Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
American Federation of Government Employees, AFL-CIO, Local 872,	)	
Complainant,	)	PERB Case No. 07-U-02
v.	)	
	)	Opinion No. 858
District of Columbia Water and Sewer Authority,	)	
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case:

On October 5, 2006, the American Federation of Government Employees, AFL-CIO, Local 872 ("Complainant", "AFGE" or "Union"), filed an "Unfair Labor Practice Complaint" and a "Motion for a Decision on the Pleadings", in the above-referenced case. In its Complaint, AFGE alleges that the District of Columbia Water and Sewer Authority ("WASA") violated D.C. Code § 1-617.04 (a) (1) and (5) by failing to fully implement an Arbitrator's Award which reinstated bargaining unit members Donnell Banks and Cleveland Hill.

WASA filed an answer denying that it violated the Comprehensive Merit Personnel Act ("CMPA") and requested that the Board dismiss the Complaint. WASA did not file a response to the Complainant's "Motion for a Decision on the Pleadings". AFGE's "Motion for a Decision on the Pleadings" and WASA's "Motion to Dismiss" are before the Board for disposition.

II. Discussion

Donnell Banks and Cleveland Hill were employed by WASA as Water Services Workers in the Water Services Department until February 14, 2005. Banks' employment with WASA began in 1986 and Hill's in 1978.

On October 26, 2004, Banks and Hill were working together, wearing uniforms which identified them as WASA employees, and riding in a WASA-owned truck (with WASA identifying marks on the outside). They were arrested at approximately 11:40 a.m. in a high crime area of Washington, D.C., an area to which they had been assigned. Banks and Hill were charged with possession of marijuana and intent to distribute. Within a day or so of October 26, WASA management became aware of the arrests and began an investigation to determine whether internal discipline was appropriate.

The criminal charges against Banks and Hill resulted in a single trial, before a judge, on February 1, 2005. Each was convicted of the crime of "possession of marijuana." Banks and Hill were terminated from employment and removed from duty that day on February 14, 2005.

Banks and Hill grieved their terminations. The matter proceeded to arbitration before Arbitrator Jane Rigler. The issue before the Arbitrator was whether WASA had cause to terminate the employment of Donnell Banks and Cleveland Hill. In an Award issued on August 16, 2005, the Arbitrator indicated that it was "clear that . . .[Donnell Banks and Cleveland Hill] were each convicted of the crime of possession of marijuana . . . [and that]] [i]t is beyond dispute that criminal convictions must be established by proof beyond a reasonable doubt. [Moreover,] [n]either Banks or Hill . . . appealed [their] criminal conviction. [Furthermore,] [a]ll these facts support [a] conclusion that . . . WASA established that Banks and Hill possessed marijuana on October 26, 2004." (Award at pgs 4-5). The Arbitrator also found "that Banks' and Hill's convictions would adversely affect the public's perception of [WASA]." (Award at p. 5).

Despite her conclusion that WASA "had cause to discipline Hill and Banks, [the Arbitrator found]. . . that discharge was an unreasonable sanction." (Award at p. 6) She indicated that the infraction with which Hill and Banks were charged specified a range of discipline, from reprimand to removal, for a first offense. In addition, the Arbitrator observed that both Hill and Banks were longtime employees with "lengthy and blemish-free employment history." Id. In light of the above, the Arbitrator determined that the more appropriate sanction in this case was a "lengthy, unpaid suspension. The February 14, 2005 termination date, and the August 16, 2005 date of this award, mean that suspension will be in the neighborhood of six months.". Id. The Arbitrator ordered that:

> DCWASA reinstate Cleveland Hill and Donnell Banks , without pay within ten calendar of its receipt of [the] award, and upon their reinstatement, treat them, for all purposes, as though they had been suspended, without pay, for the period of time between February 14, 2005 and the date of their reinstatement. (Award at p. 6).

WASA filed an Arbitration Review Request with the Board seeking reversal of the Award. WASA argued that the Award on its face was contrary to law and public policy because the Arbitrator's "decision [was] directly contrary to the strong public interest in maintaining a drug-free

workplace." (Request at p. 5) AFGE opposed WASA's Request on the grounds that: (1) WASA's submission was untimely and (2) WASA failed to establish a statutory basis for the Board's review.

