

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:)	
)	
American Federation of Government)	
Employees, Local 2725, AFL-CIO,)	
)	
Complainant,)	PERB Case No. 08-U-08
v.)	
)	Opinion No. 945
District of Columbia Department of Health,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

The American Federation of Government Employees, Local 2725, (“Complainant”, “Local 2725” or “Union”), filed an Unfair Labor Practice Complaint in the above-referenced case. The Union alleges that the District of Columbia Department of Health (“DOH”) violated Comprehensive Merit Personnel Act (“CMPA”). Specifically, the Complainant asserts that DOH has D.C. Code § 1-617.04(a) (5) by failing to fully comply with the terms of an agreement which settled a grievance. (See Compl. at p. 2).

DOH filed an answer denying that it has violated the CMPA and has requested that the Board dismiss the Complaint.

II. Discussion

On or about January 19, 2006, the Union filed a Step 1 grievance on behalf of Code Enforcement Inspector Keith Dixon. The grievance asserted a violation of Article 26, Section E of the parties’ Collective Bargaining Agreement (“CBA”), which addresses equal pay for substantially equal work. (See Compl. at p. 1).

On January 25, 2006, the Union received a copy of Management’s Step 1 response which was addressed to the grievant. “In the response, Gerard Brown, Program Manager, concluded that if the grievant provided him (Mr. Brown) with a written explanation from [his] doctor or

improve[d] [his] attendance [then] we can meet to discuss your promotion possibilities further.” (Compl. at pgs. 1-2). Since the Union did not receive a satisfactory Step 1 decision it filed a Step 2 grievance on February 8, 2006. The Union did not receive a Step 2 decision. (See Compl. at p. 2).

On February 27, 2006, the Union appealed the grievance to Step 3. (See Compl. at p. 2). The Union did not receive a response to the Step 3 grievance. As a result, on July 24, 2006, the Union appealed the grievance to Step 4. Thereafter, the Union was advised of DOH’s intent to resolve the grievance at Step 3. “On July 26, 2006, the parties executed a Step 3 Settlement Agreement. The parties’ Agreement provides for:

- a. promotion of the grievant to grade 7 with a retroactive promotion date of October 22, 2002, with back pay at grade 7 from October 22, 2002 until October 21, 2003, and
- b. promotion to grade 9, with back pay in an amount equaling the difference between the salary received and the grade 9 beginning October 22, 2003, until his salary is appropriately adjusted to the salary applicable to the grade 9 position.”

(Compl. at p. 2).

The Union asserts that the grievant was promoted to grade 9 in June 2007. However, to date, DOH has failed to pay the grievant any back pay. The Union contends that by the conduct described above, DOH is refusing to bargain in good faith, in violation of D.C. Code § 1-617.04(a) (5).¹ (See Compl. at p. 2).

Local 2725 is asking that the Board order DOH to: (1) fully comply with the terms of the settlement agreement by paying the grievant’s back pay; (2) pay fees and costs; (3) post a notice to employees; and (4) cease and desist from violating CMPA.

¹ D.C. 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.

DOH does not dispute the factual allegation underlying the asserted statutory violation. Instead, DOH claims that it “has made good faith efforts to implement the . . . [S]ettlement [A]greement including promoting Grievant to grade 9. . . is currently processing Grievant’s back pay.” (Answer at p. 3). For the above-noted reasons, DOH is requesting that the Complaint be dismissed.

After reviewing the pleadings, we believe that the material issues of fact and supporting documentary evidence are undisputed by the parties. As a result, the alleged violations do not turn on disputed material issues of fact, but rather on a question of law. Therefore, pursuant to Board Rule 520.10,² this case can appropriately be decided on the pleadings.

The Board has previously considered the question of whether the failure to implement an arbitrator’s award or settlement agreement constitutes an unfair labor practice. In *American Federation of Government Employees, Local 872, AFL-CIO v. D.C. Water and Sewer Authority*, 46 DCR 4398, Slip Op. No. 497 at p. 3, PERB Case No. 96-U-23 (1996), the Board held for the first time that “when a party simply refuses or fails to implement an award or negotiated agreement where no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and, thereby, an unfair labor practice under the CMPA.”

