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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)	
)	
American Federation of Government Employees, Local 631,)	PERB Case No. 05-U-43
)	
Complainant,)	Slip Op. No. 1001
)	
v.)	
)	
District of Columbia Department of Public Works,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, Local 631 ("Complainant" or "Union" or "AFGE" or "Local 631") filed an unfair labor practice complaint ("Complaint") alleging that the District of Columbia Department of Public Works ("Respondent" or "DPW") violated D.C. Code § 1-617.04(a)(5) and § 1-617.11(a) and (b) when Respondent refused to arbitrate three (3) grievances filed by the Union in compliance with the parties' collective bargaining agreement. The Respondent filed an Answer denying any violation of the Comprehensive Merit Personnel Act ("CMPA").

A hearing was held and the Hearing Examiner issued a Report and Recommendation ("R&R") finding a violation of the CMPA. The Respondent filed Exceptions and the Complainant filed an Opposition. The Hearing Examiner's R&R, the Respondent's Exceptions and the Complainant's Opposition are before the Board for disposition.

II. Background

There are several unions representing various employee units at DPW. AFGE along with other unions, entered into a collective bargaining agreement ("CBA") with DPW on September 23, 1988. Section 24.A of the CBA stated that "th[e] agreement shall remain in effect through September 30, 1990." Subsequently, DPW experienced a reorganization. (See R&R at p. 3). On December 11, 1996, the parties executed a memorandum of understanding ("MOU") between "Unions Representing Employees in Compensation Units 1 and 2 and the District of Columbia" including DPW. The MOU, signed by AFGE and other unions, reflected the parties' agreement that the CBA continue in full force and effect the non-compensation agreements that were currently in place, until a successor agreement was reached.¹

By MOU dated November 19, 1998, the parties agreed that specified employee units would continue to be represented by their current locals and be covered by the existing collective bargaining agreement until such time as specific units may be established" at DPW.² Negotiations between the parties resulted in a new CBA. However, the CBA was not approved by the District's approving body and never went into effect.

III. Hearing Examiner's Report

In 2005, AFGE filed three (3) grievances for arbitration and requested a list of arbitrators from the Federal Mediation and Conciliation Service ("FMCS"). The grievances pertained to a termination, a suspension and a contractual issue, respectively. The FMCS sent the parties a list of arbitrators. On April 15, 2005, DPW advised FMCS that the parties' CBA was not in force. By letter dated May 5, 2005, DPW notified AFGE, for the first time that neither DPW nor the Office of Labor Relations and Collective Bargaining ("OLRCB"), would participate in the selection of arbitrators or arbitrate the three (3) specified grievances. DPW claimed that the labor agreement between AFGE and DPW lapsed. In light of DPW's objection, on June 2, 2005, Local

¹ The 1996 MOU contained a section entitled "STATUS OF AGREEMENT PENDING SUCCESSOR AGREEMENT" stating in part C, as follows:

With respect to non-compensation agreements between the parties . . . , it is agreed that such agreements shall continue in full force and effect until the effective date of any working conditions agreements reached subsequent to September 30, 1996. Compensation and non-compensation items will be negotiated at the same time. (R&R at p. 4).

² No modification petition was filed at this time by either party. Local 631 filed a modification petition in 2004, after DPW stated that it would not bargain with Local 631 unless another AFGE Local was present at the negotiating table.

631 requested FMCS to appoint arbitrators unilaterally, rather than to allow the parties to mutually select them. DPW again opposed the request by letter dated June 7, 2005, alleging that there was no valid collectively bargained arbitration procedure. (R&R at p. 5).

On July 1, 2005, AFGE filed the Complaint in this matter alleging that DPW violated the CMPA when it refused to arbitrate grievances filed by the Union in compliance with the parties' collective bargaining agreement. (See Complaint at pgs. 2-3; R&R at p.6). Specifically, the Union alleged that DPW violated D.C. Code § 1-617.04(a)(5) and § 1-617.11(a) and (b) by: (1) refusing to recognize the collective bargaining agreement; (2) denying that a current binding CBA between the parties was in force; (3) repudiating the parties' CBA; (4) refusing to arbitrate grievances under the collective bargaining agreement; and (5) continuing to refuse to abide by the CBA and continuing to refuse to arbitrate grievances filed by the Union. The Union asked that the Board find DPW violated the CMPA and order DPW to cease and desist from refusing to process grievances. (See Compl. at p. 3).³

In its Answer to the Complaint, DPW contended that the agreement had expired and: (1) denied any obligation to arbitrate grievances until a successor agreement is reached; (2) denied that the Agreement was a binding [CBA]; (3) alleged the [Complaint] was filed in bad faith; and (4) alleged the Board lacked jurisdiction to adjudicate AFGE's Complaint. (See Answer at pgs. 4-6).

