Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Corrections,	
Petitioner,	
and	PERB Case No. 07-E-02
	Opinion No. 1105
Fraternal Order of Police, Department of Corrections Labor Committee,	**Motion for Reconsideration**
	Corrected Copy
Respondent.	

DECISION AND ORDER

I. Statement of the Case

This matter involves a Motion for Reconsideration ("Motion") filed by the District of Columbia Department of Corrections ("DOC") of the District of Columbia Public Employee Relations Board's ("Board") "Supplemental Order" issued June 15, 2011. The Supplemental Order directed that the DOC pay the interest of $41,251.37 to the grievant, Officer Dexter Allen. This Order was issued following the Board's decision in Slip Op. No. 825, where the Board denied DOC's request for review of an arbitration award.1

On June 2, 2004, DOC filed an Arbitration Review Request ("Request") of an arbitration award ("Award") that sustained the grievance filed by the Fraternal Order of Police Department

1 Specifically, the Board found that DOC's request did not meet the requirements for reversing Arbitrator Fredenberger's Award. Moreover, the Board noted that DOC had the burden to specify applicable law and definite public policy that mandated that the Arbitrator reach a different result. The Board found that DOC failed to do so and concluded that denying an offset for interim earnings did not violate any specific law or public policy. Since DOC's argument did not present a statutory basis for review, the Board determined that it could not reverse the Award. In addition, the Board indicated that the Arbitrator's conclusions: (1) were supported by the record; (2) were based on a thorough analysis; and (3) could not be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' collective bargaining agreement. The Board concluded that no statutory basis existed for setting aside the Award. (See Slip Op. No. 825 at p. 13). In view of the above, DOC's Request was denied.

of Corrections Labor Committee ("FOP" or "Union") on behalf of Dexter Allen ("Grievant"). The Grievant had been discharged from his position as a corrections officer due to his alleged involvement in the strip search and incarceration of school students touring the correctional facility. Arbitrator Fredenberger found that the Grievant had not participated in any of the conduct related to the search and incarceration of the students. As a result, the Arbitrator rescinded the Grievant's termination and directed that the Grievant be returned to his position with full back pay, seniority, and with no deduction of interim earnings from back pay.

II. Background[2]

In their Request, DOC asserted that the Arbitrator exceeded his jurisdiction and was without authority by: (1) rendering an award that allowed for payment of back pay without deductions for interim earnings; (2) making the remedy unnecessarily punitive to the agency; (3) not addressing or making determinations regarding all of DOC's grounds for termination; and (4) having questionable competence.

Additionally, DOC claimed that the Arbitrator's Award was contrary to law and public policy because: (a) it provided for an award of back pay without deductions for interim earnings; (b) the Arbitrator's competence was questionable; (c) it violated the Fourth Amendment of the United States Constitution; and (d) the Award was unnecessarily punitive. (See Memorandum in Support of DOC's Request at pgs. 8-17).

In Slip Op. No. 825 DOC's Request was denied. Pursuant to D.C. Code § 1-617.13(c) "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order in the Superior Court of the District of Columbia by filing a request within 30 days after the final order has been issued." See also, Superior Court Civil Rules, Part XV, Agency Review, Rule 1. However, DOC made no timely appeal of Slip Op. 825.[3]

On September 10, 2007 and September 12, 2007, FOP filed two documents styled "Petition for Enforcement of PERB Decision and Order" ("Petition") and "Amended Petition for Enforcement of PERB Decision and Order" ("Amended Petition") of PERB Case No. 04-A-14 (Slip Op. No. 825).4 FOP contended that DOC failed to comply with Slip Op. No. 825.

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2 The factual background of the grievance arbitration matter can found at pgs. 2-3 of the Supplemental Order.

3 Slip Op. No. 825 was issued on October 19, 2006, and the Order indicated that pursuant to Board Rule 559.1 the Decision and Order is final upon issuance. Therefore, DOC was required to file its Petition for Review in the Superior Court within 30-days of the issuance of the final order-specifically by November 18, 2006. Since November 18, 2006, fell on a Saturday, the Petition due date was automatically extended to Monday, November 20, 2006. However, DOC did not file its Petition until November 24, 2006 which was four days after the appeal deadline.

