Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
The Washington Teachers Union, Local #6, American Federation of Teachers, AFL-CIO,	PERB Case No. 05-U-14
Complainant,	Opinion No. 1417
v.	Motion for Decision on the Pleadings
District of Columbia Public Schools,	Decision and Order
Respondents.	

DECISION AND ORDER

I. Statement of the Case

Complainant Washington Teachers Union, Local #6, American Federation of Teachers, AFL-CIO ("Complainant" or "WTU" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") against District of Columbia Public Schools ("Respondent" or "DCPS"), alleging DCPS violated D.C. Code §§ 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act ("CMPA") by failing to comply with the terms of an arbitration settlement agreement ("Settlement Agreement") within the time frame set by the Settlement Agreement. (Complaint, at 2).

In its Answer, DCPS denied that it violated the CMPA and submitted the affirmative defenses that: 1) the Complaint failed to state a claim for which relief can be granted; 2) the Public Employee Relations Board ("PERB") lacks jurisdiction to grant the relief WTU requested; and 3) WTU's request for attorneys' fees should be dismissed based on PERB precedent. (Answer, at 1-5).

WTU thereafter filed a Motion for Decision on the Pleadings, arguing that DCPS' answer was untimely. (Motion for Decision, at 1-6).

II. Background

On October 25, 1999, DCPS notified bargaining unit member, Patricia Tuck-Scott[1] ("Ms. Tuck-Scott"), by letter, that she was being terminated, effective November 12, 1999, for disobedience and insubordination. (Complaint, at, 1). WTU grieved the termination, and the matter was scheduled for an arbitration hearing to be held on September 9, 2004. *Id.*, at 1-2. Prior to the scheduled hearing, DCPS proposed a settlement, which WTU accepted. *Id.*, at 2. The parties executed the binding Settlement Agreement, in full resolution of the arbitration proceeding, on September 16, 2004. *Id.*

The terms of the Settlement Agreement provided, in part, that within 30 days of the execution of the Settlement Agreement: 1) DCPS would rescind the termination and remove any record of the termination from Ms. Tuck-Scott's personnel file; and 2) DCPS would make Ms. Tuck-Scott "whole" for all pay that she lost as a result of her termination, minus any mitigating income she earned between November 12, 1999, and September 16, 2004 (the execution date of the Settlement Agreement). *Id.*

WTU alleged that, as of December 14, 2004, the date of its Complaint, DCPS had failed to pay any of the back-pay it had agreed to pay Ms. Tuck-Scott by October 16, 2004, despite numerous demands by WTU that it do so. *Id.* WTU alleged that DCPS' conduct interfered, restrained, and coerced bargaining unit employees in the exercise of their rights under D.C. Code § 1-617.04(a)(1), and constituted a refusal to bargain in good faith under D.C. Code §§ 1-617.04(a)(1) and (5). *Id.*, at 2-3.

As a result of these alleged violations, WTU requested that PERB order DCPS to: 1) cease violating the CMPA in the manner alleged or in any like or related manner; 2) immediately pay Ms. Tuck-Scott the back-pay agreed to in the Settlement Agreement; 3) immediately comply with the Settlement Agreement in all other respects; 4) pay WTU's attorneys' fees and costs; 5) post a notice to employees; and 6) comply with all aspects of the CMPA. *Id.*, at 3.

In its Answer, filed on January 3, 2005, DCPS admitted that it proposed and entered into the Settlement Agreement, in which it agreed to reinstate Ms. Tuck-Scott, "withdraw/retract the 'Notice of Termination'" from Ms. Tuck-Scott's personnel file, and pay her all back-pay owed minus any mitigating income within 30 days of the execution of the agreement. (Answer, at 1-3). DCPS denied, however, that it violated the CMPA by failing to pay Ms. Tuck-Scott her back-pay by October 16, 2004, as required by the Settlement Agreement. *Id.*, at 3-4. DCPS stated that on December 14, 2004, the DCPS Office of Human Resources sent Ms. Tuck-Scott a letter informing her that "she would need to submit a copy of her payroll statement, stubs, 1040s and W2s for each year while she was separated from service, and to complete and have notarized

[1] At the time of the letter, Ms. Tuck-Scott went by Patricia Tuck. (Complaint, n. 1)

an 'Affidavit Covering Outside Earnings and Erroneous Payments' in order for DCPS to process her back pay." *Id.* at, 3-4, Exhibit 1.