AFGE filed an Amended Complaint and Request for Preliminary Relief on October 22, 2005, after having been notified that FMCS would not appoint arbitrators in the three (3) grievances after receipt of DPW's June 7, 2005 letter advising FMCS that the parties' CBA had expired AFGE alleged that DPW's actions prevented the union from providing full representation to its members and undermined the public interest in maintaining labor management relations as required by D.C. Code § 1-617.01 and § 1-617.02 (b) (5) (2001 ed.). AFGE sought an order enjoining DPW from refusing to arbitrate future grievances [and] sought an order directing DPW to immediately select

³ Subsequent to the filing of the Complaint and prior to the hearing in this matter, in 2006 the parties returned to the bargaining table and commenced negotiations on a new contract. When negotiations resumed, there was disagreement as to which provisions had been agreed to and signed off by the parties. The parties declared impasse on ground rules and were assigned a mediator. A mediator assisted the parties to resume completion of their ground rules. Thereafter, the parties completed the negotiations regarding several articles of their incomplete agreement. According to the Union, management insisted upon meeting only one time per month for contract negotiations. After meeting several months, in 2007, the Union called an impasse because of lack of progress. After the mediation sessions, the Respondent unilaterally declared new articles as nonnegotiable. Therefore, the parties are currently in interest arbitration. (See R&R at p. 6).

arbitrators in the three (3) specified FMCS cases, as well as an award of attorney's fees and costs. (See Amend. Compl. at pgs. 3-4).⁴

DPW filed an Answer alleging that the Board lacked jurisdiction over the matter of the Union's request for injunctive relief. Furthermore, DPW asserted that the issue of substantive arbitrability was a matter for determination by a court and not an arbitrator.

A Hearing was held on November 7, 2008. AFGE asserted that pursuant to the parties' MOU dated December 11, 1996 the CBA due to expire on September 30, 1990, remained in effect until the parties reached a binding working conditions agreement. AFGE maintained that since no other agreement had become effective, the grievance and arbitration procedure found at Article 38 of the CBA remained in effect.⁵ (See R&R at p. 8). Also, the Union argued that the "Respondent continued to [process grievances] ... with other [L]ocals that had ... been [a party to] the [CBA] that was effective [from 1988] until September 30, 1990. Notwithstanding, [DPW] refused to arbitrate the three (3) grievances that were filed with the [FMCS], refused to select ... an arbitrator and repudiated the [CBA]." (R&R at p. 8).

"As a remedy, the Union [sought] *inter alia*, an award of costs in the amount of \$203.40, a cease and desist order ... for [DPW's] refusal to arbitrate, and that [the Board compel DPW] to notify FMCS that it violated the statute ... withdraw its opposition to the appointment of arbitrators in the three (3) cases that were filed previously with FMCS and post a notice informing employees of its violation of the statute...." (R&R at p. 9).

"[DPW countered that] there is no clear, unmistakable, existing agreement compelling them to arbitrate....Therefore, Local 631 is obligated to take the instant matter to court[] to determine if the parties have an obligation to arbitrate... pursuant to D.C. Code § 16-4301 to 4319 (2001 ed.)." (R&R at p. 9). "[DPW maintained] that [by its actions of] ... continuing to abide by portions of the expired [CBA] ... [and] arbitrating grievances after the expiration date of the [CBA]; it ha[d] not waived its right to allow the parties' prior contract to expire." (R&R at p. 10).

"Further[more], [DPW] argued [that] there is no legal basis to force the Agency to arbitrate the instant case [stating that] a party to an expired collective bargaining agreement can be compelled to arbitrate only if the agreement contained an arbitration clause and the parties mutually, specifically and voluntarily consented to renew or extend the arbitration obligation that arose out of and survived their agreement." (R&R at p. 10). DPW maintained that it did not have any binding agreement to arbitrate grievances with the Union. (See R&R at p. 10). "[The Respondent maintained that in the current

⁴ Due to the passage of time, the Request for Preliminary Relief was moot at the time of the hearing.