4 The only difference between the language contained in the Petition and the Amended Petition, is the sequential

Specifically, FOP asserted that despite the Board's denial of DOC's Request, DOC did not provide Mr. Allen with his back pay as required by the Award. FOP requested that the Board enforce Slip Op. No. 825 and compel DOC to comply with the terms of Arbitrator Fredenberger's Award. Pursuant to Board Rules 560.2, 501.4 and 501.5, DOC was required to file its response no later than October 1, 2007. Despite the October 1, 2007 deadline, DOC did not file their response to the FOP's Petition until October 2, 2007.5 Therefore, DOC's response was filed one (1) day late. Further, the Board noted that DOC neither requested an extension of time nor provided a legitimate reason as to why their response was late.6

As DOC did not file a timely response to the Petition, the Board examined the response pursuant to Board Rule 560.3, which provides that "[f]ailure by the responding party to file an answer in accordance with Rule 520.6 and 520.77 may be construed as an admission of the petitioner's allegations." Consistent with Board Rule 560.3, the Board found that the material issues of fact and supporting documentary evidence were undisputed by the parties, and, therefore, it was clear that DOC had not complied with Arbitrator Fredenberger's Award. Specifically, DOC had not provided Dexter Allen with back pay as required. As a result, the Board considered whether DOC's actions had been reasonable.

(Slip Opinion No. 920 at p. 5).

The Board remarked that:

> it ha[d] been one year since our Order was issued. We believe that DOC has had more than a reasonable period of time to comply with the terms of Arbitrator Fredenberger's Award.
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> Also, DOC can no longer appeal the Board's Decision and Order in the Superior Court of the District of Columbia. Therefore, we believe that DOC's failure to comply with the terms of the Award is not based on a genuine dispute over the terms of

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order of the parties. Specifically, the original Petition names the Department of Corrections as the Petitioner and the FOP as the Respondent. However, in the Amended Petition the FOP is the named Petitioner and the Department of Corrections is the named Respondent. In light of the above, when used in this Decision and Order, the term "Petition" refers to both the Petition and the Amended Petition.

5 DOC filed their opposition via facsimile on October 2, 2007.

6 DOC's representative contacted the Board's Executive Director concerning DOC's intent to file a request for an extension of time. However, DOC did not follow-up by filing a request for an extension.

7 "Board Rule 520.7 provides in relevant part [that]: [a] respondent who fails a timely answer shall be deemed to have admitted the material facts alleged in the complaint and to have waived a hearing." Unions in *Compensation Unit 20 v. D.C. Department of Health*, 49 DCR 11131, Slip Op. No. 688 at p. 2, PERB Case No. 02-13 (2000).

> Arbitrator Fredenberger's Award, but rather on a flat refusal to comply with the Award. We find that DOC has no "legitimate reason" for its on-going refusal to make Mr. Allen whole by providing him with back pay with no off-set for interim earnings as required by Arbitrator Fredenberger's Award.8

(Slip Opinion No. 920 at pgs. 5-6).

As a result, the Board determined that DOC has not complied with Slip Op. No. 825 and granted FOP's Petition for Enforcement.9 In addition, the Board sought judicial enforcement of

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8 The Board noted that:

> Notwithstanding the untimeliness of DOC's response, we find that DOC's reason for not complying with the Board's October 19, 2006 Order is its belief that it is entitled to deduct interim earnings from Mr. Allen's back pay. In Slip Op. No. 825 we rejected DOC's argument that pursuant to Sections 8.1 and 8.11 of the District Personnel Manual, the agency could deduct interim earnings from Mr. Allen's back pay. However, in its Opposition to the Petition for Enforcement, DOC asserts for the first time that during the period after Mr. Allen was terminated by DOC, he was employed by the Department of Youth and Rehabilitation Services ("DYRS"), another District government agency. As a result, DOC claims that it is only obligated to pay Mr. Allen any difference between his salaries at DOC and DYRS, provided the latter is lower. DOC never raised this argument with either Arbitrator Fredenberger or with the Board. "Issues not presented to the arbitrator cannot subsequently be raised before the Board as a basis for vacating an award." *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee,* 39 DCR 6232, Slip Op. No. 282 at p. 4 n. 5, PERB Case No. 87-A-04 (1992). Arguments "not raised before [PERB], either prior to the Board's decision, or after in the form of a Request for Reconsideration," are waived and will not be considered. *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Public Employee Relations Board,* 516 A. 2d at 505 n. 5 (Citing D.C. Code §1-618.13 (b), recodified as D.C. Code § 1-617.13 (b)). In addition to the untimeliness of DOC's response, we find that DOC's argument, that it is entitled to deduct interim earnings for the period that Mr. Allen was employed by DYRS has been waived because the agency did not raise this issue before. Therefore, we conclude that no legitimate reason exist for DOC's continued refusal to implement Arbitrator Fredenberger's Award.

(Supplemental Order at pgs. 4-5, n. 6).

9 The Board also noted:

> While the Board was considering the Petition for Enforcement, on or about October 15, 2007, DOC reinstated Officer Allen to DOC. See *Public Employee Relations Bd. v. Dep't of Corrections*, 2008 CA 397 B, at 3 (Nov. 4, 2009).

