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. 21-U-22
v.	Opinion No. 1812
District of Columbia Public Schools	
Respondent	

DECISION AND ORDER

I. Statement of the Case

On July 26, 2021, the Washington Teachers' Union, Local 6, American Federation of Teachers, AFL-CIO (WTU) filed an unfair labor practice complaint (Complaint) against the District of Columbia Public Schools (DCPS). WTU alleges that DCPS violated D.C. Official Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act (CMPA) by "refus[ing] to comply with a settlement agreement requiring it to make payment to [a] teacher"[1] (Teacher). DCPS filed an answer (Answer), denying these allegations.

For the reasons stated herein, the Complaint is dismissed.

II. Hearing Examiner's Report and Recommendations

A. Hearing Examiner's Factual Findings

On January 25, 2022, a hearing was held to resolve material issues of fact. The Hearing Examiner made the following factual findings.

On August 26, 2019, DCPS terminated the Teacher effective September 11, 2019.[2] In October 2020, the Teacher, WTU, and DCPS entered into a settlement agreement (Agreement) to

[1] Complaint at 1.
[2] Report at 2.

resolve a Step 2 grievance the Union had filed against DCPS on behalf of the Teacher.[3] The Agreement stated that the Teacher would "be reinstated into a permanent position as a French teacher[4] or a similar or comparable position for which she is qualified and DCPS [would] remove the termination from [her] Official Personnel Folder (OPF) upon the execution of the [A]greement."[5] The Agreement also stated that the Teacher's reinstatement would be retroactive to September 12, 2019, and that the Teacher would receive backpay "starting August 24, 2020 to October 26, 2020."[6] The Agreement stipulated that the Teacher would return to duty and "resume regular payments starting October 26, 2020."[7]

On November 5, 2020, DCPS emailed the Teacher a return to duty letter (Letter) "notifying her that she was being placed to work as a [high school] French teacher effective November 9, 2020."[8] DCPS sent the email to the Teacher's District government email address and her personal email address, but did not copy WTU.[9] The Letter directed the Teacher to sign the Letter and return it to DCPS to confirm that she had received it.[10] On December 22, 2020, the Teacher signed and returned the Letter from her personal email account.[11] The Teacher returned to work in January 2021.[12]

Between December 20, 2020 and January 19, 2021, WTU exchanged emails with DCPS, in which DCPS stated that it was unsure why the Teacher had not returned the signed Letter until December 22, 2020.[13] WTU stated that it had not received a copy of the Letter from the Teacher.[14] The Teacher checked her personal email account and viewed the Letter after WTU had asked her about the Letter.[15] DCPS asserted that it had no way of knowing that the Teacher would not check her personal email because she had previously replied from her personal account.[16] DCPS stated that the Teacher would be paid from the date she returned the signed Letter, but would not be paid for days she did not work before returning the signed Letter (November 9 through December 22, 2020).[17]

The Hearing Examiner found that "[t]he Teacher was put on the payroll on March 26, 2021 and paid for the entire time she worked except for the November 9 – December 22, 2020, period

[3] Report at 1.
[4] Prior to her termination, the Teacher was teaching French for DCPS. Report at 1.
[5] Report at 2 (quoting Agreement).
[6] Report at 3.
[7] Report at 2-3 (quoting Agreement).
[8] Report at 3.
[9] Report at 3.
[10] Report at 3.
[11] Report at 3.
[12] Report at 10.
[13] Report at 3.
[14] Report at 3-4.
[15] Report at 4.
[16] Report at 3-4.
[17] Report at 3.

when she had not yet responded to her placement offer."[18] "The Teacher received an Earnings Statement dated April 8, 2021, which included payments under the [Agreement]."[19]

B. Hearing Examiner's Recommendations

At the hearing, the parties stipulated the following issues:

(1) Did DCPS commit an unfair labor practice by failing to comply with the Settlement Agreement; and

(2) If so, what is the remedy?[20]

The parties submitted post-hearing briefs on March 15, 2022. In its post-hearing brief, for the first time, DCPS raised the affirmative defense that WTU had untimely filed its Complaint.[21] As a preliminary matter, the Hearing Examiner concluded that the Complaint was timely filed because "[DCPS] waived its affirmative defense of timeliness when it did not raise the defense of timeliness in its answer or at the pre-hearing conference discussions or at hearing."[22] The Hearing Examiner then turned to the Complaint's merits.

