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

| | | |
|---|---|---|
| In the Matter of: | ) | |
| District of Columbia Fire and Emergency Medical Services Department, | ) | PERB Case No. 15-U-22 |
| Complainant, | ) | Opinion No. 1556 |
| and | ) | |
| | ) | Motion for Reconsideration |
| American Federation of Government Employees, Local 3721, | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

Before the Board is a Motion for Reconsideration filed on August 5, 2015, by the District of Columbia Fire and Emergency Medical Services Department ("FEMS"). FEMS requests that the Board reconsider the Executive Director's July 6, 2015 Administrative Dismissal of FEMS' May 6, 2015 Unfair Labor Practice Complaint against the American Federation of Government Employees, Local 3721 ("Union"). As reasoned herein, the Board affirms the dismissal of FEMS' Complaint, but on different grounds than those stated in the Administrative Dismissal.

## I. Statement of the Case

In 2009, an arbitrator found that a "flex" schedule adopted by FEMS in October 2006 violated the federal Fair Labor Standards Act ("FLSA"). The arbitrator ordered FEMS to pay the employees represented by the Union overtime pay for any hours over 40 worked per week dating back to October 2006, plus liquidated damages and attorneys' fees. On April 25, 2012, PERB upheld that 2009 Award in *D.C. Fire and Emergency Med. Serv. v. Am. Fed'n of Gov't Emp., Local 3721*, 59 D.C. Reg. 9757, Op. No. 1258, PERB Case No. 10-A-09 (2012). On August 12, 2012, the Union filed a petition for enforcement with PERB (PERB Case No. 12-E-06), asking the Board to seek enforcement of the 2009 Award and its Order in PERB Case No. 10-A-09 in the D.C. Superior Court.

In 2013, while PERB Case No. 12-E-06 was still pending, FEMS met with the Union, proposed payment amounts consistent with calculations it had generated, and began making payments in accordance with those calculations after the Union demanded that FEMS cease any further delays in complying with the 2009 Award. On March 19, 2015, the Board issued a Decision and Order denying the Union's petition for enforcement, finding that the Union's demand that FEMS begin making payments after FEMS proposed its calculations, and FEMS's making of those payments in accordance with those calculations without objection from the Union constituted an implied-in-fact settlement of the 2009 Award. Alternatively, the Board held that the Union was estopped from seeking more money under the 2009 Award. [1]

After the Board issued its Decision and Order in PERB Case No. 12-E-06, FEMS sent an inquiry to the Union asking if it would withdraw a separate grievance that the Union had filed in April 2013, which sought unpaid overtime for time worked over 8 hours during a single shift, dating back to October 2006.[2] The Union refused to withdraw the grievance.[3] FEMS then filed the instant unfair labor practice complaint alleging that the Union's refusal to withdraw its April 2013 grievance constituted bad faith bargaining in violation of D.C. Official Code § 1-617.04(b)(3) in light of the Board's findings in PERB Case No. 12-E-06.[4] FEMS also filed a request for preliminary relief asking PERB to stay the April 2013 grievance prior to an arbitration hearing that was scheduled to be held in the matter on May 12-13, 2015.[5]

In its Answer, the Union denied that its refusal to withdraw the April 2013 grievance constituted bad faith bargaining.[6] The Union also filed a Motion to Dismiss, arguing that the Board's findings in PERB Case No. 12-E-06 only concerned the 2009 Award and were not dispositive of the claims in the Union's April 2013 grievance. The Union asserted that FEMS had failed to state a claim upon which relief could be granted and that PERB was without authority to stay the arbitration.[7]

On July 6, 2015, PERB's Executive Director administratively granted the Union's Motion to Dismiss, finding that the Union was correct that the Board's Decision and Order in PERB Case No. 12-E-06 had "no bearing" on the April 2013 grievance.[8] Further, the Executive Director stated that whereas the 2009 Award was based on the FLSA, the April 2013 grievance was based on the parties' compensation agreement. The Executive Director concluded that "[w]ithout being able to rely on PERB's factual findings in Case No. 12-E-06, FEMS' Complaint in the instant case does not state a viable claim for which relief can be granted."[9]

---

[1] *Am. Fed'n of Gov't Employees, Local 3721 v. D.C. Fire and Emergency Med. Serv.*, 62 D.C. Reg. 5893, Op. No. 1511, PERB Case No. 12-E-06 (2015).
[2] Complaint, Exhibit C.
[3] Complaint at 5.
[4] *Id*. at 5-6.
[5] *Id*. at 7-8. The Board notes that according to n.1 in FEMS' Motion for Reconsideration, the arbitration hearing was held on May 12-13, 2015 as scheduled. Accordingly, FEMS' request for preliminary relief is now moot.
[6] Answer at 4.
[7] Motion to Dismiss.
[8] Administrative Dismissal.
[9] *Id*.

