Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

The District of Columbia
Public Employee Relations Board

In the matter of:	
Doctors Council of the District of Columbia,	
Complainant,	PERB Case No. 07-U-19
v.	Opinion No. 967
District of Columbia Department of Youth Rehabilitation Services,	
Respondent.	

SECOND SUPPLEMENTAL DECISION AND ORDER

I. Statement of the Case:

The Doctors' Council of the District of Columbia ("Union"), filed an unfair labor practice complaint alleging that the District of Columbia Department of Youth Rehabilitation Services ("DYRS", "Respondent" or "Agency") violated D.C. Code § 1-617.04(a)(1) and (5) by failing to implement the terms of a settlement agreement that resolved a grievance filed by the Union.[1] DYRS filed an Answer denying that it violated the Comprehensive Merit Personnel Act ("CMPA") and requested that the Board dismiss the Complaint.

In Slip Op. No. 884 dated April 17, 2007 the Board issued a decision on the pleadings concluding that DYRS failed to bargain in good faith in violation of D.C. Code § 1-617.04(a)(1) and (5) when it failed

[1] The grievance addressed the issue of non-bargaining unit employees performing the work of bargaining unit members.

to comply with the terms of the settlement agreement.[2]

The Board ordered the Respondent to comply with the terms of the settlement, including payment of the annual leave and retirement contribution components. The Board also ordered the parties to file briefs on whether the Board could order DYRS to pay interest with respect to the payments for the accrued annual leave and retirement contributions. The parties submitted briefs on May 9, 2008. The matter before the Board is whether the Board in a remedial order may award interest on annual leave and retirement contributions.

II. Position of the Parties Concerning the Awarding of Interest to Remedy a Violation of the CMPA

The Respondent argues that the Board should not award interest on back pay. In support of its argument the Respondent asserts that: (1) the parties did not address the issue of interest in their settlement agreement; (2) the Board has never awarded interest on retirement contributions except when enforcing an arbitrator's award; (3) the Board does not have the authority to decide the issue of whether interest can be earned on accrued annual leave; (4) "the Board's authority in this matter may be derived from the plain language of the statutes and regulations that govern monetary awards paid by the government"; (5) the Federal Back Pay Act authorizes interest only on amounts representing pay, allowances or differentials; (6) an award of interest is punitive and the Board has no authority to award punitive damages. (See Respondent's Brief at pgs. 8-15). Also, the Respondent requests clarification of the award of interest on back pay, specifically, the start date and end date for calculating the back pay interest. (See Respondent's Brief at pgs. 8-15).

The Union counters that no statutory limitations are placed on the Board's authority to remedy a violation of the CMPA provided the remedy is appropriate. (See Union's Brief at p. 4). The Union argues that when the Board finds a violation of the CMPA, an award of interest paid on monetary amounts is consistent with the Board's remedial authority under D.C. Code § 1-605.02(3).[3] Furthermore, the Union claims that "[a]n award of interest is necessary to make whole an employee for the lost time-value of the money the District wrongfully withheld as a result of its violation of the Act. Moreover, awarding interest also serves to assist 'employers realize that there is little to be gained by delaying the payments of

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[2]On May 18, 2007, the Respondent requested clarification of the award of interest on back pay, specifically asking the Board to clarify the start and end dates for the calculation of interest. With the assistance of the Board's Executive Director, the parties conferred and agreed that interest in this matter should be paid according to an Agreement crafted by the parties and adopted by the Board on May 25, 2007, in a Supplemental Decision and Order (Slip Op. No. 893). Thus, the Respondent's request for clarification of the award is moot.

[3]D.C. Code § 1-605.02(3) provides that "[t]he Board shall have the power to . . . [d]ecide whether unfair labor practices have been committed and issue an appropriate remedial order".

arbitration awards since interest is running on the back pay so awarded'." (See Union's Brief at p. 4). Citing D.C. Code § 1-617.13(a),[4] the Union asserts that the Board's remedial authority allows it to grant the remedy of interest for DYRS's failure to comply with the settlement agreement in violation of the CMPA.

Position of the Parties Concerning Awarding Interest on Annual Leave

The Respondent asserts that an award of interest on annual leave is not supported by District law or regulation. In support of this argument, the Respondent contends that "[t]here is no District law, policy, practice or procedure that allows District employees to earn interest, money, additional leave or any form of compensation from the simple accrual of annual leave. . . . It is a benefit of employment rather than an issue of compensation . . . . Thus, the 'use or lose' rule often forces employees to lose hours of accrued leave.[5] . . . [The Respondent further contends that] [t]he D.C. Code sets forth payment of lump sum value on the accrued annual leave. In so doing, the law is silent as to whether the leave will earn interest. See D.C. Official Code § 1-612.03(h)(2)(A) and (B) (2001 ed.)" (Respondent's Brief at pgs. 9-10).[6]

The Respondent argues that in the absence of any statutory or judicial precedent, the Board lacks authority to decide the issue of whether interest can be awarded on accrued annual leave and maintains that, "a [Board] order that interest be paid on accrued annual leave is punitive rather than corrective." (Respondent's Brief at pgs. 11-12).[7] The Respondent claims that an award of interest is punitive and

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[4]D.C. Code § 1-617.13 provides at subsection (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. . . ."

