Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 2725 (on behalf of Saundra McNair and Gerald Roper),	
Complainant,	PERB Case Nos. 09-U-24 and 12-U-30
	Opinion No. 1436
v.	**Motion for Reconsideration**
District of Columbia Department of Consumer and Regulatory Affairs.	
Respondent.	

DECISION AND ORDER

Before the Board is a motion to reconsider the Board's award of costs in favor of the Complainant American Federation of Government Employees, Local 2725 ("Complainant" or "Union"). The motion to reconsider was filed by the Office of Labor Relations and Collective Bargaining ("OLRCB") on behalf of the Respondent District of Columbia Department of Consumer and Regulatory Affairs ("Respondent" or "Department").

I. Statement of the Case

On March 4, 2009, the Union filed an unfair labor practice complaint, case number 09-U-24, against the Department. The Union alleged in that case that the Department had failed to comply with an arbitration award issued in 2008. The Department agreed to settle that complaint but failed to complete the drafting of the settlement agreement as it had promised. As a result, the Union filed a second unfair labor practice complaint, case number 12-U-30, which the Board granted. *AFGE, Local 2725 (on behalf of McNair and Roper) v. D.C. Dep't of Consumer & Regulatory Affairs*, 60 D.C. Reg. 2593, Slip Op. No. 1362, PERB Case No. 12-U-30 (2013). Finding that the Department had demonstrated a pattern and practice of failure to implement awards and agreements, Board held that an award of costs was in the interest of justice. *Id.* at p. 6. The Union filed a motion for costs setting forth $112.99 in costs that it claimed. The costs were $48 for a witness's parking expenses and $64.99 for transportation expenses of the Union's

counsel. The Department filed an opposition to the motion, and the Union filed a reply to the opposition ("Reply"). In its decision and order on the motion for costs, the Board consolidated case numbers 09-U-24 and 12-U-30, granted the motion for costs, and ordered the Department to pay the Union $112.99 in costs within ten (10) days of the date of the order. *AFGE, Local 2725 (on behalf of McNair and Roper) v. D.C. Dep't of Consumer & Regulatory Affairs*, Slip Op. No. 1411, PERB Case Nos. 09-U-24 and 12-U-30 (Sept. 3, 2013) ("Slip Op. No. 1411").

The Respondent then filed the instant motion for reconsideration ("Motion"). The Complainant, which in its Reply had expressed its dismay at "Respondent's vitriolic response to the Union's motion for very minimal costs" (Reply at p. 1), elected not to file another brief replying to the Respondent's efforts to avoid paying those costs.

The Motion acknowledges that "PERB has the power to award costs" (Motion at p. 3) but objects that Slip Op. No. 1411 did not provide the guidance the Department had requested on what costs are allowable and what evidence is required to prove costs. The Motion also objected that the order to pay the costs in ten days denied the Department due process.

II. Discussion

A. Costs Awarded

The Department contends that the costs awarded were inadequately analyzed in Slip Op. No. 1411 and were "also unnecessarily punitive to DCRA." (Motion at p. 2). The Department objects that the Board did not use the federal statutes regarding costs that it had proposed and argues that "PERB has no criteria for what costs will be allowed and denied." (*Id.*).

The statute authorizing costs leaves the criteria for awarding costs to the Board's discretion: "The Board shall have the authority to require the payment of *reasonable* costs incurred by a party to a dispute from the other party or parties *as the Board may determine*." D.C. Code § 1-617.13(d) (emphasis added). The Board's criteria for what costs will be allowed were first set forth in *AFSCME Local Council 20, District 2776 v. D.C. Department of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). The criteria are:

1. The party to whom the payment is to be made was successful in at least a significant part of the case and the costs are attributable to that part of the case.

2. The costs are reasonable.

3. The award must be in the interest of justice.

Id. at pp. 4-5.

Those criteria were satisfied in this case. The Union's objective was to implement the arbitration award. The Union obtained a settlement implementing the arbitration award and an order that the Department complete the settlement. The costs are attributable to that effort because they involved filing an amended complaint and preparing for and attending the hearing

that led to the settlement. These costs "are the kind of costs that are ordinarily incurred in proceedings before the Board." *Spain v. F.O.P./Dep't of Corrs. Labor Comm.*, 46 D.C. Reg. 8352, Slip Op. No. 596 at p. 3, PERB Case Nos. 98-S-01 and 98-S-03 (1999). The Department characterizes the Union's documentation for the costs as "two quasi-affidavits, statements not notarized by a notary public." (Motion at p. 3). Notwithstanding, the Union's documentation is unobjectionable. The Board has requested expenses claimed by a party to be supported by "an affidavit explaining how it calculated its costs or other documentary evidence verifying" the costs. *Spain*, Slip Op. No. 596 at p. 3. The Union submitted both documentary evidence and affidavits. Notarization of an affidavit is not required. *See* Super. Ct. R. 9-I(e).

