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

In the Matter of:	)	
Teamsters Local Union No. 639 a/w International	)	
Brotherhood of Teamsters,	)	
Complainant,	)	PERB Case No. 08-U-42
and	)	Opinion No. 1021
District of Columbia Public Schools,	)	
Respondent.	)	

**DECISION AND ORDER**

**I. Statement of the Case:**

On May 30, 2008, the Teamsters Local Union No. 639 a/w International Brotherhood of Teamster (“Complainant” or “Teamsters” or “Union”) filed an unfair labor practice complaint (“complaint”) alleging that the District of Columbia Public Schools (“Respondent” or “DCPS”) violated D.C. Code § 1-617.04(a) (1) and (5) of the Comprehensive Merit Personnel Act (“CMPA”) by failing to comply with a DCPS Hearing Officer’s July 17, 2006, Step 3 decision, which settled a grievance awarding the grievant back pay. (See Compl. at pgs. 3-4).

The DCPS filed an answer (“Answer”) to the complaint denying any violation of the Comprehensive Merit Personnel Act (“CMPA”), stating that DCPS attempted to comply with the July 17, 2006 decision and admitting that it did not pay the back pay. (See Answer at pgs. 2-3).

The parties requested a continuance of the hearing scheduled on October 28, 2008, in order to complete settlement negotiations. They subsequently agreed upon the sum owed to the employee and referred to the Hearing Examiner the issue of interest on the amount owed. In the Report and Recommendation (“R&R”) issued on March 1, 2009, the Hearing Examiner recommended that the Board award interest on the back pay. (See R&R at p. 7). The Respondent filed Exceptions. No Opposition was filed.

The Hearing Examiner's R&R and the DCPS' Exceptions are before the Board for disposition.

## II. Hearing Examiner's R&R

The Union filed a grievance on behalf of Charlie Jones, a SW-3 Custodian, alleging that DCPS failed to pay Mr. Jones for work performed at the SW-5 pay grade. In August 2005, an agency Hearing Officer heard the grievance at Step 3. On July 17, 2006, the Hearing Officer issued a decision in which he concluded that Jones was performing the duties of a SW-5 Custodian and ordered DCPS to pay Jones at the appropriate wage rate, i.e., "SW-5, minus 120 days from the beginning of the period October 5, 2004, to the present."<sup>1</sup> (Compl., Exh. 4 at p. 3, R&R at p. 3). As of May 30, 2008, DCPS had not paid Jones back pay as ordered in the Step 3 decision.

On May 30, 2008, the Union filed the present unfair labor practice complaint alleging that DCPS violated D.C. Code § 1-617.04(a)(1) and (5) of the CMPA by failing to comply with the DCPS Hearing Officer's Step 3 decision. (See Compl. at pgs. 3-4; R&R at p. 3). The Union requested that the Board order DCPS to cease and desist and to "comply with the July 17, 2006 Decision placing Mr. Jones in his proper job classification of SW-5 and pay him the back pay he is entitled to including prejudgment interest from . . . October 5, 2004 to the present, excluding the 120 day period as set forth in the Step 3 Decision." (Compl. at p. 4). The Union also requested a notice posting admitting a violation and "costs and fees pursuant to D.C. Code § 1-617.13(d)." (Compl. at pgs. 4-5).

DCPS filed an Answer admitting that back pay was not paid; however, DCPS asserted that it attempted to comply with the Step 3 Decision. Therefore, DCPS denied that it violated the CMPA. DCPS also maintained that Mr. Jones was not entitled to back pay beyond July 17, 2006, the date of the DCPS Hearing Officer's report. (See Answer at pgs. 2-3).

The Board referred this matter to a Hearing Examiner. A hearing was scheduled and the Hearing Examiner noted as follows:

On October 28, 2008, the parties requested a continuance of the hearing in this matter in order to complete settlement negotiations. They subsequently agreed that [Mr. Jones]

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<sup>1</sup> The DCPS Hearing Officer framed the issue as follows: "Whether Management violated the Agreement by not compensating the grievant at the appropriate wage rate for the duties that he performed." (Compl., Exh. 4 at p. 1). In the DCPS Hearing Officer's decision, he states only that "the grievant should be paid at ... [Grade] SW-5, minus 120 days from the beginning of the period October 5, 2004 to present." (Compl., Exh. 4 at p. 3). The issue of "placing Mr. Jones in his proper classification of SW-5" was not addressed by the DCPS Hearing Officer and, therefore, is not before the Board.

was entitled to receive the sum of \$29,699.26 in back pay from DCPS. They further agreed that the issue of whether [Mr. Jones] was entitled to pre-judgment interest on the back pay, and if he was so entitled, [and] the period to which he was entitled, should be decided by [the Board]. (R&R at p. 3).