On August 5, 2015, FEMS filed a Motion for Reconsideration arguing that (1) the Administrative Dismissal erred by failing to take all of the allegations pled in the Complaint as true and/or to view the facts in the light most favorable to FEMS' position, as required by PERB case law, (2) the Administrative Dismissal erred in finding that the 2009 grievance arbitration award at issue in PERB Case No. 12-E-06 was based on the FLSA, but that the Union's April 2013 grievance at issue in this case is based on the parties' compensation agreement, and (3) the Administrative Dismissal erred in finding that PERB Case No. 12-E-06 only concerned the 2009 grievance arbitration award and therefore had "no bearing" on the Union's April 2013 grievance.[10]

## II. Analysis

The Board has consistently held that a motion for reconsideration cannot be based upon a "mere disagreement" with the initial decision.[11] The moving party must provide authority which "compels reversal" of the initial decision.[12]

In its Motion for Reconsideration, FEMS argues that PERB case law required PERB to take "all the allegations pleaded in the Complaint as true and to view the pleadings in the light most favorable" to FEMS' position.[13] FEMS asserts that since its Complaint alleged that "the same facts and legal claims exist in both the April 2013 grievance and the Respondent's grievance underlying PERB Case Nos. 10-A-09 and 12-E-06," the Administrative Dismissal erred in granting the Union's motion to dismiss because it did not accept that "factual allegation as true."[14]

The Board has articulated two seemingly different standards when considering motions to dismiss. In *Hicks v. D.C. Office of the Deputy Mayor for Finance, Office of the Controller & AFSCME, Dist. Council 20*, 41 D.C. Reg. 1749, Slip Op. No. 303, PERB Case No. 71-U-17 (1992), the Board stated that its standard was to take "all of complainant's allegations as true…" even if the parties' pleadings revealed that certain issues of fact were contested.[15] Since *Hicks*, however, the Board's standard has been to view only the "contested facts in the light most favorable to the complainant in [order to determine] whether the complaint gives rise to a violation of the CMPA."[16]

---

[10] Motion for Reconsideration.
[11] *See Univ. of the Dist. of Columbia Faculty Ass'n/Nat'l Educ. Ass'n v. Univ. of the Dist. of Columbia,* 59 D.C. Reg. 6013, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26 (2009); *see also Am. Fed'n of Gov't Emp., Local 2725 v. D.C. Dep't of Consumer and Regulatory Affairs and D.C. 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).
[12] *UDC Faculty Ass'n. v. UDC*, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26; *see also AFGE, Local 2725 v. DCRA and OLRCB*, Slip Op. No. 969 at ps. 5, PERB Case No. 06-U-43.
[13] Motion for Reconsideration at 1-2.
[14] *Id*. at 2
[15] *See* p. 3.
[16] *See Steele v. Am. Fed'n of Gov't Emp., Local 383*, 61 D.C. Reg. 12373, Slip Op. No. 1492 at p. 3, PERB Case No. 14-U-16 (2014) (citing *Osekre v. AFSCME, Dist. Council 20, Local 2401*, 47 D.C. Reg. 7191, Slip Op. No. 623,

Although these two standards appear to be distinct, they are not incongruent in practice. Indeed, the "most favorable" light in which PERB can view factual allegations in a complaint is to view them as true. Additionally, any alleged facts that are uncontested are also deemed to be admitted as true.[17] Therefore, it is reasonable to conclude that the Board's two stated standards when evaluating motions to dismiss stand for the same principle, but simply articulate that principle in different ways.

To avoid confusion, the Board's single standard going forward when considering a motion to dismiss will be to view all factual allegations in the complaint as true[18] in order to determine whether the complaint may give rise to a violation of the CMPA for which PERB can grant relief.[19]

In this case, FEMS is correct that the Executive Director did not state whether or not she took FEMS' factual allegations as true. However, that was not a fatal error because, even if FEMS' factual allegations are true, PERB still cannot grant the relief that FEMS seeks.

D.C. Official Code § 1-605.02(6) allows the Board to review a grievance arbitration award only after it has been issued, and does not grant PERB any authority to stay or intervene in such arbitrations while they are still pending.[20] Accordingly, even if it is true that the Board's findings in PERB Case No. 12-E-06 are dispositive of the Union's April 2013 grievance, that is for the arbitrator in the April 2013 grievance to determine, not PERB. The Board will be able to review the arbitrator's award once it is issued, but it cannot stay the arbitration or intervene in the process while it is still pending, as FEMS requests in its Complaint.[21]

Additionally, the Board cannot order the Union to cease pursuing its grievance, as FEMS requests in its Complaint.[22] The Board lacks jurisdiction over an allegation in which the very act or conduct that gives rise to the allegation, despite being alleged in the complaint as a violation

