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**Government of the District of Columbia  
Public Employee Relations Board**

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In the Matter of:	)	
	)	
Washington Teachers' Union, Local # 6	)	
American Federation of Teachers, AFL-CIO,	)	
	)	PERB Case No. 14-U-02
Complainant,	)	
	)	Opinion No. 1642
and	)	
	)	
District of Columbia Public Schools,	)	
	)	
Respondent.	)	

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**DECISION AND ORDER**

**I. Introduction**

On October 24, 2013, Washington Teachers' Union, Local #6 ("Union") filed this unfair labor practice complaint ("Complaint")<sup>1</sup> against District of Columbia Public Schools ("DCPS") alleging that DCPS violated the Comprehensive Merit Personnel Act of 1979 ("CMPA"), D.C. Official Code § 1-617.04(a)(1) and (5)<sup>2</sup>, by failing to comply with a February 7, 2011 Arbitration Opinion and Award ("Award").<sup>3</sup>

The Union requests that the Board order DCPS to cease and desist from committing violations of the CMPA described in the Complaint, comply with the Award in all respects, and pay attorneys' fees and costs.<sup>4</sup> The Union also requests the Board to order preliminary relief and

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<sup>1</sup> The Complainant filed an amended unfair labor practice complaint on October 25, 2013, primarily to provide copies of the parties' collective bargaining agreement and the Award.

<sup>2</sup> D.C. Official Code §§ 1-617.04(a)(1) and (5) provide as follows:

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

...

(5) Refusing to bargain collectively in good faith with the exclusive representative.

<sup>3</sup> Complaint at 1-2.

<sup>4</sup> Complaint at 2-3.

“seek temporary relief or a restraining order from the Superior Court of the District of Columbia,” requiring DCPS to take the previously mentioned action “pending a final determination by the Board.”<sup>5</sup>

DCPS filed an Answer on November 8, 2013, asserting that the Complaint was untimely filed, and that it had substantially complied with the Award.<sup>6</sup> DCPS requested the Board to dismiss the Complaint.<sup>7</sup>

The matter was referred to a Hearing Examiner.<sup>8</sup> Several hearings were held, and on March 15, 2017, the Hearing Examiner issued a Report of Findings and Recommendations (“Report”), recommending the Board find DCPS committed an unfair labor practice by failing to comply with the terms of the Award.<sup>9</sup>

On March 31, 2017, the Union filed Complainant’s Exceptions (“Union Exceptions”) and the Respondent filed Respondent’s Exceptions (“DCPS Exceptions”). On April 24, 2017, DCPS filed Respondent’s Opposition to Complainant’s Exceptions (“DCPS Opposition”). The same day, the Union filed Complainant’s Opposition to Respondent’s Exceptions (“Union Opposition”). The Hearing Examiner’s Report and the Parties’ exceptions are before the Board for disposition.

As explained herein, the Board concludes that DCPS violated section 1-617.04(a)(1) and (5) of the D.C. Official Code for failing to fully comply with the Arbitrator’s February 7, 2011 Award.

## **II. The Hearing Examiner’s Report and Recommendations**

### **A. Factual Determinations**

In July 2008, the Respondent notified approximately eighty (80) probationary teachers that, on the basis of input from their principals, their positions as teachers would be terminated on August 1, 2008.<sup>10</sup> On August 15, 2008, the Union filed a class grievance on behalf of the probationary teachers.<sup>11</sup> DCPS denied the grievance, and the Union moved the matter to arbitration.<sup>12</sup> On February 7, 2011, the Arbitrator issued an Award that sustained the Union’s grievance and ordered the following remedy:

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<sup>5</sup> Complaint at 3.

<sup>6</sup> Answer at 2-4.

<sup>7</sup> Answer at 6.

<sup>8</sup> Report at 1.

<sup>9</sup> Report at 22.

<sup>10</sup> Report at 1.

<sup>11</sup> Report at 1.

<sup>12</sup> Report at 1.

- (1) DCPS shall make a 60-day good faith effort to locate terminated teachers. It shall offer them reinstatement to an appropriate position, effective to the date of termination. All will be made whole, minus any appropriate deductions.
- (2) Teachers who accept reinstatement shall be returned to the probationary status they held prior to termination. The Employer may make a new determination, by means of an appropriate process, if a reinstated teacher should be continued or terminated.
- (3) Teachers who waive reinstatement shall have their records changed to show that they resigned.
- (4) Teachers who cannot be located, or do not respond within the 60-day window, shall have their records changed to show they resigned. No other action is required.<sup>13</sup>

On February 28, 2011, DCPS filed an arbitration review request, seeking review of the Arbitrator's Award.<sup>14</sup>

On March 1, 2011, DCPS issued a letter to affected probationary teachers, notifying them of the Award.<sup>15</sup> In the letter, DCPS noted that it had appealed the Arbitrator's Award and did not believe that it was obligated to comply with the Arbitrator's decision while DCPS' appeal was pending before the Board.<sup>16</sup> The letter also explained DCPS' "reconsideration process" for overturning their terminations.<sup>17</sup> The record is not clear as to the number of letters that reached the addresses, or the number who responded.<sup>18</sup> None of the affected probationary teachers were reinstated.<sup>19</sup>

On April 5, 2011, while DCPS' arbitration review request was still pending before PERB, the Union filed an unfair labor practice complaint, alleging that DCPS failed to comply with the Arbitrator's Award within the expressly stated 60-day time limit.<sup>20</sup> The Board later dismissed the complaint without prejudice because less than 60 days had passed since the issuance of the Award, and therefore, the matter was not ripe.<sup>21</sup>

On September 15, 2011, the Board denied DCPS' arbitration review request.<sup>22</sup> On October 17, 2011, DCPS filed for review of the Board's decision with the D.C. Superior Court.<sup>23</sup>

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<sup>13</sup> Report at 2-3.