[5]The Respondent makes reference to D.C. Code § 1-612.03(h) (2001 ed) which provides that "[a]nnual leave which is not used by an employee accumulates for use in succeeding years until it totals not more than 30 days. . . ."

[6]The Respondent advocates that the Board follow the definition of "back pay" *found in* the Federal Back Pay Act which allows for interest on back pay, noting that benefits such as retirement benefits and annual leave are not covered in the Federal Back Pay Act. (Respondent's Brief at p. 11). The Federal Back Pay Act allows for the payment of interest on back pay. The definition of "back pay" in the Federal Back Pay Act excludes retirement benefits and annual leave as follows: "Monetary benefits payable to separated or retired employees based upon a separation from service, such as retirement benefits, severance payments, and lump-sum payments for annual leave, are not covered." (emphasis added). The Board notes that retirement benefits are not included in the District's definition of "pay", however, annual leave is included. See District Personnel Manual ("DPM"), Chapter 11B - "Compensation" which defines "pay".

[7]DYRS cites *UDC and UDCFA*, Slip Op. No 321, PERB Case No. 92-A-05 (1992) for the premise that the Board has previously found an arbitrator to be without jurisdiction because he awarded sabbatical leave. However, that case is inapplicable to the facts in the present case. In *UDC and UDCFA*, the Board's finding that the arbitrator lacked jurisdiction to award sabbatical leave was based on the fact that "[t]he arbitrator exceeded his retained jurisdictional authority by [finding that the grievant had been erroneously denied sabbatical leave] in an arbitration

would constitute an abuse of discretion by the Board. (See Respondent's Brief at p. 10).[8]

Citing *Committee of Interns and Residents v. D.C. General Hospital,* 43 DCR 1490, Slip Op. No. 456 at p. 3, PERB Case No. 95-U-01 (1995) as precedent, the Union argues that the Board has previously awarded interest on monetary awards for employee benefits other than back pay. (See Union's Brief at p. 8). The Union asserts that in *CIR v. DCGH,* CIR alleged that DCGH committed an unfair labor practice when it failed to implement a side letter agreement to increase the meal allowance of bargaining unit employees. The Union claims that "[t]he Hearing Examiner found that the [unpaid] increase in meal allowance due under the side letter of agreement constituted a liquidated debt owed to the affected employees. As such, pursuant to D.C. Code § 15-108,[9] employees [were] entitled to interest from the time the increase became due and payable. As part of the relief authorized by law, the Hearing Examiner concluded that the rate of interest is fixed by statute at 4% per annum. See D.C. Code § 28-3302(b)."[10] (Union's Brief at p. 6).

Position of the Parties Concerning Awarding Interest on Retirement Contributions

The Respondent asserts that the Board has never awarded interest on retirement contributions in an unfair labor practice case. The Respondent claims that "all prior [Board] cases were based on [the Board's] review of an arbitrator's decision . . . to award interest." In addition, the Respondent states that a court and not the Board has awarded interest on retirement contributions owed an employee. (Citing *Board of Trustees of UDC, UDCFA v. PERB*, Civ. 92-MPA-22 and Civ. 92-MPA-24 (1993), where the D.C. Superior Court ordered that an employee who had been suspended, was entitled to an award of

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proceeding specifically and expressly limited to remedial determinations [- and not the merits of the case]. We have ruled that an arbitrator cannot retain jurisdiction on his own motion to rule upon [the merits of] a matter because he 'failed to rul[e] on all issues submitted in the original [arbitration].'" [citations omitted] (*Id.* at p. 5). Thus, the Respondent has not shown that the arbitrator was without jurisdiction to award sabbatical leave when considering the merits of the case, nor has it shown that the Board is without jurisdiction to consider the issue of interest as a remedial award in the present case. Furthermore, this analogy is faulty because the source of the Arbitrator's authority is based on the collective bargaining agreement between the parties, whereas the Board is authorized by statute to grant remedial relief for unfair labor practices.

[8]The Respondent claims that punitive damages are not available against a public entity, citing a tort case wherein the court dismissed a punitive damage claim against the District's Transit Authority.

[9]D.C. Code § 15-108 gives examples of District court 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). (emphasis added).