The costs are reasonable because they involve a modest amount of money for costs that were attributable to a part of the case in which the Complainant prevailed and were for matters ordinarily incurred in proceedings before the Board. In its earlier opinion, *AFGE, Local 2725*, 60 D.C. Reg. 2593, Slip Op. No. 1362, PERB Case No. 12-U-30 (2013), the Board found that an award of costs in this matter was in the interest of justice. The Department did not appeal or move for reconsideration of that opinion and does not dispute that it had demonstrated a pattern and practice of failure to implement awards and grievances. While that pattern and practice could be seen as justifying punitive costs, the imposition of $112.99 in costs cannot be considered "unnecessarily punitive." To the contrary, under the circumstances of this case, which involve protracted delays in implementing an arbitration award, the Board believes that the costs awarded are reasonable and not punitive.

The Respondent has compelled us to review the chronology of those delays here. The arbitration award that the Union has been trying to enforce was issued back in March of 2008. A year later the Union filed its first complaint (09-U-24) because the Department had failed to comply with the arbitration award. The parties reached a tentative agreement in December 2011, but the failure of the Department to complete the drafting of the settlement agreement in seven months induced the Union to file its second complaint (12-U-30) in July 2012. Although the Board then ordered the Department to complete the settlement and pay the Union's reasonable costs, the Department did neither, requiring the Union to file its third complaint (13-E-02) in March 2013. The Union's costs in bringing all those actions, which should have been unnecessary, over the course of five years are likely substantially more than the nominal costs the Union claimed. It is illogical to assert, as the Respondent does, that because the Union's nominal travel expenses are reasonable under the egregious circumstances of this case that any travel expenses, such as "meals at a four-star restaurant, overnights in the St. Regis Hotel and limousine service" (Motion at p. 4) could be held reasonable.

The Respondent insists that the Board pass not only on the claimed expenses but also on any other types and quantities of expenses that might be claimed in the future. The Respondent demands an "itemization of the costs allowable" (Motion at p. 1) and "guidance to litigants for identifying permissible and impermissible costs." (Motion at p. 2). The D.C. Court of Appeals has "previously held that 'the suggestion that this court may wish to give the [appellant] guidance on an issue not presented amounts to a request that we write an advisory opinion.'" *In re Estate of Bates*, 948 A.2d 518, 530 (D.C. 2008) (quoting *District of Columbia v. Wical Ltd.*

P'ship, 630 A.2d 174, 182 (D.C. 1993)). The court will not render advisory opinions in order to provide guidance:

> Our job as judges is to decide each case on the basis of the specific record before us, rather than to dispense advice with respect to issues that may arise on different facts in future cases. Indeed, our en banc court has disapproved the practice of providing "unsolicited guidance" regarding what it "behooves" trial judges (and, *a fortiori*, counsel) to do in hypothetical situations not before the court. . . .

Gilliam v. United States, 46 A.3d 360, 377 (D.C. 2012) (Schwelb, J., concurring) (quoting *Allen v. United States*, 603 A.2d 1219, 1228-29 n.20 (1992)). OLRCB has taken the position that no statute or rule authorizes PERB to issue advisory opinions either. *Doctors' Council of D.C. Gen. Hosp. v. D.C. Gen. Hosp.*, 34 D.C. Reg. 3629, Slip Op. No. 160 at pp. 1-2, PERB Case No. 86-N-01 (1987). Whether or not OLRCB was correct that PERB cannot render advisory opinions, it is clear that PERB is not required to. As a federal court put it, "[P]laintiffs cite no authority for the proposition that an administrative agency must render advisory opinions on request, and the Court is aware of none." *Chelsea Hosp. SNF v. Mich. Blue Cross Ass'n*, 436 F. Supp. 1050, 1064 (E.D. Mich. 1977).