⁵ The Union stated that "[a]lthough the parties negotiated a subsequent agreement, it was not approved by the [D.C. Financial] [C]ontrol [B]oard, and did not become effective." (R&R at p. 8).

situation,] ... when the collective bargaining agreement expired, the arbitration obligation also expired." (R&R at p. 10). "According to [DPW, the Board] has no authority to decide the instant case, because resolution requires the Hearing Examiner, *inter alia*, to interpret or construe the labor agreement and/or make a determination about a contractually agreed upon obligation [i.e., the arbitration provision of the CBA]." (R&R at p. 13).

Furthermore, "[DPW] contended that the principle of repudiation is not applicable to the instant case... [as] [Union] [P]resident Milton ... admitted that the agency is basically following major portions of the [CBA]; i.e., with the exception of its refusal to arbitrate grievances. [Therefore, the Respondent] contends that the concept of repudiation does not apply, because it has not entirely failed to implement the terms of the negotiated contract, nor has it violated the duty to bargain, or refused to honor its obligation to bargain in good faith by repudiating the grievance procedure." (R&R at p. 11).

"[The Hearing Examiner found that in making a] ... determination and disposition [of] this case [she] need not interpret or construe the parties' contract. Rather, [she determined that] this case will be disposed of within the statutory confines of [the Board's] authority as set forth in D.C. Code § 1-605.02 (3) and (5)." (R&R at p. 13). The Hearing Examiner noted that "[b]oth parties have acknowledged there was an agreement between them that contained an arbitration clause."⁶ (R&R at p. 14).

The Hearing Examiner also noted that the parties executed an MOU dated November 19, 1998, agreeing that they would "... continue to be represented by their current locals and be covered by the existing Collective Bargaining Agreement until such time as ... specific units may be established....[However, a] May 5, 2005 letter advised Local 631 that the Respondent would not [select] arbitrators[] should FMCS provide a list[] and expressed its opinion that no current contract existed between the parties." (R&R at p. 18).

"The Hearing Examiner [found that] the determination as to whether there is an obligation to act; e.g. process and arbitrate grievances; does not always turn on whether or not an unexpired agreement exists. . . . [I]f the parties continue to act as if the agreement exists, their actions may imply an agreement to be bound by the terms of the expired agreement Theoretically, . . . DPW and Local 631 have been negotiating a contract or operating on an expired contract since 1990." (R&R at pgs. 18-19).

⁶ Moreover, [the Hearing Examiner opined that] any doubt about whether DPW agreed to honor its grievance procedure and arbitrate disputes brought on behalf of Local 631 employees, can easily be resolved by application of the presumption of arbitrability. The Hearing Examiner quoted that "arbitration is favored and should be ordered, unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Niro v. Fearn Int'l, Inc.*, 827 F.2d 173,175 (7th Cir. 1987) (quoting *United Steelworkers of Am[erica]. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 [omitted] (1960)). It is well established that any "[d]oubts should be resolved in favor of coverage." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 US 574, 574 (1960). (R&R at p. 14).

“[The Hearing Examiner noted that] ... a unilateral change not only violates the requirement that the parties bargain over ‘wages, hours, and other terms and conditions, but also injures the process of collective bargaining itself.’ ... DPW’s actions served to interfere with ‘...the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.’” [citations omitted]. . . . [DPW] contends the obligation to arbitrate expired when the agreement expired in 1990. Thus, it could unilaterally stop arbitrating grievances when it so decided in 2005; while continuing to honor parts of the agreement, which expired more than fifteen years prior.” (R&R at p. 21). The Hearing Examiner concluded that “[u]nilaterally changing a mandatory subject of bargaining such as wages, hours, or working conditions before reaching impasse in bargaining over those matters (unless you have waived this right in the contract), is an unfair labor practice.” (R&R at p. 22).