<sup>14</sup> Report at 3; *D.C. Pub. Sch. v. Washington Teachers' Union*, 59 D.C. Reg. 6772, Slip Op. No. 1130, PERB Case No. 11-A-04 (2014).

<sup>15</sup> Report at 3.

<sup>16</sup> Report at 3.

<sup>17</sup> Report at 3-4.

<sup>18</sup> Report at 4.

<sup>19</sup> Report at 17.

<sup>20</sup> Report at 5.

<sup>21</sup> Report at 3-4.

<sup>22</sup> Report at 5; *D.C. Pub. Sch. v. Wash. Teachers' Union*, 59 D.C. Reg. 6772, Slip Op. No. 1130, PERB Case No. 11-A-04 (2014).

<sup>23</sup> Report at 5.

On April 3, 2013, the D.C. Superior Court denied DCPS' request to overturn the Board's decision.<sup>24</sup>

On June 3, 2013, then-Union President Nathan Saunders wrote then-DCPS Chancellor Kaya Henderson, noting that the period for DCPS to appeal the Superior Court's decision had passed. In his letter, he wrote:

Therefore, please notify me, in writing, within ten (10) days after your receipt of this letter, whether and when DCPS will comply with the Award issued by Arbitrator Feigenbaum in this case. If DCPS does not respond within this time period, such failure to respond can and must be interpreted to mean that DCPS will not comply with Arbitrator Feigenbaum's Award. If, by the end of this ten (10) day time period, DCPS has not affirmatively informed the WTU that it will comply with Arbitrator Feigenbaum's Award and when it will do so, WTU will take whatever legal recourse is available to it to enforce Arbitrator Feigenbaum's Award.<sup>25</sup>

Chancellor Henderson did not respond within the 10-day period. On June 19, 2013, President Saunders sent a follow-up email to Chancellor Henderson requesting an update. Chancellor Henderson responded on June 24, 2013, assuring that DCPS "intends to fully comply with, and in fact has already largely complied with, its legal obligations to the probationary teachers covered by [the Award]." In her letter, she stated:<sup>26</sup>

In fact, the relief awarded was provided to the 64 covered teachers long ago. DCPS originally thought there were 74 affected probationary teachers but upon further investigation, we determined that 10 [of] those employees resigned before being terminated. On March 1, 2011, DCPS sent letters to all the affected probationary teacher[s] at their last known addresses in an attempt to locate them. You may recall that we confirmed those addresses with your staff prior to sending these letters by way of e-mails in February, 2011. Those that could not be located during the 60 days set forth in Paragraph Four of the award had their records changed to reflect that they resigned, as DCPS was directed to do in the award. Regarding such former employees, the award provided that no other action is required.

DCPS also complied with Paragraph Two of the award by providing each of the located probationary teachers with the narrative of the basis upon which the[y] were denied tenure and giving each one the opportunity to respond. Only 11 responded and 2 of these responses stated that the employees resigned prior to their termination. DCPS considered each of the remaining 9 responses carefully but determined that none were sufficient to refute the bases upon which tenure was denied. We informed these 9 remaining former employees of our final

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<sup>24</sup> Report at 6.

<sup>25</sup> Report at 6.

<sup>26</sup> Report at 6.

decision on or about June 16, 2011. The arbitration award made it clear that DCPS, after giving the terminated probationary employees their opportunity, was free to terminate the teacher.<sup>27</sup>

The parties concede that the Union received Chancellor Henderson's June 24, 2013 letter on June 26, 2013.<sup>28</sup> On October 24, 2013, the Union filed this Complaint—precisely 120 days after June 26, 2013.<sup>29</sup>

On November 19, 2013, the Union filed a Motion for an Order Based on the Pleadings. On November 26, 2013, DCPS filed a Motion to Dismiss and Opposition to Union's Motion. On December 2, 2013, the Union filed Union's Opposition to DCPS Motion to Dismiss. In a Decision and Order in Slip Opinion 1452, the Board denied the motions and referred the Complaint to a hearing to develop a factual record.<sup>30</sup>

A hearing was held on October 22, 2014; the Union did not appear.<sup>31</sup> On December 1, 2014, the Hearing Examiner recommended that the Complaint be dismissed for failure to prosecute.<sup>32</sup> PERB rejected the recommendation and referred the matter back to a hearing.<sup>33</sup>

Additional hearings were held on March 25, August 4, and October 24, 2016.<sup>34</sup> The parties submitted post-hearing briefs.<sup>35</sup> On March 15, 2017, the Hearing Examiner issued a Report of Findings and Recommendations ("Report"). As stated previously, the parties submitted exceptions to the Hearing Examiner's Report as well as oppositions to the exceptions.

## **B. Hearing Examiner's Recommendations**

The Hearing Examiner determined the issues for resolving the Union's allegations were the following:

1. Was the Complaint timely filed?
2. If the Complaint was timely filed, did the Respondent commit an unfair labor practice by failing to comply with the terms of the Award?
3. If the Respondent committed an unfair labor practice, what should be the remedy?<sup>36</sup>

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<sup>27</sup> Report at 6.

<sup>28</sup> Report at 7.

<sup>29</sup> PERB notes that under Rule 501.5, in computing any period of time prescribed by PERB Rules, the time begins to run the day after the event occurs. As such, the deadline for filing an unfair labor practice complaint in this case was Friday, October 25, 2013—120 days after Thursday, June 27, 2013.

<sup>30</sup> *Washington Teachers' Union, Local 6 v. D.C. Pub. Sch.*, 61 D.C. Reg. 2727, Slip Op. No. 1452 at 6, PERB Case No. 14-U-02 (2014).

