Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
Psychologists Union Local 3758, 1199 (NUHHCE) National Union of Hospital and Health Care Employees, American Federation of State, County, and Municipal Employees, AFL-CIO,	
Complainant,	PERB Case No. 06-U-40
v.	Opinion No. 1260
District of Columbia Department of Mental Health,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

This matter is before the Board upon an unfair labor practice complaint ("Complaint") filed by Psychologists Union Local 3758, 1199 (NUHHCE) National Union of Hospital and Health Care Employees, AFL-CIO ("Union" or "Complainant") against the District of Columbia Department of Mental Health ("Department" or "Respondent"). The Complaint alleges that the Respondent failed to comply with or implement an arbitration award the Complainant had obtained against the Respondent. The Respondent filed an answer asserting that it had not committed an unfair labor practice and that the Complaint does not allege an unfair labor practice. The answer requests that the Board dismiss the Complaint.

II. Background

The pleadings establish the following undisputed facts. The Union represents psychologists employed by the Department. Some of the psychologists work in the Community Services Agency of the Department ("CSA") providing mental health services in out-patient facilities (Complaint at pp. 1-2; Answer at p. 2). Dr. John Bruce was a member of the bargaining unit represented by the Union. A March 2005 letter from the director of the Adult Services Department of the CSA gave Dr. Bruce advance notice of his removal as a consequence of his alleged misconduct with a "consumer" of the CSA (Complaint at p. 2 & Exhibit B pp. 2-8; Answer at p. 2 & Exhibit 1 pp. 2-7). The letter also stated that "during this period of advance

are not to have any contact with DCCSA consumers and you are not allowed to visit any DCCSA site without obtaining permission from me." (Complaint at pp. 2-3; Answer at p. 2 & Exhibit 1 at p. 10).

A grievance brought by the Union against the administrative leave was denied by the Department but upheld by an arbitrator (Complaint at p. 3; Answer at p. 2). On April 6, 2006 the arbitrator issued the following award:

> [T]he Agency is found to have violated Section 8 of Article 16 [of the Collective Bargaining Agreement] when it placed Dr. John Bruce on administrative leave and barred him from DMH premises absent special permission on March 15, 2005, during the period of Advance Notice of Disciplinary Action. The Agency is therefore directed to post a notice stating that it violated the Collective Bargaining Agreement when it took these actions and that it will cease and desist from any violations in the future.

(Complaint at pp. 3-4 & Exhibit B at p. 18; Answer at pp. 3 & 7 & Exhibit 4).

The notice posted by the Department in response to the award stated:

> THE DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH HEREBY notifies our employees that the American Arbitration Association has found that we violated Section 8 of Article 16 of the collective bargaining agreement.
>
> WE WILL cease and desist from any future violations Section 8 of Article 16 of the collective bargaining agreement with the Psychologists Union, Local 3758 of the District of Columbia Department of Mental Health 1199 National Union of Hospital and Health Care Employees ("NUHHCE"), American Federation of State, County and Municipal Employees, AFL-CIO.

(Complaint at p. 5 & Exhibit E; Answer at p. 4).

After an exchange of letters on the sufficiency of the Department's posting, the Union filed the instant unfair labor practice complaint on June 13, 2006.[1] The Complaint alleges that the notice the Department posted does not implement the award in that the "Award mandated that the Employer post a notice that identifies the actions the Department took which violated the contract. The document entitled 'Notice' posted by the Employer does not do so." (Complaint at p. 5). The Complaint concludes: "By failing and refusing to implement Arbitrator Doering's Award, the Employer is, and has been, failing to bargain in good faith with the Union within the meaning of D.C. Code § 1.617.04(a)(1) and (5)." (Complaint at p. 6). The Union prays the Board to declare the Department's conduct to be an unfair labor practice and to issue remedial orders (*Id.* at p. 7). The answer filed by the Department replied:

[1] Despite the requirements of Rule 520.3(f), the Complaint did not state that at that time two related proceedings had been filed with this Board involving Dr. Bruce's subsequent termination (PERB Case Nos. 05-U-41 and 06-A-17).

> Respondent denies that it refused to post a Notice that implements the Arbitrator's Award. The Department did implement the Arbitrator's Award, although not to the Union's pleasure. The Department believes that the Notice and posting were sufficient. The Arbitrator's Award did not provide a Notice for posting, nor did the Award specifically state in quotations how the Notice was intended to read.

(Answer at p. 5).

The Answer asserts that the Complaint fails to allege facts which would constitute an unfair labor practice (*Id.* at p. 6).

III. Discussion

The material facts including the text of the award and of the notice are undisputed. As there is no issue of fact to warrant a hearing, the Board will render its decision on the alleged unfair labor practice on the pleadings in accordance with Rule 520.10.