The Hearing Examiner noted that “[DPW] urges that the Hearing Examiner adopt the rationale that the Supreme Court applied in *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190 (1999), i.e., that the arbitration provision in its contract, which expired in 1990, did not extend beyond that expiration date. *Litton* was a case in which an employer was closing or discontinuing an aspect of its operation and terminated or laid off employees in a manner incongruent with their respective seniority considerations. In addition, *Litton* paid them severance without union notification. The Hearing Examiner finds that in several aspects, the instant case is not analogous to *Litton*. Moreover, the Supreme Court in *Litton* engaged in contract interpretation. Contract interpretation is not required to resolve the instant case.” (R&R at p. 22).

“Having determined that the statute does not shield DPW’s unilateral acts, [the Hearing Examiner found that] ... [t]he evidence submitted ... clearly supports the Union’s contention that the parties ... took affirmative steps to show they intended the contract, including the arbitration obligation, to continue. This finding made by the Hearing Examiner did not require...constru[ction] or interpret[ation] [of] the [CBA]. The record is clear and the evidence is unrefuted.” (R&R at p. 25).

“[DPW] argued there has been no repudiation, in that . . . the Agency is basically following everything [in the CBA] except the arbitration article. Without examining the parties’ collective bargaining agreement, and for reasons stated above the Hearing Examiner finds that the question of repudiation does not need to be reached in order to find a violation of the statute” (R&R at p. 25).

The Hearing Examiner found a violation of the CMPA at D.C. Code § 1-617.04 (a)(5) and (1) was committed by DPW’s refusal to bargain in good faith by not processing grievances. Moreover, the Hearing Examiner determined that there has been

violation of D.C. Code § 1-617.11, Rights Accompanying Exclusive Recognition.”⁷ (See R&R at p. 13). The Hearing Examiner recommended that the Board issue “[a] cease and desist order ... and such other remedy as the Board deems appropriate.” (R&R at p. 25).

IV. Exceptions

The Respondent alleges that the Hearing Examiner made three significant errors. First, The Respondent takes exception to the Hearing Examiner’s alleged failure to follow Board precedent. The Respondent cites numerous Board cases for the proposition that the Board has no jurisdiction to consider contract violations.⁸ The Respondent asserts that only a court can determine whether the obligation to arbitrate exists, and the Board has no jurisdiction to decide whether there is a CBA in existence. Second, the Respondent maintains that the Hearing Examiner converts the duty to bargain into a perpetual duty, misconstruing the *Litton* case which, the Respondent asserts supports its position that arbitration is voluntary and there is no duty to arbitrate grievances once the CBA expires. Third, the Hearing Examiner, relying on *Litton*, states that because DPW abided by the CBA it adopted the CBA. The Respondent alleges that the Hearing Examiner misinterpreted the *Litton* case when she stated *Litton* states that when the Employer follows an in-force Agreement it becomes a term and condition of employment and a violation thereof is an unfair labor practice.

⁷ D.C. Code § 1-617-11, Rights Accompanying Exclusive Recognition states in relevant part:

(a) The labor organization which has been certified to be the exclusive representative of all employees in the unit shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to membership in the labor organization. (emphasis added).

(b) Bargaining units established at the time this chapter becomes effective shall continue to be recognized as appropriate units subject to § 1-617.09(c), and labor organizations which have exclusive recognition in bargaining units existing at the time this chapter becomes effective shall continue to enjoy exclusive recognition in these units subject to § 1- 617.10(b)(2).

⁸ In support of this contention, the Respondent cited numerous cases where the Board has found that it has jurisdiction to consider only claims alleging a statutory violations and not claims of contractual violations. *UDCFANE v. UDC*, Slip Op. No. 387, PERB Case No. 93-U-22 and 93-U-23 (1994), citing *Teamsters, Local Union No. 639 and 730 v. D.C. Public Schools*, 39 DCR 9625, Slip Op. No. 318, PERB Case No. 92-U-04 (1992); *FOP/MPDLC v. MPD*, 46 DCR 7605, Slip Op. No. 384, PERB Case No. 94-U-23 (1994); *AFSCME, DC Council 20, Local 2921 v. DCPS*, 42 DCR 5488, Slip Op. No. 339, PERB Case No. 92-U-08 (1992); *Carlease M. Forbes v. Teamsters, Local Union 1714 and Teamsters Joint Council 55*, 36 DCR 7097, Slip Op. No. 205, PERB Case No. 87-U-11 (1989); and others.