<sup>31</sup> Report at 1.

<sup>32</sup> Report at 1.

<sup>33</sup> Report at 1.

<sup>34</sup> Report at 1.

<sup>35</sup> Report at 1.

<sup>36</sup> Report at 7.

Before the Hearing Examiner, the Union argued that the event that triggered the start of PERB's 120-day time limit for filing an unfair labor practice complaint, occurred on June 26, 2013, when the Union received DCPS' letter of June 24, 2013, stating that DCPS had "largely complied" with the remedies prescribed in the Award.<sup>37</sup> The Union argued that the June 24<sup>th</sup> letter was the only communication that it received from DCPS regarding the affected probationary teachers after DCPS had exhausted its legal challenges to the Award.<sup>38</sup> In the Union's view, DCPS' March 1, 2011 letter to affected teachers did not start the 120-day filing deadline, as the letter suggested that full compliance would occur after DCPS' judicial recourse was exhausted.<sup>39</sup> Similarly, the Union argued that DCPS' failure to respond to the Union's June 3, 2013 letter within the Union's 10-day deadline did not provide notice of DCPS' intentions.<sup>40</sup> The fact that the Union sent another letter on June 19, 2013 asking for an "update" indicated that the Union did not interpret DCPS' failure to respond as a clear and unambiguous statement.<sup>41</sup>

Conversely, DCPS argued that the Complaint was untimely. DCPS pointed to three dates on which the Union knew or should have known of DCPS' plans to comply with the Award. First, in DCPS' view, the Union knew or should have known no later than November 4, 2011, that the proper action was to file an enforcement petition, as advised by PERB in its Opinion and Award in Slip Opinion 1211.<sup>42</sup> Second, DCPS argued that the Union knew on June 3, 2013, since DCPS had not filed an appeal of the Superior Court's April 3, 2013 denial of its Petition for Review of PERB's denial of the arbitration review request.<sup>43</sup> DCPS also points to June 13, 2013, the deadline set by the Union for DCPS to respond. In that letter, the Union stated that it would treat the failure by DCPS to submit a reply within 10 days as proof that DCPS did not intend to comply with the Award.<sup>44</sup>

As to the merits, the Union's position was that DCPS committed unfair labor practices by failing to comply with the terms of the Arbitrator's Award. Specifically, the Union argued that DCPS failed to offer reinstatement and back pay to any of the affected teachers.<sup>45</sup> As a remedy, the Union asserted that the seventy-four affected teachers be offered reinstatement and made whole for lost wages and benefits between July 2008 and the present.<sup>46</sup> The Union believed that the most accurate list of teachers was the list of seventy-four teachers agreed to by the parties shortly after the issuance of the Award.<sup>47</sup> The Union rejected DCPS' attempt to exclude ten

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<sup>37</sup> Report at 15.

<sup>38</sup> Report at 10.

<sup>39</sup> Report at 10.

<sup>40</sup> Report at 11.

<sup>41</sup> Report at 11.

<sup>42</sup> Report at 8.

<sup>43</sup> Report at 9.

<sup>44</sup> Report at 9.

<sup>45</sup> Report at 12.

<sup>46</sup> Report at 12.

<sup>47</sup> Report at 13.

teachers on the ground that they resigned before they were terminated.<sup>48</sup> The Union also requested attorney fees and costs and asked that PERB order DCPS to post a notice.<sup>49</sup>

DCPS argued before the Hearing Examiner that even if the Complaint were timely, it failed on the merits. DCPS argued that it took action to cure its decision to separate probationary teachers by providing the teachers with narratives as to why they were terminated and giving teachers the opportunity to respond.<sup>50</sup> DCPS also asserted that it took reasonable steps to comply with Paragraph 1 of the Award—to locate the affected teachers.<sup>51</sup> Additionally, DCPS noted that the Award allowed for the affected teachers to be terminated “by means of an appropriate process” without defining the process.<sup>52</sup> DCPS also claimed that at least 15 of the affected teachers voluntarily resigned prior to being separated.<sup>53</sup> DCPS countered that the teachers who did not respond to its March 1, 2011 letter had their records changed to show that they resigned voluntarily, in compliance with the Award.<sup>54</sup> Further, in DCPS’ view, even if the Complaint is found to be valid, any relief granted should be limited to the approximately twelve (12) teachers who responded to the March 1, 2011 letter.<sup>55</sup> Finally, DCPS requested that the Complaint be dismissed in its entirety.<sup>56</sup>

The Hearing Examiner’s conclusions and recommendations are discussed below in the order addressed in the Report.

(1) Was the Complaint timely filed?

The Hearing Examiner found that the Union’s cause of action arose on June 26, 2013, and that none of the earlier events pointed to by DCPS should be considered, given the procedural history of the case.<sup>57</sup> The Hearing Examiner determined that the Union’s June 24, 2013 letter, received on June 26, 2013, was “the first clear and unambiguous statement by DCPS that it would not be taking any additional remedial actions, such as awarding back pay to teachers, and this constitutes the first clear and unambiguous statement from the Respondent that it would not take any additional compliance actions.”<sup>58</sup> Therefore, finding that the Complaint was filed 120 days after the Union’s receipt of DCPS’ June 24, 2013 letter, the Hearing Examiner concluded that the instant Complaint was timely.<sup>59</sup>

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<sup>48</sup> Report at 13.

<sup>49</sup> Report at 13.

<sup>50</sup> Report at 13.

<sup>51</sup> Report at 13.

<sup>52</sup> Report at 14.

<sup>53</sup> Report at 14.

<sup>54</sup> Report at 14.

<sup>55</sup> Report at 14.

<sup>56</sup> Report at 15.

