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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,)
Petitioner,)
and)
District of Columbia Public Schools,)
Respondent.)
_____)

PERB Case No. 12-E-10
Opinion No. 1518
Motion for Reconsideration

DECISION AND ORDER

I. Statement of the Case

Before the Board is a Motion for Reconsideration (“Motion”) filed on or about April 8, 2015, by the District of Columbia Public Schools (“DCPS”). DCPS requests that the Board reconsider its March 25, 2015, Decision and Order in Slip Op. No. 1512 (hereinafter “Slip Op. No. 1512”), in which the Board granted in part and denied in part an Enforcement Petition (“Petition”) filed by American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO (“AFSCME”). DCPS asserts that Slip Op. No. 1512 is contrary to PERB precedent because “a genuine dispute exists over the terms of the underlying decision” (found in 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) (hereinafter “Slip Op. No. 1299”). For the reasons stated herein, the Board rejects DCPS’ arguments and denies DCPS’ Motion.

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 providing AFSCME advance 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 in PERB Case No. 05-U-19 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.¹ 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 findings² that: (1) because DCPS did not file an answer in the case, all of the material facts were deemed admitted³; (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 terms⁴; (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.⁵

Upon finding that the hearing examiner’s findings and recommendations were reasonable, supported by the record, and consistent with PERB precedent,⁶ the Board, in pertinent part, ordered the following:

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

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

² *Id.* at 3-4, 6.

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

⁴ *Id.* at 2, 4.

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

⁶ *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).

20, Local 2921 and by failing to comply with the Applewhite Award as it pertains to notifications about reductions in force.

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

On or about September 6, 2012, AFSCME filed a Petition for Enforcement ("Petition"), alleging that 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."⁷ The Petition's Certificate of Service certified that the Petition was duly served by 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.⁸ Notwithstanding, DCPS did not file a response to AFSCME's Petition.

On March 25, 2015, the Board issued Slip Op. No. 1512, in which it granted AFSCME's Petition in part, and denied it in part.⁹ Specifically, the Board found that because DCPS "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 in File & ServeXpress within 10 business days of the issuance of this Decision and Order."¹⁰

DCPS now asks PERB to reconsider its finding, arguing that there exists "a genuine dispute" concerning the Board's Order in Slip Op. No. 1299.¹¹

III. Analysis

The Board has repeatedly held that "a motion for reconsideration cannot be based upon mere disagreement with its initial decision."¹² Additionally, the moving party must provide

⁷ (Petition at 2).

⁸ (Petition at Cert. of Service).

⁹ *American Federation of State, County and Municipal Employees, Local 2921, AFL-CIO v. District of Columbia Public Schools*, Slip. Op. No. 1512, PERB Case No. 12-E-10 (March 25, 2015) (holding that the Board will seek enforcement of paragraph 2 in its Order in Slip Op. No. 1299, but will not seek enforcement of paragraphs 3-6 in the Order).

¹⁰ *Id.* at 6.

¹¹ (Motion at 4-5) (citing *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 5006, Slip Op. No. 966 at p. 5, PERB Case No. 08-E-02 (2009)).

¹² See *Candi Peterson v. Washington Teachers Union*, Slip Op. No. 1254 at ps. 2-3, PERB Case No. 12-S-01 (March 28, 2012); see also *University of the District of Columbia Faculty Association/National Education Association v. University of the District of Columbia*, 59 D.C. Reg. 6013, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26 (2009); and *American Federation of Government Employees, Local 2725 v. District of Columbia Department of Consumer and Regulatory Affairs and District of Columbia Office of Labor Relations and Collective Bargaining*, 59 D.C. Reg. 5041, Slip Op. No. 969 at ps. 4-5, PERB Case No. 06-U-43 (2003).

authority which “compels reversal” of the Board’s initial decision.¹³ Lastly, a party that has failed to raise certain arguments or to file appeals in a timely manner waives its right to raise or challenge those specific issues for the first time in a Motion for Reconsideration.¹⁴

A. DCPS Cannot Raise its “Genuine Dispute”/“Legitimate Reason” Exception for the First Time in its Motion for Reconsideration.

