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

In the Matter of:)	
American Federation of Government Employees, Local 1000,)	
Petitioner,)	PERB Case No. 13-U-15
v.)	Opinion No. 1486
District of Columbia)	Motion for Reconsideration
Department of Employment Services,)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

On March 22, 2013, Petitioner American Federation of Government Employees (“AFGE”) filed the instant Petition for Reconsideration (“Petition”), contending that the Order in Slip Op. No. 1368 should be reconsidered because the Board’s jurisdiction is not defined by an arbitrator, and that there was no dispute over the implementation of the arbitration award in this case because Respondent District of Columbia Department of Employment Services (“DOES”) took no steps to implement the Award. (Petition at 1). In support of its argument, AFGE cited to Board precedent stating that the failure to comply with an arbitrator’s award is an unfair labor practice, and contended that DOES “may not insulate itself from unfair labor practice liability based on its failure to comply by simply hiding under a reservation of the arbitrator’s jurisdiction to resolve unforeseen disputes regarding implementation.” (Petition at 1-2).

Concurrent with the Petition, AFGE asked Arbitrator Elliot H. Shaller to enforce the Award or state that he lacked jurisdiction to do so. (Petition Ex. B). On March 26, 2013, AFGE filed a Supplement to its Petition (“Supplement”), informing the Board that the Arbitrator had determined that he lacked authority to make a decision regarding compliance with or enforcement of the Award. (Supplement at 1; Supplement Attachment B).

DOES did not respond to the Petition or the Supplement.

II. Discussion

A. Background

On February 6, 2013, AFGE filed an Unfair Labor Practice Complaint (“Complaint”), in relation to the Arbitrator’s arbitration award sustaining the grievance of Grievant Sheila Myers. Ms. Myers was terminated by DOES on December 28, 2011. In the Award, the Arbitrator ordered DOES to reinstate Ms. Myers to the position she held at the date of her discharge, without back pay or benefits. (Award at 33). The Arbitrator retained jurisdiction to address AFGE’s application for attorney’s fees, and any disputes that arose in implementing the Award. (Award at 34).

In the Complaint, AFGE alleged that DOES failed to reinstate Ms. Myers, and had not sought review of the Award in accordance with D.C. Official Code § 1-605.2(6). (Complaint at ¶¶ 7-8). AFGE contended that by failing to comply with the Award, DOES interfered with, restrained, and coerced employees in the exercise of their rights under D.C. Official Code § 1-617.06(a)(1), and refused to bargain in good faith, in violation of D.C. Official Code §§ 1-617.04(a)(1) and (5). (Complaint at ¶ 9).

In its Answer, DOES admitted that it had not reinstated Ms. Myers, and raised the affirmative defense that the Board lacked jurisdiction over the Complaint because the Arbitrator had retained jurisdiction to address disputes over the implementation of the Award. (Answer at 3-4).

In Slip Op. No. 1368, the Board concluded that the matter was not ripe for resolution, as the proper forum for the parties’ dispute was with the Arbitrator, who had retained jurisdiction to address disputes that arose in implementing the Award. *American Federation of Government Employees, Local 1000 v. D.C. Dep’t of Employment Services*, 60 D.C. Reg. 5247, Slip Op. No. 1368 at p. 3, PERB Case No. 13-U-15 (2013). The Complaint was dismissed, and AFGE filed the instant Petition.

B. Analysis

The Board will dismiss motions for reconsideration that are based upon mere disagreement with its initial decision, or which do not provide a statutory basis for reversal. See, e.g., *American Federation of Government Employees, Local 2725 v. D.C. Dep’t of Consumer and Regulatory Affairs*, 59 D.C. Reg. 5041, Slip Op. No. 969 at p. 5, PERB Case No. 06-U-43 (2009).

In the instant case, the Board interpreted the Arbitrator’s statement that “[j]urisdiction is retained to address [an application for attorney’s fees] and/or any disputes that may arise in implementing this Award” to mean that the Arbitrator was the proper forum to adjudicate AFGE’s dispute with DOES over Ms. Myers’ reinstatement, or lack thereof. Slip Op. No. 1368 at p. 2-3. However, in light of the Arbitrator’s own determination that he lacked authority to

make a decision on this issue, it cannot be said that AFGE's Petition is based upon mere disagreement with the Board's initial decision in this case.

With jurisdiction over this matter no longer an issue, AFGE has provided the Board with a basis for reversal of its previous decision and order. As AFGE correctly notes, “[t]here is ample PERB case law stating that failure to comply with an arbitrator's award is an unfair labor practice. When a party simply refuses to implement an award where no dispute exists over its terms, the employer commits an unfair labor practice.” (Petition at 1-2; citing *AFSCME, District Council 20, Local 2921 v. D.C. Public Schools*, Slip Op. No. 713 at p. 3, PERB Case No. 03-U-17 (May 21, 2003)); *see also American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, 46 D.C. Reg. 4398, Slip Op. No. 497, PERB Case No. 96-U-23 (1996) (“when a party simply refuses or fails to implement an award or negotiated agreement where no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and, thereby, an unfair labor practice under the CMRA”); *American Federation of Government Employees, Local 2725 v. D.C. Housing Authority*, 46 D.C. Reg. 6278, Slip Op. No. 585, PERB Case No. 98-U-20 (1999); *American Federation of Government Employees, Local 2725 v. D.C. Housing Authority*, 46 D.C. Reg. 8356, Slip Op. No. 597, PERB Case No. 99-U-23 (1999).