(Supplemental Order at p. 5, n. 7).

its October 19, 2006 Decision and Order, as provided under D.C. Code § 1-617.13(b) (2001 ed.). The Board filed a Petition for Enforcement of its Decision and Order with the District of Columbia Superior Court on January 17, 2008. See Petition for Enforcement of Agency Decision and Orders, *Public Employee Relations Board v. Department of Corrections*, 2008 CA 397 B (Jan. 17, 2008). The Board grounded its Petition for Enforcement on the fact that it is an unfair labor practice for DOC to fail to implement the provisions of the Award. (*Id.* at 5, ¶ 25.) The Board, therefore, filed the petition to halt the continued unfair labor practice. (*Id.* at 6, ¶ 25.)

The Court affirmed the Board's Petition on October 23, 2010. (Order, *Public Employee Relations Bd. v. Dep't of Corrections*, 2008 CA 397 B, at 3 (Oct. 23, 2010) (Holeman, J.) Following additional litigation, on March 17, 2011, DOC paid Officer Allen $287,466 less taxes (a net amount of $197,049.40). (See *Praecipe*, *Public Employee Relations Bd. v. Dep't of Corrections*, 2008 CA 397 B (March 30, 2011)).

Following the March 31, 2011 hearing before Judge Brian Holeman, counsel for the Board requested that the parties submit pleadings to the Board stating their positions on DOC's compliance with the award. DOC submitted its brief and exhibits on April 6, 2011, claiming that it had fully complied with the Award, as neither the Board nor the Superior Court suggested that a different amount was owed following the submission of pay calculations to the Board and the Court. (Respondent's Report of Compliance with the [Board's] Decision for Enforcement, *Fraternal Order of Police/Metro. Police Dep't v. Dep't of Corrections*, _DCR_, Slip Op. No. 920, PERB Case No. 07-E-02 (Apr. 6, 2011).) In DOC's view, it has complied with the Award as worded. (*Id.*)

III. Discussion

FOP submitted a response on April 13, 2011, contending that DOC has not complied with the Award. (Ex. 2, Petitioner's Response to Respondent's Report of Compliance, *Fraternal Order of Police/Metro. Police Dep't v. Dep't of Corrections*, PERB Case No. 07-E-02 (Apr. 6, 2011).) In FOP's view, the award of interest is a matter that should be left to the Superior Court and should not be decided by the Board. (*Id.*) Nevertheless, in the May 9, 2011 status conference, Judge Holeman expressed an interest in having the Board issue a decision on this matter before proceeding further.

FOP's Petition for Enforcement requested that DOC pay all back pay and benefits **with interest** (including salary increases) to Officer Allen and reinstate him with the seniority to which he is entitled. FOP did not specify the rate of interest or the date interest should start to accrue.

In accordance with Board precedent, back pay will be ordered, with interest on the back pay, to remedy unfair labor practices, including the failure by a party to comply with an arbitration award. See *American Federation of Government Employees, AFL-CIO, Local 872 v.*

D.C. Water and Sewer Authority, 54 D.C.R. 2967, Slip Op. No. 858, PERB Case No. 07-U-02 (2006) (awarding back pay with 4% interest after WASA failed to reinstate grievants as ordered by an arbitrator). In addition, the Board has ordered interest pursuant to an unfair labor practice awards to make employees "whole" for economic harms they have suffered due to violations of the CMPA. See *American Federation of Government Employees, Local 3721 v. D.C. Fire Dep't*, 36 D.C.R. 434, Slip Op. No. 202, PERB Case No. 88-U-25 (1989) (ordering 4% interest on unfair labor practice remedy).

In this case, the Arbitrator ordered an equitable remedy, back pay without offset for interim earnings, for the period between the date of the award and the date of reinstatement. Following Officer Allen's reinstatement, the Arbitrator's equitable remedy no longer served the purpose of compelling DOC to comply with the Award. In light of DOC's continuing non-compliance with the Award after Officer Allen's reinstatement, the Board finds that an award of interest, for the purposes of making Officer Allen whole and to compel swift compliance with the award, is necessary.

D.C. Code § 28-3302(b) provides: "Interest, when authorized by law, on judgments or decrees against the District of Columbia, or its officers, or its employees acting within the scope of their employment, is at the rate of not exceeding 4% per annum." No party has made any showing that an interest rate below the maximum 4% would be appropriate. Furthermore, 3 years and 153 days elapsed between October 19, 2007 and March 17, 2011. The principle amount is $287,466. The total interest owed under these circumstances would be $41,251.37. Thus, the Board directs DOC to pay interest, as calculated above, for the period at issue.