<sup>57</sup> Report at 15. The Hearing Examiner noted that at the hearing, DCPS conceded that the Union received its June 24, 2013 letter stating that it had “largely complied” with the Award on June 26, and that if it was determined that the receipt of this letter was the starting date for the 120-day rule, the Complaint, filed on October 24, 2013, was timely.

<sup>58</sup> Report at 17.

<sup>59</sup> Report at 17.

(2) Did DCPS commit an unfair labor practice by failing to make a 60-day good faith effort to locate terminated teachers?

The Hearing Examiner determined that DCPS made a good faith effort to contact the affected teachers as required by the Award.<sup>60</sup> The Hearing Examiner noted that the Award did not describe what would constitute “good faith effort” nor did the parties ask the Arbitrator for clarification of this matter.<sup>61</sup> However, given that DCPS shared its list of last known contact information for the affected teachers with the Union before sending out the March 1, 2011 letter, the Hearing Examiner determined that DCPS made a good faith effort to contact affected teachers as required by the Award.<sup>62</sup>

Although the Hearing Examiner determined that DCPS made a good faith effort to locate and contact the affected teachers, the Hearing Examiner found that the letter of March 1, 2011 that was sent to teachers did not conform to the requirements of the Award.<sup>63</sup> The Hearing Examiner concluded that DCPS’ statement: “[i]f . . . DCPS upholds your termination, you will remain separated from the school system, no changes will be made to your personnel records, and you will not be eligible for back pay,” did not reflect the terms of the Award.<sup>64</sup> Therefore, the Hearing Examiner found that the misinformation in DCPS’ March 1, 2011 letter constituted an unfair labor practice.<sup>65</sup>

(3) Did DCPS commit an unfair labor practice by failing to make a new determination, by means of an appropriate process, if a reinstated teacher should be continued or terminated?

The Hearing Examiner noted that the Arbitrator did not prescribe the characteristics of an “appropriate process” and neither party sought clarification from the Arbitrator.<sup>66</sup> The Hearing Examiner also noted that the record shows that DCPS confirmed its initial decision to terminate all of the affected teachers who responded to the March 1, 2011 letter.<sup>67</sup> However, the record does not describe the process DCPS used to determine whether to terminate the affected teachers.<sup>68</sup> The Hearing Examiner opined that this issue should be resolved through the parties’ negotiated grievance procedure.<sup>69</sup>

(4) Did DCPS commit an unfair labor practice by failing to offer affected teachers reinstatement to an appropriate position, effective to the date of termination, and to make them whole minus any appropriate deductions?

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<sup>60</sup> Report at 17.

<sup>61</sup> Report at 17.

<sup>62</sup> Report at 17.

<sup>63</sup> Report at 18.

<sup>64</sup> Report at 19.

<sup>65</sup> Report at 19.

<sup>66</sup> Report at 17.

<sup>67</sup> Report at 17.

<sup>68</sup> Report at 17-18.

<sup>69</sup> Report at 18.

The Hearing Examiner found that the Award clearly and unambiguously states that affected teachers were to be “offered reinstatement to an appropriate position, effective to the date of termination” and to be made whole.<sup>70</sup> Despite this clear directive, the Hearing Examiner determined that DCPS interpreted this provision to mean that reinstatement and back pay would be provided only to those teachers who it determined, upon application of an appropriate process should be retained.<sup>71</sup> Further, the Hearing Examiner noted that DCPS’ interpretation of the directive contradicted the interpretation of the Award’s requirement for back pay that DCPS gave PERB. DCPS told PERB that payments to the affected teachers would constitute windfalls for teachers whose services would not be retained after a new review.<sup>72</sup> The Hearing Examiner determined DCPS’ refusal here was a clear violation of the Award.<sup>73</sup> The Hearing Examiner found the Award ordered that only after the affected teacher was reinstated and made whole should a determination be made as to whether the teacher should be retained.<sup>74</sup> Accordingly, the Hearing Examiner determined that DCPS’ failure to comply with the reinstatement and back pay provisions was not based on a “genuine disagreement” over the Award’s terms and therefore constituted an unfair labor practice.<sup>75</sup>

(5) Did DCPS commit an unfair labor practice by failing to change the records of teachers who waved reinstatement, could not be located, or did not respond, to show that they resigned?

The Hearing Examiner found that the record indicates that DCPS complied with the requirement that teachers who did not respond to the March 1, 2011 letter have their records changed to show that they resigned voluntarily.<sup>76</sup> However, the Hearing Examiner noted that some teachers may have been deterred from responding to the letter because of the misleading information therein.<sup>77</sup>

The Hearing Examiner stated at the hearing that DCPS provided letters from 12 teachers who it said had already submitted letters of resignation prior to being terminated.<sup>78</sup> DCPS argued that those 12 teachers should not be considered among the affected teachers to be reinstated with back pay.<sup>79</sup> However, the Hearing Examiner remarked that the Arbitrator did not identify any of the affected teachers by name and found that a determination of the particular teachers covered by the original grievance could not be made from the factual record at hand.<sup>80</sup> Further, the arbitrator determined that resolving the list of grievants is not relevant to the issue here.<sup>81</sup> As

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<sup>70</sup> Report at 18.

<sup>71</sup> Report at 18.

<sup>72</sup> Report at 18.

<sup>73</sup> Report at 18.

<sup>74</sup> Report at 18.

<sup>75</sup> Report at 18.

<sup>76</sup> Report at 19.

<sup>77</sup> Report at 19-20.

<sup>78</sup> Report at 20.

<sup>79</sup> Report at 20.

<sup>80</sup> Report at 20.

<sup>81</sup> Report at 20.

such, the Hearing Examiner found that this issue is best resolved between the parties or during another grievance proceeding.<sup>82</sup>

(6) What should be the appropriate remedy?

