

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:)	
)	
American Federation of Government Employees,)	
Local 2725 (on behalf of Sandra McNair and)	
Gerald Roper, Grievants),)	
)	PERB Case No. 12-U-30
Complainant,)	
)	Opinion No. 1362
v.)	
)	
District of Columbia Department of Consumer)	
and Regulatory Affairs.)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, Local 2725 ("Complainant" or "Union") filed an unfair labor practice complaint ("Complaint") against the Department of Consumer and Regulatory Affairs ("Respondent" or "Department") alleging that the Department through its counsel had failed and refused to comply with a settlement agreement and thereby failed to bargain in good faith and committed an unfair labor practice. The Department filed an answer ("Answer") admitting some allegations, denying others, and asserting that the complaint failed to state a claim upon which relief may be granted. With regard to many of the paragraphs of the Complaint, the Answer admitted parts of the paragraph, denied other parts, and sometimes paraphrased an averment using words that the Respondent was able to admit.

The following undisputed facts are established by administrative notice or by the pleadings, having been alleged by the Complaint and admitted by the Answer. Language drawn from the Answer's paraphrases of the Complaint is enclosed in brackets as are items of administrative notice.

1. Complainant, AFGE Local 2725, is a labor organization within the meaning of the CMPA. The Local has a business

address of P.O. Box 75960, Washington, DC 20013. Mr. Eric Bunn is the President of the Local, with a telephone number of 202-842-4540.

2. D.C. Department of Consumer and Regulatory Affairs is an Agency within the meaning of the CMPA. Its business address is 1100 4th St. SW, Washington, DC 20024. The Director of the Agency is Mr. Nicholas Majett. Mr. Majett's telephone number is 202-442-4400. His facsimile number is 202-442-9445. The Agency is represented by Mr. James Langford, Attorney, D.C. Office of Labor Relations and Collective Bargaining. His telephone number is 202-724-4675.

3. The Agency and the Local are parties to a collective bargaining agreement ("Agreement"), signed by all parties on February 24, 1989.

4. Pursuant to the negotiated grievance procedure in the collective bargaining agreement, AFGE filed a grievance on behalf of Grievants Sandra McNair and Gerald Roper. As the matter was not resolved, the parties submitted to arbitration on March 26 and 27, 2008. On July 26, 2008, the Arbitrator issued an award sustaining the grievance nearly *in toto*. The Award is attached as Exhibit A.

[The Board takes administrative notice that its records reflect that the Respondent filed an arbitration review request in the above matter, and that the Board dismissed the request as untimely and sustained the arbitrator's award of back pay and retroactive promotion in *District of Columbia Department of Consumer and Regulatory Affairs v. American Federation of Government Employees, Local 2725*, 59 D.C. Reg. 5392, Slip Op. No. 978, PERB Case No. 09-A-01 (2009).]

5. . . . The Agency did not file a petition to review that decision in D.C. Superior Court.

[The Board takes administrative notice that its records reflect that the Union filed PERB Case No. 09-U-24, alleging that the Department underpaid the Grievants in response to the award in PERB Case No. 09-A-01.]

* * *

8. On December 14, 2011, the parties settled this unfair labor practices complaint for specified sums for the Grievants, interest,

notice from the Agency to appropriate authorities that one of the Grievants, Mr. Roper, had a new high -3 salary amount for purposes of his retirement due to the Award, and a letter to be sent on from DCRA on behalf of the other Grievant, Ms. McNair, to another DC Agency notifying it of the award. Due to the settlement, the Union agreed to withdraw the ULP.

9. On December 15, 2011, Agency attorney James Langford drew up a document for PERB stating that the case had settled, so that PERB would cancel the December 16, 2011 hearing. Mr. Langford signed the document on behalf of the Agency and attorney for AFGE Local 2725, Leisha Self, signed it on behalf of the Union. Mr. Langford filed the document with the PERB on December 15, 2011. See attached Notice of Settlement (the version included herein is unsigned, as Mr. Langford did not provide a signed version to the Union, but the PERB has a signed version in the files for 09-U-24) and related emails as Exhibit B.

10. Agency attorney Langford notified Ms. Self that he wished to draw up the settlement. . . . Mr. Langford [was drafting the settlement agreement].

11. . . . Ms. Self and Mr. Langford also spoke about this matter on the telephone either that day or shortly thereafter. In the telephone call, Mr. Langford agreed that he should have included language about the high-3 salary notification and would take care of that.

* * *

13. On April 16, April 24, and May 1, 2012, Ms. Self again sent emails. . . .

14. On [or about] May 11, 2012, Ms. Self . . . spoke with . . . Mr. Michael Levy. . . . This telephone conversation is confirmed in an email of that same date. See Exhibit B.

* * *

16. On that same date, Ms. Self notified Mr. Langford that the agreement failed to include the high- 3 salary notification for Mr. Roper. See Exhibit B (email on May 11, 2012, 3:19 pm from Leisha Self). . . . [Respondent received a] May 22, 2012, at 10:33 am, [email from] Ms. Self. . . . This email attached a sample letter. . . .