[The Union asserted that] despite repeated assurances from DCPS that it would comply...[with the Step 3 grievance decision by the DCPS Hearing Officer,] Mr. Jones did not receive the back pay he was due, nor was his position adjusted to the correct grade and classification. [R&R at pgs. 3-4]. [Relying on *AFGE, Local 872 v. District of Columbia Water and Sewer Authority* ("*AFGE v. WASA*"), 54 DCR 2967, Slip Op. No. 858, PERB Case No. 07-U-02 (1996), [the Union argued that] interest must be paid from the date of the Step 3 decision, in accordance with [the Board's previous] ruling that prejudgment interest begins to accrue at the time that the back pay "became due" and should be computed at 4% per annum. (R&R at p. 3).

Before the Hearing Examiner, DCPS countered that *AFGE v. WASA*, cited by the Union, is distinguishable from the present case because: (1) unlike the employee in *AFGE v. WASA*, Mr. Jones was never terminated; (2) unlike *AFGE v. WASA*, in the present case there was no deadline for paying the back pay; (3) prejudgment interest is an equitable remedy that was awarded in *AFGE v. WASA* because the agency in that matter took 18 months to comply, rather than the 6 months ordered in that case; and (4) in the present case, DCPS never refused to comply and (5) failure to comply was benign as DCPS personnel and payroll records were in a state of disarray during the relevant period. (See R&R at p. 4). DCPS also maintained that the "Grievant is not entitled to interest because 'back pay [was] determined as part of a settlement agreement...[before going to hearing, and] interest was not agreed to as part of the settlement agreement'." (R&R at p. 4).

Relying on *American Federation of State, County and Municipal Employees, District Council 20, Locals 1959 and 2921, AFL-CIO v. District of Columbia Public Schools and District of Columbia Government*, -DCR-, PERB Case No. 05-U-06, Slip Op. No. 796 (2005), DCPS maintained that in order to be entitled to the award of interest, the Union must establish that failure to pay the award had "adverse economic impact" on Mr. Jones. (R&R at p. 4). DCPS also asserted that the Union did not demonstrate "a pattern and practice of refusing to implement arbitration awards and settlement agreements such as to justify a payment of prejudgment interest in this case." (R&R at p. 4). Finally, DCPS argued that if the Board awards interest, "it should be simple interest calculated at the rate of 4% per annum in accordance with D.C. Code § 28-3302(b)." (R&R at p. 4).

The Hearing Examiner retained jurisdiction in this matter to rule on the one remaining issue that was raised in the complaint. She then determined that “[i]f this matter had been heard on the merits, based on these arguments and facts presented, it is likely that this Hearing Examiner would have concluded that the Union had met its burden of proof that DCPS had committed an unfair labor practice in this matter.... [There was no dispute that the back pay was awarded to Mr. Jones and that it was not paid. She noted that] “an award requiring [that] employees be given back pay for a specified time period establishes a ‘liquidated debt’ and is subject to D.C. Code Section 15-108 which provides for ‘prejudgment interest on liquidated debts’ at a rate of 4% per annum.” (R&R at p. 5).

The Hearing Examiner rejected DCPS’ argument that Mr. Jones is not entitled to interest because the parties did not include payment of interest in their settlement agreement, as the parties submitted this issue to the Board. The Hearing Examiner also rejected DCPS’ argument that the delay in complying with the DCPS Hearing Officer’s decision was benign, and not in bad faith, because it was not intentional and “there was no ‘pattern and practice’ established that would evidence bad faith”. (R&R at p. 6). The Hearing Examiner determined that two (2) years was an unreasonable delay, even without a showing of bad faith or “pattern and practice.” (See R&R at p. 6). Regarding DCPS’ argument that there was no showing that Mr. Jones suffered economic harm, the Hearing Examiner stated that Mr. Jones “was denied the use of \$29,699.26 for almost two years.... [B]y any standard, this is a considerable sum and denial of the use of this sum for almost two years establishes economic harm.” (R&R at p. 6). The Hearing Examiner noted that in *AFGE v. WASA*, the agency was ordered to pay back pay within 6 months and did not pay for 18 months. In the present case, DCPS exceeded the 18 month delay in *AFGE v. WASA*. (See R&R at p. 6).