DCPS further offered three affirmative defenses. *Id.*, at 4-5. First, DCPS argued that the Complaint should be dismissed because it "fails to state an unfair labor practice for which relief could be granted." *Id.*, at 4-5. DCPS averred it had already complied with the requirement to remove all documents related to the termination from Ms. Tuck-Scott's personnel file, and that it would comply with the back-pay requirement as soon as Ms. Tuck-Scott provided the documentation described in DCPS' December 14, 2004, letter, thus leaving "no unresolved issue, or basis for the [C]omplaint." *Id.* Second, DCPS contended that because it had complied with and/or taken to steps to comply with the Settlement Agreement, the Complaint should be dismissed because PERB lacks jurisdiction to grant the relief requested. *Id.*, at 5. Third, DCPS argued that WTU's request for attorneys' fees should be dismissed because PERB precedent holds that PERB "lacks jurisdiction to award such fees." *Id.* (citing *International Brotherhood of Police Officers v. District of Columbia General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1994); and *American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, 46 D.C. Reg. 10388. Slip Op. No. 603, PERB Case No. 99-U-18 (1999)).

On January 5, 2005, WTU filed a Motion for Decision on the Pleadings, arguing that DCPS' Answer was untimely. (Motion for Decision, at 1-5). WTU argued that DCPS failed to file its Answer by January 3, 2005, as required by a December 16, 2004, letter from former PERB Executive Director, Julio Castillo, to DCPS. *Id.*, at 1. WTU contended that, as a result, PERB should consider all of the material facts alleged in the Complaint to be admitted pursuant to PERB Rule 520.7, and should render a decision on the pleadings in accordance with PERB Rule 520.10. *Id.*, at 1-2.

PERB has no record of any other pleadings having been filed in this matter. WTU's Complaint and Motion for Decision are therefore now before the Board for disposition.

III. Discussion

A. Motion for Decision on the Pleadings

WTU's Motion for Decision is based solely on the contention that DCPS failed to file its Answer by the January 3, 2005, deadline set by former Executive Director Castillo in his December 16, 2004, letter. *Id.*, at 1-5. However, the date-stamp on DCPS' Answer and its corresponding cover letter show that the Answer was timely filed by hand-delivery at approximately 4:29PM on January 3, 2005. WTU's Motion for a Decision on the Pleadings based upon its allegation that DCPS' Answer was untimely is therefore denied.

Notwithstanding, PERB Rule 520.8 states that "[t]he Board or its designated representative shall investigate each complaint", and PERB Rule 520.10 states that "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." Here, DCPS generally denied WTU's legal conclusions, but admitted the Complaint's alleged underlying facts, which are that: 1) DCPS agreed in the Settlement Agreement to make Ms. Tuck-Scott "whole" for all pay that she lost as a result of her termination, minus any mitigating income she earned between November 12, 1999, and September 16, 2004, within 30 days starting on September 16, 2004; and 2) DCPS failed to take any action to comply with said agreement within those 30 days. (Complaint, at 2-3); and (Answer, at 1-5). Therefore, because these facts are undisputed by the parties, leaving only legal questions to be resolved, the PERB can properly decide this matter based upon the pleadings in accordance with PERB Rule 520.10. See *American Federation of Government Employees, AFL-CIO Local 2978 v. District of Columbia Department of Health*, 60 D.C. Reg. 2551, Slip Op. No. 1356 at p. 7-8, PERB Case No. 09-U-23 (2013); see also *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 D.C. Reg. 6278, Slip Op. No. 585 at p. 3, PERB Case Nos. 98-U-20, 99-U-05, and 99-U-12 (1999).

B. Decision

Generally, a complainant must assert in the pleadings allegations that, if proven, would demonstrate a statutory violation of the CMPA. *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department and Cathy Lanier*, 59 D.C. Reg. 5427, Slip Op. No. 984 at p. 6, PERB Case No. 08-U-09 (2009) (citing *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 D.C. Reg. 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and *Gregory Miller v. American Federation of Government Employees Local 631 and District of Columbia Department of Public Works*, 48 D.C. Reg. 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994)).

When a party refuses or fails to implement an award or negotiated agreement where there is no dispute over its terms, such conduct constitutes a failure to bargain in good faith and thereby, an unfair labor practice. *American Federation of Government Employees, Local 872, AFL-CIO v. District of Columbia Water and Sewer Authority*, 46 D.C. Reg. 4398, Slip Op. No. 497 at p. 2-3, PERB Case No. 96-U-23 (1996). In addition, an agency waives its right to appeal an arbitration award when it fails to file a timely arbitration review request with the Board or otherwise appeal for judicial review of the award in accordance with D.C. Code § 1-617.13(c). See *AFGE, Local 2725 v. DCHA, supra*, Slip Op No. 585 at p. 3, PERB Case Nos. 98-U-20, 99-U-05, and 99-U-12. If an agency waives its right to appeal an arbitration award, then no