The Hearing Examiner, finding that DCPS failed to fully comply with the terms of the Arbitrator's Award, recommended an award of back pay under the Federal Back Pay Act.<sup>83</sup> The Hearing Examiner reasoned that the Arbitrator in the underlying grievance determined that the teachers were improperly terminated, resulting in loss of pay, and awarded back pay.<sup>84</sup>

The Hearing Examiner also recommended DCPS send a new letter to all teachers covered by the original grievance to make it clear that:

- (1) All covered teachers are entitled to reinstatement and back pay from the date of termination until April 8, 2011;
- (2) Teachers who waive reinstatement will receive back pay from the date of their original termination until April 8, 2011 and that their records will be changed to show voluntary resignation;
- (3) A teacher who wishes to submit a refutation of his or her principal's recommendation for termination may do it; and if, upon review through an appropriate process, DCPS reverses the termination, the teacher will be reinstated with back pay from the date of the original termination; if DCPS upholds the termination, the teacher may file a new grievance with any questions concerning back pay beyond the end of the Award's compliance period determined through that process; and
- (4) Teachers who cannot be located will have their records changed to show he or she voluntarily resigned.<sup>85</sup>

The Hearing Examiner also awarded reasonable costs, pursuant to section 1-617.13 of the D.C. Official Code in light of DCPS' "refusal to honor the clear and unambiguous terms of the Award."<sup>86</sup> Finally, The Hearing Examiner recommended that the Board order DCPS to post a notice acknowledging commission of an unfair labor practice.<sup>87</sup>

### **III. Parties' Exceptions and Oppositions to the Exceptions**

Both parties filed exceptions. DCPS filed its Exceptions on March 31, 2017. First, as it asserted before the Hearing Examiner, DCPS argued that the Complaint was untimely.<sup>88</sup> DCPS argued that the Hearing Examiner failed to consider PERB precedent that the 120-day time

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<sup>82</sup> Report at 20.

<sup>83</sup> Report at 20.

<sup>84</sup> Report at 20.

<sup>85</sup> Report at 21.

<sup>86</sup> Report at 20-21.

<sup>87</sup> Report at 21.

<sup>88</sup> DCPS Exceptions at 6.

period for filing a complaint is “mandatory and jurisdictional.”<sup>89</sup> Additionally, DCPS asserted that the Hearing Examiner incorrectly denied its oral Motion for Directed Verdict.<sup>90</sup> DCPS again argued that the Hearing Examiner’s finding that June 3, 2013, was not the starting date for calculating PERB’s 120-day deadline for filing a complaint was not supported by the evidence.<sup>91</sup> Second, DCPS asserted that the Report contained several factual errors and contradictions.<sup>92</sup> DCPS contended that the Report was not clear as to whether DCPS made a good faith effort to contact affected teachers as the Award required.<sup>93</sup> DCPS also argued that the record does not support the Hearing Examiner’s statement that “[t]he record does not clearly state how many teachers . . . refutations [to the narratives they received].”<sup>94</sup> DCPS also stated its disagreement with the Hearing Examiner’s recommendation that the “appropriate process” of determining whether a teacher should be reinstated is subject to the Parties’ grievance procedure.<sup>95</sup> Finally, DCPS noted that the Hearing Examiner’s finding that the Complaint was timely “works a grave injustice on DCPS.”<sup>96</sup> DCPS requested the Board to dismiss the Complaint as untimely, or remand the decision to the Hearing Examiner.<sup>97</sup> In the alternative, DCPS requested the Board to order additional briefing.<sup>98</sup>

The Union filed its Exceptions on March 31, 2017. The entirety of the Union’s Exceptions requested the Board to modify the Hearing Examiner’s proposed remedy. First, the Union argued that PERB should not adopt the Hearing Examiner’s recommendation that teachers receive back pay until April 8, 2011, as the proposed remedy does not satisfy the original Arbitration Award.<sup>99</sup> The Union argued that this proposed remedy should continue until the present since DCPS did not comply with the Award’s directive to offer affected teachers reinstatement in 2011.<sup>100</sup> The Union argued that under well-established principles of law, the remedy should presume that the teachers would have continued employment after April 2011.<sup>101</sup> Thus, back pay should be owed for the entire period between termination and reinstatement.<sup>102</sup> Further, the Union asserted that the proscribed process for awarding post-2011 back pay was inadequate to the teachers and cumbersome to DCPS.<sup>103</sup> Next, the Union contended that PERB should order the teachers to be immediately reinstated.<sup>104</sup> The Union argued that under the proposed remedy, affected teachers were not ordered to be reinstated unless and until they

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<sup>89</sup> DCPS Exceptions at 6 (*citing Johnson v. D.C. Pub. Sch. and Teamsters Local Union No. 639*, 61 D.C. Reg. 7280, Slip Op. No. 1472 at 3, PERB Case No. 07-U-07 (2014)).

<sup>90</sup> DCPS Exceptions at 6-7.

<sup>91</sup> DCPS Exceptions at 6-7.

<sup>92</sup> DCPS Exceptions at 8-9.

<sup>93</sup> DCPS Exceptions at 8.

<sup>94</sup> DCPS Exceptions at 9.

<sup>95</sup> DCPS Exceptions at 9.

<sup>96</sup> DCPS Exceptions at 9-10.

<sup>97</sup> DCPS Exceptions at 10.

<sup>98</sup> DCPS Exceptions at 10.

<sup>99</sup> Union Exceptions at 4-5.

<sup>100</sup> Union Exceptions at 5.

<sup>101</sup> Union Exceptions at 6-7.

<sup>102</sup> Union Exceptions at 7.

<sup>103</sup> Union Exceptions at 8-9.