Motion for Reconsideration

As stated above, the instant matter before the Board is DOC's Motion for Reconsideration, which asserts:

> Pursuant to PERB Rule 559.2, the Respondent, District of Columbia Department of Corrections (DOC), moves for reconsideration of the Decision and Order entered in this case on June 15. 2011. The reason is simple: The decision contains a sentence that is factually wrong. At the bottom of page 6, the decision states: "No party has made any showing that an interest rate below the maximum 4% would be appropriate." This is a misstatement of the record in this case.
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> In fact, on May 20, 2011, DOC filed "Respondent's Supplemental Brief Urging No Interest Be Awarded Herein." It is undisputed that DOC filed this brief. DOC's brief of May 20, 2011, can be fairly read to say that DOC urged the correct rate of

interest to be 0%.

(Motion at p. 1)(citations omitted).

In addition, DOC's contends that the Board should: find that "payment of the unreduced back pay does not do any fundamental justice"; "give DOC a credit for the payment and not award interest. . . . [and] not consider the amounts of money Dexter Allen has received when considering whether to award interest or not"; and find "that [the Board's] decision issued on June 15, 2011 [has] made [the grievant] whole already." (Motion at pgs. 3-7).

The Union opposes the Agency's Motion and argues that: (1) pursuant to Board Rule 559.2, the Agency did not timely file its request for reconsideration.10 (See Opposition at p. 1). Specifically, FOP contends that:

> that "[th]e Board's Decision and Order shall not become final if any party files a motion for reconsideration within ten (10) days after issuance of the decision...." According to the Agency's motion, which was filed with PERB on June 29, 2011, it was requesting reconsideration of "the Decision and Order entered in this case on June 15, 2011." Clearly more than ten days passed between PERB's Decision and Order and the Agency's request for reconsideration.

(Opposition at p. 2).

In addition, the Union asserts that:

> As a matter of law, interest on an action to recover a liquidated debt in the District is not only recoverable, but mandatory. Petitioner previously argued before Judge Holeman that the mandatory award of prejudgment interest on a liquidated debt is codified in D.C. Code § 15-108. See also *Giant Food. Inc. v. Jack I. Bender & Sons*. 399 A.2d 1293, 1305 (D.C. 1979) (quoting D.C. Code § 15-108 that "the judgment for the plaintiff shall include interest on the principal debt from the time it was due and payable ... until paid.") (emphasis in original) (internal citation omitted).

(Opposition at pgs. 2-3).

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10 Board Rule 559.2 provides that "[t]he Board's Decision and Order shall not become final if any party files a motion for reconsideration within ten (10) days after issuance of the decision, or if the Board reopens the case on its own motion within ten (10) days after issuance of the decision, unless the order specifies otherwise.

After reviewing the Agency's motion, the Board concludes that the Agency's arguments concerning its obligation to remit interest as directed in the Supplemental Order amounts to nothing more than a disagreement with Board's previous findings. Moreover, we find that a mere disagreement with the Board's decision is not a sufficient basis for reversing that decision, and the Motion does not raise any new issues. Furthermore, DOC's assertion that its briefed position against awarding interest in this case renders the Board's finding that: "'[n]o party has made any showing that an interest rate below the maximum 4% would be appropriate.' . . . is a misstatement of the record" is disingenuous at best. As a result, the Board concludes that the DOC has failed to assert any grounds for the Board to reverse the Board's prior decision. See *White v. District of Columbia Department of Corrections and FOP/DOC Labor Committee*, 49 DCR 8973, Slip Op. No. 686, PERB Case No. 02-U-15 (2002).

As to the Union's request to dismiss the motion based on timeliness, the Board finds the Motion timely. Pursuant to Board Rule 501.5:

> Computation - Weekends and Holidays
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> In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included. If the last day of a prescribed period falls on a Saturday, Sunday or District of Columbia holiday, the period shall extend to the next business day. If a prescribed time period is less than eleven (11) days, Saturdays, Sundays, and District of Columbia holidays shall be excluded from the computation. Whenever the prescribed time period is eleven (11) days or more, such days shall be included in the computation.

As stated above, Board Rule 559.2 allows ten (10) days for a party to file a motion for reconsideration. Here, the Board's decision and order was issued on June 15, 2011. According to Board Rules 501.5 and 559.2, the motion was due no later than June 29, 2011. The Board received the Motion on June 28, 2011. As a result, the Board deems the Motion timely.

In view of the above, the Board finds that the Board's Supplemental Order was reasonable and supported by Board precedent. Therefore, we deny DOC's Motion for Reconsideration and affirm the Board's previous decision and order.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The District of Columbia Department of Correction's Motion for Reconsideration is denied.

(2) 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.

Date: October 7, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-E-02 was transmitted via Fax and U.S. Mail to the following parties on this the 7th day of October 2011.

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