[10]D.C. Code § 28-3302 provides: "Interest, 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."

interest on the retirement contributions owed.)[11] (See Respondent's Post-Decision Brief at pgs. 13-14). In the alternative, DYRS argues that, "at best . . . [the Board] is limited . . . to the statutory cap of 4%." (Citing D.C. Code § 28-3302(b) (2001 ed.)). (Respondent's Post-Decision Brief at pgs. 14-15).

The Union counters that the Board has previously awarded interest on back retirement contributions in *University of the District of Columbia Faculty Ass'n/NEA v. University of the District of Columbia*, PERB Case No. 86-U-16, Slip Op. Nos. 285 (Supplemental Order) and 307 (1992). The Union argues that in *UDCFA/NEA v. UDC*, the Hearing Examiner ordered the parties to "work out an appropriate and practical means for making whole, with interest at 4% per annum, all employees in the bargaining unit [who] would have received step increases in salary for AY '86-'87. . . ." (Union's Brief at p. 5). The Union asserts that in *UDCFA/NEA v. UDC*, "the Board adopted and incorporated into its Order the proposed [settlement] remedy [of] the parties, which included a term specifying that 'the aggregate amount due under the PERB Order [was] the total amount of back pay, retirement contribution, and interest at 4% per annum on back pay and retirement contribution. . . . Id'." [emphasis in the original]. (Union's Brief at p. 6).

The Union claims that if the employee's defined pension contributions had been timely made, they would have earned income at the same rate as other contributions contemporaneously made. (See Union's Brief at p. 8). The Union contends that "[b]y refusing to pay these amounts in violation of the Agreement and the CMPA, DYRS not only deprived Grievant of the full value of the award, but benefitted by retaining use of the Grievant's funds after inducing Complainant and Grievant to enter the Agreement, withdraw the claim, and waive future claims. [The Union asserts that] [a]warding interest on those amounts - back pay, retirement contributions, and accrued annual leave alike - serves the dual purposes of making [the employee] whole for the economic losses as described above, and remov[ing] from the Agency the benefit it realized in violating the CMPA." (Union's Brief at pgs. 8-9).

III. Discussion Concerning the Awarding of Interest on Annual Leave and Retirement Contributions to Remedy a Violation of the CMPA

The parties entered into a settlement agreement providing the employee back pay and benefits. The parties reduced the employee's annual leave and retirement benefits to a monetary sum.[12] However, the sums contained in the settlement agreement were not timely paid in accordance with the terms of the

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[11] In *Board of Trustees*, the Court awarded interest at the rate such contributions would have accrued if invested. (Respondent's Post-Decision Brief at pgs. 13-14).

[12] At Section 3(b) of the parties' settlement agreement states that DYRS agrees to provide retroactive retirement contributions to the District of Columbia Defined Contribution Pension Plan in the amount of $2,017.26. Section (3)(c) provides that DYRS will "credit accrued annual leave in the amount of 92 hours, which would be paid in accordance with the District's personnel regulations, approximated value at $5,424.95 (for 92 hours x $58.97)."

agreement. As a result, the Union filed an unfair labor practice complaint alleging that the agency violated the CMPA by failing to implement the agreement. (See PERB Case No. 07-U-19, Slip Op. No. 884 (April 17, 2007)). The Board found that DYRS violated the CMPA and ordered DYRS to implement the terms of the settlement agreement.[13] In addition, the Board granted the Complainant's request for remedial relief by ordering DYRS to provide the employee with interest on the back pay amount. Also, the Board ordered the parties to brief "whether the Board can order DYRS to pay interest with respect to the amount of back pay for annual leave and retirement contributions." (See Slip Op. No. 884 at p. 9. Here, we will consider the of whether the Board may award interest on annual leave or retirement contributions in a remedial order.[14]

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 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 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). *Id.* at

[13] In Slip Op. No. 884, the Board held that DYRS violated D.C. Code § 1-617.04(a)(1) and (5) by failing to comply with the terms of the settlement agreement where there was no genuine dispute over the terms and ordered DYRS to make the payments specified in the agreement. Furthermore, the Board determined that DYRS's failure to implement the parties' settlement agreement resulted in the employee suffering an adverse economic effect with regard to the back pay, in violation of the CMPA. (See Slip Op. No. 884, pgs. 6-7).

[14] In *University of the District of Columbia Faculty Ass'n/NEA v. University of the District of Columbia*, Supplemental Decision, 39 DCR 8594, Slip Op. No. 285 at p. 3, ¶ 4, PERB Case No. 86-U-16 (1992), the Board adopted a settlement agreement by the parties that provided, *inter alia*, interest on retirement contributions.

p. 17.[15]

> Consistent with our holding in the *UDFCA* case, "we state, once again, that [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. *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. Metropolitan Police Department*, 37 DCR 2704, Slip Op. No. 242, PERB Case No. 89-U-07 (1990).[16]

(Slip Op. No. 884 at p. 7).