In the present case, DOH acknowledges that: (1) the parties signed a settlement agreement on July 26, 2006; (2) it agreed to pay the grievant back pay and (3) it has not paid the grievant’s back pay. (See Answer at p. 3). DOH asserts that the delayed compliance with the terms of the settlement agreement is not an unfair labor practice. (See Answer at p. 3).

After reviewing DOH’s arguments, we have determined that DOH’s failure to comply with the terms of the negotiated settlement agreement is not based on a genuine dispute over the terms of the settlement agreement, but rather on a flat refusal to comply with the agreement.³ We believe that DOH has no “legitimate reason” for its on-going refusal to comply with the terms of the settlement agreement. We conclude that DOH’s actions constitute a violation of its duty to bargain in good faith, as codified under D.C. Code § 1-617.04(a)(5) (2001 ed.). We find that by “these same acts and conduct, [DOH’s] failure to bargain in good faith with [AFGE] constitutes, derivatively, interference with bargaining unit employees’ rights in violation of D.C. Code § [1-617.04] (a)(1) (2001 ed.).” (Emphasis in original). *AFGE, Local 2725 v. D.C. Housing*

² Board Rule 520.10 provides as follows:

If the investigation reveals that there is no issue or fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument.

³ We recognize that the Union has asserted that the grievant was promoted to grade 9 in June 2007 and DOH states that the promotion took place in March 2007. However, DOH does not assert that this has created a genuine dispute over the terms of the settlement agreement or that this is the reason why it has not paid the back pay. Therefore, we believe DOH has failed to establish that a legitimate dispute exists.

Authority, 46 DCR 8356, Slip Op. No. 597 at p. 5, PERB Case No. 99-U-33 (1991). Also see, *Committee of Interns and Residents v. D.C. General Hospital*, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01.

Having determined that DOH has violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.), we now turn to the appropriate remedy in this case. The Complainant is asking that the Board order DOH to: (1) fully comply with the terms of the settlement agreement by paying the grievant's back pay; (2) pay fees and costs; (3) post a notice to employees; and (4) cease and desist from violating the CMPA.

"We recognize 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." *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). In light of the above, we are requiring that DOH post a notice to all employees concerning the violations found and the relief afforded, notwithstanding the fact that all employees may not have been directly affected. By requiring that DOH post a notice, "bargaining unit employees . . . would know that DOH has been directed to comply with their bargaining obligations under the CMPA." *Id.* at p. 16. "Also, a notice posting requirement serves as a strong warning against future violations." *Wendell Cunningham v. FOP/MPD Labor Committee*, 49 DCR 7773, Slip Op. No. 682 at p. 10, PERB Case Nos. 01-U-04 and 01-S-01 (2002).

Concerning the Complainant's request for reasonable costs, the Board first addressed the circumstances under which the awarding of costs to a party may be warranted in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). In that case, the Board concluded that it could, under certain circumstances, award reasonable costs.⁴

⁴ In the AFSCME case we noted as follows:

First any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively cataloged. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot foresee. What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged action is the undermining

In cases which involve an agency's failure to implement an arbitration award or a negotiated settlement, this Board has been reluctant to award costs. See, *AFGE, Local 2725 v. D.C. Housing Authority*, 46 DCR 6278, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999), and *American Federation of Government Employees, Local 2725 v. D.C. Department of Health*, Slip Op. No. 752, PERB Case No. 03-U-18 (2004). However, we have awarded costs when an agency has demonstrated a pattern and practice of refusing to implement arbitration awards or negotiated settlements. See, *AFGE Local 2725 v. D.C. Housing Authority*, 46 DCR 8356, Slip Op. No. 597 at p. 2, PERB Case No. 99-U-23 (1991).

In the present case, the parties executed a settlement agreement on July 26, 2006 and in its December 14, 2007 answer DOH acknowledged that it has not provided Mr. Dixon with his back pay. (See Answer at p. 3). Also, we have today considered a similar case (PERB Case No. 08-U-12) involving the same parties and the same violation of the law.⁵ We conclude that DOH's actions have established a pattern and practice of refusing to implement settlement agreements. We therefore find that it would be in the interest of justice to accord the Complainant its requested reasonable costs in these proceedings for prosecuting DOH's latest violation of this same nature. In light of the above, we grant the Complainant's request for reasonable costs.⁶

