

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 formal 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:)	
)	
DEBORAH CHISHOLM,)	
)	
Complainant,)	PERB Case Nos. 99-U-32 and 99-U-33
)	
v.)	Opinion No. 689
)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 20,)	
)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2401,)	
)	
and)	
)	
DISTRICT OF COLUMBIA OFFICE OF LABOR RELATIONS AND COLLECTIVE BARGAINING,)	
)	
)	
)	
Respondents.)	
)	

DECISION AND ORDER

Respondent, American Federation of State, County and Municipal Employees (AFSCME), District Council 20 (Council 20) filed a Motion to Amend the Board's Decision and Order in Opinion No. 656¹. Through its Motion, the Respondent seeks to have the Board modify its original

¹ In Deborah Chisholm v. AFSCME Council 20, AFSCME Local 2401, and D.C. Office of Labor Relations and Collective Bargaining, the Board considered an unfair labor practice complaint filed by Deborah Chisholm against the American Federation of State, County and Municipal Employees (AFSCME), D.C. District Council 20 (Council 20), the American Federation of State, County and Municipal Employees (AFSCME), Local 2401, (Local 2401) and the D.C. Office of Labor Relations and Collective Bargaining (OLRCB). Specifically, the
(continued...)

Decision and Order

PERB Case Nos. 99-U-32 and 99-U-33

Page 2

Decision and Order by mandating that the Federal Mediation Conciliation Service (FMCS) reopen Deborah Chisholm's grievance arbitration. In Slip Op. No. 656, the Board found that Council 20 breached its duty of fair representation to Deborah Chisholm by directing that her grievance arbitration be canceled. *Id.* In fashioning the appropriate remedy for the breach, the Board directed that the Union request to have the grievance arbitration reinstated. In the event that the grievance arbitration was not reinstated, then consistent with the National Labor Relations Board's (NLRB) decision in Iron Workers Local Union 377, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Ronald Bryant² (Iron Workers), the Board ordered that the present case be remanded to a Hearing Examiner for a determination on whether the Grievant would have prevailed on the merits. Pursuant to the Iron Workers' standard, the Board determined that the Complainant would only be entitled to backpay if she could demonstrate that she would have prevailed in the underlying grievance arbitration.³

Consistent with the remedy ordered by the Board, Council 20 sought to have the grievance arbitration reinstated by the FMCS.⁴ However, the FMCS declined to order that the grievance arbitration be reinstated, absent an express Order from the Board directing it to do so.⁵ The FMCS stated in its letter that it had no authority to "refer the case back to Arbitrator Marvin Johnson for resumption of hearing."

In its Motion, Council 20 argues, *inter alia*, that the Board *has* authority to order FMCS to reinstate the grievance arbitration, but does not cite to any persuasive authority to support this

¹(...continued)

Complainant alleged that Council 20, Local 2401 and OLRCB violated D.C. Code §1-617.04 (a)(1), (3) and (5)(2001 ed.) by conspiring to have her arbitration canceled. 48 DCR 789, Slip Op. No. 656, PERB Case No. 99-U-32 and 33 (2002). The Complaint against Local 2401 was dismissed because Local 2401 had no authority to make decisions regarding whether to invoke arbitration on behalf of its members. *Id.* The Complaint was also dismissed against OLRCB because there was no finding of wrongdoing on their part. *Id.*

²326 NLRB No. 54 (1998).

³Deborah Chisholm's grievance sought to reverse her March 8, 1998 termination from the District of Columbia Department of Human Services (DHS), where she worked as a Social Services Representative.

⁴Council 20 made its request by letter dated December 19, 2001.

⁵The FMCS responded by letter dated March 27, 2002.

position.⁶ In addition, Council 20 asserts that the Board has jurisdiction to direct OLRCB to participate in a re-opened arbitration and cites two cases in support of that proposition, Regal Knitwear v. NLRB⁷, 324 U.S. 9 (1945) and Cherokee Marine Terminal⁸, 287 NLRB 1080 (1988).

⁶ In support of its position, Council 20 merely cites D.C. Code §1-605.02(3) (2001 ed.), which provides in pertinent part that: the Board has jurisdiction to “decide whether unfair labor practices have been committed and to issue an appropriate remedial order.”

Council 20 also cites D.C. Code §1-617.13(a) (2001 ed.), which provides in pertinent part that the Board “direct compliance with the provisions of this subchapter.” After reviewing these sections of the D.C. Code, the Board does not find that they support Council 20's position.

⁷ In paragraph 11 of its motion, Council 20 states the following:

In *Regal Knitwear v. NLRB* 324 U.S. 9 (1945), the Supreme Court held that Rule 65(d) of the Federal Rules of Civil Procedure authorized the National Labor Relations Board to include a “successor and assigns” clause in its remedial orders. Rule 65(d) provides that an order is binding upon the parties to an action and “upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” (Motion at p.3).