In PERB Case No. 05-A-10, we determined that WASA's Request was timely. However, we found that none of the public policies identified by WASA, mandated removal of Banks and Hill. (See Slip Op. No. 843, issued on June 7, 2006.) We noted that WASA's argument involved a disagreement with the Arbitrator's ruling and a "disagreement with the arbitrator's interpretation . . . does not make the award contrary to law and public policy." District of Columbia Water and Sewer Authority v. AFGE ,Local 872, Slip Op. No. 843 at p. 8, PERB Case No. 05-A-10 (2006). In light of the above, we denied WASA's Arbitration Review Request.

AFGE asserts that pursuant to the Award, WASA was required to reinstate Banks and Hill within ten days of the August 16, 2005 arbitration award. The grievants were not reinstated until July 24, 2006, and "[u]pon their reinstatement, WASA did not pay the grievants back pay for the approximate 11 month period from [the date] of issuance of the award until their reinstatement [date]." (Compl. at p. 3).

In light of the above, AFGE filed an unfair labor practice complaint on October 5, 2006 alleging that WASA is violating D.C. Code § 1-617.04(a)(1) and (5) by refusing to fully implement an award which directed that bargaining unit members Donnell Banks and Cleveland Hill be reinstated by a particular date.[1] AFGE is requesting that the Board issue a decision on the pleadings. In addition, AFGE is asking that the Board order WASA to: (1) cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); (2) fully implement the Award by paying the Grievants back pay with interest for the period from August 26, 2005 until the date of their reinstatement on or about July 24, 2006; and (3) pay reasonable costs. (See Compl. at p. 4).

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[1] D.C. Code § 1-617.04(a)(1) and (5) provide as follows:

> (a) The District, its agents, and representatives are prohibited from:
>
> > (1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;
> >
> > • • •
> >
> > (5) Refusing to bargain collectively in good faith with the exclusive representative.

In accordance with Board Rule 520.6, WASA filed an answer denying that they have committed an unfair labor practice and asserting:

> It is well settled that a party's failure to comply with the terms of an arbitration award resulting from the parties agreed upon vehicle for resolving grieveable dispute concerns are a breach of a contractual obligation and "does not give rise to an unfair labor practices under the CMPA." . . . Thus, although the Board posses the authority to seek compliance with its decision and orders, there is no explicit statutory authority to seek compliance with decisions or awards rendered by third parties, e.g. arbitrators. . . . Accordingly, since no statutory basis exists for the PERB to consider the claim alleged, which is strictly contractual in nature, the complaint should be dismissed. . . .
>
> Further, contrary to the Union's contention, [WASA] did fully implement the arbitrator's award. The award is clear on its face and does not lend itself to the interpretation that the Union suggests. Specifically, nowhere in arbitrator's Rigler's award does the language indicate that the grievants are entitled to any back award under any circumstances. In fact, quite the contrary is suggested by arbitrator Rigler's refusal to retain jurisdiction of the matter during the implementation phases of her award. Also, it should be noted that, although the Union requested that the arbitrator retain jurisdiction in it's post hearing brief, arbitrator Rigler specifically declined to do so.
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> * * *
>
> Finally, the Union's settlement request to [WASA] was clear and specific. It listed just two demands:
>
> 1. Payment of its Attorney fees; and
>
> 2. Reinstatement of the two grievants.
>
> The Union never requested back pay for the grievants as a condition of settlement regarding the Authority complying with the arbitrator's award. Under these circumstances, the Union's latter day claim for relief should be dismissed for the reasons stated herein. (Compl. at pgs. 2-4, citations omitted.)

WASA does not deny that it reinstated the grievants on or about July 24, 2006.

Consistent with Board Rule 520.7, we find that the material issues of fact and supporting documentary evidence are undisputed by the parties. As a result, the alleged violation is a question of law. Therefore, pursuant to Board Rule 520.10, this case can appropriately be decided on the pleadings. In light of the above, we grant AFGE's motion for a decision on the pleadings.