WTU argued that the Agreement required DCPS to reinstate the Teacher into a permanent position as a French teacher or a comparable position, retroactive to September 12, 2019.[23] WTU contended that the Agreement provided that the Teacher's "regular payroll payments would resume starting October 26, 2020."[24] WTU further argued that there was no genuine dispute over the Agreement's terms and that DCPS's failure to implement the Agreement constituted an unfair labor practice.[25]

DCPS contended that it had complied with the Agreement by providing the Teacher with backpay for the time between the start date in the Agreement (October 26, 2020) and the start date in the Letter (November 9, 2020).[26] DCPS further argued that it followed its standard practice by sending the Letter via email without copying WTU,[27] and DCPS was not responsible for the Teacher's failure to sign the Letter until December 22, 2020.[28]

The Hearing Examiner found that "the parties' positions constitute[d] different and reasonable interpretations of the settlement agreement that could have been raised to a labor

[18] Report at 10.
[19] Report at 3.
[20] Report at 4.
[21] DCPS Brief at 3-5.
[22] Report at 7 (citing *Jenkins and McKinnon v. DOC*, 65 D.C. Reg. 4046, Slip Op. No. 1652, PERB Case No. 15-U-31 (2018)).
[23] Complaint at 3.
[24] Complaint at 3.
[25] WTU Brief at 6.
[26] DCPS Brief at 6.
[27] DCPS Brief at 7-10.
[28] DCPS Brief at 11.

arbitrator (after a timely filed grievance) to determine which interpretation prevails…."[29] The Hearing Examiner found that the Agreement indicated DCPS would begin regular payments to the Teacher starting on October 26, 2020, but also found the Agreement stated that the Teacher would receive backpay on "the day she returns to duty."[30] The Hearing Examiner concluded that "this provision of the settlement agreement appears to link the initial backpay payment to a return to duty."[31]

The Hearing Examiner found that the Teacher received payment for the periods from August 26, 2020 through November 9, 2020; and then from "December 22, 2020, through March 2021, although the Teacher did not receive these payments until March 26, 2021."[32] Therefore, the Hearing Examiner concluded that the "essence of the dispute" was (1) "the Respondent's failure to pay the Teacher for the November 9, 2020, through December 22, 2020, period"; and (2) "the delay in the payment to the Teacher for the period from December 22, 2020, through March 2021."[33]

Relying on Federal Labor Relations Board (FLRA) precedent, the Hearing Examiner stated, "Where the nature and scope of the breach amount to a repudiation of an obligation imposed by the agreement's terms,…an unfair labor practice has occurred…."[34] Further, he found that under FLRA precedent, "two elements are examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach…(i.e., was the breach clear and patent?); and (2) the nature of the agreement allegedly breached (i.e., did the provision go to the heart of the parties' agreement?)."[35] The Hearing Examiner stated that, under National Labor Relations Board (NLRB) precedent, "a breach of contract is not per se an unfair labor practice[,] [but]…where a breach of contract, under all the circumstances, amounts to a wholesale repudiation of the collective-bargaining agreement,…[there is a statutory] violation."[36]

The Hearing Examiner concluded that "[DCPS]'s actions…do not constitute a repudiation of the settlement agreement[,]" as they "do not evidence bad faith intent to undermine the intent of the parties to return the Teacher to work and pay her for that work upon her reinstatement."[37] The Hearing Examiner based his conclusion on multiple factors, including the Teacher and Union's failure to follow-up with DCPS, prior to December 22, 2020, regarding the Teacher's appointment.[38] The Hearing Examiner found that DCPS "acted in good faith" and, "[a]t most…committed a technical violation of the settlement agreement when it did not pay the Teacher

[29] Report at 8.
[30] Report at 8.
[31] Report at 8.
[32] Report at 8.
[33] Report at 8.
[34] Report at 9 (quoting *DOD, Warner Robins Air Logistics Center, Robins AFB, GA and AFGE, Local 987*, 40 FLRA 1211 (1991)).
[35] Report at 9 (quoting *Air Force, 375th Mission Support Squadron, Scott AFB, and NAGE, Local R-7-23, SEIU, AFL-CIO*, 51 FLRA 858 (1996)).
[36] Report at 9 (quoting *Indiana & Michigan Electric Co.*, 284 NLRB 53, 59 (1987)).
[37] Report at 10.
[38] Report at 10-11.