Therefore, in the R&R issued on March 1, 2009, the Hearing Examiner recommended that “interest should be awarded at the statutory rate of 4% per annum on the \$29,699.26 owed ...[and] shall begin to accrue on 60 days from September 17, 2006, i.e., 60 days from the date the Step 3 Decision was issued, until [the date on which Mr. Jones] receives all of the back pay award.” (See R&R at pgs. 6-7).

### III. DCPS’ Exceptions

DCPS asserts that “[i]ts decision to compromise the claim by paying an agreed upon amount of back pay does not constitute an admission of wrongdoing on its part.” (Exceptions at p. 4). Also, DCPS claims that the Hearing Examiner incorrectly awarded a make-whole remedy since there was no evidence that it committed an unfair labor practice. Furthermore, DCPS believes that “the Hearing Examiner erred as a matter of law in concluding that if this matter had been heard on [the] merits ‘it is likely that [she] would have concluded that DCPS had committed an unfair labor practice in this matter’. [DCPS maintains that]...[the Hearing Examiner] was wrong to make such a finding in the absence of testimony regarding the facts of this matter.” (Exceptions at p. 4).

DCPS further contends that the Hearing Examiner incorrectly analyzed DCPS' argument regarding interest on back pay. DCPS distinguishes *AFGE v. WASA* from the present case. DCPS argues that the employee in this case was never separated from his position; there was no requirement that back pay must occur by a certain date; and prejudgment interest is an equitable remedy and the circumstances of this case does not warrant equitable relief because there was no pattern and practice of willful refusal to comply with the back pay order. (See Exceptions at p. 5). Also, DCPS maintains that "the Hearing Examiner failed to give sufficient weight to the benign nature of the failure to pay the back pay in the present case." (Exceptions at p. 5). DCPS contends that "the Hearing Examiner's determination, without hearing testimony, that the mere failure to pay for approximately two years amounts to a showing of economic harm *per se* cannot be sustained in the absence of an affirmative showing by the Employee, particularly in view of the fact that he has at all times remained in the employ of DCPS." (Exceptions at p. 6). DCPS asserts that the Hearing Examiner erred in failing to require proof of specific economic harm to the Employee in making an award of equitable relief.

Finally, DCPS asserts that the Hearing Examiner awarded interest in the absence of any lawful basis for so doing. (See Exceptions at p. 6). DCPS contends that the "Step 3 decision was based on a claim under the parties'... collective bargaining agreement. The agreement does not explicitly grant the [DCPS] Hearing Officer in the administrative grievance hearing any power to award interest and indeed he did not do so. The claim for prejudgment interest arose for the first time before the [Board] and there is nothing specifically in the statute establishing [the Board's] authority to grant prejudgment interest. Furthermore, there was no award by the [Board] to form the basis of an award of interest since the parties compromised [on the] the back pay issue prior to any determination by the [Board]." (Exceptions at p. 6). Relying on *Kennedy v. District of Columbia*, 654 A.2d 847 (D.C. 1994), DCPS argues that in that case, "it was determined that interest is not payable against a District entity when there was no explicit statutory or other lawful basis for so doing." (Exceptions at p. 7). DCPS requests that the Board dismiss this matter. No Opposition was filed.

#### IV. Discussion

In its complaint, the Union alleged that by failing to comply with the DCPS Hearing Officer's decision of back pay, DCPS is refusing to bargain in good faith in violation of D.C. Code § 1-617.04(a)(1) and (5).<sup>2</sup> (See Compl. at pgs. 3-4). The Union did not withdraw these

<sup>2</sup> 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.

allegations after the parties reached settlement on the principle amount owed, submitting the issue of interest to the Board. Therefore, the issues raised in the complaint are still before the Board for consideration.

Here, DCPS admits to the material facts of this case in its Answer to the complaint. DCPS admits that the DCPS Hearing Officer issued a decision in 2006 awarding back pay to Mr. Jones and that Mr. Jones had not been paid at the time of the filing of the complaint, i.e., May 30, 2008. After reviewing the pleadings, we find that the material issues of fact and supporting documentation 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.<sup>3</sup>

In *Washington Teachers Union, Local No. 6, American Federation of Teachers, AFL-CIO v. D.C. Public Schools*, Slip Op. No. 848 at p. 3, PERB Case No. 05-U-18 (2006), the Board held that “[a]lthough the material facts alleged in [that] complaint [were] deemed admitted, the Board must still determine whether the Complainant has met [its] burden of proof concerning whether an unfair labor practice has been committed.” See also, *Unions in Compensation Unit 20 v. D.C. Department of Health*, 499 DCR 111311, Slip Op. No. 688, at p. 3, PERB Case No. 02-U-13 (2000).

