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

In the Matter of:)	
)	
American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO,)	PERB Case No. 12-E-10
)	
Petitioner,)	Opinion No. 1512
)	
and)	
)	Decision and Order
District of Columbia Public Schools,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

The matter before the Board arises from an Enforcement Petition (“Petition”)¹ filed on or about September 6, 2012, by American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO (“AFSCME”). AFSCME alleged that the District of Columbia Public Schools (“DCPS”) failed to comply with the Board’s July 26, 2012, Order in *American Federation of State, County and Municipal Employees, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 59 D.C. Reg. 11364, Slip. Op. No. 1299, PERB Case No. 05-U-19 (2012)² (hereinafter “Slip Op. No. 1299”).³ DCPS did not file a response to AFSCME’s Petition.

The questions before the Board are whether DCPS failed to comply with the Board’s Order in Slip Op. No. 1299 and if so, whether PERB should grant AFSCME’s Petition and seek enforcement of the Order in the D.C. Superior Court in accordance with D.C. Official Code § 1-

¹ The Board notes that AFSCME originally filed its Petition under PERB Case No. 05-U-19. However, on October 1, 2014, PERB notified the parties that it had given the matter an enforcement case number, namely 12-E-10.

² Included with AFSCME’s Petition as Exhibit A.

³ (Petition at 1-2).

617.13(b)⁴ and PERB Rule 560 *et seq.* For the reasons stated below, the Board finds that DCPS has not complied with paragraph 2⁵ in the Order of Slip Op. No. 1299, and therefore hereby grants AFSCME's Petition for Enforcement with regard to that paragraph. However, the Board will not seek judicial enforcement of paragraphs 3, 4, 5, and 6 of its Order in Slip Op. No. 1299.

II. Background

Slip Op. No. 1299 in PERB Case No. 05-U-19 originated from an unfair labor practice complaint filed by AFSCME on January 7, 2005, in which AFSCME alleged that in 2003, an arbitration award ("Applewhaite Award") ordered DCPS to begin providing AFSCME with proper notice prior to conducting reductions-in-force ("RIFs"). In 2004, DCPS conducted a RIF without giving AFSCME any prior notice. On June 15, 2004, AFSCME filed a group grievance ("Grievance") challenging the RIF, but on October 1, 2004, DCPS refused to process the Grievance. On January 7, 2005, AFSCME filed its unfair labor practice complaint before PERB alleging that DCPS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it failed and refused to process AFSCME's Grievance, and when it failed to comply with the notice requirements in the Applewhaite Award.⁶ DCPS did not file an answer to the complaint, and PERB assigned the matter to a hearing examiner.

In its July 26, 2012 Decision and Order in PERB Case No. 05-U-19 (Slip Op. No. 1299), the Board adopted the hearing examiner's findings⁷ that: (1) because DCPS did not file an answer in the case, all of the material facts were deemed admitted⁸; (2) DCPS was bound by the 2003 Applewhaite Award because it did not challenge or appeal the Award; nor did it seek clarification of the Award's terms⁹; (3) DCPS repudiated the parties' collective bargaining agreement and therefore committed unfair labor practices under D.C. Official Code §§ 1-617.04(a)(1) and (5) when it failed and refused to process AFSCME's Grievance and when it failed to give AFSCME proper notice prior to its 2004 RIF.¹⁰

⁴ D.C. Official Code § 1-617.13(b): "The Board may request the Superior Court of the District of Columbia to enforce any order issued pursuant to this subchapter, including those for appropriate temporary relief or restraining orders. No defense or objection to an order of the Board shall be considered by the Court, unless such defense or objection was first urged before the Board. The findings of the Board with respect to questions of fact shall be conclusive if supported by substantial evidence on the record considered as a whole. The Court may grant such temporary relief or restraining order as it deems just and proper and enter a decree enforcing, modifying and enforcing as so modified, or setting aside, in whole or in part, the order of the Board."

⁵ The Board notes that paragraphs 1 and 7 of the Order in Slip Op. No. 1299 did not require any action by either of the parties. Therefore, the Board will not discuss those paragraphs herein.

⁶ *AFSCME Local 2921 v. DCPS*, *supra*, Op. No. 1299 at ps.1-3, PERB Case No. 05-U-19.

⁷ *Id.* at 3-4, 6.

⁸ *Id.* at 3; *see also* PERB Rule 520.7.

⁹ *Id.* at 2, 4.