In its Motion in this case, DCPS relies on *FOP v. MPD, supra*, Slip Op. No. 966, PERB Case No. 08-E-02. DCPS argues that therein, the Board held that a “genuine dispute” over the terms of an award or order may provide a “legitimate reason” for failing to comply with that award or order.¹⁵ DCPS alleges that the “plain language” of the Board’s Order in Slip Op. No. 1299 never expressly ordered DCPS to process AFSCME’s June 15, 2004 Grievance, and that the Order’s lack of clear direction established a “legitimate reason” for DCPS’s failure to process the Grievance.¹⁶ Accordingly, DCPS argues that its failure to process the Grievance was not deliberate.¹⁷

The Board wholly rejects DCPS’ contention, and finds that DCPS’ reliance on *FOP v. MPD, supra*, Slip Op. No. 966, PERB Case No. 08-E-02 is misplaced. In that case, the Board found the following:

Consistent with D.C. Code § 1-617.13(c) and Superior Court Rule 1, MPD could have filed a Petition for Review of Agency Decision in the Superior Court of the District of Columbia within thirty days of the [...] Board[’s] Decision and Order. However, MPD did not file a Petition for Review. Therefore, MPD has waived its right to appeal the Board’s [...] Decision and Order in the Superior Court of the District of Columbia. In view of the above, we believe that MPD’s failure to comply with the terms of the Award is not based on a genuine dispute over the terms of [the Arbitrator’s] Award, but rather on a flat refusal to comply with the Award. We find that MPD has no “legitimate reason” for its on-going refusal to [comply with the Award].¹⁸

¹³ *UDC Faculty Assoc. v. UDC, supra*, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26; *see also AFGE, Local 2725 v. DCRA and OLRCB, supra*, Slip Op. No. 969 at ps. 5, PERB Case No. 06-U-43.

¹⁴ *AFGE, Local 2725 v. DCRA and OLRCB, supra*, Slip Op. No. 969 at p. 5, PERB Case No. 06-U-43; *see also FOP v. MPD, supra*, Slip Op. No. 966 at p. 5, PERB Case No. 08-E-02; *American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 50 D.C. Reg. 5077, Slip Op. No. 712 at p. 4, PERB Case No. 03-U-17 (2003); *and American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 51 D.C. Reg. 4170, Slip Op. No. 731 at p. 2, PERB Case No. 03-U-17 (2003).

¹⁵ *FOP v. MPD, supra*, Slip Op. No. 966 at p. 4-5, PERB Case No. 08-E-02.

¹⁶ (Motion at 4-5).

¹⁷ *Id.* at 5.

¹⁸ *See* p. 5.

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The Board has applied a similar analysis in numerous other cases, reasoning that if the non-complying party failed to file an appeal of the award or order, then there could not be a “genuine dispute” giving rise to a “legitimate reason” that justified that party’s failure to comply with the award or order.¹⁹ The purpose behind the Board’s reasoning is clear: if a party “genuinely disputes” an award or order, it must exhaust its administrative and adjudicative remedies in an effort to resolve those disputes. Otherwise, a party could simply refuse to comply with an award or order just because it disagreed with it.²⁰

In this case, DCPS’ Motion for Reconsideration is the first time that DCPS has filed any pleading in PERB Case No. 05-U-19 or in the instant PERB Case No. 12-E-10 asserting that the Board’s 2012 Order in Slip Op. No. 1299 was somehow unclear. As the Board noted in its initial Decision in this matter (Slip Op. No. 1512), DCPS 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 in PERB Case No. 05-U-19.²¹

Although DCPS did attempt to raise its argument that the Order was unclear in a March 3, 2015, email to a PERB staff-member during PERB’s investigation of AFSCME’s Petition for Enforcement in PERB Case No. 12-E-10, the Board summarily dismissed that effort, stating:

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.

