

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:)
)
Council of School Officers, Local 4, American)
Federation of School Administrators, AFL-CIO,) PERB Case No. 05-U-34
)
Complainant,)
v.)
) Opinion No. 903
)
District of Columbia Public Schools,)
)
Respondent.)
_____)



DECISION AND ORDER

I. Statement of the Case:

The Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO (“Complainant” or “Union”), filed an unfair labor practice complaint against the District of Columbia Public Schools (“Respondent” or “DCPS”) alleging a violation of D.C. Code § 1-617.04(a)(1), (3) and (5) and the parties’ collective bargaining agreement (“CBA”). Specifically, the Complainant asserts that the DCPS failed to resolve Step 2 grievance hearings in a timely manner as required by the CBA. As a remedy, the Complainant requested that the Board order DCPS to render decisions in its Step 2 grievances in a timely manner and that the Board award fees¹ and costs pursuant to D.C. Code § 1-617.13(d).

The Respondent filed an Answer (“Answer”) denying that they violated the Comprehensive Merit Personnel Act (“CMPA”). The Respondent also asserted that the Board lacks jurisdiction to award attorney fees.

A hearing was held in this matter. The Hearing Examiner issued a Report and Recommendation (R&R”) finding that the Respondent violated D.C. Code § 1-

¹ Petitioner does not expressly request attorney fees.

617.04(a)(1) and (5) by failing to issue Step 2 grievances in a timely manner. The Hearing Examiner recommended that the Board order the Respondent to adhere to the deadlines required by the CBA and pay the Complainant's costs in bringing the Complaint as authorized by D.C. Code § 1-617.13(d)]

The parties did not file exceptions to the R&R. The Hearing Examiner's R&R is before the Board for disposition.

II. Discussion:

On March 25, 2005, Union President Lucas wrote to Superintendent Clifford Janey expressing the Union's concern that grievances were not being processed at the Step 2 level within the 20-day time frame required by the CBA. President Lucas identified five grievances at the Step 2 level that had been heard by the Superintendent's designee (i.e. DCPS' designated hearing officer), but were still awaiting a Step 2 decision. At the time of President Lucas' letter in March of 2005, the elapsed times since the hearing officer's hearings were: (a) 7-1/2 months for R. Mark Harris; (b) 2 months for Martin Cherry; (c) 8-1/2 months for El-Kahina Hunt; (d) 6-1/2 months for Denise Keeling; and (e) 4 months for Raymond Miller. (See R&R at pgs. 3-4).

Superintendent Janey responded by letter of April 12, 2005, informing President Lucas that recommendations on improving the timeliness situation were under consideration and that a reply to President Lucas would take place "in the very near future." (R&R at p. 5). President Lucas stated that no further response came from DCPS after the April 12, 2005 letter. (See R&R at p. 5). The Union filed the instant unfair labor practice complaint on May 5, 2005. In its Answer, DCPS did not dispute its failure to meet the timeliness requirement of the parties' CBA. However, DCPS contended that the Union still had the ability to invoke arbitration in order to resolve grievances. DCPS also denied refusing to follow the grievance process or failing to bargain in good faith. (See Answer at p. 4). In addition, DCPS claimed that the Board lacked jurisdiction to award attorney fees.

At the hearing held on October 26, 2005, President Lucas indicated that only two hearing officer decisions had been issued in the cases named above and the Union was awaiting an additional Step 2 decision. (See R&R at p. 5).

The issues presented to the Hearing Examiner were:

- (1) Did the Respondent, DCPS, fail to comply with the timeliness requirement for responding to Step 2 grievances found in the parties' CBA?
- (2) If so, did Respondent, DCPS, violate D.C. Code § 1-617.04(a)(1), (3) and (5) by failing to abide by the negotiated time frames of the Step 2 grievance process?

(See R&R at p. 5).

The parties' CBA, Article VIII, provides, in pertinent part, as follows:

B. General

* * *

6. All time limits set forth in this Article may be extended by mutual consent, but if not so extended, they must be strictly observed. If the matter in dispute is not resolved within the time period provided for any step, the next step may be invoked. However, if any party fails to pursue any step within the time limits provided, the party shall have no further right to press the grievance.

* * *

C. Procedure

1. Informal

Within ten (10) work days of the event giving rise to the grievance, the officer [*i.e.* employee] will orally present the grievance to the officer's immediate supervisor or designee . . . [T]he supervisor or designee shall give an answer orally to the officer.

2. Formal

- a. *Step 1.* Within five (5) work days of the oral answer, if the grievance is not resolved, it shall be reduced to writing, signed by the grievant and presented to the same person(s) referred to in the informal step . . . Within five (5) work days after receiving the grievance, the immediate supervisor or designee shall communicate an answer in writing to the grievant and to the Council.
- b. *Step 2.* Within five (5) work days of receipt of the written answer, if the grievance is not resolved, the grievant may file the same written grievance with the Superintendent of Schools . . . Within ten (10) work days of receipt of the written grievance, the Superintendent or the Superintendent's designee . . . shall meet with the grievant (and representative) for a full review of all the facts and

contentions involved and render a written decision thereon within twenty (20) work days of such meeting.