until March 26, 2021, rather than upon her return to work after December 22, 2020."[39] He noted that "[t]he Teacher and/or Union…could have acted more diligently and/or promptly to follow up with [DCPS] regarding the placement" and, although DCPS could have been more proactive in its communication, "neither the settlement agreement nor practice appear to require [DCPS] to do so."[40] The Hearing Examiner found that the only period for which DCPS did not pay the Teacher was November 9 through December 22, 2020 – the days during which the Teacher failed to respond to DCPS's Letter regarding her new placement.[41]

For these reasons, the Hearing Examiner found that DCPS's actions did not constitute an unfair labor practice under D.C. Official Code § 1-617.04(a)(1) and (5).[42] Therefore, he recommended that the Board dismiss the instant Complaint.[43]

III. Discussion

The Board will adopt a hearing examiner's recommendations where those recommendations are reasonable, supported by the record, and consistent with Board precedent.[44] The parties did not file exceptions.

The Board finds the Hearing Examiner's conclusion that DCPS waived its timeliness defense[45] is reasonable, supported by the record, and consistent with Board precedent. The Board has held that Board Rule 520.4's 120-day filing deadline is a claim-processing rule, which is subject to waiver.[46] Where, as here, the respondent fails to raise timeliness as an affirmative defense in its answer, that defense is waived and may not be introduced at a later stage.[47]

Turning to the merits of this matter, the Board has held that a party's failure to "implement the express, unambiguous terms of a settlement agreement" constitutes a violation of the duty to bargain in good faith – a duty which is set forth in D.C. Official Code § 1-617.04(a)(1) and (5).[48] The Board has stated that, where a party refuses or fails to implement the undisputed terms of a negotiated agreement, such conduct constitutes a failure to bargain in good faith and, thereby, an unfair labor practice under the CMPA.[49] However, the Board has stated that it will only find such an unfair labor practice where a party has "entirely failed to implement the terms of a negotiated

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[39] Report at 11.
[40] Report at 11.
[41] Report at 10.
[42] Report at 8.
[43] *See* Report at 11.
[44] *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. 1668 at 6-7, PERB Case No. 15-U-28 (2018); *AFGE, Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).
[45] Report at 7 (citing *MPD v. FOP/MPD Labor Comm.*, 67 D.C. Reg. 11472, Slip Op. No. 1756, PERB Case No. 20-A-07 (2020); *Jenkins*, Slip Op. No. 1652).
[46] *Jenkins*, Slip Op. No. 1652 at 11.
[47] *Id.* at 10-12.
[48] *Doctors Council of D.C. and Constance R. Diangelo v. OCME*, 59 D.C. Reg. 6399, Slip Op. No. 993 at 2, PERB Case Nos. 05-U-47 & 07-U-22 (2009).
[49] *WASA v. AFGE, Local 872*, 59 D.C. Reg. 4659, Slip Op. No. 949 at 3, PERB Case No. 05-U-10 (2009).

or arbitrated agreement."[50] These holdings are consistent with the persuasive FLRA and NLRB precedent that the Hearing Examiner relied on in his Report.[51] The Board finds that the Hearing Examiner's conclusion regarding the merits is reasonable, supported by the record, and consistent with Board precedent. The Board concurs with the Hearing Examiner's determination that "the parties' positions constitute[d] different and reasonable interpretations of the settlement agreement…[,]"[52] and "d[id] not constitute a repudiation of the settlement agreement."[53]

IV. Conclusion

Based on the findings, conclusions, and recommendations of the Hearing Examiner, the Board finds that DCPS did not violate D.C. Official Code § 1-617.04(a)(1) and (5) of the CMPA. Therefore, the Board adopts the Hearing Examiner's recommendation that the Complaint should be dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint 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

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

May 19, 2022

Washington, D.C.

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[50] *See AFGE, Local 872 v. WASA*, 46 D.C. Reg. 4398, Slip Op. 497 at 2, PERB Case No. 96-U-23 (1996) (quoting *Teamsters Local Unions No. 639 and 730 A/W Int'l Brotherhood of Teamsters v. DCPS*, 43 D.C. Reg. 6633, Slip Op. No. 400 at 7, PERB Case No. 93-U-29 (1994)).
[51] Report at 9.
[52] Report at 8.
[53] Report at 10.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.