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.” 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).” *AFGE, Local 2725 v. D.C. Housing Authority*, 46 8356, Slip Op. No. 597 at p. 2, PERB Case No. 99-U-23 (1999).

In the present case, DCPS does not dispute the terms of the DCPS Hearing Officer’s award of back pay, nor is there any evidence that DCPS appealed his decision. Therefore, we find that no dispute exists over the terms of the award. DCPS asserts that it attempted to make

<sup>3</sup> Board Rule 520.10 provides as follows: “If the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument.”

payment and the delayed compliance was benign because “during the relevant period DCPS personnel and payroll were in a state of disarray.” (R&R at p. 4). We find that DCPS has provided no legitimate reason for its on-going refusal to comply with the DCPS Hearing Officer’s award. Thus, we find that DCPS is simply refusing or failing to implement the award, where no dispute exists over its terms.

In view of our findings, the Board concludes that DCPS’ actions constitute a failure of its duty to bargain in good faith in violation of D.C. Code § 1-617.04(a)(5). (*See id.*) Furthermore, we find that by “these same acts and conduct, [DCPS’s] failure to bargain in good faith constitutes, derivatively interference with bargaining unit employees’ rights in violation of D.C. Code § 1-617.04( a)(1) (2001 ed.)” (emphasis in the original). *AFGE, Local 2725 v. D.C. Housing Authority*, 46 DCR 8356, Slip Op. No. 597 at p.2, PERB Case No. 99-U-23 (1999). *See also, Washington Teachers Union, Local No. 6, American Federation of Teachers, AFL-CIO v. DC Public Schools*, Slip Op. No. 848 at p. 4, PERB Case No. 05-U-18 (2006).<sup>4</sup>

In its exceptions, DCPS contends that the “Hearing Examiner incorrectly analyzed DCPS’ argument regarding interest on back pay” and that she does not correctly apply *AFGE v. WASA*. (*See* Exceptions at p. 5). Furthermore, DCPS maintains that “the Hearing Examiner failed to give sufficient weight to the benign nature of [its] failure to pay the back pay in the present case.” (Exceptions at p. 5). DCPS asserts that the Hearing Examiner erred in failing to require a showing of specific economic harm to the Employee in making an award of equitable relief, i.e., an award of interest. (Exceptions at p. 6). However, the Board believes that DCPS is merely restating arguments that were raised before the Hearing Examiner. The Hearing Examiner rejected DCPS’ attempt to distinguish *AFGE v. WASA* from the facts of the present case and found that the employee suffered economic harm.

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<sup>4</sup> DCPS believes that “the Hearing Examiner erred as a matter of law in concluding that if this matter had been heard on its merits, ‘it is likely that [she] would have concluded that DCPS had committed an unfair labor practice’.... [DCPS maintains that]...[the Hearing Examiner] was wrong to make such a finding in the absence of testimony regarding the facts of this matter.” (Exceptions at p. 4). Therefore, DCPS requests that the Board reverse the Hearing Examiner’s findings and dismiss this matter. However, as stated above, in the present case, the Union pled that there was a violation of the CMPA and has not withdrawn the complaint. The Hearing Examiner acknowledges that she did not decide whether there was a violation of the CMPA by stating that “it is likely that [she] would have concluded that DCPS had committed an unfair labor practice.” The Board believes that the Hearing Examiner’s failure to rule on the complaint was an oversight. However, based on the pleadings, the Board has found that DCPS’ actions violate the CMPA. Therefore, DCPS’ argument that the Board should dismiss this matter because the Hearing Examiner “was wrong to make . . . findings in the absence of testimony,” lacks merit.

DCPS also contends that “there was no award by the [Board] to form the basis of an award of interest since the parties compromised the back pay issue prior to any determination by the [Board].” (Exceptions at p. 6). However, as stated above, the Board has made a decision on the pleadings and found that DCPS’ actions violate the CMPA. Therefore, DCPS’ argument that there is no basis for awarding interest, lacks merit.

Also, DCPS' exceptions constitute a challenge to the factual findings of the Hearing Examiner. The Board has previously stated that "issues of fact concerning the probative value of the evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracey Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (2000). The Board has also held that "[c]hallenges to [a Hearing Examiner's] evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's finding." (*Id.* at p. 4). In addition, the Board has determined that it is the Hearing Examiner that is in the best position to assess the probative value of evidence. *See Mack, Lee and Butler v. FOP/DOC*, 47 D CR 6539, Slip Op. No. 421 at p. 2, PERB Case No. 95-U-24 (2000).