legitimate reason exists for the agency's refusal to implement the award, and said refusal constitutes a failure to bargain in good faith in violation of D.C. Code § 1-617.04(a)(5). See *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 D.C. Reg. 8356, Slip Op No. 597, PERB Case No. 99-U-23 (1999). Such a refusal further constitutes, derivatively, an interference with the bargaining unit employees' rights in violation of D.C. Code § 1-617.04(a)(1). See *AFGE, Local 2725 v. DCHA, supra*, Slip Op No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05, and 99-U-12; and *American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 50 D.C. Reg. 5077, Slip Op. No. 712 at p. 3-4, PERB Case No. 03-U-17 (2003).

In the present case, DCPS admitted that it does not dispute the terms of the Settlement Agreement as they were alleged in the Complaint. (Answer, at 2-3). DCPS further admitted that the terms of the Settlement Agreement required it to make Ms. Tuck-Scott "whole" by approximately October 16, 2004 (or 30 days from the date the Settlement Agreement was executed, which was September 16, 2004). *Id.* Indeed, DCPS admitted that it took no steps to obtain the documentation it said it needed from Ms. Tuck-Scott in order to make her "whole' until December 14, 2004, when its Office of Human Resources first sent her a letter detailing the information DCPS needed in order to determine the amount of back-pay she was owed. *Id.* December 14, 2004, is also the same day that WTU filed its Complaint. (Complaint, at 1).

Based on the foregoing, and in consideration of the facts that DCPS proposed, negotiated, and agreed to the terms of the Settlement Agreement, and did not file any appeal to the Settlement Agreement in accordance with D.C. Code § 1-617.13(c), the Board finds that DCPS had no legitimate reason for failing to take any action to make Ms. Tuck-Scott "whole" by October 16, 2004. *AFGE, Local 2725 v. DCHA, supra*, Slip Op No. 585 at p. 3, PERB Case Nos. 98-U-20, 99-U-05, and 99-U-12. The Board further finds that said failure constitutes a failure to bargain in good faith in violation of D.C. Code § 1-617.04(a)(5), and, derivatively, an interference with the bargaining unit employees' rights in violation of D.C. Code § 1-617.04(a)(1). *AFGE, Local 2725 v. DCHA, supra*, Slip Op No. 597, PERB Case No. 99-U-23; and *AFSCME, District Council 20, Local 2921, v. DCPS, supra*, Slip Op. No. 712 at p. 3-4, PERB Case No. 03-U-17.

DCPS' affirmative defenses that the Complaint should be dismissed because it "fails to state an unfair labor practice for which relief could be granted" and that PERB "lacks jurisdiction to grant the relief requested" do not avail because the facts demonstrate that DCPS' failure to take any action to make Ms. Tuck-Scott "whole" by October 16, 2004, violated D.C. Code §§ 1-617.04(a)(1) and (5), for which PERB is empowered to grant relief. (Answer, at 3-5); see also *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of*

Columbia Metropolitan Police Department, 60 D.C. Reg. 9212, Slip Op. No. 1391 at p. 22, PERB Case Nos. 09-U-52 and 09-U-53 (2013) (citing *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 50 D.C. Reg. 5049, Slip Op. No. 697 at p. 6, PERB Case No. 00-U-22 (2002)).

IV. Remedy

In accordance with the Board's finding that DCPS' conduct constituted an unfair labor practice under D.C. Code §§ 1-617.04(a)(1) and (5), the Board now turns to the question of an appropriate remedy. WTU requested that PERB order DCPS to: 1) cease violating the CMPA in the manner alleged or in any like or related manner; 2) immediately pay Ms. Tuck-Scott the back-pay agreed to in the Settlement Agreement; 3) immediately comply with the Settlement Agreement in all other respects; 4) pay WTU's attorneys' fees and costs; 5) post a notice to employees; and 6) comply with all aspects of the CMPA. (Complaint, at 3).

