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

In the Matter of:)	
)	
American Federation of Government Employees, Local 2725,)	
)	
Complainant,)	
)	PERB Case No. 06-U-43
v.)	
)	Opinion No. 969
)	
District of Columbia Department of Consumer and Regulatory Affairs,)	Motion for Reconsideration
)	
and)	
)	
Office of Labor Relations and Collective Bargaining,)	
)	
Respondents.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case

This matter involves a Motion for Reconsideration (“Motion”) filed by the Office of Labor Relations and Collective Bargaining (“OLRCB” or “Respondent”) on behalf of the District of Columbia Department of Consumer Affairs (“DCRA” or “Respondent”).¹ Respondents are requesting that the Board reconsider its Decision and Order in Slip Opinion No. 930. (See Motion at p. 1).

The American Federation of Government Employees, Local 2725 (“Union”, “AFGE, Local 2725” or “Complainant”) filed an unfair labor practice complaint (“Complaint”) against DCRA and OLRCB alleging that DCRA violated the

¹ DCRA and OLRCB are collectively referred to as “Respondents”.

Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-617.04(a)(1) and (5), by failing and refusing to comply with or implement Arbitrator David M. Vaughn's June 2, 2006 Arbitration Award ("Award"). A hearing was held in this matter, and in his Report and Recommendation ("R&R"), Hearing Examiner Sean J. Rogers concluded that DCRA violated the CMPA by failing to comply with the Award. In Slip Op. No. 930, the Board adopted the findings and conclusions of Hearing Examiner Rogers and found that DCRA committed an unfair labor practice by failing to implement the Award.² On March 4, 2008, the Respondents submitted the present Motion for Reconsideration pursuant to Board Rule 500.4.³

AFGE, Local 2725 filed no opposition to the Motion. The Respondents' Motion is before the Board for disposition.

II. Discussion

The matter at issue stems from Arbitrator Vaughn's Award concerning a grievance filed by the Union on behalf of bargaining unit employee William Harris challenging his performance appraisal of "satisfactory" for the rating period April 1, 2003, through March 31, 2004. (See Slip Op. No. 930 at p. 2). The parties were unable to resolve the grievance and AFGE, Local 2725 invoked arbitration pursuant to the collective bargaining agreement ("CBA"). (See Slip Op. No. 930 at p. 2). The Arbitrator issued an arbitrability ruling, finding the grievance to be arbitrable, and asserted jurisdiction over the merits of the dispute. (See Slip Op. No. 930 at p. 2). The Arbitrator held a hearing on the merits, however, the Respondents refused to participate. (See R&R at p. 4). Following the hearing, the Arbitrator ruled that Mr. Harris' rating "shall be changed from Satisfactory to Outstanding."⁴ (See R&R at p. 4 and Award at p. 12). The Respondents did not appeal Arbitrator Vaughn's Award to the Board. (See Slip Op. No. 930 at p. 3).

² Slip Opinion No. 930 was issued on February 19, 2008,

³ In the Motion for Reconsideration, Respondents request that the Board reconsider its decision and "rewrite it to allow due process to the Respondents." (Motion at p. 1).

⁴ The Arbitrator's Award states, in pertinent part, as follows:

The Grievant's performance rating of Satisfactory was in violation of the Collective Bargaining Agreement between the Parties and the District of Columbia Personnel Manual. The Union demonstrated that Grievant was entitled to, but was improperly denied, a rating of Outstanding. Grievant's rating for the evaluation period from April 1, 2003 through March 31, 2004 shall be changed from Satisfactory to Outstanding. Grievant shall be made whole for any wages and/or benefits lost as a result of the improperly lowered rating.

(R&R at p. 4).

DCRA did not implement Arbitrator Vaughn's Award. As a result, the Union filed an unfair labor practice complaint against DCRA and OLRCB alleging that DCRA violated the CMPA by failing and refusing to comply with or implement Arbitrator Vaughn's Award. (See Slip Op. No. 930 at p. 3). DCRA filed an Answer to the Complaint. In its Answer, DCRA countered that it did not commit an unfair labor practice because a grievance concerning an employee's performance evaluation is not substantively arbitrable. In addition, DCRA asserted that the Arbitrator did not have authority to issue the Award and, therefore, DCRA did not violate the CMPA by failing to comply with the Award.

A hearing was held and Hearing Examiner Rogers concluded that DCRA violated D.C. Code § 1-617.04(a)(1) and (5) by not complying with Arbitrator Vaughn's Award. (See Slip Op. No. 930 at p. 5). The Hearing Examiner noted that DCRA's only defense for non-compliance was its disagreement with that portion of Arbitrator Vaughn's Award finding the grievance arbitrable. (See Slip Op. No. 930 at p. 5). Furthermore, the Hearing Examiner indicated that the exclusive method for review of Arbitrator Vaughn's Award was the filing of an appeal with the Board pursuant to D.C. Code § 1-605.02(6). (See R&R at p. 13).⁵ In view of the above, the Hearing Examiner recommended that the Board:

1. [Order DCRA to] [i]mplement the June 2, 2006 arbitration Award of Arbitrator M. David Vaughn in the William Harris grievance immediately, including the payment of arbitration fees to the Complainant and any backpay, with interest, to the Grievant William Harris;
2. [Order DCRA to] [p]ost for 30 days a notice, where notices to employees are ordinarily posted in the work place, stating that DCRA and OLRCB have violated the provisions of D.C. Code § 1-617.04(a)(1) and (5) by failing and refusing to implement the June 2, 2006 arbitration Award of Arbitrator M. David Vaughn in the William Harris grievance ;

⁵ D.C. Code § 1-605.02(6) provides that "[t]he Board shall have the power to do the following:"

- (6) Consider appeals from arbitration awards pursuant to a grievance procedure; provided, however, that such awards may be modified or set aside or remanded, in whole or in part, only if the arbitrator was without, or exceeded his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means; provided, further, that the provision of this paragraph shall be the exclusive method for reviewing the decision of the arbitrator concerning a matter properly subject to the jurisdiction of the Board, notwithstanding the provisions of §§ 16-4301 to 16-4319.

3. [Order DCRA to] [p]ay the Complainant's reasonable costs with interest incurred in enforcing the June 2, 2006 arbitration Award of Arbitrator M. David Vaughn in the William Harris grievance; and
4. [Grant] [a]ny other relief that [it] deems appropriate.

(R&R at p. 16).

DCRA filed Exceptions to the Hearing Examiner's R&R. The Union did not file an opposition to Respondents' Exceptions. The Board found that the Respondents' defense to their failure to comply with Arbitrator Vaughn's Award rested in DCRA's disagreement with the Arbitrator's ruling that the issue of performance evaluations was arbitrable. (See Slip Op. No. 930 at p. 5). The Board determined that pursuant to D.C. Code § 1-605.02(6), Respondents' exclusive remedy for appealing the Arbitrator's ruling concerning the issue of arbitrability was to request the Board's review of Arbitrator Vaughn's Award. (See Slip Op. No. 930 at p. 6).⁶ In addition, the Board stated that "DCRA has simply failed and refused to implement the clear and simple terms of the Award. DCRA has provided no reason for its inaction other than its contention that the issue of performance evaluations is not arbitrable." (See Slip Op. No. 930 at p. 6). As a result, the Board found that DCRA violated the CMPA by failing to comply with Arbitrator Vaughn's Award.

In its Motion for Reconsideration, the Respondents contend that the issue of arbitrability should be determined by a court and not an arbitrator and that the Board's decision and order has denied the Respondents due process by denying "access to the courts" to make a determination on arbitrability. (See Motion at p. 2). In support of its position, the Respondents argue that the Board has misread the holding in *American Federation of Government Employees, Local 3721 v. District of Columbia*, 563 A. 2d 361, 362 (D.C. 1989). In that case the Court of Appeals held that "[u]nder District of Columbia law, when deciding whether to order arbitration, the trial court must determine whether the parties agreed to arbitrate the particular dispute at issue." Specifically, the Respondents assert that it is a court that must first rule that an issue is arbitrable if the parties' CBA is "susceptible of an interpretation that covers the dispute." *Id.* at 364. The Respondents claim that based on this holding, all issues of arbitrability must be resolved by the Courts and that the Arbitrator did not have authority to determine arbitrability. (See Motion at p. 2).

After reviewing the Motion, we find that DCRA's arguments are a repetition of the arguments made in its Exceptions and previously rejected by the Board. As a result, we find that the Respondents merely disagree with the Board's long held position that matters of arbitrability are initially determined by the arbitrator. See *American Federation of State, County and Municipal Employees, Council 20, AFL-CIO v. District*

⁶ The Board noted that the arbitrability Award was issued on March 27, 2006, and that the Respondents did not request review of the Award within twenty days of the March 27 date, or at any point thereafter. (See Slip Op. No. 930 at p. 6).

of Columbia General Hospital and the District of Columbia Office of Labor Relations and Collective Bargaining, 36 DCR 7101, Slip Op. No. 227 at p. 5, PERB Case No. 88-U-29 (1989). Moreover, the Respondents clearly waived any right to challenge the issue of arbitrability by failing to appeal the Arbitrator's Award in a timely manner.

In light of the above, we find that the Motion for Reconsideration has failed to provide a statutory basis for reversal of the Board's Decision in Slip Op. No. 930. Therefore, we deny the Respondents' Motion for Reconsideration of the Board's Decision and Order in Slip Op. No. 930.

ORDER⁷

IT IS HEREBY ORDERED THAT:

- (1) The Motion for Reconsideration filed by the Office of Labor Relations and Collective Bargaining on behalf of the District of Columbia Department of Consumer and Regulatory Affairs is denied.
- (2) Pursuant to Board Rule 559.3, this Decision and Order is final upon issuance.

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

August 26, 2009

⁷ This Decision and Order implements the decision and order reached by the Board on April 29, 2008 and ratified on July 13, 2009.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-U-34 was transmitted via Fax and U.S. Mail to the following parties on this the 26th day of August 2009.

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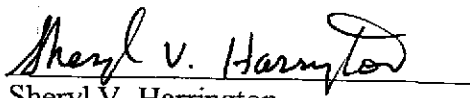
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