In its Opposition to DPW's Exceptions, the Union alleged that: (1) the exceptions were filed four (4) days late and (2) no request for an extension of time was filed until four (4) months later – therefore both filings were in violation of Board Rules. The Union's Opposition is before the Board for consideration. (Opposition at pgs. 1-2).

With regard to the timing of the filing of the Exceptions, Board Rule 501.2 provides that: "A request for an extension of time shall be in writing and made at least three (3) days prior to the expiration of the filing period. Exceptions to this requirement may be granted for good cause shown as determined by the Executive Director." Also, Board Rule 501.3 provides that: "A request for an extension of time shall indicate the purpose and reason for the requested extension of time and the positions of all interested parties regarding the extension. With the exception of the time limit for the filing of the initial pleading that begins a proceeding of the Board, the parties may waive all time limits established by the Board by written agreement in order to expedite a pending matter.

The Hearing Examiner's Report in this matter issued on March 10, 2009. The parties' exceptions were due within fifteen (15) days after March 10, plus five days for mailing. Here, service was by mail. Therefore, the exceptions were due on March 30, 2009. The Exceptions were filed on Friday, April 3, 2009, four (4) days after they were due. No request for an extension of time was filed at this time. Four (4) months later, on August 21, 2009, DPW submitted to the Board a request for an extension of time. The request for an extension of time states that "[o]n April 1, 2009 . . . [OLRCB] encountered a major delay in the completion of the Exceptions such that it was not possible to transmit the papers by facsimile in a timely fashion."

On April 3, 2009, the Union opposed the Exceptions as untimely filed. Citing *Doctor's Council of the District of Columbia General Hospital v. D.C. General Hospital*, 43 DCR 5159, Slip Op. No. 475 n.2 at p. 1, PERB Case No. 92-U-17 (1996). (Opposition at pgs. 1-2). In Slip Op. No. 475, the Board adopted the Executive Director's finding that Exceptions in that case were untimely filed, stating, "The Hearing Examiner's Report and Recommendation was served on the parties on May 15, 1996. Pursuant to Board Rule 520.13, exceptions were due no later than May 30, 1996. On June 10, 1996, DCGH requested an extension of time for submitting exceptions that failed to comply with the requirements of Board Rule 501.2 and 501.3. The Executive Director denied DCGH's request as untimely." Since the request for an extension of time was due "at least three (3) days prior to the expiration of the filing period" (and not 4 months later), the Complainant claims that the Board must deny the request for an extension of time pursuant to Board precedent in Slip Op. No. 475.

It is undisputed that the Exceptions in this matter were untimely filed and that no request was made for an extension at that time. The request was not made until four (4) months later. Therefore, the Board finds that the Exceptions were untimely filed.

Nonetheless, we believe that addressing the issues raised in the Exceptions will be instructive to the parties.

V. Discussion

The Respondent disputes the Hearing Examiner's findings that: (1) "because DPW honored the provisions of the CBA, it adopted the CBA" and (2) "when the Employer follows an in-force Agreement it becomes a term and condition of employment and a violation thereof is an unfair labor practice." The Respondent argues that the Hearing Examiner misinterpreted the *Litton* case in this regard.

DPW does not dispute the factual allegations raised in the Complaint concerning the parties' efforts at negotiating a successor agreement or the declaration that the CBA was terminated. Rather, DPW asserts it has the right to declare that the CBA is no longer in effect and therefore refuses to arbitrate. In light of these facts, we must determine whether DPW committed an unfair labor practice when it declared that the CBA was no longer in existence.

The Board has previously considered the issue of whether management must maintain the *status quo* after expiration of the parties' CBA. In *FOP/MPD Labor Committee and IAF, Local 36 and D.C. Office of Labor Relations and Collective Bargaining*, 31 DCR 6208, Slip Op. No. 94, PERB Case Nos. 84-U-15 and 85-U-01 (1984), the Board considered the "question of whether the District of Columbia, as Employer, may cancel, when a collective bargaining agreement expires, employee dental and optical insurance coverage established under the agreement." The Board determined that the District could not cancel insurance coverage when the parties' CBA expired:

The position taken here by the unions has been upheld consistently and without discovered exception by the National Labor Relations Board (applying the terms of Section 8(a)(5) of the National Labor Relations Act, which are virtually identical with those of Section 1-618.4(a)(5)⁹ of the D.C. Code), by other public employment boards (also administering similar statutory provision), by the federal district courts and courts of appeal, and by the Supreme Court of the United States. The conclusion which has been reached is dictated clearly by the letter of the law and equally by the practicalities of responsible collective bargaining.