<sup>104</sup> Union Exceptions at 9.

prevailed in the application and arbitration process.<sup>105</sup> The Union asserted that this proposed remedy does not comply with the Award's directive to reinstate teachers.<sup>106</sup> The Union also requested that the Board strengthen procedures for finding affected teachers by giving the Union the right to participate in the search and provide additional measures for locating teachers and provide six months to locate teachers.<sup>107</sup> Additionally, the Union asked the Board to clarify that the remedy includes benefits and interest.<sup>108</sup> The Union also requested the Board retain jurisdiction to resolve any disputes regarding the teachers that have allegedly retired.<sup>109</sup> Finally, the Union requested PERB to award attorneys' fees.<sup>110</sup>

DCPS filed its Opposition to the Union's Exceptions on April 24, 2017. The entirety of DCPS' Opposition countered the Union's argument that the Hearing Examiner's proposed remedy should be modified.

The Union also filed its Opposition to DCPS' Exceptions on April 24, 2017. The Union noted that it is undisputed that DCPS committed an unfair labor practice.<sup>111</sup> The Union asserted that since DCPS did not challenge in its exceptions the Hearing Examiner's finding that DCPS committed an unfair labor practice by failing to offer reinstatement and back pay, DCPS is deemed to have conceded that it committed an unfair labor practice.<sup>112</sup> The Union also reiterated its position that its Complaint is timely.<sup>113</sup> Lastly, the Union countered DCPS' arguments regarding procedural irregularities and contradictions in the Hearing Examiner's Report.<sup>114</sup>

#### **IV. Discussion**

The Board will affirm a hearing examiner's findings and recommendations when they are reasonable, supported by the record, and consistent with Board precedent.<sup>115</sup>

In its Exceptions, DCPS did not dispute the factual allegations raised in the Complaint concerning its not fully complying with the Arbitrator's Award. Nor did DCPS dispute the Hearing Examiner's finding that it committed an unfair labor practice for not fully complying with the Award. Rather, DCPS primarily asserted that the Complaint is untimely. DCPS also took issue with what it alleged were several factual errors and contradictions in the Report. The Union requested the Board to modify the Hearing Examiner's proposed remedy.

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<sup>105</sup> Union Exceptions at 9.

<sup>106</sup> Union Exceptions at 9.

<sup>107</sup> Union Exceptions 10-11.

<sup>108</sup> Union Exceptions at 11-12.

<sup>109</sup> Union Exceptions at 12.

<sup>110</sup> Union Excpetions at 13.

<sup>111</sup> Union Opposition at 7.

<sup>112</sup> Union Opposition at 7.

<sup>113</sup> Union Opposition at 8-18.

<sup>114</sup> Union Opposition at 18-

<sup>115</sup> *Am. Fed'n of Gov't Emp., Local 872 v. D.C. Water and Sewer Auth.*, 52 D.C. Reg. 2474, Slip Op.. 702, PERB Case No. 00-U-12 (2003).

A. The Board adopts that Hearing Examiner's finding that the Complaint was filed timely.

The Board concludes that the Complaint was timely filed. The Board agrees with the Hearing Examiner's determination that the Union's cause of action arose on June 26, 2013, when it received DCPS' letter indicating that DCPS had not fully complied with the Arbitrator's Award.<sup>116</sup> The Board also agrees with the Hearing Examiner dismissing DCPS' argument that the cause of action arose on June 13, 2013, when the 10-day deadline the Union gave to DCPS was reached.<sup>117</sup> As the Hearing Examiner noted, the 10-day deadline given by the Union is not based on statutory or contractual requirements.<sup>118</sup> In the present case, the Hearing Examiner's analysis is consistent with the PERB precedent. The Board has held under PERB Rule 520.4, the deadline date for filing a complaint is 120 days after the date the Complainant knew or should have known of the event giving rise to complaint allegations.<sup>119</sup> Here, the Complaint was filed within 120 days of June 26, 2013. Moreover, the Board has held that it will affirm a Hearing Examiner's recommendation if it finds that, upon review of the record, that the Hearing Examiner's analysis, reasoning and conclusions are reasonable, supported by the record, and consistent with Board precedent.<sup>120</sup> The Board finds the Hearing Examiner's findings and conclusions to be reasonable, supported by the record and consistent with Board precedent; therefore, DCPS' Exceptions in regards to the issue of timeliness are denied.

B. The Board adopts the Hearing Examiner's finding that DCPS committed unfair labor practices by communicating misinformation to terminated teachers in its letter of March 1, 2011.

The Board agrees with the Hearing Examiner's finding that DCPS made a good faith effort to contact the affected teachers as required by the Award.<sup>121</sup> The Board finds no merit to DCPS' contention that the Report was not clear as to whether DCPS made a good faith effort to contact affected teachers.<sup>122</sup> The Board also finds no merit to DCPS' complaint that the Hearing Examiner noted that the record does not clearly state how many teachers responded to its letter. The question of how many teachers responded is immaterial to the Hearing Examiner's findings and conclusions.

The Board also adopts the Hearing Examiner's finding that DCPS committed unfair labor practices by communicating misinformation to terminated teachers. The record supports the Hearing Examiner's conclusion that the letter of March 1, 2011 that was sent to teachers did not conform to the requirements of the Award.<sup>123</sup> Consistent with the Arbitrator's Award, teachers

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<sup>116</sup> Report at 15.

<sup>117</sup> Report at 16.

<sup>118</sup> Report at 16.

<sup>119</sup> *Wash. Teachers' Union Local 6 v. D.C. Pub. Sch.*, 61 D.C. Reg. 2727, Slip Op. No. 1452 at 2, PERB Case No. 14-U-02 (2014).