Next we will consider whether the awarding of interest is appropriate in this case. We have previously considered the question of whether the Board can award interest as part of the its "authority to 'make whole' 'those who the Board finds [have] suffered adverse economic effects in violation of . . . the Labor-Management Relations Section of the CMPA. . .'" *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 39 DCR 8594, Slip Op. No. 285 at p. 15, PERB Case No. 86-U-16 (1992). In the *UDCFA* case we stated the following:

The D.C. Superior Court has held that an "award requiring [that] . . . employee[s] be given back pay for a specific period of time establishes . . . a liquidated debt" and therefore is subject to the provisions of D.C. Code Sec. 15-108 which provides for prejudgment interest on liquidated debts at the rate of four percent (4%) per annum. See *American Federation of*

of the union among the employees for whom it is the exclusive bargaining representative.
Slip Op. No. 245, at p. 5.

⁵ In PERB Case No. 08-U-12 the parties executed a settlement agreement on March 1, 2007 which required that DOH change certain job titles and classifications, with step adjustments and back pay. DOH asserts that it has changed the job titles and classifications. However, DOH acknowledged in its December 2007 answer that the affected employees had not received any back pay. (See DOH's Answer in PERB Case No. 08-U-12 at p. 3).

⁶ The Board has made it clear that attorney fees are not a cost. See, *Cassie Lee v. AFGE, Local 872*, 54 DCR 2593, Slip Op. No. 802, PERB Case No. 04-S-07 (2007); and *AFGE, Local 2725 v. D.C. Department of Health and Office of Labor Relations and Collective Bargaining*, 54 DCR 2876, Slip Op. No. 841, PERB Case No. 05-U-30 (2007).

Government Employees, Local 3721 v. District of Columbia Fire Department, 36 DCR 7857, PERB Case No. 88-U-25 (1989) and *American Federation of State, County and Municipal Employees v. District of Columbia Bd. of Education*, D.C. Superior Court. Misc. Nos. 65-86 and 93-86, decided Aug. 22, 1986, reported at 114 Wash. Law Reporter 2113 (October 15, 1986). *Id* at p. 17.

Consistent with our holding in the *UDCFA* case, “we state, once again, that [an order directing back pay can] expressly and specifically include[] ‘prejudgement interest’ as part of [the Board’s] make-whole remedy.” *University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia*, 41 DCR 1914, Slip Op. No. 307 at p. 2, PERB Case No. 86-U-16 (1992). See also, *Fraternal Order of Police/MPD Labor Committee v. District of Columbia Metropolitan Police Department*, 37 DCR 2704, Slip Op. No. 242 PERB Case No. 89-U-07 (1990). Furthermore, that prejudgment interest shall be computed at the rate of four percent (4%) per annum. See *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 39 DCR 8594, Slip Op. No. 285 at p. 17, PERB Case No. 86-U-16 (1992) and *University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia*, 41 DCR 1914, Slip Op. No. 307 at p. 2, PERB Case No. 86-U-16 (1992).

Pursuant to the parties’ July 26, 2006 settlement agreement, DOH was required to promote Mr. Dixon to: (1) grade 7 with a retroactive promotion date of October 22, 2002, with back pay at grade 7 from October 22, 2002 until October 21, 2003; and (2) grade 9, with back pay in an amount equaling the difference between the salary received and the grade 9 beginning October 22, 2003, until his salary is appropriately adjusted to the salary applicable to the grade 9 position. (See Settlement Agreement). As previously discussed, DOH has promoted Mr. Dixon but has failed to provide him with his retroactive back pay. We find that DOH’s failure to fully implement the parties’ settlement agreement has resulted in Mr. Dixon suffering an adverse economic effect in violation of the CMPA. Therefore, as part of the Board’s make whole remedy, DOH is ordered to pay interest at the rate of 4% per annum for its failure to comply timely with the settlement agreement. Having determined that DOH shall pay interest, we now turn to the question of when the interest begins to accrue in this case. The Federal Labor Relations Authority (“FLRA”) considered this question in *Social Security Administration Baltimore, Maryland and American Federation of Government Employees*, 55 FLRA 246 (1999). In that case the FLRA determined that the Agency committed an unfair labor practice by failing to comply with an arbitrator’s award. The FLRA awarded interest based on the Agency’s failure to comply timely with the arbitrator’s award and found that pursuant to the Back Pay Act, 5 U.S.C. § 5596(b)(2)(A) and (B) interest on the back pay begins to accrue at the time that the Agency was obligated to pay the back pay and liquidated damages. *Id.* at 251. Specifically, the FLRA determined that the Agency was obligated to pay the back pay and liquidated damages

