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

In the Matter of:	)	
	)	
	)	
Fraternal Order of Police/Department of	)	
Corrections Labor Committee (on behalf of	)	
Dexter Allen),	)	
	)	
	)	
Petitioner,	)	PERB Case No. 07-E-02
v.	)	Opinion No. 920
	)	
District of Columbia Department of	)	Petition for Enforcement
Corrections,	)	
	)	
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On September 10, 2007 and September 12, 2007, the Fraternal Order of Police/Department of Corrections Labor Committee (“FOP” or “Union”), 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”)<sup>1</sup>, regarding PERB Case No. 04-A-14 (Slip Op. No. 825). FOP alleges that the District of Columbia Department of Corrections (“DOC”) has failed to

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<sup>1</sup> The only difference between the language contained in the Petition and the Amended Petition, is the sequential 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.

comply with Slip Op. No. 825 which was issued on October 19, 2006. Specifically, FOP claims that DOC has failed to implement the terms of an arbitration award issued on May 13, 2004 and affirmed by the Board on October 19, 2006. (See Petition at pgs. 2-4). FOP is asking the Board to “enforce its Decision and Order of October 24, 2006<sup>2</sup> and issue all back pay and benefits with interest (including salary increases) to Officer Allen [(“Grievant”)] and reinstate him with the seniority to which he is entitled.” (Petition at pgs. 4-5).

DOC opposes FOP’s Petition. FOP’s Petition and DOC’s opposition are before the Board for disposition.

## **II. Discussion**

“On May 17, 2001, a group of male students from Evans Junior High School, in the D.C. Public School system took a tour of the D.C. Jail. On that date the Grievant was on duty as a correctional officer (Corporal) at the D.C. Jail. Other correctional officers also were on duty. During the tour, allegedly at the urging of D.C. Public Schools employees, the students were subjected to some procedures associated with the intake of prisoners into the facility including strip searches and body cavity searches as well as exposure while naked to inmates who made abusive comments to the students, . . . and [the] students were forced to wear prison clothing.” (Slip Op. No. 825 at p. 2 and Award at pgs. 4-5). In addition “[t]he students were subjected to the foregoing actions by correctional officers on duty at the D.C. Jail on the date of the tour. These officers also forcibly removed clothing from the students and yelled at them.” (Slip Op. No. 825 at p. 2 and Award at p. 5).

The incident was reported to the Office of Internal Affairs by a correctional officer who was not involved in the incident. (See Memorandum at p. 3). An investigation was conducted and the Grievant, as well as other officers, was found to have violated several departmental regulations and procedures. (See Slip Op. No. 825 at p. 2 and pgs. 5-7). Subsequently, the Grievant was summarily removed on May 29, 2001. (See Slip Op. No. 825 at p. 2).

The Union filed a grievance, which was denied. As a result, the Union invoked arbitration on behalf of the Grievant.

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<sup>2</sup> Although in this statement FOP indicates that the Board’s Decision and Order was issued on October 24, 2006, the Board actually issued its decision on October 19, 2006. Also, with the exception of this statement, FOP in its two submissions indicates that the Board’s decision was issued on October 19, 2006. In light of the above, we believe that the one reference made by FOP to the October 24, 2006 date, was a typographical error.

In an Award issued on May 13, 2004, Arbitrator William Fredenberger found that the record did not establish that the Grievant participated in the action taken by other correctional officers against the students touring the correctional facilities. (See Slip Op. No. 825 at p. 2). Therefore, the Arbitrator rescinded the termination and directed that the Grievant should be reinstated with full back pay and seniority.

In addition, the arbitrator indicated that "there [should] be no deduction from the back pay for outside earnings by [the] Grievant during the period he [was] out of service." (Slip Op. No. 825 at p. 4).

DOC filed an Arbitration Review Request ("Request") seeking review of the May 13, 2004 Award issued by Arbitrator Fredenberger. The FOP opposed DOC's Request.

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.

Also, 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 the Board found that DOC's Request for Review did not meet the requirements for reversing Arbitrator Fredenberger's Award. Specifically, we noted that DOC had the burden to specify applicable law and definite public policy that mandated that the Arbitrator reach a different result. We found that DOC failed to do so. Thus, we concluded that denying an offset for interim earnings in this case did not violate any specific law or public policy. Therefore, DOC's argument did not present a statutory basis for review. As a result, we determined that we could not reverse the Award on this ground. 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.