<sup>120</sup> *Am. Fed'n of Gov't Emp., Local 872 v. D.C. Water and Sewer Auth.*, 52 D.C. Reg. 2474, Slip Op. 702, PERB Case No. 00-U-12 (2003).

<sup>121</sup> Report at 17.

<sup>122</sup> DCPS Exceptions at 8.

<sup>123</sup> Report at 18.

that waive reinstatement are still entitled to back pay.<sup>124</sup> Therefore, the Board finds that the Hearing Examiner's conclusion that DCPS communicated misinformation to terminated teachers and thereby violated section 1-617.04(a)(1) and (5) of the D.C. Official Code was reasonable, supported by the record, and consistent with Board precedent.

- C. The Board adopts the Hearing Examiner's finding that the issue of whether DCPS failed to make a new determination, by means of an appropriate process, if a reinstated teacher should be continued or terminated, should be resolved through the parties negotiated grievance process.

After reviewing the record, the Board adopts that Hearing Examiner's finding of fact on this issue. The issue of DCPS' contractual obligations in deciding whether to reinstate teachers is not within the jurisdiction of the Board.

In determining a violation, the Board has always made a distinction between obligations that are statutorily imposed under the CMPA and those obligations that are contractually agreed-upon between the parties.<sup>125</sup> The Board has concluded that it lacks jurisdiction over alleged violations that are strictly contractual in nature.<sup>126</sup> In the present case, the Hearing Examiner noted that the parties did not ask the Arbitrator for clarification regarding the characteristics of an "appropriate process" for determining whether to reinstate teachers.<sup>127</sup> Further, this issue does not involve obligations which are statutory in nature. Therefore, relief is not found within the Board's authority.

The Board has reviewed the findings, conclusions, and recommendations of the Hearing Examiner and finds them to be reasonable, persuasive and supported by the record. The Board hereby adopts the Hearing Examiner's conclusion that DCPS' contractual obligations in deciding whether to reinstate teachers is not within the jurisdiction of the Board.

- D. The Board adopts the Hearing Examiner's finding that DCPS committed an unfair labor practice for failing to reinstate affected teachers and award back pay.

There is no dispute that DCPS has failed to reinstate or award back pay to any affected teachers. As the Hearing Examiner noted, the Award clearly and unambiguously stated that affected teachers were to be "offered reinstatement to an appropriate position, effective to the date of termination" and be made whole.<sup>128</sup> The Board adopts that the Hearing Examiner's finding that DCPS' failure to reinstate teachers and award back pay was a violation of section 1-

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<sup>124</sup> Report at 2.

<sup>125</sup> *Fraternal Order of Police/Metro. Police Dep't/Labor Comm. v. Metro. Police Dep't*, 60 D.C. Reg. 5337, Slip Op. No. 1374 at 8, PERB Case No. 06-U-41 (2013).

<sup>126</sup> *Id.*

<sup>127</sup> Report at 17.

<sup>128</sup> Report at 18.

617.04(a)(1) and (5) of the D.C. Official Code. The Hearing Examiner's finding was reasonable, supported by the record, and consistent with Board precedent.

E. The Board adopts the Hearing Examiner's proposed remedy to the extent that it adequately addressed the remedies provided in the Arbitrator's Award.

The Board adopts the Hearing Examiner's conclusion that DCPS failed to offer reinstatement and back pay to any affected teachers and that DCPS' failure to comply with the terms of the Award is not based upon a genuine dispute over the terms of the Award. The parties do not dispute that DCPS has failed to comply with the Award by reinstating affected teachers or awarding back pay in their Exceptions. Under these facts, it is apparent that this conduct constitutes a violation of DCPS' duty to bargain in good faith under section 1-617.04(a)(5), and derivatively, interferes with bargaining unit employees' rights in violation of section 1-617.04(a)(1) of the D.C. Official Code.

Under section 1-617.13(a) of the D.C. Official Code, the Board may order a party to "reinstatement, with or without back pay, or otherwise make whole, the employment or tenure of any employee, who the Board finds has suffered adverse economic effects in violation of this subchapter." The Board will order DCPS to desist from violations of the CMPA and to comply with the Award by reinstating the affected teachers to the positions they held as of the date of their discharge. Consistent with the Arbitrator's Award, once the teachers have accepted reinstatement, DCPS is permitted to make a determination, by means of an appropriate process, if reinstated teachers should be terminated. In order to make the affected teachers whole from DCPS' unlawful refusal to promptly implement the terms of the Arbitration Award with which it had no genuine dispute, the affected teachers are awarded back pay, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Award's compliance period.<sup>129</sup>

Consistent with the Award, teachers who waive reinstatement shall have their records changed to show that they voluntarily resigned. The Board will also award the teachers back pay, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Award's compliance period.

The Board adopts the Hearing Examiner's recommendation to award costs, based on DCPS' "refusal to honor the clear and unambiguous terms of the Award."<sup>130</sup> Under section 1-617.13 of the D.C. Official Code, the Board has the authority to award the payment of costs. The Board finds that the Hearing Examiner's conclusion is reasonable, supported by the record, and consistent with Board precedent. Therefore, DCPS is ordered to pay reasonable costs to the Union.

The Board also adopts that Hearing Examiner's recommendation that DCPS should send a new letter to all teachers covered by the original grievance, in part. The letter should include

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<sup>129</sup> April 8, 2011 is 60 days after the Arbitrator's Award was issued on February 8, 2011.