- c. Step 3. If the Council is dissatisfied with such decision, provided that no provision of this Agreement which is stated to be a matter of policy shall be subject to arbitration, the Council may request arbitration of the dispute.

The Hearing Examiner found that DCPS violated the parties' CBA by failing to timely process grievances at the Step 2 level. (See R&R at p. 5). The Hearing Examiner next focused upon whether DCPS' violation constituted an unfair labor practice. D.C. Code § 1-617.04(a)(1), (3) and (5) provide as follows:

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

* * *

(3) Discriminating in regard to hiring or tenure of employment or any term and condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter;

* * *

(5) Refusing to bargain collectively in good faith with the exclusive representative.

The Hearing Examiner found that the delay in processing grievances caused "the Union's membership to question the Union and its ability to enforce the agreed upon terms of the collective bargaining agreement." (R&R at p. 6). In addition, the Hearing Examiner noted that the delays caused the Union to proceed directly to arbitration, which is a comparatively expensive process. (See R&R at p. 6). The Hearing Examiner also determined that the record showed "a recurrent pattern by [DCPS] demonstrating that [DCPS] is not providing timely decisions at the Step 2 level." (R&R at p. 8). Thus, the Hearing Examiner concluded that DCPS' "failure to implement the collective bargaining agreement violates its duty to bargain in good faith. . . . and constituted an unfair labor practice under D.C. Code § 1-617.04(a)(5), and by extension D.C. Code § 1-617.04(a)(1)." (R&R at p. 8).

The Hearing Examiner also examined the Unions allegations regarding DCPS' violation of D.C. Code § 1-617.04(a)(3), which prohibits discrimination in regard to

hiring, tenure of employment, or terms and conditions of employment to encourage or discourage membership in a union. The Hearing Examiner found that "the Union's Post Hearing Brief does not address this Subsection (a)(3) charge, and it appears this aspect of the ULP complaint has been abandoned. Moreover, I find the evidence in the limited record in this case does not support a finding of a § 1-617.04(a)(3) violation, and I therefore recommend the Union's charge of a § 1-617.04(a)(3) violation be dismissed." (R&R at pgs. 8-9).

In light of the above, the Hearing Examiner recommended that DCPS: (1) be found to have violated D.C. Code § 1-617.04(a)(1) and (5); (2) be ordered to cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) and issue all pending Step 2 grievances within 10 business days; (3) be ordered to abide by the deadlines of the grievance process set forth in the parties' CBA; (4) post a notice advising the bargaining unit members of DCPS' unfair labor practice; and (5) pay the Union's costs in bringing this action. (See R&R at pgs. 9-10). Neither party filed exceptions to the Hearing Examiner's Report and Recommendation.

The Board has held that "[i]n general, claims alleging a violation of the parties' collective bargaining agreement are not unfair labor practices under the CMPA." *American Federation of Government Employees, Local 872, AFL-CIO v. District of Columbia Water and Sewer Authority*, 46 DCR 4398, Slip Op. No. 497 at p. 2, PERB Case No. 96-U-23 (1999). Also, "[it] has previously held that disputes over the meaning or application of a collective bargaining agreement are matters for resolution through the grievance procedure rather than an Unfair Labor Practice Complaint." *Teamsters Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 DCR 6633, Slip Op. No. 400 at p. 7, PERB Case No. 93-U-29 (1996). "However, we have held that a party's refusal to implement a viable collective bargaining agreement is an unfair labor practice." *Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 DCR 6633, Slip Op. No. 497 at p. 3, PERB Case No. 96-U-23 (1996). Further, we have found that "such conduct constitutes a repudiation of the collective bargaining process and a violation of the duty to bargain." *Id.* The duty to bargain in good faith includes "the obligation to take reasonable efforts to insure the effectiveness of agreements actually reached." *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 46 DCR 7228, Slip Op. No. 485 at p. 5, PERB Case No. 96-U-14 (1996). An agency's "failure to bargain in good faith with [the Union] constitutes, derivatively, interference with bargaining unit employees' rights in violation of D.C. Code § 1-617.04(a)(1) (2001 ed.)." *AFGE, Local 2725 v. D.C. Housing Authority*, 46 DCR 8356, Slip Op. No. 597 at p. 5, PERB Case No. 99-U-33 (1991) (emphasis in the original).

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed record and the findings, conclusions and recommendations of the Hearing

Examiner and the entire record. See *Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 DCR 5585, Slip Op. No. 375 at p. 2, PERB Case No. 93-U-11 (1994). The Board hereby adopts the Hearing Examiner's finding and conclusion that the allegations contained in the Complaint that DCPS violated D.C. Code § 1-617.04(a)(1) and (5). We also adopt the Hearing Examiner's conclusion that the evidence did not support a violation of § 1-617.04(a)(3).