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

¹⁹ See, i.e. *AFSCME, Local 2921 v. DCPS*, *supra*, Slip Op. No. 712 at p. 4, PERB Case No. 03-U-17; *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 ps. 5-6, PERB Case No. 07-E-02 (2007); and *American Federation of Government Employees, Local 2725 v. District of Columbia Department of Consumer and Regulatory Affairs and District of Columbia Office of Labor Relations and Collective Bargaining*, 59 D.C. Reg. 5347, Slip Op. No. 930 at 9, PERB Case No. 06-U-43 (2008).

²⁰ *Id.*; see also *AFGE, Local 2725 v. DCRA and OLRCB*, *supra*, Slip Op. No. 969 at p. 5, PERB Case No. 06-U-43.

²¹ *AFSCME, Local 2921 v. DCPS*, *supra*, Slip Op. No. 1512 at ps. 4-5, PERB Case No. 12-E-10.

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

Thus, because DCPS did not appeal or seek clarification of the Board's Order in Slip Op. No. 1299, and because it did not file a Response to AFSCME's Petition for Enforcement in PERB Case No. 12-E-10, the Board finds that DCPS cannot now raise its argument that the Board's Order in Slip Op. No. 1299 was somehow unclear for the first time in the instant Motion for Reconsideration.²³ Moreover, even if DCPS could raise its argument for the first time here, the Board would still find that DCPS' reasons for failing to process AFSCME's Grievance—deliberate or not—would not qualify as a “genuine dispute” or “legitimate reason” because DCPS did not appeal or seek any clarification of the Board's Order in Slip Op. No. 1299. Accordingly, DCPS' Motion on this asserted basis is denied.

B. The Board's Findings in Slip Op. No. 1512 Did Not Legitimize DCPS' Interpretation of the Board's Order in Slip Op. No. 1299.

DCPS argues that when the Board stated in Slip Op. No. 1512 that the Order in Slip Op. No. 1299 “unquestionably required DCPS to process AFSCME's June 15, 2004 Grievance,”²⁴ the Board actually legitimized DCPS' position that the Order was unclear because it “emphasiz[ed] the existing issues with the [...] order.”²⁵ DCPS reasons that “[i]f the Board's directive to process the June 15, 2004 grievance was clear from the prior Decision and Order, there would be no need to address the Board's intentions from the Decision and Order in question.”²⁶ This argument misrepresents the Board's position and reasoning. As stated previously, the Board in Slip Op. No. 1512 expressly declined to “entertain” DCPS' attempt to parse the language of the Board's Order in Slip Op. No. 1299 because DCPS had, in all previous opportunities, failed to file any pleadings objecting to the Order. Accordingly, the Board found that DCPS had forfeited its right to challenge the intent of the Order, which, the Board stated, was clear and unambiguous.²⁷

Notwithstanding, the Board noted through *dicta* that even if it had addressed the merits of DCPS' argument, DCPS' position would still 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.”²⁸ The Board reasoned the following:

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,

²² *Id.* at 5.

²³ See *AFGE, Local 2725 v. DCRA and OLRCB, supra*, Slip Op. No. 969 at p. 5, PERB Case No. 06-U-43.

²⁴ *AFSCME, Local 2921 v. DCPS, supra*, Slip. Op. No. 1512 at p. 5, PERB Case No. 12-E-10.

²⁵ (Motion at 5).

²⁶ *Id.*

²⁷ *AFSCME, Local 2921 v. DCPS, supra*, Slip. Op. No. 1512 at p. 5, PERB Case No. 12-E-10.

²⁸ *Id.* at 5-6.