⁹ Now codified at D.C. Code § 1-617.04(a)(5) (2001 ed.).

An extended line of cases applies this same principle to situations, paralleling exactly the facts of the present case, in which the employer canceled insurance plans of one kind or another while negotiations for a new collective bargaining agreement were in progress. The holdings have been, consistently, that such action violates the duty-to-bargain provisions in the National Labor Relations Act and in virtually all state public employment statutes. *Hinson v. NLRB*, 428 F.2d 133 (8th Circuit, 1970); *In re Cumberland School District*, 100 LRRM 2059 (Pa. Supreme Ct. 1978); cf. *Borden, Inc. v. NLRB*, 196 NLRB 172 (1972).

The good sense underlying this uniform body of precedent is plain. If employers were entitled to make unilateral changes in existing wages rates or *other terms and conditions of employment where an agreement expires and while a new one is being negotiated, it would invited unrestrained coercive action by the employers and inevitable retaliatory and disruptive action by unions.* The statutory prohibition on coercive action and the statutory duty to bargain collectively about changes in established wage rates and other terms and conditions of employment are designed specifically to prevent this kind of chaos. *The have special point in public employment situations, in which strikes or similar employee action are prohibited.*

The employer's contention here that this general rule becomes inapplicable if the contract places a termination date on specific terms of the agreement misconceives the basis of the rule. *The obligation to continue the established terms and conditions of employment flows from the statute, not from the terms of the agreement.* (emphasis added). (Slip Op. No. 94 at p. 3).

Consistent with our holding in the *FOP* case, we find that DPW must maintain the *status quo* concerning the terms and condition of employment contained in the CBA until the parties negotiate a successor agreement. This is especially true in the present case, where the parties reduced to writing that the current terms and conditions of employment would be in place until a new agreement was reached. We hereby adopt the Hearing Examiner's finding that DPW violated the CMPA at D.C. Code § 1-617.04(a)(5). However, we reject the Hearing Examiner's analysis and rely on our prior ruling in the *FOP* case. We find that the violation occurred when DPW did not maintain the *status quo* pending negotiations for a successor agreement.

The Board has held that District agencies are prohibited from "interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter." D.C. Code § 1-617.04(a)(1). DPW's action was patently coercive, in violation of D.C. Code § 1-617.04(a)(1). We also find that "[c]hanging the existing employment terms unilaterally during the renegotiation period is plainly a refusal to bargain collectively in good faith under § 1-617.04(a)(5)." *FOP/MPD Labor Committee and IAF, Local 36 and D.C. Office of Labor Relations and Collective Bargaining*, 31 DCR 6208, Slip Op. No. 94 at p. 6, PERB Case Nos. 84-U-15 and 85-U-01 (1984). We therefore adopt the Hearing Examiner's findings and conclusion to the extent they are consistent with our ruling. No arguments were raised in the Exceptions that were not raised before the Hearing Examiner. Thus, even if they had been timely filed, there is no basis for granting DPW's Exceptions.

Since we have determined that DPW has violated the CMPA by not maintaining the *status quo* concerning the terms and conditions of employment found in the 1988-90 CBA, and continued in effect by a memorandum of understanding, we now turn to the issue of what is the appropriate remedy in this case. AFGE has requested, *inter alia*, that the Board order DPW to post a notice acknowledging that it has violated the CMPA. (See Compl. at p. 4). Concerning the posting of a notice, the Board has previously noted that, "[w]e recognize that when a violation is found, the Board's order is intended to have therapeutic as well as a 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. District of Columbia Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). Moreover, "it is the furtherance of this end, i.e., the protection of employees rights, ... [that] underlies [the Board's] remedy requiring the posting of a notice to all employees concerning the violations found and the relief afforded...." *Charles Bagenstose v. D.C. Public Schools*, 41 DCR 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991). We are requiring DPW to post a notice to all employees concerning the violations found and the relief afforded. Therefore, bargaining unit employees who are most aware of DPW's conduct and thereby affected by it, will know that exercising their rights under the CMPA is indeed fully protected. "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 No. 01-U-04 and 01-S-02 (2002).