DOES does not dispute that it has failed to comply with the Award by reinstating Ms. Myers, nor has it filed a petition for review of the Award before PERB. (Answer at 3). Under these facts, it is apparent that DOES' failure to comply with the terms of the Award is not based upon a genuine dispute over the terms of the Award, but rather a flat refusal to comply. This conduct constitutes a violation of DOES' duty to bargain in good faith under D.C. Official Code § 1-617.04(a)(5), and derivatively, interference with bargaining unit employees' rights in violation of D.C. Official Code § 1-617.04(a)(1). *See AFGE Local 2725*, Slip Op. No. 597 at p. 5.

In the Complaint, AFGE requested that the Board order DOES to desist from violations of D.C. Official Code §§ 1-617.04(a)(1) and (5) in the manner alleged or in any like or related manner, immediately reinstate Ms. Myers and make her whole for any and all losses incurred as a result of DOES' failure to promptly comply with the Award, comply immediately with the Award in all other respects, pay attorney's fees and costs, and post a notice to employees. (Complaint at 3).

The Board will order DOES to desist from violations of the CMRA, and to comply with the Award by immediately reinstating Ms. Myers to the position she held as of the date of her discharge, and in all other respects. Consistent with the terms of the Award, DOES is not required to pay back pay or benefits for the period between the date of Ms. Myers' discharge and the date of the issuance of the Award. However, in order to make Ms. Myers whole for DOES' unlawful refusal to promptly implement the terms of an arbitration award with which it had no genuine dispute, Ms. Myers is awarded back pay, with prejudgment interest computed at a rate of 4% per annum, from the date of the Award, November 13, 2012, through the date of Ms. Myers' reinstatement. *See D.C. Official Code § 1-617.13(a)* (“Remedies of the Board may include, but shall not be limited to, orders which: ...reinstate, with or without back pay, or otherwise make

whole, the employment or tenure of any employee, who the Board finds has suffered adverse economic effects in violation of this subchapter...”).

When a violation of the CMPA 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 D.C. Reg. 7551, Slip Op. No. 635 at p. 15-16, PERB Case No. 99-U-04 (2000). In light of the above, DOES will be required to post a notice to all employees concerning the unfair labor practice violations found in this case. See *AFGE Local 2725 v. D.C. Dep’t of Health*, 59 D.C. Reg. 4627, Slip Op. No. 945 at p. 3, PERB Case No. 08-U-08 (2009). Such a notice posting informs bargaining unit employees that DOES has been directed to comply with its bargaining obligations under the CMPA, and “serves as a strong warning against future violations.” *Cunningham v. Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee*, 49 D.C. Reg. 7773, Slip Op. No. 682 at p. 10, PERB Case Nos. 01-U-04 and 01-S-01 (2002).

In *AFSCME, District Council 20, Local 2776 v. D.C. Dep’t of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990), the Board articulated the criteria for determining when an award of costs would be in the interest of justice. The interest-of-justice criteria include whether the losing party’s claim or position was wholly without merit, whether the successfully challenged action was undertaken in bad faith, and whether a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union. *Id.* at 5. The Board has been reluctant to award costs in cases involving an agency’s failure to implement an arbitration award or negotiated settlement. See *AFGE Local 2725*, Slip Op. No. 945. The Board has shown a willingness to overcome this reluctance in instances where an agency has demonstrated a pattern or practice of refusing to implement arbitration awards or negotiated settlements, or where an agency has flatly refused to comply with the award. See *Psychologists Union, Local 3758, 1199 NUHHCE v. D.C. Dep’t of Mental Health*, 59 D.C. Reg. 9770, Slip Op. No. 1260 at p. 3, PERB Case No. 06-U-40 (2012). In the instant case, AFGE does not allege that DOES has a pattern or practice of refusing to implement arbitration awards. However, DOES has flatly refused to comply with the Award by failing to reinstate Ms. Myers, an action undertaken in bad faith, and one whose reasonably foreseeable result is the undermining of AFGE among the bargaining unit members. Therefore, an award of reasonable costs in this case is in the interest of justice.

As the Arbitrator specifically retained jurisdiction to address AFGE’s application for attorneys’ fees, the Board will not consider AFGE’s request for attorneys’ fees in the Complaint. (Award at 34).

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 1000's Petition for Reconsideration is granted.
2. The D.C. Dep't of Employment Services, its agents, and representatives shall cease and desist from refusing to bargain in good faith with the Union by failing to implement the terms of the November 13, 2012, arbitration award, over which no genuine dispute exists.
3. DOES shall immediately reinstate Ms. Sheila Myers to the position she held as of the date of her discharge.
4. DOES will pay back pay with prejudgment interest computed at a rate of 4% per annum, from the date of the arbitration award, November 13, 2012, through the date of Ms. Myers' reinstatement.
5. DOES will pay the reasonable costs associated with this litigation.
6. DOES 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.
7. Within fourteen (14) days from the issuance of this Decision and Order, DOES shall notify the Public Employee Relations Board, in writing, that the Notice has been posted accordingly. Also within fourteen (14) days from the issuance of this Decision and Order, DOES shall notify the Public Employee Relations Board, in writing, that it has complied with paragraphs 3 and 4 of this Order.
8. 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.

August 21, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-15 was transmitted to the following parties on the 25th day of August 2014.

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