There is no dispute that the parties agreed that the employee was to receive retroactive pay for a specific period of time, for accrued annual leave and retroactive retirement contributions and that these were reduced to specific sums. In Slip Op. No. 884, we also concluded that DYRS' failure to implement the terms of the settlement agreement violated the CMPA. As a remedy for DYRS' violation of the CMPA, we directed DYRS to comply with the Agreement, awarded interest on the back pay and asked that the parties brief the issue of whether the Board may award interest for accrued annual leave and retroactive retirement contributions.[17]

As we stated in *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 39 DCR 8594, Slip Op. No. 285, PERB Case No. 86-U-16(1992), "[t]he 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." (*Id.* at p. 15).

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[15]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).

[16]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."

[17]DYRS does not dispute payment of interest on back pay for wages.

In the present case, it is undisputed that the parties identified a specific sum of money for accrued annual leave and retroactive retirement contributions. 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. Pursuant to our remedial authority to grant a make whole remedy,[18] we are awarding interest on accrued annual leave and retroactive retirement contributions. Furthermore, interest shall be computed at the rate of four percent (4%) per annum. See *Id.* at p. 17; see also *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).

In the present case, the parties executed a settlement agreement on October 28, 2006. The agreement provides: (1) Dr. Charles with retroactive retirement contributions to the District of Columbia Defined Contribution Pension Plan in the amount of $2,017.26; and (2) crediting Dr. Charles with accrued annual leave in the amount of 92 hours, which would be paid out in accordance with the District's personnel regulations and its approximated value is calculated at $5,424.95. We have found in Slip Op. 884, that DYRS' failure to implement the agreement was in violation of the CMPA. We find that DYRS's failure to fully implement the parties' settlement agreement has resulted in the employee suffering an adverse economic effect. Therefore, as part of the Board's make whole remedy, DYRS is ordered to pay interest at the rate of 4% per annum for its failure to timely comply with the settlement agreement.

Having determined that DYRS shall pay interest, we now turn 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). In that case, 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 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.[19] The FLRA's decision involves failure to timely implement an arbitrator's award directing that the Agency provide back pay and not failure to timely implement a settlement agreement requiring back pay, as here. However, we find that FLRA's reasoning in *Social Security Administration* persuasive for the purpose of determining when interest begins to accrue. In the present case, the parties executed the settlement agreement on October 28, 2006. We find

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[18] D.C. Code § 1-605.02(3), provides that "[t]he Board shall have the power to . . . [d]ecide whether unfair labor practices have been committed and issue an appropriate remedial order."

[19] In *Social Security Administration*, the FLRA determined that the arbitrator's award became final thirty days after service of the award. Therefore, the interest began to accrue when the award became final, i.e., thirty days after service of the arbitration award.

that the settlement agreement became final and binding on that date. Therefore, we find that DYRS was obligated to pay the back pay on that date. In light of the above, we find that interest in this case begins to accrue at the time that DYRS was obligated to pay the back pay, namely, October 28, 2006, the date of the last signature on the settlement agreement.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Youth Rehabilitation Services ("DYRS"), shall within ten (10) days from the issuance of this Decision and Order fully implement the terms of the parties' October 2006 settlement agreement by providing Dr. Charles with interest at the rate of 4 % per annum on the sum contained in the settlement for accrued annual leave. The period of interest shall begin to accrue at the time the back pay became due, namely October 28, 2006, and shall continue to the date on which the principle sum was paid.

2. DYRS shall within ten (10) days from the issuance of this Decision and Order fully implement the terms of the parties' October 2006 settlement agreement by providing Dr. Charles with interest at the rate of 4 % per annum on the sum contained in the settlement for retirement contributions. The period of interest shall begin to accrue at the time the back pay became due, namely October 28, 2006, and shall continue to the date on which the principle sum was paid.

3. Within fourteen (14) days from the issuance of this Decision and Order, DYRS shall notify the Public Employee Relations Board (Board), in writing, of the steps it has taken to comply with paragraphs 1 and 2 of this Order.

4. 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.

September 30, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-19 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of September 2009.

Wendy Kahn, Esq.
Zwerdling, Paul, Leibig, Kahn
& Wolly, P.C.
1025 Connecticut Ave., N.W.
Suite 712
Washington, D.C. 20036

FAX & U.S. MAIL

Jonathan K. O'Neill, Esq.
Supervisory Attorney Advisor
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Natasha Campbell, Director
D.C. Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Sheryl V. Harrington
Secretary