

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:)	
)	
Fraternal Order of Police/Department of)	
Corrections Labor Committee)	
(on behalf of Allen Claiborne),)	
)	
Petitioner,)	
)	PERB Case No. 12-E-09
v.)	
)	Opinion No. 1398
District of Columbia Department of Corrections,)	
)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

The Fraternal Order of Police/Department of Corrections Labor Committee (“FOP” or “Petitioner”) has petitioned the Board to enforce an arbitration award arising out of discipline imposed upon Corporal Allen Claiborne (“Claiborne” or “Grievant”) by the District of Columbia Department of Corrections (“Corrections” or “Respondent”).

I. Statement of the Case

For a period of approximately an hour and a half the morning of December 23, 2006, the Grievant, while on duty at a Corrections facility, failed to make security checks that were required to be made every half hour. During that period, an inmate committed suicide. Following this incident, Corrections removed Claiborne from his position with Corrections. FOP filed a grievance, and the matter was referred to arbitration.

On September 15, 2009, the arbitrator issued an opinion and award (“Original Award”) in which he sustained the grievance. The arbitrator also concluded that he had the authority to award attorneys’ fees in the arbitration under the Back Pay Act, 5 U.S.C. § 5596. The arbitrator issued the following award:

1. The removal of the Grievant was not for cause.

2. The Grievant's removal shall be reduced to a suspension without pay for sixty days, and the Grievant shall be reinstated forthwith.
3. The Grievant shall receive all pay, benefits and entitlements provided under the Back Pay Act and under the Agreement.
4. The Union may file a motion for attorney's fees with the Arbitrator no later than twenty-one days from the date of this Award. Thereafter the Union and the Department shall attempt to agree on the amount of any attorney's fees to be awarded to the Grievant. If no agreement is reached within fourteen days after the submission of the motion, the Department will have an additional fourteen days thereafter to respond to the motion.
5. The Arbitrator will retain jurisdiction for ninety days from the date of this Award to resolve any disputes regarding attorney's fees and/or compliance with this Award.

(Original Award at pp. 26-27).

Corrections filed an arbitration review request solely on the arbitrator's reservation of authority to award attorneys' fees. The Board issued a decision and order ("Decision and Order") sustaining the Original Award. *D.C. Dep't of Corrs. and FOP/Dep't of Corrs. Labor Comm.*, 59 D.C. Reg. 10816, Slip Op. No. 1306, PERB Case No. 10-A-03 (2011). On April 30, 2013, Corrections' motion for reconsideration was denied. *D.C. Dep't of Corrs. v. FOP/Dep't of Corrs. Labor Comm.*, 60 D.C. Reg. 7185, Slip Op. No. 1380, PERB Case No. 10-A-03 (2013).

While the motion for reconsideration was pending, FOP filed a petition for enforcement ("Petition").¹ The Petition states that on November 11, 2009, the arbitrator issued a supplemental award ("Supplemental Award"), which awarded \$23,700 in attorneys' fees to FOP's attorney. The Petition alleges that "[t]he District of Columbia has not complied with the award of attorneys' fees." (Petition at p. 2). The Petition concludes with this prayer for relief: "FOP/DOC respectfully requests that PERB issue an order to enforce its Decision and Order of August 9, 2012, awarding attorney's fees with interest and leave to file a further petition for attorneys' fees with PERB on account of the cost of obtaining the award." (Petition at p. 3). Corrections moved to dismiss the Petition on the grounds that it was premature as it was filed while Corrections' motion for reconsideration was pending and that it failed to set forth a *prima facie* case under Board Rule 560.1. On September 26, 2012, FOP filed an opposition to the motion to dismiss in which it acknowledged that FOP is also seeking enforcement of the attorneys' fee award in the District of Columbia Superior Court. On June 26, 2013, FOP filed a pleading entitled "Petitioner's Motion to Grant Petition for Enforcement or, in the Alternative,

¹ FOP erroneously filed the Petition in the arbitration review initiated by Corrections, PERB Case No. 10-A-03. The Petition has been given PERB Case No. 12-E-09.

