In the Matter of:

DEBORAH CHISHOLM,

Complainant,

v.

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

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

Opinion No. 689

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 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.


⁵The FMCS responded by letter dated March 27, 2002.
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. NLRB*, 324 U.S. 9 (1945) and *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

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.

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.

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

Second, OLRCB 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, OLRCB 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, OLRCB claims that the Union's citation to Regal Knitwear and Cherokee cases are somewhat of a mystery.

After reviewing the pleadings, we believe that the Regal Knitwear case seems to lend support to OLRCB'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.

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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 OLRCB 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.

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

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

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

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

Courtesy Copies:

Lois Hochhauser, Esq.
1101 14th Street, N.W.
Suite 200
Washington, D.C. 200005
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Mary Leary, Esq.
Director
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820-North
Washington, D.C. 20001

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

Alicia D. Williams
Intern