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 State, County, and Municipal Employees, AFL-CIO, Local 2921, Complainant, v. District of Columbia Public Schools, Respondent.	PERB Case No. 05-U-19 Opinion No. 1299

DECISION AND ORDER

I. Statement of the Case

The matter before the Board is the Report and Recommendation ("Report") of Hearing Examiner Lois Hochhauser. The American Federation of State, County, and Municipal Employees Local 2921 ("Complainant" or "Union" or "AFSCME") filed an Unfair Labor Practice Complaint ("Complaint") on January 7, 2005, alleging that the District of Columbia Public Schools ("Respondent", "DCPS" or "Agency") violated D.C. Code § 1-617.04(a)(1) and (5) by refusing to process a group grievance filed by the union, repudiating its obligation to do so, and failing to comply with an earlier arbitration award ("Award"). (Complaint at 2). The Agency did not file an answer. On December 6, 2005, the Union filed a document styled "Motion for Decision on the Pleadings and Motion to Stay the Hearing Pending Decision of this Motion." Although the Board did not rule on this motion, the parties proceeded to an evidentiary hearing.

The hearing took place on February 22, 2006. (Report at 1). In her Report, the Hearing Examiner concluded that the Agency committed an unfair labor practice by refusing to process the Union's group grievance and failing to comply with the earlier arbitration award. (Report at 12). The Hearing Examiner recommended that the Board direct the Agency to cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"), direct a notice posting,

award reasonable costs of litigation, and notify the Board of compliance. (Report at 12). Neither party filed exceptions to the Report.

The issue before the Board is whether the Hearing Examiner's findings and conclusions regarding the issues are reasonable, supported by the record, and consistent with Board precedent.

II. Discussion

The Hearing Examiner found the following undisputed facts:

> Complainant is the certified exclusive representative for the purpose of establishing wages, hours, and other terms and conditions of [employment] for employees in two occupational units and classifications, i.e. instructional program assistants, and secretarial/clerical. DCPS is responsible for the provision of public education to students in the District of Columbia. The parties entered into an Agreement Between the Board of Education of the District of Columbia and District Council 20, Local 2921, American Federation of State, County and Municipal Employees, AFL-CIO, effective from January 1, 2001 through December 21, 2003. The Agreement provides that it will remain valid until a new agreement takes effect. No new contract has been negotiated, and the Agreement remains in effect.
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> The Union contends that DCPS committed unfair labor practices in violation of D.C. Code §§ 1-617.04(1) and (5) and 1-617.06 when it refused to process a Step 3 grievance submitted by the Union and refused to comply with an arbitration award.
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> In 2002, the Union invoked arbitration after DCPS abolished certain bargaining unit positions pursuant to a reduction-if-force [sic] (RIF). In his November 10, 2003, Opinion and Award ("Award"), Arbitrator Applewhaite determined that while DCPS properly abolished the positions, it improperly failed, among other things, to notify the Union of the intended action. He directed DCPS to use "proper procedures" to notify the Union of RIFs in the future. He also ordered Respondent to offer positions to adversely affected permanent and probationary employees according to their seniority and qualifications, in accordance with Article IX(G) of the Agreement. DCPS did not challenge or appeal the Award. It did not seek clarification of its terms, comply or attempt to comply with the Award.

> DCPS conducted another RIF in 2004 and did not provide the Union with any notice. The Union grieved the matter and on June 15, 2004, the Union filed a Step 3 grievance with DCPS. DCPS responded by letter on October 1, 2004. Agency refused to process the grievance and returned it to the Union stating that DCPS would "not process [the] grievance under the collective bargaining agreement" because it was not the appropriate procedure, rather it alleged that the matter could be appealed to the D.C. Office of Employee Appeals, D.C. Office of Human Rights or the D.C. Superior Court. The Union disagreed, maintaining it followed the appropriate procedure and this Complaint followed.
>
> In its post hearing submission, DCPS denied that it failed to bargain in good faith, asserting that its policy is to bargain with AFSCME "whenever warranted." It asserted that the Applewhaite Award was contradictory since DCPS was ordered to reinstate employees despite the finding that the RIF was proper.

(Award at 5-6) (internal citations omitted).

A. <u>Allegation that the Agency wrongfully refused to process the Step 3 grievance</u>

The Hearing Examiner found that because the Agency did not file an answer to the Complaint, it is deemed to have admitted the material facts alleged in the Complaint.[1] Specifically, the Agency is deemed to have admitted that it wrongfully refused to process the Step 3 grievance and that its refusal interfered with, restrained or coerced employees in the exercise of their rights, and constituted a refusal to bargain in good faith. (Report at 7).

The Hearing Examiner concluded that the Agency violated the contractual agreement between the parties by refusing to process the Step 3 grievance. *Id.* She noted that the Board distinguishes between obligations that are statutorily imposed by the CMPA and those that are mandated by the parties collective bargaining agreement, and that contractual violations do not necessarily constitute unfair labor practices. *Id.* The Hearing Examiner found that refusing to process a grievance that is part of a collective bargaining agreement interferes with the Union's ability to represent its members and bargain collectively, and therefore constitutes a violation of the CMPA. *Id.*

The Board finds that the Hearing Examiner's findings and conclusions regarding the Step 3 grievance issue are reasonable, supported by the record, and consistent with Board precedent. Therefore, this portion of the Report is upheld.