We hereby adopt the Hearing Examiner's Report and Recommendation to the extent that it is consistent with the Board's findings in this case.

## V. Interest

Having determined that DCPS violated D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.), we now turn to the appropriate remedy in this case. The Complainant asks the Board to order DCPS to: (1) comply with the terms of the Hearing Examiner's decision finding that back pay was owed to Mr. Jones; (2) cease and desist from violating the CMPA; (3) pay reasonable fees and costs, and (4) post a notice to the employees. The parties submitted the issue of whether the employee is entitled to interest to the Board.

DCPS asserts that there is nothing specifically in the statute establishing [the Board's] authority to grant prejudgment interest. Relying on *Kennedy v. District of Columbia*, 654 A.2d 847 (D.C. 1994) ("*Kennedy*"), DCPS argues that the Hearing Examiner awarded interest in the absence of any lawful basis for so doing. (Exceptions at p. 6). DCPS asserts that in *Kennedy*, it was determined that interest is not payable against a District entity when there was no explicit statutory or other lawful basis for so doing. (Exceptions at p. 7). However, *Kennedy* does not contain this language, nor does it apply to the facts of the present case.<sup>5</sup>

<sup>5</sup> In *Kennedy*, the District of Columbia Court of Appeals addressed the remedies found in a Mayoral Order (back pay, benefits and reinstatement under Mayor's Order 75-230 § 19(b)(1) (1975) D.C. Stat. at 526), to be applied when the Director of EEO finds that an employee of a department was a victim of discrimination. The Court affirmed the Agency's denial of compensatory damages "on the basis that the meager record did not support such recovery." (*Id.* at p. 19). We find that the Mayoral Order does not apply to the CMPA and that the Hearing Examiner's findings in the present case are reasonable and based on the record. Therefore, the Respondent has not shown how *Kennedy* applies to the present case. Also, in *Kennedy*, the Court of Appeals did not disturb the trial court's denial of sanctions for the alleged violation of Rule 11. The present case is distinguishable from the *Kennedy*, as Rule 11 applies to the Courts and not to administrative agencies, nor was it raised here. The relevant language of Rule 11 provides as follows:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, and that it is not

The Board has 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 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. 17, PERB Case No. 86-U-16 (1992). In the *UDCFA* case, the Board 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 debt 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 vs. District of Columbia Board 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). We, therefore, shall modify this provision of the recommended remedy accordingly. *Id.* at p. 17.<sup>6</sup>

In *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), we clarified that "the Board's remedial authority in proceedings properly within its jurisdiction is provided under D.C. Code [§] 1-605.2(3) and [§] 1-618.13 of the Comprehensive Merit Personnel Act." Consistent with our holding in the *UDCFA* case, an order directing back pay expressly and specifically includes prejudgment interest as part of the Board's make-whole remedy. Furthermore, 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. (See *id.* at p. 2; also see, *Fraternal Order of Police/MPD Labor Committee v. Metropolitan Police Department*, 37 DCR 2704, Slip Op. No. 242, PERB Case No. 89-U-07 (1990).<sup>7</sup>

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interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

*Kennedy v. District of Columbia*, 654 A.2d 847 at p. 20, (D.C. 1994)).

<sup>6</sup> D.C. Code § 15-108 gives examples of cases defining a liquidated debt. A debt is "liquidated" and requires award of pre-judgment interest under District of Columbia law, if at the time it arose, it was an easily ascertainable sum certain. *Harbor Ins. Co. v. Schnabel Foundation Co.*, 992 F. Supp. 431 (1997).

<sup>7</sup> D.C. Code § 28-3302 provides that: "[i]nterest, when authorized by law, on judgments or decrees against the District of Columbia, or its officers, or its employees acting within the scope of their employment, is at the rate of not exceeding 4% per annum."

In the present case, it is undisputed that the parties identified a specific sum of money for back pay to Mr. Jones. Therefore, under *UDCFA*, there is a liquidated debt. Moreover, the parties have not cited any authority which prohibits the Board from awarding interest as a remedy for a violation of the *CMPA*. We conclude that the Hearing Examiner's finding that DCPS' failure to implement the agency Hearing Officer's decision has resulted in the employee suffering an adverse economic effect is reasonable, based on the record and consistent with Board precedent. Therefore, as part of the Board's make whole remedy, the Board shall order DCPS to pay interest at the rate of 4% per annum for its failure to timely comply with the agency Hearing Officer's decision.