In finding that the Regal Knitwear v. NLRB case is not relevant or persuasive in this matter, the Board notes that OLRCB was not found to be in active concert with Council 20, the wrongdoer in this matter; therefore, there is no basis for making the remedial order binding on OLRCB.

⁸ In paragraph 12 of its motion, Council 20 states the following:

In *Cherokee Marine Terminal*, 287 NLRB 1080 (1988), the NLRB suggested that a visitatorial clause which permitted discovery from a specified third party might be an appropriate part of a remedial order. (Motion at p.3).

(continued...)

Respondent, OLR CB opposes Council 20's motion on several grounds. First, OLR CB objects on the basis of timeliness. Specifically, OLR CB argues that the Union failed to file any objections or motions within the time period specified by the Board's rules.⁹ In addition, OLR CB contends that the Union did not file any such objections or motions prior to the Board's decision becoming final.¹⁰

Second, OLR CB objects on the merits of the motion by asserting that the Board's reasoning and application of the Iron Workers' standard in this matter was appropriate. In addition, OLR CB asserts that since they were not found responsible for any wrongdoing in this matter, they should not be required to participate in any re-opened arbitration case. Also, OLR CB claims that the Union's citation to Regal Knitwear and Cherokee cases are somewhat of a mystery. Response at pg. 4.

After reviewing the pleadings, we believe that the Regal Knitwear¹¹ case seems to lend support to OLR CB's contention that they should not be forced to participate in any arbitration under these circumstances. 324 U.S. 9 (1945). Also, the Board finds that Council 20 has presented no new arguments that the Board did not consider when it made its original decision. Furthermore, Council 20 has failed to present any compelling reason for the Board to modify its Order. As a result, the Respondent's Motion is denied.

⁸(...continued)

After reviewing the Cherokee Marine Terminal case, the Board does not find that the case is relevant to the facts that are before it, nor does it find that the case lends support to Council 20's argument that the Board has jurisdiction to direct OLR CB to participate in a re-opened arbitration.

⁹Board Rule 559.2 requires that a party file a motion for reconsideration within ten (10) days after issuance of the decision. The rule also provides that the Board's Decision and Order shall not become final if any party files a motion for reconsideration within ten (10) days after issuance of the decision.

¹⁰Board Rule 559.1 provides that the Board's Decision and Order shall become final (30) days after issuance unless the order specifies otherwise.

¹¹Regal Knitwear stated the following:

The Courts, nevertheless, may *not* grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.

ORDER

IT IS HEREBY ORDERED THAT:

1. AFSCME District Council 20's Motion to Amend Order is denied.
2. In the event that the grievance arbitration is not reinstated within the next ten (10) days, AFSCME, Council 20 shall immediately notify the Board. Upon proper notification and consistent with paragraph 6 of Slip Op. No. 656, the Board will order that PERB Case No. 99-U-32 and 99-U-33 be remanded to a Hearing Examiner for a hearing on the issue of whether the Complainant would have prevailed in arbitration. Additionally, consistent with paragraph 7 of the Board's Order in Slip Op. No. 656, the Hearing Examiner shall issue a Report and Recommendation within 30 days of the conclusion of the hearing or the filing of briefs.
3. 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.**

September 13, 2002

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 99-U-32 and 99-U-33 was transmitted via U.S. Mail to the following parties on this 13th day of September, 2002.

Joesph Kaplan, Esq.
Passman & Kaplan, P.C.
1090 Vermont Avenue, N.W.
Suite 920
Washington, D.C. 20005

U.S. MAIL

Jonathan G. Axelrod, Esq.
Beins, Axelrod & Kraft, P.C.
1717 Massachusetts Avenue, N.W.
Suite 704
Washington, D.C. 20036

U.S. MAIL

Walter Wojcik, Esq.
Labor Relations Specialist
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820-North
Washington, D.C. 20001

U.S. MAIL

Paula J. Caira, Esq.
Associate General Counsel
AFSCME, Local 2401
1101 7th Street, N.W.
Suite 1210
Washington, D.C. 20036-5687

U.S. MAIL

Courtesy Copies:

Lois Hochhauser, Esq.
1101 14th Street, N.W.
Suite 200
Washington, D.C. 20005

U.S. MAIL

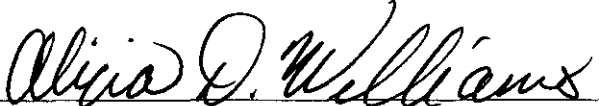
Decision and Order
PERB Case No. 00-U-32 and 00-U-33
Page 2

Mary Leary, Esq.
Director
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820-North
Washington, D.C. 20001

U.S. MAIL

George T. Johnson
Administrator
D.C. Council 20, AFSCME, 1801
1724 Kalorama Road, N.W.
Suite 200
Washington, D.C. 20009

U.S. MAIL


Alicia D. Williams
Intern