17. On June 5, 2012, [Respondent received an e-mail from the Union].

18. On June 7, 2012, Union Attorney Ms. Self telephoned Agency Attorney Mr. Langford, in another attempt to resolve this matter. In that telephone call, she was able to obtain from Mr. Langford his concerns about the current language of the letter for Ms. McNair, and she revised the letter according to his concerns, attaching it to a June 7, 2012 4:24pm email to Mr. Langford. Mr. Langford and his supervisor Mr. Levy agreed that the revised letter was acceptable, as did Ms. McNair. See Exhibit B, June 7, 2012, 4:32pm email, and June 8, 2012, 8:51am email.

19. Mr. Langford did not provide the settlement on Friday, June 8, 2012 or by June 12, 2012, despite email reminders from Ms. Self regarding the same on those dates.

20. . . . [Attorney Self] obtained signatures from all appropriate parties on the Union's side. [Respondent received a] June 21, 2012 [email attaching] the entire settlement package. . . .

21. . . . [Respondent received from Attorney Self] an email dated July 9, 2012.

II. Discussion

This case involves two agreements made in connection with the settlement of Case Number 09-U-24, a tentative agreement on the terms of the settlement ("Tentative Agreement") and a final agreement ("Agreement") to reduce the Tentative Agreement to writing. Complainant alleges that the Respondent failed to implement the Agreement.

Failure to implement the terms of a negotiated settlement agreement where no genuine dispute exists over its terms constitutes a failure to bargain in good faith and, consequently, an unfair labor practice under the Comprehensive Merit Personnel Act. *AFGE, Local 2725 v. D.C. Dep't of Health*, 59 D.C. Reg. 4628, Slip Op. No. 945 at p. 3, PERB Case No. 08-U-08 (Sept. 1, 2009); *AFGE, Local 872 v. Water & Sewer Auth.*, 46 D.C. Reg. 4398, Slip Op. No. 497 at p. 3, PERB Case No. 96-U-23 (1996).

The pleadings establish the presence of those elements in this case. In settlement of PERB Case No. 09-U-24, the parties on December 14, 2011, reached a Tentative Agreement on the terms of the settlement and an Agreement to reduce the Tentative Agreement to writing. (Complaint and Answer ¶¶ 8 & 9). Despite repeated requests from the Union, as of June 12, 2012, the Department had not taken the steps necessary to implement the Agreement to reduce the Tentative Agreement to writing. (Complaint and Answer ¶¶ 10, 11, 16, 18, & 19). Respondent does not allege that it reduced the Agreement to writing or implemented the Agreement at any time after June 12, 2012.

The Respondent was informed that terms related to a notification for Mr. Roper and a letter for Ms. McNair needed to be written in order for the drafting of the Tentative Agreement to be completed. Complainant drafted and, at the request of Respondent, revised the letter for Ms. McNair. (Complaint and Answer ¶¶ 11, 16, & 18). There is no dispute with respect to the drafting of either of those two terms of the Tentative Agreement. (*Id.* ¶¶ 11 & 18). The Respondent does not allege that any other dispute exists over the terms of the Agreement.

Therefore, the pleadings establish that the Respondent failed to implement a settlement agreement where no dispute exists over its terms. As the elements of an unfair labor practice for failure to implement a settlement agreement are established by the pleadings, the Board determines pursuant to Rule 520.10 that the Department's acts and omissions constitute a violation of its duty to bargain in good faith and therefore constitute an unfair labor practice in violation of D.C. Code 1-617.04(a)(5).

Having determined that the Respondent committed an unfair labor practice, we now turn to the appropriate remedy in this case. The Complainant requests that the Board direct the Respondent to (1) cease and desist from refusing to bargain in good faith, (2) implement the terms of the Agreement with interest from December 14, 2011, (3) post a notice of the violation, and (4) reimburse the Complainant for its costs.

These requests are unobjectionable with the exception of the requests for interest and costs, which call for some discussion. The Union prays that the Department be ordered to implement the terms of the Agreement with the additional term of "interest added from December 14, 2011." (Complaint ¶ 26). Interest accrues from the date a settlement agreement became final and binding, which is the date of the last of the parties' signatures on the agreement. *Doctors' Council of D.C. v. D.C. Dep't of Youth Rehab. Servs.*, 59 D.C. Reg. 5013, Slip Op. No. 967 at pp. 8-9, PERB Case No. 07-U-19 (2009); *see also AFGF, Local 2725 v. D.C. Dep't of Health*, 59 D.C. Reg. 4628, Slip Op. No. 945 at pp. 3 & 6-7, PERB Case No. 08-U-08 (Sept. 1, 2009). The Tentative Agreement to correct the underpayment alleged in PERB Case No. 09-U-24 has not become final and binding. There is a final Agreement *to prepare* such an agreement. Although the Union requests interest from December 14, 2011, the December 15, 2011, notice requesting the Board to cancel the hearing scheduled for the next day discloses that the Tentative Agreement on the alleged underpayment was *not* final or signed. The December 15, 2011 notice specifically stated: "The formal agreement is in progress. The elements are agreed to. *Pending final resolution and signing the settlement agreement*, the parties urge that PERB cancel the hearing presently scheduled for December 16, 2011." (Complaint Ex. B at p. 7) (emphasis added). Final resolution and signing of the Tentative Agreement did not occur subsequent to that notice; indeed, that is the essence of the Union's Complaint. As the Tentative Agreement on the alleged underpayment is not final and binding, interest on the amount agreed to will not be assessed as result of the unfair labor practice but will be due under the terms of the Tentative Agreement. (*See* Complaint and Answer ¶ 8).¹ There can be no interest on the

