relief requested at this time.

¹⁰ See e.g., *Doctors Council for the District of Columbia General Hospital v. District of Columbia General Hospital and Hospital Public Benefit Corporation*, 59 D.C. Reg. 4576, Slip Op. No. 937, PERB Case No. 97-U-25 (2012).

¹¹ WTU Motion for Reconsideration at 2.

¹² 340 N.L.R.B. 1129, 1132 (2003).

¹³ 340 N.L.R.B. 1129, 1132 (2003).

¹⁴ *Id.*

¹⁵ Slip Opinion No. 1642 at 9.

¹⁶ *Id.*

¹⁷ *Id.* at 10.

IV. Conclusion

The Board amends the Order in Slip Opinion 1642 to allow DCPS 60 days to implement the Arbitration Award and to make affected teachers whole.

AMENDED ORDER

IT IS HEREBY ORDERED THAT:

1. District of Columbia Public Schools (“DCPS”) shall cease and desist from refusing to bargain in good faith with the Washington Teachers’ Union, Local #6 (“WTU”) by failing to fully comply with the terms of the February 7, 2011 Arbitration Award.
2. DCPS shall, within sixty (60) days from the issuance of this Decision and Order, reinstate the affected probationary teachers to the positions they held as of the date of their discharge. DCPS shall make teachers whole, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Award’s compliance period.
3. Once the teachers have accepted reinstatement, DCPS is permitted to make a determination, by means of an appropriate process, if reinstated teachers should continue to be terminated.
4. DCPS shall change the records of teachers who waive reinstatement to show that they resigned. DCPS shall make teachers whole, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Award’s compliance period.
5. DCPS shall within sixty (60) days from the issuance of this Decision and Order send a new letter to affected teachers consistent with the Order in Slip Opinion 1642.
6. DCPS shall change the records of teachers who cannot be located or do not respond to the new letter to show that he or she voluntarily resigned.
7. DCPS shall reimburse WTU for reasonable costs associated with PERB Case No. 14-U-02, within sixty (60) days from the issuance of this Decision and Order.
8. DCPS shall conspicuously post where notices to employees are normally posed a notice that the Board will furnish DCPS. The notice shall be posted within fourteen (14) days

from DCPS' receipt of the notice and shall remain posted for thirty (30) consecutive days.

9. Within fourteen (14) days from the receipt of this notice, DCPS shall notify the Public Employee Relations Board in writing that the notice is posted.
10. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Members Ann Hoffman, Mary Anne Gibbons, Barbara Somson, and Douglas Warshof.

March 27, 2018

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-U-02, Op. No. 1657 was transmitted to the following parties on this the 3rd day of April, 2018.

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Public
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1642, PERB CASE NO. 14-U-02 (October 19, 2017), AS AMENDED BY ITS DECISION AND ORDER IN SLIP OPINION 1657 (March 27, 2018).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law in the manners alleged in PERB Case No. 14-U-02, and has ordered DCPS to post this Notice.

WE WILL cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5) in the manners stated in Slip Opinion No. 1642, PERB Case No. 14-U-02.

WE WILL reimburse the Union for reasonable costs associated with Slip Opinion No. 1642, PERB Case No. 14-U-02, within sixty (60) days from the issuance of Slip Opinion No. 1657.

WE WILL, within sixty (60) days from the issuance of Slip Opinion 1657, PERB Case No. 14-U-02, reinstate the affected probationary teachers to the positions they held as of the date of their discharge. Once the teachers have accepted reinstatement, we will make a determination, by means of an appropriate process, if reinstated teachers should continue to be terminated. We will make teachers whole, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Arbitration Award's compliance period.

WE WILL change the records of teachers who waive reinstatement to show that they voluntarily resigned. We will make teachers whole, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Arbitration Award's compliance period.

WE WILL within sixty (60) days from the issuance of Slip Opinion No. 1657, PERB Case No. 14-U-02 send a new letter to affected teachers consistent with Slip Opinion No. 1642.

WE WILL change the records of teachers who cannot be located or do not respond to the new letter to show that they voluntarily resigned.

Department of Public Schools

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or DCPS' compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board by U.S. Mail at 1100 4th Street, SW, Suite E630; Washington, D.C. 20024, or by phone at (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

March 27, 2018

Washington, D.C.