The Board finds it reasonable to order DCPS to post a notice acknowledging its violation of the CMPA, as detailed herein. When a violation of the CMPA has been found, the Board's order is intended to have a "therapeutic as well as a remedial effect" and is further to provide for the "protection of rights and obligations." *American Federation of Government Employees, Local 2725 v. District of Columbia Department of Health*, 59 D.C. Reg. 6003, Slip Op. No. 1003 at p. 5, PERB Case No. 09-U-65 (2009) (quoting *National Association of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635 at p. 15-16, PERB Case No. 99-U-04 (2000)). It is this end, the protection of employees' rights, that "underlies [the Board's] remedy requiring the posting of a notice to all employees" that details the violations that were committed and the remedies afforded as a result of those violations. *Id.* (quoting *Charles Bagenstose v. District of Columbia Public Schools*, 41 D.C. Reg. 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991)). Posting a notice will enable bargaining unit employees to know that their rights under the CMPA are fully protected. *Id.* It will likewise discourage the Agency from committing any future violations. *Id.*

Furthermore, the Board finds it reasonable to order DCPS to: 1) cease violating the CMPA in the manner detailed herein or in any like or related manner; 2) immediately pay Ms. Tuck-Scott the back-pay agreed to in the Settlement Agreement if it has not already done so; 3) immediately comply with the terms of the Settlement Agreement in all other aspects if it has not already done so; and 4) comply with all aspects of the CMPA.

WTU further requested that DCPS be ordered to pay WTU's attorneys' fees and costs. (Complaint at 3). D.C. Code § 1-617.13 authorizes the Board "to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may

determine." This does not, however, include an award of attorneys' fees. *AFGE, Local 2725 v. D.C. DOH, supra*, Slip Op. No. 1003 at p. 6, PERB Case No. 09-U-65 (citing *International Brotherhood of Police Officers, Local 1445, AFL-CIO/CLC v. District of Columbia General Hospital* 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); and *University of the District of Columbia Faculty Association NEA v. University of the District of Columbia*, 38 D.C. Reg. 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991). Any portion of DCPS' request involving attorneys' fees is therefore denied.

The circumstances under which an award of costs is warranted were 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 at p. 4-5, PERB Case No. 89-U-02 (1990), in which the Board stated:

> [A]ny such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.
>
> Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued . . . What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative.

In the instant matter, the Board found that DCPS violated the CMPA by failing, without a legitimate reason, to take any action to make Ms. Tuck-Scott "whole" by October 16, 2004, as it had proposed and agreed to do. (Answer, at 2-3). Indeed, DCPS took no action to notify Ms. Tuck-Scott that it needed anything from her in order to comply with the Settlement Agreement until December 14, 2004, the same day that WTU filed the Complaint. *Id.* As a result of DCPS' failure to comply with the Settlement Agreement in violation of the CMPA, the Board finds that awarding costs in accordance with WTU's request would serve and meet the "interest-of-justice" test articulated in *AFSCME, D.C. Council 20, Local 2776 v. DCDFR, supra.*

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent must cease and desist from violating D.C. Code §§ 1-617.04(a)(1) and (5) ("CMPA") in the manner detailed herein or in any like or related manner;

2. Respondent must immediately pay Ms. Tuck-Scott the back-pay agreed to in the Settlement Agreement if it has not already done so;

3. Respondent must immediately comply with the Settlement Agreement in all other respects if it has not already done so;

4. Within fourteen (14) days of the service of this order, Complainant must submit to Respondent a written statement of the actual costs it incurred in processing this unfair labor practice complaint. Said statement must be accompanied by any and all supporting documentation. Respondent must pay Complainant's costs in this matter within thirty (30) days of receiving Complainant's written statement and supporting documentation;

5. Respondent must conspicuously post, within ten (10) days of the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. Said Notice shall remain posted for thirty (30) consecutive days.

6. Within fourteen (14) days of the service of this Decision and Order, Respondent must notify the Board, in writing, that the Notice has been posted as ordered.

7. Within fourteen (14) days from the service of this Decision and Order, Respondent must notify the Board of the steps it has taken to comply with paragraphs 2 and 3 of this Order.

8. Respondent must comply with all aspects of the CMPA;

9. Complainant's request for attorneys' fees is denied; and

10. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

September 3, 2013

PERB Public Employee Relations Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DC.gov

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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS ("DCPS"), 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. 1417, PERB CASE NO. 05-U-14 (September 3, 2013).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered DCPS to post this notice.

DCPS violated D.C. Code § 1-617.04(a)(1) and (5) by failing, without a legitimate reason, to comply with the terms of a binding settlement agreement between DCPS and the Washington Teachers Union, Local #6, American Federation of Teachers, AFL-CIO.

District of Columbia 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 compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, located at: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024, Telephone: (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

September 3, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-U-14, Slip Op. No. 1417, was transmitted via U.S. Mail and e-mail to the following parties on this the 23rd day of September, 2013.

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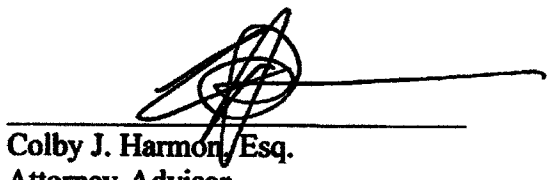

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