III. Remedy:

Having adopted the Hearing Examiner's finding that DCPS has violated D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.), we now turn to what is the appropriate remedy in this case. The Union is requesting that the Board order DCPS to: (1) abide by deadlines set forth in the parties' CBA with respect to Step 2 grievance decisions; (2) require all hearing officers who hear Step 2 grievances to render their decisions within the time required by the parties' CBA; (3) require all hearing officers who have been assigned cases where a decision has not been rendered in a timely manner and is still outstanding to render any such decision within 10 days of the Board's Order; (4) post an appropriate notice advising the bargaining unit that DCPS committed an unfair labor practice by failing to timely render decisions in Step 2 hearings and that DCPS will cease and desist from such violations in the future; (5) award costs and fees pursuant to D.C. Code § 1-617.13(d); and (6) take such other action as PERB deems necessary and appropriate to remedy the unfair labor practices. (See Complaint at pgs. 3-4).

"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 DCPS 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 DCPS post a notice, "bargaining unit employees . . . would know that [DCPS] 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*, Slip Op. No. 682 at p. 10, PERB Case Nos. 01-U-04 and 01-S-01 (2002).

Concerning the Union's request for reasonable costs pursuant to D.C. Code § 1-617.13(d), the Board first addressed the circumstances under which the awarding of costs to a party may be warranted in *AFSCME, District 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 stated:

First, any such award of costs necessarily assumes that the party to whom the payment is 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 of the union among the employees for whom it is the exclusive bargaining representative. (Slip Op. No. 245, at p. 5). We find that the violations committed by DCPS meet the above criteria. . DCPS' actions clearly constitute a failure to bargain in good faith and had the effect of interfering, restraining and coercing employees in the exercise of their rights under the CMPA.

DCPS clearly failed to comply with the CBA requirement for timely responses to Step 2 grievances. Specifically, DCPS failed to process three out of the five grievances alleged in the Complaint and accumulated another grievance while the Complaint was pending. Further, in its Answer, DCPS suggests that arbitration is a valid substitute for complying with its contractual obligations to meet Step 2 of the grievance procedure. However, we note that Step 2 is the last step in the parties' CBA which provides for resolution of a contractual dispute without the need of a neutral and costly intervention. The evidence demonstrates that DCPS' failure was not mere negligence but was a bad faith course of action. This pattern of non-compliance with the CBA constitutes a failure to bargain in good faith. Delaying the resolution of grievances has the effect of interfering with, restraining and coercing employees in the exercise of their rights under the CMPA. DCPS' refusal to abide by the Step 2 grievance timeliness requirements also had the reasonably foreseeable result of undermining the Union representing the bargaining unit. This meets the interest of justice standard we established in prior cases. Therefore, we adopt the Hearing Examiner's recommendation that the Union's request for reasonable costs be granted.

Finally, the Board's authority to impose monetary payments is expressly and specifically limited to costs (absent attorneys fees) incurred by the party.² See, *Committee of Interns v. D.C. Dept. of Human Services*, 48 DCR 6868, Slip Op. No. 480, PERB Case No. 95-U-22 (1996). See also, *University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia*, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 09-U-10 (1991) (costs under the CMPA exclude attorney fees).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's recommended decision that the District of Columbia Public Schools ("DCPS") committed an unfair labor practice is adopted in its entirety.
2. DCPS, its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the labor-management subchapter of the Comprehensive Merit Personnel Act ("CMPA").
3. DCPS, its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(5) by refusing to bargain collectively in good faith with Council of School Officer's, Local 4, American Federation of School Administrator's, AFL-CIO ("CSO").
4. CSO's request for costs is granted for the reasons stated in this Decision and Order.
5. CSO shall submit to the Board, within fourteen (14) days from the date of this Decision and Order, a statement of actual costs incurred processing the CSO's Complaint. The statement of costs shall be filed together with supporting documentation. DCPS may file a response to the CSO's statement of costs within fourteen (14) days from service of the statement upon it.
6. DCPS shall pay the CSO 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.

² The Complainant did not expressly request "attorney fees", but did use the word "fees" in its Complaint.

7. DCPS 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.
8. Within fourteen (14) days from the issuance of this Decision and Order, DCPS shall notify the Public Employees Relations Board ("Board"), in writing that the Notice has been posted accordingly. Also, DCPS shall notify the Board of the steps it has taken to comply with provisions of this Order.
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.

June 28, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-U-34 was transmitted via Fax and U.S. Mail to the following parties on this the 28th day of June 2007.

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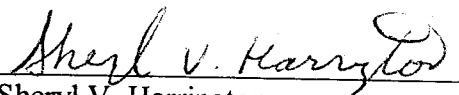
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Sheryl V. Harrington
Secretary



Public
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Government of the
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, 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. 903, PERB CASE NO. 05-U-34 (June 28, 2007)

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. 903.

WE WILL cease and desist from refusing to bargain in good faith with the Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO by failing to comply with the terms of the CBA 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 Public Schools

Date: _____

By: _____
Acting Chancellor

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.**

June 28, 2007