Having determined that DCPS shall pay interest on the back pay, we turn now to the question of when the interest begins to accrue in this case. The Federal Labor Relations Authority ("FLRA") considered this question in *Social Security Administration Baltimore, Maryland and American Federation of Government Employees*, 55 FLRA 246 (1999), ("*SSA*"). In *SSA*, the FLRA determined that the Agency committed an unfair labor practice by failing to comply with an arbitrator's award. The FLRA awarded interest based on the Agency's failure to timely comply with the arbitrator's award and found that pursuant to the Back Pay Act, 5 U.S.C. § 5596(b)(2)(A) and (B), interest on back pay begins to accrue at the time that the Agency was obligated to pay the back pay and liquidated damages. (*Id.* at p. 251). Specifically, the FLRA determined that the Agency was obligated to pay the back pay and liquidated damages commencing from the date the arbitration award became final and binding. The FLRA's reasoning in *SSA* is persuasive for the purpose of determining when interest begins to accrue.

Therefore, as stated by the Hearing Examiner in the present case, "interest should be awarded at 4% per annum on the \$29,699.26 owed...[and] shall begin to accrue on 60 days from September 17, 2006, i.e., 60 days from the date the Step 3 Decision was issued, until [the date on which Mr. Jones] receives all of the back pay award." (R&R at pgs. 6-7).

## VI. Costs

The Complainant requests that reasonable costs be awarded. We believe the Hearing Examiner's failure to address the issue of costs was an oversight. D.C. Code § 1-617.13(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 has articulated an interest of justice criteria for awarding costs. In *AFSCME, Council 20*, the Board addressed the criteria for determining whether costs should be awarded, stating as follows:

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. [emphasis added].

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.

In the present case, the Complainant established that an unfair labor practice was committed. However, this is a case of first blush, as the Board is finding for the first time that failure to implement a decision by an agency Hearing Officer constitutes a failure to bargain in good faith. DCPS could not have known the outcome of its failure to comply with the DCPS Hearing Officer's award. Therefore, this is not a situation in which "the successfully challenged action was undertaken in bad faith." (*AFSCME, Council 20* at p. 5). As a result, we conclude that an award of costs is not warranted in the interest of justice. The Board hereby denies the Complainant's request for reasonable costs.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The District of Columbia Public Schools ("DCPS"), its agents and representatives shall cease and desist from refusing to bargain in good faith with Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters ("Union") by failing to comply with the terms of the agency Hearing Officer's Step III decision of July 17, 2006.
2. 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 XVII. Labor Management Relations" of the Comprehensive Merit Personnel Act to bargain collectively through representatives of their own choosing.

3. DCPS shall within fourteen (14) days of the issuance of this Decision and Order fully implement the terms of the agency Hearing Officer's decision of July 17, 2006, including back pay in the amount of \$29,699.26 with interest at the rate of 4% per annum. The interest in this case shall begin to accrue 60 days from the date the Step 3 Decision was issued, until the date on which Mr. Jones receives all of the back pay award, pursuant to the terms of the July 17, 2006 decision.
4. The Union's request for reasonable costs is denied for the reasons stated in this Slip Opinion.
5. DCPS shall post conspicuously, within ten (10) days of the service from this Decision and Order, the attached Notices where notices to bargaining unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
6. Within fourteen (14) days from the issuance of this Decision and Order, DCPS shall notify the Public Employee Relations Board ("Board"), in writing that the Notice has been posted accordingly. Also, DCPS shall notify within fourteen (14) days from the issuance of this Decision and Order, DCPS shall notify the Board of the steps it has taken to comply with paragraph 3 of this Order.
7. 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.

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July 15, 2010

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 08-U-42 was transmitted via Fax and U.S. Mail to the following parties on this the 15<sup>th</sup> day of July 2010.

Michael Levy, Esq.  
District of Columbia Public Schools  
825 North Capitol Street, N.E.  
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Washington, D.C. 20002

**FAX & U.S. MAIL**

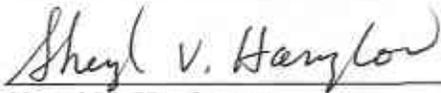
Mark Murphy, Esq.  
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**Courtesy Copy:**

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**U.S. MAIL**



Sheryl V. Harrington  
Secretary