The Board has previously considered the question of whether the failure to implement an arbitrator's award or settlement agreement constitutes an unfair labor practice. In American Federation of Government Employees, Local 872, AFL-CIO v. D.C. Water and Sewer Authority, 46 DCR 4398, Slip Op. No. 497 at p. 3, PERB Case No. 96-U-23 (1996), the Board held for the first time that "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 CMPA." (See also, American Federation of Government Employees, Local 2725, AFL-CIO v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597 , PERB Case No. 99-U-23 (1999), and American Federation of Government Employees, Local 2725, AFL-CIO v. D.C. Housing Authority, 46 DCR 6278, Slip Op. No. 585 , PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999).

In the present case, the evidence submitted by the parties demonstrates that in the Award issued on August 16, 2005 the Arbitrator directed that WASA reinstate Cleveland Hill and Donnell Banks, without pay within ten calendar days of WASA's receipt of the award. Upon their reinstatement, the Arbitrator directed that the Grievants be treated, for all purposes, as though they had been suspended without pay, for the period of time between February 14, 2005 and August 16, 2005, the date of their ordered reinstatement. The Arbitrator indicated the period of time between the February 14, 2005 termination date, and the August 16, 2005 date of the award, meant that Hill's and Banks' suspension would be in the neighborhood of six months.

It is clear from the parties' pleadings that Banks and Hill were not reinstated within ten calendar days of the date of the August 16, 2005 Award as ordered by the Arbitrator. Instead, Banks and Hill were reinstated on July 24, 2006. To date, Banks and Hill have not been paid for the period August 26, 2005 (ten calendar days after the date of the Award) to July 24, 2006 (the date of their reinstatement). In effect, WASA converted their discipline from a an approximate six-month unpaid suspension into an almost eighteen-month (18) suspension without pay.

After reviewing the parties' pleadings and exhibits, we have determined that WASA's failure to fully comply with the terms of the Award is not based on a genuine dispute over the terms of the Award, but rather on a flat refusal to comply with the Award. Furthermore, we find that WASA has no "legitimate reason" for its on-going refusal to provide Banks and Hill with compensation for the period August 26, 2005 to July 24, 2006, a period during which the Arbitrator expected them to be back on the job. We conclude that WASA's actions constitute a violation of its duty to bargain in good faith, as codified under D.C. Code § 1-617.04(a)(5) (2001 ed.). Also, we find that by "these same acts and conduct, [WASA's'] failure to bargain in good faith with [AFGE] constitutes, derivatively, interference with bargaining unit employees' rights in violation of D.C. Code § [1-

617.04] (a)(1) (2001 ed.)." (Emphasis in original.) AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597 at p. 5, PERB Case No. 99-U-33 (1991). Also see, Committee of Interns and Residents v. D.C. General Hospital, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01 (1995).

Having determined that WASA has violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.), we now turn to what is the appropriate remedy in this case. AFGE is asking that the Board order WASA to: (1) cease and desist from violating the CMPA; (2) fully implement the Award and pay the Grievants back pay with interest for the period from August 26, 2005 until the date of their reinstatement on or about July 24, 2006; and (3) pay reasonable costs. (See Compl. at p. 4).

We find that WASA's failure to fully implement the Award by not reinstating Hill and Banks until July 24, 2006 has resulted in Hill and Banks suffering an adverse economic effect in violation of the CMPA. Therefore, as part of the Board's make whole remedy, WASA is ordered to pay Hill and Banks back pay for the period August 26, 2005 through July 24, 2006.

In addition, AFGE has requested that the Board award compound interest. We have previously considered the question of whether the Board can award interest as part of its "authority to 'make whole' 'those who the Board finds [have] suffered adverse economic effects in violation of . . . the Labor-Management Relations Section of the CMPA. . . '." University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 39 DCR 8594, Slip Op. No. 285 at p. 15, PERB Case No. 86-U-16 (1992). In the UDCFA case we stated the following:

> The D.C. Superior Court has held that an "award requiring [that]. . . employee[s] be given back pay for a specific period of time establishes . . . a liquidated debt" and therefore is subject to the provisions of D.C. Code Sec. 15-108 which provides for prejudgment interest on liquidated debts at the rate of four percent (4%) per annum. See American Federation of Government Employees, Local 3721 v. District of Columbia Fire Department, 36 DCR 7857, PERB Case No. 88-U-25 (1989) and American Federation of State, County and Municipal Employees v. District of Columbia Bd. of Education, D.C. Superior Court. Misc. Nos. 65-86 and 93-86, decided Aug. 22, 1986, reported at 114 Wash. Law Reporter 2113 (October 15, 1986). Id at p. 17.

