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

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| In the Matter of: | ) | |
| Washington Teachers' Union, Local #6, American Federation of Teachers, AFL-CIO, | ) | |
| Complainant, | ) | PERB Case No. 04-U-01 |
| v. | ) | |
| | ) | Opinion No. 741 |
| District of Columbia Public Schools, | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

## I. Statement of the Case:

The Washington Teachers' Union, Local #6, American Federation of Teachers, AFL-CIO, ("Complainant", "WTU" or "Union"), filed an Unfair Labor Practice Complaint and a Motion for a Decision on the Pleadings, in the above-referenced case. The Complainant alleges that the District of Columbia Public Schools ("DCPS" or "Respondent") violated D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.) by failing to implement an arbitration award which rescinded the involuntary transfer of Ronald Hershner. (Compl. at p. 2). The Complainant is asking the Board to grant their request for a decision on the pleadings and order DCPS to: (1) immediately transfer Mr. Hershner to Duke Ellington School of the Arts; (2) pay attorney fees and costs; (3) post a notice to employees; and (4) cease and desist from violating the Comprehensive Merit Personnel Act.

DCPS filed an answer to the Complaint. DCPS does not deny WTU's claim. Instead, DCPS asserts that extenuating circumstances have prevented the school system from returning Mr. Hershner to Duke Ellington School of the Arts. As a result, DCPS has requested that the Board dismiss the Complaint. In addition, DCPS filed a response opposing the Complainant's "Motion for a Decision on the Pleadings." The Complaint and WTU's motion are before the Board for disposition.

## II. Discussion

In July 2001, DCPS involuntarily transferred nine teachers, including math teacher Ronald Hershner, from their positions at Duke Ellington School of the Arts ("Ellington"). WTU filed a grievance concerning these transfers. On September 21, 2002, Arbitrator Marvin Johnson issued an award. The Arbitrator found that four of the nine teachers had been involuntarily transferred in violation of the parties' collective bargaining agreement. With regard to Mr. Hershner, the Arbitrator concluded that "DCPS involuntary transferred Mr. Hershner for reasons of discipline and performance in violation of the parties' agreement." (Award at p. 34). In view of the above, the Arbitrator ordered that "Ms. Johnson, Ms. Coleman, Mr. Hershner and Mr. Harris ... be offered the option of being transferred back to Ellington for the 2002-2003 school year." (Award at p. 38). Three of these individuals, including Mr. Hershner, opted to return to Ellington. On December 16, 2002, two of these teachers were returned to Ellington. However, to date, Mr. Hershner has not been returned to Ellington. Instead, Mr. Hershner remains at Woodrow Wilson Senior High School, where he was involuntarily transferred in 2001. (Compl. at p. 2).

WTU asserts that DCPS' failure to implement the arbitration award constitutes a violation of D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.).[1] As a result, WTU filed an unfair labor practice complaint. Also, WTU claims that DCPS acknowledges that they have failed to implement the award. Therefore, WTU is requesting that the Board issue a decision on the pleadings. Furthermore, WTU is requesting that the Board order DCPS to: (1) comply with the terms of the award; (2) pay attorney fees and costs; (3) cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); and (4) post a Notice.

DCPS filed an answer to the unfair labor practice complaint denying that it violated the CMPA. In addition, DCPS filed a response opposing the Complainant's "Motion for a Decision on the Pleadings."

DCPS does not dispute the factual allegations underlying the asserted statutory violation. Instead, DCPS claims that "the Complainant's unfair labor practice complaint should be dismissed because the Complainant fails to state an unfair labor practice for which relief [can] be granted."

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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.