Petitioner's Second Petition for Enforcement" in which FOP noted that the denial of Corrections' motion for reconsideration had become final and again requested the Board to "issue an order to enforce its Decision and Order of August 9, 2012, and April 30, 2013, awarding attorney's fees with interest and leave to file a further petition for attorneys' fees with PERB on account of the cost of obtaining the award."

II. Discussion

The Petitioner's Motion to Grant Petition for Enforcement or, in the Alternative, Petitioner's Second Petition for Enforcement moots the Respondent's argument that the Petition was prematurely filed while the Respondent's motion for reconsideration was pending. On the merits, the Respondent contends that "the Petition erroneously conflates the PERB Decision and Order with an arbitration award that has never been before PERB, and inappropriately seeks enforcement of such arbitration award (and not the PERB Decision and Order)." (Mot. to Dismiss at p. 3). This conflation of the Decision and Order with the Supplemental Award can be seen in FOP's prayer for relief, which asks the Board to enforce "its Decision and Order . . . awarding attorney's fees with interest. . . ." The two can be untangled by considering whether the elements under Board Rule 560.1 are present with respect to the Original Award and to the Supplemental Award.

Board Rule 560.1 provides: "If any party fails to comply with the Board's decision within the time period specified in Section 559.1, the prevailing party may petition the Board to enforce the order." Thus, two elements of a petition for enforcement are (1) a decision of the Board and (2) a failure to comply with that decision within the specified time period. As noted, the Original Award reduced the penalty imposed on Claiborne, ordered his reinstatement with back pay, and established a procedure by which FOP could move for attorneys' fees. The Decision and Order sustained this award. Because there is a Decision and Order, the first element of Rule 560.1 is met. But there is no allegation that Corrections failed to comply with what was ordered by the Decision and Order, which is to say, there is no allegation that Corrections failed to comply with anything ordered by the award the Board sustained. For example, such an allegation could be that Claiborne was not reinstated, *see FOP/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department (on behalf of Suggs)*, 59 D.C. Reg. 5006, Slip Op. No. 966 at p. 4, PERB Case No. 08-E-02 (2009), or not paid his back pay, *see FOP/Department of Corrections Labor Committee (on behalf of Butler) v. D.C. Department of Corrections*, Slip Op. No. 1022 at p. 7, PERB Case No. 10-E-02 (July 29, 2010), or even that Corrections did not "attempt to agree [with FOP] on the amount of attorney's fees to be awarded the Grievant." (Original Award at p. 27).

While the Petitioner made no allegation of such a failure to comply with the Original Award, Petitioner does allege a failure to comply with the Supplemental Award's order to pay \$23,700 in attorneys' fees. However, there has been no decision and order of the Board sustaining that award. Although the Board has authority to seek enforcement of its orders, it does not have authority to seek enforcement of orders of third parties such as arbitrators.

FOP/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't, 39 D.C. Reg. 9617, Slip Op. No. 295 at p. 3, PERB Case No. 91-U-18 (1992).

Whether the Petition is seeking enforcement of what was ordered by the Original Award or by the Supplemental Award, the elements of a decision and order of the Board and a failure to comply with the decision and order are not present. Therefore, the Respondent's motion to dismiss is granted.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department of Corrections' motion to dismiss is granted.
2. The Fraternal Order of Police/Department of Corrections Labor Committee's petition for enforcement is denied.
3. The Fraternal Order of Police/Department of Corrections Labor Committee's motion to grant petition for enforcement or, in the alternative, second petition for enforcement is denied.
4. 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 1, 2013

CERTIFICATE OF SERVICE

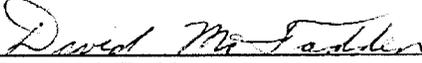
This is to certify that the attached Decision and Order in PERB Case No. 12-E-09 is being transmitted to the following parties on this the 1st day of July 2013.

Kevin Stokes
Jonathan O'Neil
Office of Labor Relations and Collective Bargaining
441 4th St. NW, suite 820 North
Washington, D.C. 20001

VIA FILE & SERVEXPRESS

J. Michael Hannon
1901 18th Street NW
Washington, D.C. 2009

VIA FILE & SERVEXPRESS



David McFadden
Attorney-Advisor