We have held "that prejudgment interest begins to accrue at the time the back-pay . . . became due" and shall be computed at the rate of four percent (4%) per annum. University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, 41 DCR 1914, Slip Op. No. 307 at p. 2, PERB Case No. 86-U-16 (1992). See also, Fraternal Order of Police/MPD Labor Committee v. District of Columbia Metropolitan Police Department, 37 DCR 2704, Slip Op. No. 242, PERB Case No. 89-U-07 (1990).

WASA was required to reinstate Hill and Banks within ten calendar days of the August 16, 2005 Award. WASA did not reinstate Hill and Banks until July 24, 2006. WASA is ordered to pay Hill and Banks back pay with compound interest at the rate of four percent (4%) per annum.

As to AFGE's request for reasonable costs, the Board first addressed the circumstances under which the awarding of costs to a party may be warranted in AFSCME, D.C. Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). In that case, the Board concluded that it could, under certain circumstances, award reasonable costs.

In cases which involve an agency's failure to implement an arbitration award or a negotiated settlement, this Board has been reluctant to award costs. See, AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 6278, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999), and American Federation of Government Employees, Local 2725 v. D.C. Department of Health, Slip Op. No. 752, PERB Case No. 03-U-18 (2004). However, we have awarded costs when an agency has demonstrated a pattern and practice of refusing to implement arbitration awards or negotiated settlements. See, AFGE Local 2725 v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597 at p. 2, PERB Case No. 99-U-23 (1991).

In the present case, AFGE does not assert or provide evidence that WASA has engaged in a pattern and practice of refusing to implement arbitration awards or negotiated settlements. We therefore find that it would not be in the interest of justice to accord AFGE its requested reasonable costs in these proceedings for prosecuting WASA's violation. In light of the above, we deny AFGE's request for reasonable costs.

"We recognize that when a violation 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 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). In light of the above, we are requiring that WASA post a notice to all employees concerning the violations found and the relief afforded, notwithstanding the fact that all employees may not have been directly affected. By requiring that WASA post a notice, "bargaining unit employees . . . would know that [WASA] has been directed to comply with their bargaining obligations under the CMPA." Id. at p. 16. "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 Nos. 01-U-04 and 01-S-01 (2002).

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 872's, ("AFGE") Motion for a Decision on the Pleadings, is granted.

2. The District of Columbia Water and Sewer Authority's ("WASA"), Motion to Dismiss is denied.

3. WASA, its agents and representatives shall cease and desist from refusing to bargain in good faith with AFGE by failing to fully comply with the terms of the August 16, 2005 Arbitration Award.

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

5. WASA shall within fourteen (14) days from the issuance of this Decision and Order fully implement the terms of the Arbitration Award by providing Donnell Banks and Cleveland Hill with back pay retroactive for the period August 26, 2005 through July 24, 2006, with interest at the rate of four percent (4%) per annum. The interest in this case shall begin to accrue at the time Hill and Banks were ordered reinstated, namely August 26, 2005.

6. AFGE's request for reasonable costs is denied for the reasons stated in this Slip Opinion.

7. WASA 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.

8. Within fourteen (14) days from the issuance of this Decision and Order, WASA shall notify the Public Employees Relations Board (Board), in writing, that the Notice has been posted accordingly. Also, WASA shall notify the Board of the steps it has taken to comply with paragraph 5 of this Order.

10. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

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

December 20, 2006

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-02 was transmitted via Fax and U.S. Mail to the following parties on this the 20th day of December 2006.

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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, 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. 858, PERB CASE NO. 07-U-02 (December 20, 2006)

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. 858.

WE WILL cease and desist from refusing to bargain in good faith with the American Federation of Government Employees (AFGE), Local 872, AFL-CIO by failing to comply with the terms of an arbitration award over which no genuine dispute exists over the terms.

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

District of Columbia Water and Sewer Authority

Date:_____ By:_____
General Manager

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 may 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. Phone: (202) 727-1822.

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

December 20, 2006