---

PERB Case Nos. 99-U-15 and 99-S-04 (1998)); *see also, e.g.*, (providing Slip Op. Nos. and Case Nos. only) Slip Op. No. 1102 at p. 3, PERB Case No. 08-U-49; Slip Op. No. 1110 at p. 3-4, PERB Case No. 10-U-51; Slip Op. No. 1111 at p. 5-6, PERB Case No. 10-U-49; Slip Op. No. 1112 at p. 8, PERB Case No. 09-U-62; Slip Op. No. 1113 at p. 4, PERB Case No. 08-U-35; Slip Op. No. 1115 at p. 4, PERB Case No. 10-U-03; Slip Op. No. 1116 at p. 4, PERB Case No. 09-U-37; Slip Op. No. 1117 at p. 3, PERB Case No. 10-U-44; Slip Op. No. 1119 at p. 4, PERB Case No. 08-U-38; Slip Op. No. 1131 at p. 3, PERB Case No. 09-U-59; Slip Op. No. 1440 at p. 4, PERB Case No. 13-U-09; and Slip Op. No. 1452 at p. 4, PERB Case No. 14-U-02.

[17] *See* PERB Rule 520.6.

[18] Consistent with U.S. Supreme Court precedent, this standard does not require PERB to accept as true a complaint's legal allegations, or any allegations that are legally conclusory or speculative. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (holding that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"); *see also Papasan v. Allain*, 487 U.S. 265, 286 (1986) (holding that on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

[19] *See Newell v. D.C. Housing Auth.*, 59 D.C. Reg. 11351, Slip Op. No. 1297, PERB Case No. 12-U-24 (2012) (dismissing complaint on grounds that it failed to state a claim for which relief could be granted).

[20] *Gov't of the D.C., et al. v. AFSCME, Dist. Council 20, Local 2921, et al.*, 60 D.C. Reg. 16011, Slip Op. No. 1429 at p. 10-11, PERB Case No. 12-N-03 (2013).

[21] *Id.*; *see also* Complaint at 9.

[22] Complaint at 9.

of statute, was envisioned and expressly authorized by the parties in their collective bargaining agreement.[23] In such instances, the Board defers resolution of the allegation to the parties' established grievance and arbitration procedures.[24] Here, the parties unambiguously negotiated and ratified a grievance and arbitration process in their collective bargaining agreement.[25] Accordingly, the Board cannot find that the Union acted in bad faith in violation of the CMPA when it simply availed itself of that process and not chose not to withdraw its grievance.[26] As noted above, the Board will be able to review the arbitrator's award once it is issued, but it does not have any authority to order the Union to cease pursuing its grievance while it is still pending.[27]

Finally, the Board acknowledges that two other statements in the Administrative Dismissal may have been inaccurate. First, it may not be correct that the 2009 Award and the Union's April 2013 grievance are based on different legal authorities. Second, it is also not clear that the Board's Decision and Order in PERB Case No. 12-E-06 has "no bearing" on the Union's April 2013 grievance. However, as noted above, both of those questions are for the arbitrator in the April 2013 grievance to resolve, not PERB. Thus, even if the Executive Director's reasoning in the Administrative Dismissal was inaccurate, her conclusion that FEMS has not stated a claim for which PERB can grant relief was correct.

Accordingly, the Board rejects the Executive Director's reasoning in the Administrative Dismissal, but affirms the dismissal of FEMS' Complaint based upon the grounds stated herein.

---

[23] *Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Metropolitan Police Dep't,* 60 D.C. Reg. 2585, Slip Op. No. 1360 at p. 5-6, PERB Case No. 12-U-31 (2013), aff'd, *Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Pub. Emp. Relations Bd.,* Case No. 2013 CA 001289 P(MPA) (D.C. Super. Ct. Apr. 18, 2014); *see also Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. et al*, 59 D.C. Reg. 6039, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41 (2009); *and Am. Fed'n of Gov't Emp., Local 2741 v. D.C. Dep't of Recreation and Parks*, 46 D.C. Reg. 6502, Slip Op. No. 588 at p. 4, PERB Case No. 98-U-16 (1999).

[24] *Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Metropolitan Police Dep't,* Slip Op. No. 1360 at p. 5-6, PERB Case No. 12-U-31; *see also Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. et al*, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41.

[25] *See* Complaint, Exhibit A at Article 31.

[26] *See Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Metropolitan Police Dep't*, 60 D.C. Reg. 2585, Slip Op. No. 1360 at p. 4-5, PERB Case No. 12-U-31.

[27] *Gov't of the D.C., et al. v. AFSCME, Dist. Council 20, Local 2921, et al.*, Slip Op. No. 1429 at p. 10-11, PERB Case No. 12-N-03.

## ORDER

**IT IS HEREBY ORDERED THAT:**

1. FEMS' Complaint is dismissed, with prejudice; and

2. 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 Ann Hoffman and Yvonne Dixon. Member Keith Washington was not present.

November 19, 2015

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 15-U-22, Op. No. 1556 was transmitted by File & ServeXpress to the following parties on this the 1st day of December, 2015.

Kevin M. Stokes, Esq.
Michael D. Levy, Esq.
Dean Aqui, Esq.
D.C. Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

Rushab Sanghvi, Esq.
AFGE, District 14
444 North Capitol Street, N.W.
Washington, D.C. 20016

/s/ Sheryl Harrington
PERB