(Answer at p. 4) [Furthermore, DCPS asserts that it] has complied with the Arbitrator's Award. [DCPS contends that] the teachers were given the option of returning to Duke Ellington. [Consistent with the award, DCPS claims that] three teachers opted to return to Duke Ellington and two were returned. [However,] Mr. Hershner was not returned due to extenuating circumstances and reasons unrelated to the Duke Ellington Arbitration Decision and Award. [Specifically,] DCPS contends that after the award was issued, a parent came forward alleging that Mr. Hershner had an inappropriate relationship with her daughter while she was attending Duke Ellington during the 1999-2000 school year." (Answer at p. 4). Also, DCPS claims that "the [complaining] parent has a younger daughter who currently attends [Ellington]. [In addition, the parent] has expressed concerns for the younger daughter. [In light of the above,] the parent does not want Mr. Hershner to return to Ellington." (DCPS' Response to Motion at p. 2). For the above-noted reasons, DCPS is requesting that the complaint be dismissed.

After reviewing the pleadings, we believe that the material issues of fact and supporting documentary evidence are undisputed by the parties. As a result, the alleged violations do not turn on disputed material issues of fact, but rather on a question of law. Therefore, pursuant to Board Rule 520.10, this case can appropriately be decided on the pleadings.

The Board has previously considered the question of whether the failure to implement an arbitrator's award 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, 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." Slip Op. at p. 3. In addition, the Board has noted that an agency waives its right to: appeal an arbitration award when it fails to file: (1) a timely arbitration review request with the Board; and (2) for judicial review of the award, pursuant to D.C. Code § 1-617.13 (c) (2001 ed.). 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). Furthermore, the Board has determined that if an agency waives its right to appeal an arbitration award, "no legitimate reason exists for [the agency's] on-going refusal to implement the award and . . .[the agency's] refusal to do so [constitutes] a failure to bargain in good faith in violation of D.C. Code § 1-617.04 (a)(1) and (5)." American Federation of Government Employees, Local 2725 v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597 at p. 2, PERB Case No. 99-U-23 (1999).

In the present case, DCPS acknowledges that the September 21, 2002 arbitration award has not been fully implemented. Specifically, DCPS contends that Ms. Johnson, Ms. Coleman, and Mr. Harris were offered the option to return to Ellington. Furthermore, Mr. Harris and Ms. Johnson were returned to Ellington in December 2002.[2] However, DCPS claims that extenuating circumstances have prevented the school system from returning Mr. Hershner to Ellington. Specifically, on November 4, 2002, a parent came forward alleging that during the 1999-2000 school year, Mr. Hershner had an inappropriate relationship with her daughter while she was attending Ellington.

[2]Ms. Coleman declined the offer to return to Ellington.

DCPS claims that the student alleged that Mr. Hershner would ask her to go for walks in the park and that he took her to Starbucks during school hours. (Answer at p. 4) In addition, the student alleged that Mr. Hershner: (1) made a comment about how good her body was; (2) took pictures of her while she was in class; and (3) gave her a book in which he wrote his e-mail address, home telephone number and home address. (Answer at p. 4) Also, DCPS contends that after Mr. Hershner was transferred to Woodrow Wilson Senior High School, he attended all of the student's recitals and showed up at her prom and approached her. (Answer at p. 4) The student has graduated from Duke Ellington; however, she claims that Mr. Hershner continues to attempt to contact her. For example, it is alleged that Mr. Hershner sent her an e-mail while she was at the University of North Carolina. (Answer at p. 4).

DCPS claims that its EEO office conducted an investigation and found that Mr. Hershner had acted inappropriately toward the student. DCPS contends that based on these findings, it was determined that Mr. Hershner would not be returned to Duke Ellington. (DCPS' Response to Motion at p. 4) Furthermore, DCPS asserts that as the government agency charged with the care, safety, and academic growth of children, it has a duty to its students. Specifically, DCPS claims that it has a responsibility to reduce the risk of exposing children to potential harm. Also, DCPS contends that the parent stated that she does not want Mr. Hershner returned to Ellington because she has another daughter currently attending the school. In addition, DCPS asserts that the parent is concerned that Mr. Hershner might try to use her younger daughter to get to her other daughter. In view of the above, DCPS is requesting that the Complainant's unfair labor practice complaint be dismissed for failure to state a claim upon which relief can be granted.