commencing from the date the award became final and binding.⁷ The FLRA's decision involves failure to timely implement an arbitrator's award directing that the Agency provide back pay and not failure to timely implement a settlement agreement requiring back pay. However, we find the FLRA's reasoning in the *Social Security Administration Baltimore, Maryland* case persuasive for the purpose of determining when interest begins to accrue. In the present case, the parties executed the settlement agreement on July 26, 2006. The settlement agreement became final and binding on that date. Therefore, we find that DOH was obligated to pay the back pay on that date. In light of the above, we find that interest in this case begins to accrue at the time that DOH was obligated to pay the back pay, namely, July 26, 2006.

ORDER⁸

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Health ("DOH"), its agents and representatives shall cease and desist from refusing to bargain in good faith with the American Federation of Government Employees, Local 2725, ("Complainant") by failing to comply with the terms of the July 26, 2006 settlement agreement.
2. DOH, its agents and representatives shall cease and desist from interfering, restraining or coercing its employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter XVII. Labor-Management Relations" of the Comprehensive Merit Personnel Act ("CMPA") to bargain collectively through representatives of their own choosing.
3. DOH shall within ten (10) days from the issuance of this Decision and Order fully implement the terms of the July 26, 2006 settlement agreement by providing Mr. Keith Dixon with retroactive back pay: (1) at grade 7 from October 22, 2002 until October 21, 2003, and (2) in an amount equaling the difference between the salary received and the grade 9 beginning October 22, 2003, until his salary is appropriately adjusted to the salary applicable to the grade 9 position. Also, DOH shall provide Mr. Dixon with interest on the back pay at the statutory rate of 4% per annum. The interest in this case

⁷ In the *Social Security Administration Baltimore, Maryland* case the FLRA determined that the arbitrator's award became final thirty days after service of the award. Therefore, the interest began to accrue thirty days after service of the award.

⁸ This Decision and Order implements the decision reached by the Board on May 20, 2008 and ratified on July 13, 2009.

shall begin to accrue from the date the settlement agreement became final and binding, namely July 26, 2006.

4. The Complainant's request for reasonable costs is granted for the reasons stated in this Slip Opinion.
5. DOH shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
6. Within fourteen (14) days from the issuance of this Decision and Order, DOH shall notify the Public Employees Relations Board ("Board"), in writing that the Notice has been posted accordingly. Also, within fourteen (14) days from the issuance of this Decision and Order, DOH shall notify the Board of the steps it has taken to comply with paragraph 3 of this Order.
7. The Complainant shall submit to the Board, within fourteen (14) days from the issuance of this Decision and Order, a statement of actual costs incurred in processing this complaint. The statement of costs shall be filed together with supporting documentation. DOH may file a response to the Complainant's statement of costs within fourteen (14) days from the service of the statement upon it.
8. DOH shall pay the Complainant the reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.
9. 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 1, 2009



Public
Employee
Relations
Board

Government of the
District of Columbia

717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, 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. 945, PERB CASE NO. 08-U-08 (September 1, 2009)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 945.

WE WILL cease and desist from refusing to bargain in good faith with the American Federation of Government Employees, Local 2725, AFL-CIO, by failing to comply with the terms of a settlement agreement over which no genuine dispute exists over the terms.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management Subchapter of the District of Columbia Comprehensive Merit Personnel Act.

District of Columbia Department of Health

Date: _____

By: _____

Director

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 compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717 14th Street, N.W., Suite 1150, Washington, D.C. 20005. Phone: (202) 727-1822.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.**

September 1, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-08 was transmitted via Fax and U.S. Mail to the following parties on this the 1st day of September 2009.

Eric Bunn, President
AFGE, Local 2725
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Washington, D.C. 20013-5960

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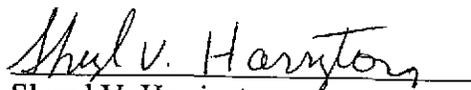
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Sheryl V. Harrington
Secretary