In September 2007, FOP filed the current Petition for Enforcement with the Board. FOP contends that DOC has failed to comply with Slip Op. No. 825. Specifically, FOP asserts that despite

the Board's denial of DOC's Request, DOC has not provided Mr. Allen with his back pay as required by the Award. FOP is requesting that the Board enforce Slip Op. No. 825 and compel DOC to comply with the terms of Arbitrator Fredenberger's Award.

Board Rules 560.1, 560.2, 501.4 and 501.5 provide in relevant part as follows:

**560.1 - Enforcement**

If any party fails to comply with the Board's decision within the time period specified in Rule 559.1, the prevailing party may petition the Board to enforce the order.

**560.2 - Enforcement (cont.)**

The responding party **shall have ten (10) days from service to respond to the petition.** (Emphasis added.)

**501.4 - Computation-Mail Service**

Whenever a period of time is **measured from the service of a pleading and service by mail, five (5) days shall be added to the prescribed period.** (Emphasis added.)

**501.5 - Computation-Weekends and Holidays**

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 . . . **Whenever the prescribed time period is eleven (11) days or more, [Saturdays, Sundays and District of Columbia Holidays] shall be included in the computation.** (Emphasis added.)

In the present case FOP filed its Petition on September 12, 2007 and served DOC via U.S. Mail on that date. Therefore, pursuant to Board Rules 560.2, 501.4 and 501.5, DOC was required to file its response no later than October 1, 2007. However, DOC did not file their response to the FOP's Petition until October 2, 2007.<sup>3</sup> Therefore, DOC's response was filed one (1) day late. Also, we note that DOC did not either request an extension of time or provide a legitimate reason as to why their response was late.<sup>4</sup>

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<sup>3</sup> DOC filed their opposition via facsimile on October 2, 2007.

<sup>4</sup> 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.

As noted above, DOC did not file a timely response to the Petition. Board Rule 560.3 provides that “[f]ailure by the responding party to file an answer in accordance with Rule 520.6 and 520.7<sup>5</sup> may be construed as an admission of the petitioner’s allegations.” Consistent with Board Rule 560.3, we find that the material issues of fact and supporting documentary evidence are undisputed by the parties. Therefore, it is clear that DOC has not complied with Arbitrator Fredenberger’s Award. Specifically, DOC has not provided Dexter Allen with back pay as required. As a result, the Board must determine if DOC’s action is reasonable.

In the present case, the FOP filed for arbitration on behalf of Dexter Allen and on May 13, 2004, Arbitrator Fredenberger issued his Award. Subsequently, on June 2, 2004, DOC filed an Arbitration Review Request seeking that the Board reverse the award. On October 19, 2006, the Board denied DOC’s Request. 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. Consistent with D.C. Code § 1-617.13(c), DOC filed a Petition for Review of Agency Decision in the Superior Court of the District of Columbia on November 24, 2006. In January 2007, the Board responded to DOC’s Petition for Review by filing a Motion to Dismiss based on the fact that DOC’s Petition for Review was untimely filed.<sup>6</sup> On March 15, 2007, DOC withdrew its Petition for Review. In light of the above, DOC has waived its right to appeal the Board’s October 19, 2006 Decision and Order.

As previously discussed, the Board’s decision denying DOC’s Arbitration Review Request was issued on October 19, 2006. Thus, it has 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.

Also, DOC can no longer appeal the Board’s Decision and Order in the Superior Court of the

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<sup>5</sup> “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).

<sup>6</sup> 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.

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 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.<sup>7</sup>

For the reasons noted above, we find that DOC has not complied with Slip Op. No. 825; therefore, the FOP's Petition for Enforcement is granted. The Board will seek judicial enforcement of our October 19, 2006 Decision and Order, as provided under D.C. Code § 1-617.13(b) (2001 ed.).

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<sup>7</sup> 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.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Fraternal Order of Police/Department of Corrections Labor Committee's "Petition for Enforcement of PERB Decision and Order" is granted.
2. The Board shall proceed with enforcement of Slip Op. No. 825 pursuant to D.C. Code § 1-617.13(b) (2001 ed.), if full compliance with Slip Op. No. 825 is not made and documented to the Board within ten (10) days of the issuance of this Decision and Order.
3. 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.**

October 30, 2007

**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 30<sup>th</sup> day of October 2007.

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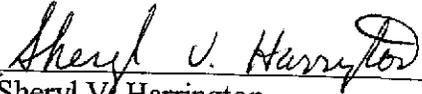
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