Instead, the correct procedure for requesting the Board to issue broad guidelines is to petition for the amendment of the Board's rules in conformity with Rule 567.2, which provides, "Any interested person may petition the Board in writing for amendments to any portion of the rules and regulations and provide specific proposed language together with a statement of grounds in support of the amendment."

B. Allotted Time for Payment of Costs

The Board directed that the Department pay the costs within ten (10) days of the date of Slip Op. No. 1411, the order determining the amount of the costs. The Department contends that "[t]his part of the decision denies DCRA due process." (Motion at p. 5). Despite that claim, the Department does not assert that it is a person within the meaning of the Due Process Clause of the Fifth Amendment. Rather, the Department contrasts the ten-day period with the thirty days allowed for appeals to D.C. Superior Court by Superior Court Rule 1. The Department then speculates:

> If and when DCRA pays on time, then PERB can resist any appeal under the stated rule, claiming the costs were paid. DCRA would pay under protest, of course. But is this ten-day rule designed to avoid another critical Superior Court decision? Alternatively, does PERB seek to set up DCRA for some sort of contempt if it is late in paying? Then the Union could file some additional pleading and PERB could award more costs (costs upon costs).

(Motion at p. 5). The Department also claims that "[i]t is practically impossible for the D.C. paymasters to prepare a check within ten days." (*Id.*).

The Department was given ten days to pay the costs because that is the amount of time from the determination of costs that the Board has given to all other litigants who were ordered to pay costs. *See Council of Sch. Officers, Local 4 v. D.C. Pub. Schs.*, 59 D.C. Reg. 12673, Slip Op. No. 1318 at p. 3, PERB Case No. 12-E-05 (2012); *Washington Teachers' Union, Local #6 v. D.C. Pub. Schs.*, 59 D.C. Reg. 3463, Slip Op. No. 848 at p. 6, PERB Case No. 05-U-18, *motion for reconsideration denied and request for additional costs granted*, 59 D.C. Reg. 3537, Slip Op. 881 at p. 6, PERB Case No. 05-U-18 (2006); *Parker v. Am. Fed'n of Teachers*, Slip Op. No. 764 at p. 7, PERB Case No. 03-U-20 (Sept. 27, 2004); *Doctors' Council of D.C. Gen. Hosp. v. D.C. Health & Hosps. Pub. Benefit Corp.*, 47 D.C. Reg. 10108, Slip Op. No. 641 at p. 4, PERB Case No. 00-U-29 (2000); *AFGE, Local 2725 v. D.C. Housing Auth.*, 46 D.C. Reg. 10388, Slip Op. No. 603 at p. 4, PERB Case No. 99-U-18 (1999); *AFGE, Local 2725 v. D.C. Housing Auth.*, 46 D.C. Reg. 8356, Slip Op. No. 597 at p. 3, PERB Case No. 99-U-23 (1999); *Spain v. F.O.P./Dep't of Corrs. Labor Comm.*, 46 D.C. Reg. 4414, Slip Op. No. 581at p. 6, PERB Case Nos. 98-S-01 and 98-S-03 (1999); *Doctors' Council of D.C. Gen. Hosp. v. D.C. Gen. Hosp.*, 43 D.C. Reg. 5159, Slip Op. No. 475 at p. 3, PERB Case No. 92-U-17 (1996); *Doctors' Council of D.C. Gen. Hosp. v. D.C. Gen. Hosp.*, 43 D.C. Reg. 5142, Slip Op. No. 468 at p. 3, PERB Case No. 95-U-12 (1996).

If the Department felt that the Board should depart from that practice in this particular case, then rather than engage in rash and unfounded speculation about the Board's motives, the Department should have moved for an extension of time and explained why it has become too difficult to write a check in ten days.

Absent authority which compels reversal, the Board will not overturn its decision and order. *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 12,058, Slip Op. No. 1400 at p. 6, PERB Case No. 11-U-01 (2013). The Respondent has not presented any authority compelling reversal of Slip Op. No. 1411. Therefore, the motion for reconsideration is denied. Moreover, any further filings with the Board by the Respondent related to the costs it owes the Complainant, which are now a month and a half overdue, will be considered an abuse of the process and may result in the award of additional costs, interest, and fees.

ORDER

IT IS HEREBY ORDERED THAT:

1. The motion for reconsideration filed by the District of Columbia Department of Consumer and Regulatory Affairs 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.

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 09-U-24 and 12-U-30 is being transmitted to the following parties on this the 8th day of November, 2013.

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