¹ The case cited by the Union, *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 39 D.C. Reg. 8594, Slip Op. No. 285, PERB Case No. 86-U-16 (1992), does not involve a settlement agreement. Rather, it is an adjudicated case in which a hearing examiner issued a report and recommendation. The Board adopted the recommendation that interest be assessed consistent with the Board's

Agreement to prepare the Tentative Agreement because no principal upon which to calculate interest is involved in an agreement to draft a document.

In addition, the Union requests the Board to “direct the Agency to reimburse AFGE for all costs incurred in filing and prosecuting this Complaint because such order is in the interest of justice, due to the Agency’s bad faith and meritless actions. See *AFGE Local 2725 v. DCRA*, PERB Case No. 06-U-43, Op No. 930 (Feb. 19, 2008) (costs awarded for same).” (Complaint ¶ 28). An award of costs is in the interest of justice in a case of a failure to implement a settlement agreement or arbitration where the respondent has shown a pattern and practice of failure to implement arbitration awards or settlement agreements in previous cases. *DiAngelo v. D.C. Gov’t Office of the Chief Med. Examiner*, 59 D.C. Reg. 6399, Slip Op. No 1006 at p. 2, PERB Case Nos. 05-U-47 & 07-U-22 (2009). The Department has demonstrated such a pattern and practice. The Department was found to have committed an unfair labor practice by failing to implement a settlement agreement in *AFGE Local 2725 v. District of Columbia Department of Consumer and Regulatory Affairs*, 59 D.C. Reg. 5347, Slip Op No. 930, PERB Case No. 06-U-43 (2008), and by failing to implement an arbitration award in *AFGE Local 2725 v. District of Columbia Department of Consumer and Regulatory Affairs*, Slip Op. No. 1335, PERB Case No. 10-U-18 (Oct. 19, 2012). In both cases, costs were awarded. Therefore, the Board finds that in this case an award of costs pursuant to D.C. Code 1-617.13(d) is in the interests of justice.

Accordingly, Complainant’s unfair labor practice complaint is granted, and Respondent is directed to fully comply with the terms of the December 14, 2011, Agreement. Additionally, Respondent will post a notice and pay Complainant’s reasonable costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant AFGE Local 2725’s unfair labor practice complaint is granted.
2. Within ten (10) days of the service of this order, Respondent shall submit to Complainant a proposed, complete settlement package, which shall include terms related to the agreed-upon notification for Mr. Roper and letter for Ms. McNair.
3. Within fifteen (15) days of the service of this order, Respondent shall sign a complete settlement package and otherwise fully implement the terms of the December 14, 2011, Agreement.
4. Respondent shall pay reasonable costs to the Complainant.
5. Respondent shall conspicuously post within ten (10) days from the service of this Decision and Order the attached Notice where notices to bargaining unit members are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

6. Respondent shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the service of this Decision and Order that the Notice has been posted accordingly.
7. Respondent shall notify the Public Employee Relations Board, in writing, within twenty (20) days from the service of this Decision and Order that it has complied with the terms of the December 14, 2011, Agreement.
8. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

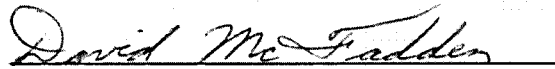
BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

January 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-U-30 is being transmitted to the following parties on this the 19th day of February, 2013.



David McFadden
Attorney-Advisor

Leisha A. Self
American Federation of Government Employees
Office of the General Counsel
80 F Street NW
Washington, D.C. 20001

VIA FILE & SERVEXPRESS

James T. Langford
441 4th St. NW, suite 820 North
Washington, D.C. 20001

VIA FILE & SERVEXPRESS

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS ("DCRA"), 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. 1362, PERB CASE NO. 12-U-30 (January 31, 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 DCRA to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(5) by the actions and conduct set forth in Slip Opinion No.1362.

WE WILL cease and desist from refusing to bargain in good faith with AFGE Local 2725, by failing to fully implement the terms of the December 14, 2011, settlement agreement.

District of Columbia Department of Consumer
and Regulatory Affairs

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, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

January 31, 2012