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[1] The Agency did request an extension of time to respond to the Complaint after the hearing was proceeding. (Report at 6). This request was denied by the Arbitrator. *Id.*

B. Allegation that the Agency refused to adhere to the Applewhaite Award

The Hearing Examiner concluded that "[w]ith regard to the Union's claim that DCPS refused to adhere to the terms of the Award, only the claim that DCPS did not comply with the directive to notify the Union of the 2004 RIF is timely." (Report at 7-8). The claim that the Agency did not comply with the directive to consider reinstatement of employees as appropriate is not timely. *Id.*

Regarding the claim that the Agency did not comply with the Award's reinstatement directive, the Hearing Examiner found that the Union knew, or should have known within a reasonable period of time, that the Agency was not complying with the directive. (Report at 8). Further, the Hearing Examiner found that the 120-day time period for filing a complaint imposed by Board Rule 520.4 is reasonable. *Id.*

The Hearing Examiner concluded that the Agency's failure to provide the Union with notification of the 2004 RIF violated the Award and constitutes an unfair labor practice. *Id.* In support of her conclusion, the Hearing examiner cited to *UDCFA v. UDC*, 39 D.C. Reg. 9628, Slip Op No. 320, PERB Case No. 92-A-04 (1992), for the holding that parties who arbitrate a matter pursuant to a collective bargaining agreement are bound by an arbitrator's award. Additionally, the Hearing Examiner pointed to *AFGE Local 872 v. DC WASA*, 46 D.C. Reg. 4837, Slip Op. No. 497, PERB Case No. 96-U-23 (1996), which states that the failure or refusal to implement an arbitration award constitutes a failure to bargain in good faith and is an unfair labor practice under the CMPA.

The Board finds that the Hearing Examiner's findings and conclusions regarding the claims that the Agency failed to adhere to the Applewhaite Award are reasonable, supported by the record, and consistent with Board precedent. Therefore, this portion of the Report is upheld.

C. Relief

Having determined that the Agency's actions violated the rights of the Union under the CMPA, the Hearing Examiner recommended that the Board direct the Agency to cease and desist from violating the CMPA, as well as to post a notice regarding the violations. (Report at 12). The Board has held that "when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations." *Nat'l Assoc. of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635 at pp. 15-16, PERB Case No. 99-U-04 (2000). Further, "it is in the furtherance of this end, *i.e.*, the protection of employee rights,...[that] underlies [the Board's] remedy requiring the posting of a notice to *all employees* concerning the violation found and the relief afforded, notwithstanding the fact that all employees may not have been directly affected." *Bagentose 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). The Hearing Examiner's remedy is adopted as consistent with Board precedent regarding notice posting.

Additionally, the Hearing Examiner recommended that the Board direct the Agency to pay reasonable costs associated with prosecuting this matter. (Report at 12). The Board has held that:

> any 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 fact 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.
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> 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 situation 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 representative.

AFSCME, D.C. Council 20, Local 2776 v. District of Columbia Department of Finance and Revenue, 73 D.C. Reg. 5658, Slip Op. No. 245 at pp. 4-5, PERB Case No. 98-U-02 (2000).

The Hearing Examiner found that the Union was the prevailing party, and that there is evidence of bad faith on the part of the Agency in this matter. (Report at 11). The Union claimed that the Agency's actions have undermined the Union among its members, and the Hearing Examiner concluded that this should have been a "reasonable foreseeable result." *AFSCME*, Slip Op. No. 245 at pp. 4-5.

Additionally, the Hearing Examiner looked to *Allen v. USPS*, in which the Merit System Protection Board identified factors that would serve as "directional markets [sic] toward the 'interest of justice.'" 2 MSPR 420, 435 (1980). These factors include "examining if the agency engaged in a prohibited practice, if its actions were without merit, if its actions demonstrate bad faith, if agency [sic] delayed the proceeding or prejudiced the other party, and if the agency knew or should have known it would not prevail." (Report at 11). The Hearing Examiner concluded that each factor was present in the instant case, and that reasonable costs should be awarded. (Report at 11-12).

The Hearing Examiner's remedy is adopted as consistent with Board precedent regarding the awarding of reasonable costs incurred in processing an unfair labor practice complaint.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's Report and Recommendation is adopted.

2. The District of Columbia Public Schools will cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by refusing to process group grievances filed by AFSCME District Council 20, Local 2921 and by failing to comply with the Applewhaite Award as it pertains to notifications about reductions in force .

3. The District of Columbia Public Schools shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

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

5. AFSCME District Council 20, Local 2921 shall have thirty (30) business days from the issuance of this Decision and Order to submit a statement of the actual costs incurred in processing the instant matter, together with associated receipts, to the District of Columbia Public Schools.

6. The District of Columbia Public Schools shall pay to AFSCME District Council 20, Local 2921, the reasonable costs associated with bringing this matter within thirty (30) business days from the date it receives a statement of the actual costs incurred and associated receipts. The District of Columbia Public Schools shall notify the Public Employee Relations Board, in writing, when it has paid the reasonable costs to AFSCME District Council 20, Local 2921.

7. 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.

July 26, 2012.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-U-19 was transmitted via U.S. Mail and e-mail to the following parties on this the 26th day of July, 2012.

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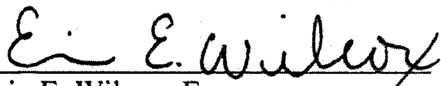

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