This Board held in *International Brotherhood of Police Officers, Local 446 v. D.C. Health & Hosps. Pub. Benefit Corp.*, 47 D.C. Reg. 7184, Slip Op. No. 622 at p. 4, PERB Case No. 99-U-30 (2000), that a refusal to implement an arbitrator's award where no *genuine* dispute exists over its terms is an unfair labor practice, but failure to implement an award when its interpretation is disputed by the parties does not constitute an unfair labor practice. In that case, an arbitration award ordered back pay but, according to the agency, did not explain how back pay was to be calculated. The Board held that the parties' dispute over the calculation of back pay was a genuine issue. *Id.* at pp. 4-5. In the instant case, the award is less ambiguous. The award found that placing the grievant on administrative leave and barring him from the premises violated the collective bargaining agreement and ordered the posting of "a notice stating that [the Department] violated the Collective Bargaining Agreement when it took these actions. . . ." In the Union's view, by using the words "when it took these actions," the award calls for "a notice that identifies the actions the Department took which violated the contract." (Complaint at p. 5). For there to be a genuine dispute, the Department would simply have to offer an alternative interpretation giving these words a different meaning or explaining why they should be deemed to have no meaning. We have searched the Department's answer in vain for an alternative interpretation. The answer offers only the conclusions that the Department's notice was "sufficient," "more than appropriate," and "as intended by the Arbitrator Award."

In the light of this review of the Department's contentions, the Board finds that the Department's reasons for the wording of its notice do not constitute a genuine dispute over the terms of the award. Thus, we conclude that the Department has not in good faith implemented fully the arbitration award. The same failure constitutes a violation of the Department's duty to bargain in good faith as codified in section 1-617.04(a)(5) of the D.C. Code. *Am. Fed'n of State, County, and Mun. Employees, Dist. Council 20, Local 2921 v. D.C. Pub. Schs.*, 50 D.C. Reg. 5077, Slip Op. No. 712 at p. 4, PERB Case No. 03-U-17 (2003).

In addition, the Union prays that the Board "[g]rant such other relief, including attorneys' fees and costs, as PERB deems fair and appropriate." The Board articulated in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990), criteria for determining when an award of costs would be in the interest of justice. The interest-of-justice criteria include whether the losing party's claim or position was wholly without merit, whether the successfully challenged action was undertaken in bad faith, and whether a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union. *Id.* at p. 5. As we noted in *American Federation of Government Employees, Local 2725 v. Department of Health*, "[i]n cases which involve an agency's failure to implement an arbitration award or a negotiated settlement, this Board has been reluctant to award costs." Slip Op. No. 945 at p. 5, PERB Case No. 08-U-08 (Sept. 1, 2009) (citing *AFGE, Local 2725 v. D.C. Housing Auth.*, 46 D.C. Reg. 6728, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999) and *Am. Fed'n of Gov't Employees, Local 2725 v. D.C. Dep't of Health*, 51 D.C. Reg. 11398, Slip Op. No. 752, PERB Case No. 03-U-18 (2004)). *Accord, Doctors' Council v. D.C. Dep't of Youth Rehab. Servs.*, Slip Op. No. 884 at pp. 5-6, PERB Case No. 07-U-19 (Apr. 17, 2007); *Int'l Bhd. of Police Officers, Local 446 v. D.C. Health & Hosps. Pub. Benefit Corp.*, 47 D.C. Reg. 7184, Slip Op. No. 622 at p. 5, PERB Case No. 99-U-30 (2000). We have, however, awarded costs when an agency has demonstrated a pattern and practice of refusing to implement arbitration awards or negotiated settlements. *Am. Fed'n of Gov't Employees, Local 2725 v. D.C. Dep't of Health*, Slip Op. No. 948 at pp. 4-5, PERB Case No. 08-U-12 (Sept. 1, 2009).

In the instant case, the Union has not alleged a pattern or practice by the Department of refusing to implement awards. Moreover, the Department did not flatly refuse to comply with the award. As there has been no pattern or practice nor a flat refusal, the *AFSCME* interest-of-justice criteria stated above would not be served by granting the Union's request for costs. *See AFSCME*, Slip Op. at p. 5. With respect to the Union's request for attorney fees, the Board lacks the authority to grant such a request. *Int'l Bhd. of Police Officers v. D.C. Gen. Hosp.*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1994).

Therefore, the Board holds that the Department committed an unfair labor practice, and we deny the Union's request for attorney's fees and costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department, its agents, and representatives shall cease and desist from refusing to bargain in good faith with the Union by failing to implement the terms of the April 6, 2006 arbitration award, over which no genuine dispute exists.

2. The Union's request for costs and attorney fees are denied for the reasons stated in this Opinion.

3. The Department shall, within ten (10) days from the service of this Decision and Order post for thirty (30) consecutive days the attached Notice, dated and signed, conspicuously on all bulletin boards where notices to bargaining-unit employees are customarily posted.

4. The Department shall notify the Public Employee Relation Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that the Notice has been posted accordingly.

8. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

April 24, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-U-40 is being transmitted via U.S. Mail to the following parties on this the 25th day of April 2012.
April 24, 2012

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Sheryl V. Harrington
Secretary

PERB Public Employee Relations Board

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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH, 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. _____, PERB CASE NO. 06-U-40 (April 24, 2012).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board (1) has found that we violated the law by failing to post a notice stating:

> We violated the collective bargaining agreement when we placed a bargaining unit member on administrative leave and barred him from DMH premises absent special permission.

and (2) has ordered us to post this notice.

WE WILL cease and desist from refusing to bargain in good faith with the Psychologists Union Local 3758, 1199 (NUHHCE) National Union of Hospital and Health Care Employees, AFL-CIO by failing to implement the provisions of an arbitration award (rendered pursuant to the negotiated provisions of the collective bargaining agreement) over which no genuine dispute exists over the terms.

WE WILL NOT, in any like or related manner, interfere, restrain, or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Department of Mental Health

Date: _____

By: _____

Director

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 the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th St. SW, Washington, D.C. 20024. Phone: (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

April 24, 2012