AFGE has also requesting that the Board order DPW to: (1) cease and desist its refusal to arbitrate grievances; (2) enjoin DPW from refusing to arbitrate future grievances; (2) direct DPW to immediately select arbitrators in the three (3) specified FMCS cases; (4) pay attorney's fees and costs. We grant AFGE's request that we order DPW to cease and desist from violating the CMPA by failing to honor the terms and conditions of the collective bargaining agreement, including the arbitration provision.

V. Attorney Fees and Costs

AFGE has requested that the Board grant attorney fees. That request is denied as the Board is not authorized to grant attorney fees.

The Complainant requested that reasonable costs be awarded. The Hearing Examiner did not address this issue. D.C. Code § 1-618.13(d) provides that “[t]he 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.” In *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pgs. 4-5, PERB Case No. 98-U-02 (2000), the Board addressed the criteria for determining whether a party should be awarded costs:

First, any such award of costs necessarily assumes that the party to whom the payment is to be 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 catalogued....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 reasonable foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative. (emphasis added).

In light of the recent Court ruling in the *Litton* case, it is not clear that DPW would have known at the time of declaring the CBA terminated that its claim was wholly without merit. Therefore, the Board finds insufficient evidence to establish a claim for costs under the interest of justice criteria.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Public Works ("DPW"), its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5), by the acts and conduct set forth in this Opinion.
2. DPW, its agents and representatives shall: (a) maintain the *status quo* concerning the terms and conditions of employment contained in the 1988-90 CBA and continued in effect by a memorandum of understanding; (b) honor the terms of the CBA, including the arbitration provision, until the completion of the negotiations for the Successor Agreement; and (c) cease and desist from violating the Comprehensive Merit Personnel Act.
3. DPW, its agents and representatives shall cease and desist from interfering, restraining, or coercing employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter VII Labor-Management Relations" of the Comprehensive Merit Personnel Act ("CMPA") to bargain collectively through representatives of their own choosing.
4. DPW shall post conspicuously within ten (10) days from the service of this Decision and Order, the attached Notice, admitting the above noted violations where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
5. DPW shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the date of this Decision and Order that the Notice has been posted accordingly. Also, within fourteen (14) days from the issuance of this Decision and Order, DPW shall notify the Board of the Steps it has taken to comply with paragraphs 2 and 4 of this Order.
6. 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.

December 31, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-U-43 was transmitted via Fax & U.S. Mail to the following parties on this the 31st day of December 2009.

Barbara Hutchinson, Esq.
7907 Powhatan Street
New Carrollton, MD 20784

FAX & U.S. MAIL

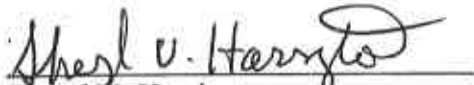
James Langford, Esq.
Attorney Advisor
Office of Labor Relations and
Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Natasha Campbell, Director
Office of Labor Relations and
Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

U.S. MAIL


Sheryl V. Harrington
Secretary



Public
Employee
Relations
Board

Government of the
District of Columbia



717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS, 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. 1001, PERB CASE NO. 05-U-43 (December 31, 2009).

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. 1001.

WE WILL cease and desist from refusing to bargain in good faith with American Federation of Government Employees, Local 631, and we will: (a) maintain the *status quo* concerning the terms and conditions of employment contained in the 1988-90 CBA and continued in effect by a memorandum of understanding; (b) honor the terms of the CBA, including the arbitration provision, until the completion of the negotiations for the Successor Agreement; and (c) cease and desist from violating the Comprehensive Merit Personnel Act.

WE WILL cease and desist from interfering, restraining, or coercing employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter VII Labor-Management Relations" of the Comprehensive Merit Personnel Act ("CMPA") to bargain collectively through representatives of their own choosing.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by Subchapter XVII Labor-Management Relations, of the District of Columbia Comprehensive Merit Personnel Act.

District of Columbia Department of Public Works

Date: _____ By: _____
Director

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. Telephone: (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 31, 2009