¹⁰ *Id.* at 3-4 (citing *University of the District of Columbia Faculty Association / NEA v. University of the District of Columbia*, 39 D.C. Reg. 9628, Op. No. 320, PERB Case No. 92-A-04 (2004) (holding that parties who arbitrate a matter pursuant to a collective bargaining agreement are bound by the arbitrator's award); and *American Federation of Government Employees, Local 872 v. District of Columbia Water and Sewer Authority*, 46 D.C. Reg. 4398, Op. No. 497, PERB Case No. 96-U-23 (1996) (holding that failing or refusing to implement an arbitration award

Upon finding that the hearing examiner's findings and recommendations were reasonable, supported by the record, and consistent with PERB precedent,¹¹ the Board ordered the following:

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.

constitutes a failure to bargain in good faith and is an unfair labor practice under D.C. Official Code § 1-617.04(a)(5)).

¹¹ *Id.*; see also *American Federation of Government Employees, Local 872 v. District of Columbia Water and Sewer Authority*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12 (2003) (holding that the Board will affirm a Hearing Examiner's findings if the findings are reasonable, supported by the record, and consistent with Board precedent).

7. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.¹²

DCPS did not appeal or challenge the Board's Order.¹³

On or about September 6, 2012, AFSCME filed the instant Petition for Enforcement, alleging that as of that date, DCPS had "not complied with any portion of [the Board's Order in Slip Op. No. 1299], including and especially the requirements set forth in paragraphs 2-4...; nor ha[d] DCPS taken any steps toward compliance with the order."¹⁴ AFSCME's Certificate of Service that accompanied the Petition certified that the Petition was duly served *via* U.S. Mail on: 1) DCPS' General Counsel; 2) a Supervisory Attorney with the D.C. Office of Labor Relations and Collective Bargaining; and 3) an Assistant Attorney General in the D.C. Office of the Solicitor General.¹⁵ Notwithstanding, DCPS did not file a response to AFSCME's Petition.

III. Analysis

As stated previously, the questions before the Board in this Enforcement case are: has DCPS fully complied with the Board's Order in Slip Op. No. 1299, and if not, should PERB seek enforcement of that Order in the D.C. Superior Court.¹⁶ D.C. Official Code § 1-617.13(b) states that "the findings of the Board with respect to questions of fact shall be conclusive if supported by substantial evidence on the record considered as a whole." Accordingly, PERB has the authority to determine whether or not its own orders have been complied with as long as its conclusions are supported by substantial evidence from the whole record.¹⁷

Additionally, PERB Rule 560.2 states that after a petition for enforcement has been filed, "the responding party shall have ten (10) days from service to respond to the petition." PERB Rule 560.3 directs that "[f]ailure by the responding party to file [a response] ... may be construed as an admission of the petitioner's allegations."

In this matter, it is uncontested that AFSCME's Petition was duly served on DCPS and its representatives and that DCPS thereafter failed to file a response. Thus, in accordance with its authority under D.C. Official Code § 1-617.13(b), the Board construes DCPS' failure to file a response as an admission of AFSCME's allegation that DCPS has failed to comply with the Board's Order in Slip Op. No. 1299. This finding is substantially bolstered by the undisputed facts that DCPS also did not: 1) appeal or raise any challenges to the 2003 Applewhaite Award; 2) file an answer to AFSCME's 2005 unfair labor practice complaint in PERB Case No. 05-U-19; or 3) appeal or raise any challenges to the Board's findings and Order in Slip Op. No. 1299

¹² *AFSCME Local 2921 v. DCPS, supra*, Op. No. 1299 at p. 6, PERB Case No. 05-U-19.

¹³ *See* (Petition at 2).

¹⁴ (Petition at 2).

¹⁵ (Petition at Cert. of Service).

¹⁶ *See* D.C. Official Code § 1-617.13(b).

¹⁷ *Id.*

in PERB Case No. 05-U-19. Accordingly, AFSCME's Petition for Enforcement of the Board's Order in Slip Op. No. 1299 is granted with two exceptions, as noted below.

A. The Board Will Seek Judicial Enforcement of Paragraph 2 of its Order in Slip Op. No. 1299, PERB Case No. 05-U-19.

Paragraph 2 of the Board's Order of Slip Op. No. 1299 ordered DCPS to "cease and desist from violating D.C. [Official] Code § 1-617.04(a)(1) and (5)" by refusing to process group grievances filed by AFSCME and by failing to give prior notice when conducting a RIF as required by the Applewhaite Award.¹⁸ In a March 2, 2015 email from DCPS' counsel to PERB, DCPS asserted that, since July 26, 2012 (the date Slip Op. No. 1299 was issued), DCPS has processed all group grievances submitted by AFSCME and has fully complied with the Applewhaite Award's notice requirement when conducting RIFs.¹⁹ However, in a March 3, 2015 email to PERB, DCPS' counsel also admitted that DCPS still has not processed AFSCME's June 15, 2004 Grievance, which was the underlying Grievance at issue in PERB Case No. 05-U-19.²⁰ DCPS argued in its March 3 email that despite the Board's finding that DCPS committed an unfair labor practice by failing to process the Grievance, the Board's Order in Slip Op. No. 1299 only ordered DCPS to cease violating D.C. Official Code § 1-617.04(a)(1) and (5) going forward, and did not expressly order DCPS to retroactively process AFSCME's Grievance.²¹