<sup>130</sup> Report at 20-21.

the proposed remedies in the Hearing Examiner's Report with the exception of the following statement:

“A teacher who wishes to submit a refutation of his or her principal's recommendation for termination may do it; if, upon review through an appropriate process, DCPS reverses the termination, the teacher will be reinstated with back pay from the date of the original termination; if DCPS upholds the termination, the teacher may file a new grievance with any questions concerning back pay beyond the end of the Award's compliance period determined through that process.”<sup>131</sup>

The Board adopts the Hearing Examiner's recommendation that for any teacher who cannot be located or who does not respond to the new letter, his or her records should be changed to show that he or she voluntarily resigned.

In light of the violations discussed, the Board adopts the Hearing Examiner's recommended remedy that DCPS post a notice acknowledging its violations of the CMPA found that the relief afforded. The Board has recognized 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.”<sup>132</sup> Therefore, the Board adopts this remedy as consistent with Board precedent.

Concerning the Union's request for attorney fees in its Exceptions, the Board has held that section 1-617.13 of the D.C. Official Code does not authorize it to award attorney fees.<sup>133</sup> Therefore, the Union's request for attorney fees is denied. The Union's request for Preliminary Relief is rendered moot by issuance of the Board's Decision and Order.

## V. Conclusion

The Board has reviewed the findings, conclusions, and recommendations of the Hearing Examiner, and concludes that DCPS violated section 1-617.04(a)(1) and (5) of the D.C. Official Code for failing to fully comply with the Arbitrator's February 7, 2011 Award.

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<sup>131</sup> Report at 21.

<sup>132</sup> *Nat'l Ass'n of Gov't Emp., Local R3-06 v. D.C. Water & Sewer Auth.*, 47 D.C. Reg. 7551, Slip Op. No. No. 635 at 15-16, PERB Case No. 99-U-04 (2000).

<sup>133</sup> *Wash. Teachers' Union, Local #6, Am. Fed'n of Teachers v. D.C. Pub. Sch.*, Slip Op. No. No. 848 at 4, PERB Case No. 05-U-18 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. District of Columbia Public Schools (“DCPS”) shall cease and desist from refusing to bargain in good faith with the Washington Teachers’ Union, Local #6 (“Union”) by failing to fully comply with the terms of the February 7, 2011 Arbitration Award.
2. DCPS shall reimburse the Union for reasonable costs associated with PERB Case No. 14-U-02, within fourteen (14) days from the issuance of this Decision and Order.
3. DCPS shall, within fourteen (14) days from the issuance of this Decision and Order, reinstate the affected probationary teachers to the positions they held as of the date of their discharge. Once the teachers have accepted reinstatement, DCPS is permitted to make a determination, by means of an appropriate process, if reinstated teachers should continue to be terminated. DCPS shall pay the affected teachers back pay, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Award’s compliance period.
4. DCPS shall change the records of teachers who waive reinstatement to show that they resigned. DCPS shall pay the teachers back pay, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Award’s compliance period.
5. DCPS shall within fourteen (14) days from the issuance of this Decision and Order send a new letter to affected teachers consistent with this Order.
6. DCPS shall change the records of teachers who cannot be located or do not respond to the new letter to show that he or she voluntarily resigned.
7. DCPS shall conspicuously post where notices to employees are normally posed a notice that the Board will furnish DCPS. The notice shall be posted within fourteen (14) days from DCPS’ receipt of the notice and shall remain posted for thirty (30) consecutive days.
8. Within fourteen (14) days from the receipt of this notice, DCPS shall notify the Public Employee Relations Board in writing that the notice is posted.
9. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of Board Members Mary Anne Gibbons, Barbra Somson, and Douglas Warshof.

October 19, 2017

Washington, D.C.



Public  
Employee  
Relations  
Board

GOVERNMENT OF  
THE DISTRICT OF COLUMBIA



1100 4<sup>th</sup> Street SW  
Suite E630  
Washington, D.C. 20024  
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# NOTICE

**TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, 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. 1642, PERB CASE NO. 14-U-02, (October 19, 2017).**

**WE HEREBY NOTIFY** our employees that the District of Columbia Public Employee Relations Board has found that we violated the law in the manners alleged in PERB Case No. 14-U-02, and has ordered DCPS to post this Notice.

**WE WILL** cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5) in the manners stated in Slip Opinion No. 1642, PERB Case No. 14-U-02.

**WE WILL** reimburse the Union for reasonable costs associated with Slip Opinion No. 1642, PERB Case No. 14-U-02, within fourteen (14) days from the issuance of Slip Opinion No. 1642, PERB Case No. 14-U-02.

**WE WILL**, within fourteen (14) days from the issuance of Slip Opinion No. 1642, PERB Case No. 14-U-02, reinstate the affected probationary teachers to the positions they held as of the date of their discharge. Once the teachers have accepted reinstatement, we will make a determination, by means of an appropriate process, if reinstated teachers should continue to be terminated. We will pay the affected teachers back pay, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Arbitration Award's compliance period.

**WE WILL** change the records of teachers who waive reinstatement to show that they voluntarily resigned. We will pay back pay, with prejudgment interest computed at a rate of 4% per annum, from the date of termination until April 8, 2011, the end of the Arbitration Award's compliance period.

**WE WILL** within fourteen (14) days from the issuance of Slip Opinion No. 1642, PERB Case No. 14-U-02 send a new letter to affected teachers consistent with Slip Opinion No. 1642, PERB Case No. 14-U-02.

**WE WILL** change the records of teachers who cannot be located or do not respond to the new letter to show that they voluntarily resigned.

Department of Public Schools

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 DYRS' compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board by U.S. Mail at 1100 4<sup>th</sup> Street, SW, Suite E630; Washington, D.C. 20024, or by phone at (202) 727-1822.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

October 19, 2017

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 14-U-02, Opinion No. 1642 was sent by File and ServeXpress to the following parties on this the 30th day of October, 2017.

Lee W. Jackson, Esq.  
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/s/ Sheryl Harrington  
Administrative Assistant