After reviewing DCPS' arguments, we recognize the sensitive nature of the current situation. Unfortunately, the allegations concerning Mr. Hershner's improper conduct occurred after the award was issued. As a result, we believe that DCPS' reasons for failing to implement the terms of the award do not constitute a genuine dispute over the terms of the September 21, 2002 award. Furthermore, DCPS has waived its right to appeal the arbitration award by failing to file either a timely arbitration review request with the Board or a petition for review with the D.C. Superior Court. As a result, the Board opines that DCPS has no "legitimate reason" for its on-going refusal to implement the award. As such, we conclude that DCPS' 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.). Furthermore, we find that by these same acts and conduct, DCPS' failure to bargain in good faith with WTU constitute, derivatively, interference with bargaining unit employees' rights in violation of D.C. Code § 1-617.04(a)(1) (2001 ed.). See, Committee of Interns and Residents v. D.C. General Hospital, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01.

Concerning the Complainant's request for attorney fees, the Board has held that D.C. Code § 1-617.13 does not authorize it to award attorney fees. See, e.g., International Brotherhood of Police Officers, Local 1446, AFL-CIO/CLC v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). Therefore, the Complainant's request for attorney fees is denied. See, University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991).

As to the Complainant'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 observed:

> 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. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot foresee. 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 reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. Slip Op. No. 245, at p.5.

In cases which involve an agency's failure to implement an arbitration award, the 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). However, the Board has awarded costs when an agency has demonstrated a pattern and practice of refusing to implement arbitration awards. See, AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597, PERB Case No. 99-U-33 (1991).

In the present case, the Complainant has not asserted that DCPS has engaged in a pattern and practice of refusing to implement arbitration awards. As a result, we believe that the interest-of-justice criteria articulated in the AFSCME case, would not be served by granting the Complainant's request for reasonable costs. Therefore, we deny the Complainant's request for reasonable costs.

## ORDER

**IT IS HEREBY ORDERED THAT:**

1. The Washington Teachers' Union (WTU), Local #6, American Federation of Teachers (WTU), "Motion for a Decision on the Pleadings," is granted.

2. The District of Columbia Public Schools' (DCPS) request that the complaint be dismissed is denied..

3. DCPS, its agents and representatives shall cease and desist from refusing to bargain in good faith with WTU by failing to implement the September 21, 2002 arbitration award rendered pursuant to the negotiated provisions of the parties' collective bargaining agreement.

4. DCPS, 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 XVIII. Labor-Management Relations" of the Comprehensive

Merit Personnel Act (CMPA), to bargain collectively through representatives of their own choosing.

5. DCPS shall, in accordance with the terms of the award, fully implement, forthwith, the arbitration award.

6. WTU's request for costs and attorney fees are denied for the reasons stated in this Opinion.

7. DCPS shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice. The Notice shall be posted 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, DCPS shall notify the Public Employee Relations Board ("PERB"), in writing, that the Notice has been posted. Also, DCPS shall notify PERB of the steps it has taken to comply with paragraphs 5 and 7 of this Order.

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

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

March 12, 2004

## CERTIFICATION OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 04-U-01 was served via Fax and U.S. Mail to the following parties on this the 12th day of March 2004.

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Sheryl V. Harrington
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PERB Public Employee Relations Board

Government of the District of Columbia

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# NOTICE

**TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, 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. 741, PERB CASE NO. 04-U-01 (March 12, 2004)**

**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. 741.

**WE WILL** cease and desist from refusing to bargain in good faith with the Washington Teachers' Union, Local #6, American Federation of Teachers, by failing to implement arbitration awards rendered pursuant to the negotiated provisions of the parties' collective bargaining agreement 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 Public Schools

Date:_____ By:_____
Superintendent

**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.**

March 12, 2004