The Board wholly dismisses DCPS' contention. As mentioned previously, DCPS did not challenge or seek clarification of the Applewhaite Award. It did not file an Answer to AFSCME's unfair labor practice complaint in PERB Case No. 05-U-19; nor did it challenge PERB's final Decision and Order in PERB Case No. 05-U-19 (Slip Op. No. 1299). Moreover, DCPS did not file a response to AFSCME's instant Petition for Enforcement. Based on DCPS' failure to file timely responses in these cases, the Board declines to entertain DCPS' efforts to now raise an argument that attempts to parse the language of the Board's Order in Slip Op. No. 1299.²²

Furthermore, in accordance with its aforementioned authority under D.C. Official Code § 1-617.13(b), the Board finds that its Order in Slip Op. No. 1299 unquestionably required DCPS to process AFSCME's June 15, 2004 Grievance. Indeed, when the Board found that DCPS violated D.C. Official Code § 1-617.04(a)(1) and (5) by failing to process the Grievance, and additionally when it ordered DCPS to cease violating D.C. Official Code §§ 1-617.04(a)(1) and (5), the Board undoubtedly intended for DCPS to cease violating the statute by failing to process

¹⁸ *AFSCME Local 2921 v. DCPS*, *supra*, Op. No. 1299 at p. 6, PERB Case No. 05-U-19.

¹⁹ E-mail from Michael D. Levy, Supervisory Attorney, Office of Collective Bargaining and Labor Relations, to Colby J. Harmon, Attorney-Advisor, Public Employee Relations Board, and Brenda C. Zwack, Partner, Murphy Anderson, PLLC (Mar. 02, 2015, 06:01pm EST).

²⁰ E-mail from Michael D. Levy, Supervisory Attorney, Office of Collective Bargaining and Labor Relations, to Colby J. Harmon, Attorney-Advisor, Public Employee Relations Board, and Brenda C. Zwack, Partner, Murphy Anderson, PLLC (Mar. 03, 2015, 11:18am EST).

²¹ *Id.*

²² See PERB Rules 520.7 and 560.3.

not just all similar subsequent grievances, but that very Grievance as well. Thus, even if the Board was to entertain DCPS' contention that Slip Op. No. 1299 only required DCPS to process future grievances, that argument would fail because the plain language of the Board's Order clearly required DCPS to process AFSCME's 2004 Grievance as well as all future similar grievances. Therefore, because DCPS has admitted that it still has not processed AFSCME's June 15, 2004 Grievance, PERB will seek judicial enforcement of paragraph 2 of its Order in Slip Op. No. 1299 in the D.C. Superior Court unless full compliance with the paragraph is documented to the Board *via File & ServeXpress* within 10 business days of the issuance of this Decision and Order.²³

B. PERB Will Not Seek Judicial Enforcement of Paragraphs 3 and 4 of its Order in Slip Op. No. 1299, PERB Case No. 05-U-19.

The Board will not seek judicial enforcement of paragraphs 3 and 4 of its Order in Slip Op. No. 1299, which required DCPS to "conspicuously post within ten (10) days from the issuance of [Slip Op. No. 1299]" a Notice detailing its violations of D.C. Official Code §§ 1-617.04(a)(1) and (5), and to "notify [PERB], in writing, within fourteen (14) business days from the issuance of [Slip Op. No. 1299] that the Notice ha[d] been posted accordingly."²⁴ In conjunction with PERB's investigation of this case, DCPS' counsel sent PERB an email on September 15, 2014, which showed that DCPS did post the Notice for 30 days, but not until after September 20, 2012, which was more than a month and a half after the Board issued Slip Op. No. 1299 on July 29, 2012.²⁵ In so doing, DCPS clearly violated the Board's Order to post the Notice within 10 days of the issuance of Slip Op. No. 1299. It is further uncontested that DCPS violated the Board's Order to notify PERB in writing within 14 business days that the Notice had been posted. Notwithstanding, in an effort to preserve PERB's and the D.C. Superior Court's resources, PERB will not seek judicial enforcement of paragraphs 3 and 4 of its Order in Slip Op. No. 1299 in the D.C. Superior Court. However, the Board asserts in the strongest terms possible that the time limits the Board sets in its orders are not to be skirted or ignored. Accordingly, in appropriate future cases, the Board will not hesitate to seek judicial enforcement of its orders in the D.C. Superior Court if parties violate the time periods that the Board sets.