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 not just all similar subsequent grievances, but that very Grievance as well.²⁹

In other words, the Board simply made it clear to DCPS that its Order in Slip Op. No. 1299 unquestionably required DCPS to process AFSCME's 2004 Grievance as well as all future similar grievances.³⁰ As AFSCME correctly reasoned in its Opposition to DCPS' Motion, to interpret the Board's Order to mean that the Board had granted relief in future similar matters, but not in the matter at hand, would be "irrational".³¹ Therefore, the Board rejects DCPS' argument that the Board's discussion of what it ordered in Slip Op. No. 1299 somehow legitimized DCPS' position that the Order was unclear.

C. DCPS Has Not Provided Any Authority That "Compels Reversal" of the Board's Initial Decision in Slip Op. No. 1512.

The Board noted in Slip Op. No. 1512 that D.C. Official Code § 1-617.13(b) expressly authorizes the Board to interpret its own orders and to determine whether or not its orders have been complied with as long as its conclusions are supported by substantial evidence from the whole record.³² Additionally, the Board noted that PERB Rules 560.2 and 560.3 state that after a petition for enforcement has been filed, "the responding party shall have ten (10) days from service to respond to the petition", and that "[f]ailure by the responding party to file [a response] ... may be construed as an admission of the petitioner's allegations."³³

The Board's finding in Slip Op. No. 1512 was more than adequately supported by substantial evidence from the whole records of PERB Case Nos. 05-U-19 and 12-E-10. It is undisputed that: (1) DCPS did not challenge or appeal the Applewhaite Award; (2) did not file an answer to AFSCME's complaint in PERB Case No. 05-U-19; (3) did not appeal the Board's Order in Slip Op. No. 1299; and (4) did not file a response to AFSCME's Petition for Enforcement in PERB Case No. 12-E-10.³⁴ Nevertheless, the Board still weighed all of the facts and evidence before it and, in accordance with its express authority under the statute and PERB's Rules, reasonably determined that DCPS had not processed AFSCME's 2004 Grievance and that judicial enforcement of the Order in the D.C. Superior Court was therefore warranted.³⁵ In its Motion, DCPS has not pointed to any substantial evidence that disproves the Board's findings, nor has it provided any authority that "compels reversal" of the Board's Decision.³⁶ Therefore, the Board denies DCPS' Motion for a Reconsideration of that Decision.

²⁹ *Id.* at 5-6.

³⁰ *Id.*

³¹ (Opposition to Motion for Reconsideration at 1).

³² *AFSCME, Local 2921 v. DCPS, supra*, Slip Op. No. 1512 at p. 4, PERB Case No. 12-E-10.

³³ *Id.* at 4.

³⁴ *Id.* at 4-7.

³⁵ *Id.* at 4-7.

³⁶ See *UDC Faculty Assoc. v. UDC, supra*, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26.

D. Conclusion

Based on the foregoing, the Board finds that DCPS' Motion constitutes nothing more than a mere disagreement with the Board's initial Decision in Slip Op. No. 1512.³⁷ Thus, the Motion is denied. Accordingly, as stated in the Board's Order in Slip Op. No. 1512, the Board 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 paragraph is documented to the Board in File & ServeXpress within 10 business days of the issuance of this Decision and Order.³⁸

ORDER

IT IS HEREBY ORDERED THAT:

1. DCPS' Motion for Reconsideration of the Board's Decision in Slip Op. No. 1512 is denied.
2. 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.
3. 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 Order in paragraph 2 is documented to the Board in File & ServeXpress within 10 business days of the issuance of this Decision and Order.
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, and Ann Hoffman. Member Yvonne Dixon was not present.

April 24, 2015

Washington, D.C.

³⁷ See *Peterson v. WTU*, *supra*, Slip Op. No. 1254 at ps. 2-3, PERB Case No. 12-S-01.

³⁸ 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).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-E-10, Op. No. 1518 was transmitted by File & ServeXpress to the following parties on this the 28th day of April, 2015.

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PERB