C. PERB Will Not Seek Judicial Enforcement of Paragraphs 5 and 6 of its Order in Slip Op. No. 1299, PERB Case No. 05-U-19.

The Board will not seek judicial enforcement of paragraphs 5 and 6 of its Order in Slip Op. No. 1299, which (1) ordered AFSCME to submit to DCPS within 30 days of July 26, 2012 (the date Slip Op. No. 1299 was issued), "a statement of the actual costs incurred in processing [PERB Case No. 05-U-19], together with associated receipts"; and (2) ordered DCPS to pay

²³ See *Fraternal Order of Police/Department of Corrections Labor Committee (on behalf of Dexter Allen) v. District of Columbia Department of Corrections*, 59 D.C. Reg. 3919, Slip Op. No. 920 at p. 7, PERB Case No. 07-E-02 (2007).

²⁴ *AFSCME Local 2921 v. DCPS*, *supra*, Op. No. 1299 at p. 6, PERB Case No. 05-U-19.

²⁵ E-mail from Michael D. Levy, Supervisory Attorney, Office of Collective Bargaining and Labor Relations, to Colby J. Harmon, Attorney-Advisor, Public Employee Relations Board (Sept. 15, 2014, 03:06pm EDT).

AFSCME the amount that AFSCME submitted within 30 business days after receiving it and to thereafter notify PERB in writing that it had done so.²⁶ During PERB's investigation of this enforcement case, AFSCME's counsel sent an email to PERB on September 15, 2014, stating that AFSCME could not confirm that it ever submitted to DCPS its statement of costs.²⁷ Therefore, because AFSCME did not timely comply with the Board's Order to submit a statement of costs to DCPS within 30 days of July 26, 2012, the Board will not seek judicial enforcement of paragraphs 5 and 6 of its Order in Slip Op. No. 1299 in the D.C. Superior Court.

D. Conclusion

Based on the foregoing, and in accordance with its authority under D.C. Official Code § 1-617.13(b), the Board finds that DCPS has not complied with paragraph 2 of the Board's Order in Slip Op. No. 1299, PERB Case No. 05-U-19. Accordingly, the Board will seek judicial enforcement of that paragraph in the D.C. Superior Court unless full compliance with the paragraph is documented to the Board *via* File & ServeXpress within 10 business days of the issuance of this Decision and Order.²⁸ Additionally, even though DCPS violated the Board's Orders to post a Notice detailing its violations of D.C. Official Code §§ 1-617.04(a)(1) and (5) within 10 days of the issuance of Slip Op. No. 1299 and to notify PERB within 14 business days that the Notice had been posted, it is still apparent that DCPS did post the Notice. Thus, in an effort to preserve PERB's and the D.C. Superior Court's resources, PERB will not seek judicial enforcement of paragraphs 3 and 4 of its Order in Slip Op. No. 1299 in the D.C. Superior Court. Finally, the Board finds that because AFSCME did not timely comply with the Board's Order to submit a statement of costs to DCPS within 30 days of July 26, 2012, the Board will not seek judicial enforcement of paragraphs 5 and 6 of its Order in Slip Op. No. 1299 in the D.C. Superior Court.

²⁶ *AFSCME Local 2921 v. DCPS, supra*, Op. No. 1299 at p. 6, PERB Case No. 05-U-19.

²⁷ E-mail from Brenda C. Zwack, Counsel, O'Donnell, Schwartz & Anderson, PC, to Colby J. Harmon, Attorney-Advisor, Public Employee Relations Board, and Michael D. Levy, Supervisory Attorney, Office of Collective Bargaining and Labor Relations (Sept. 15, 2014, 03:23pm EDT).

²⁸ *See FOP/DOCLC v. DOC, supra*, Slip Op. No. 920 at p. 7, PERB Case No. 07-E-02.

ORDER

IT IS HEREBY ORDERED THAT:

1. AFSCME's Petition for Enforcement of Paragraph 2 of the Board's Order in Slip Op. No. 1299, PERB Case No. 05-U-19, is granted.
2. PERB will seek judicial enforcement of paragraph 2 of the Board's Order in Slip Op. No. 1299 in the D.C. Superior Court unless full compliance with the Board's orders in the paragraph is documented to the Board *via* File & ServeXpress within 10 business days of the issuance of this Decision and Order.
3. AFSCME's Petition for Enforcement of Paragraphs 3, 4, 5 and 6 of the Board's Order in Slip Op. No. 1299, PERB Case No. 05-U-19, 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

By unanimous vote of Board Chairperson Charles Murphy, and Members Donald Wasserman, Keith Washington, Yvonne Dixon, and Ann Hoffman.

March 19, 2015

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-E-10, Op. No. 1512, was transmitted via File & ServeXpress and email to the following parties on this the 25th day of March, 2015.

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/s/ Colby J. Harmon
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