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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. 930
District of Columbia Department of Consumer and Regulatory Affairs,)	
)	
and)	
)	
Office of Labor Relations and Collective Bargaining,)	
)	
Respondents.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case

This case involves an Unfair Labor Practice Complaint (“Complaint”) filed by the American Federation of Government Employees, Local 2725 (“Union”, “AFGE Local 2725” or “Complainant”) against the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA” or “Respondent”) and the Office of Labor Relations and Collective Bargaining (“OLRCB” or “Respondent”). The Union alleges that DCRA violated the Comprehensive Merit Personnel Act (“CMPA”). Specifically, the Union asserts that DCRA violated D.C. Code § 1-617.04(a)(1) and (5) by failing and refusing to comply with Arbitrator David M. Vaughn’s June 2, 2006 Arbitration Award (“Award”) in a case involving *DCRA and AFGE Local 2725*. DCRA filed an Answer asserting 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 in this matter. In his Report and Recommendation ("R&R"), Hearing Examiner Sean J. Rogers concluded that DCRA violated the CMPA by refusing to implement the Award and recommended that the Board direct DCRA to implement the Award and grant the Grievant back-pay with interest and the Union's reasonable costs to prosecute the unfair labor practice complaint.

The Respondents filed Exceptions to the Hearing Examiner's R&R. The Union did not file an opposition to DCRA's Exceptions. The Hearing Examiner's R&R and DCRA's Exceptions are before the Board for Disposition.

II. Background

The present dispute arose from a grievance filed by the Union on behalf of bargaining unit employee William Harris challenging his performance appraisal for the rating period April 1, 2003 through March 31, 2004. (See R&R at p. 3). The Parties were unable to resolve the grievance and AFGE, Local 2725 invoked arbitration pursuant to the collective bargaining agreement ("CBA").¹ The Union contacted the Federal Mediation and Conciliation Service ("FMCS") for a panel of arbitrators. (See R&R at p. 3). However, DCRA, represented by OLRCB, opposed the appointment of an arbitrator. (See R&R at p. 3). Pursuant to the CBA, Arbitrator Vaughn was appointed to serve as arbitrator to resolve the dispute.² (See R&R at p. 3).

The arbitration proceeding was bifurcated. The initial question concerned arbitrability. The Respondents filed a Motion to Dismiss based on the assertion that the Arbitrator lacked jurisdiction over the grievance because it was not "substantively arbitrable". (See R&R at p. 3). The Arbitrator issued an arbitrability ruling finding the grievance to be arbitrable and asserted jurisdiction over the merits of the dispute. (See R&R at p. 3). The Hearing Examiner noted that no request for review was made of Arbitrator Vaughn's arbitrability ruling. (See R&R pgs. 3-4).³

¹ Article 10 of the parties' CBA, Grievance Procedure, provides for the resolution of grievances by binding arbitration. Section E – Arbitration, ¶ 1., provides that "[i]f either party refuses to participate [sic] in the selection of an arbitrator, FMCS or AAA may be requested to appoint one." Section E also states that "[t]he arbitrator's award shall be binding upon both parties during the life of this Agreement." Section F – General, ¶ 4., provides that "[d]isputes of procedural grievability or non-arbitrability shall be referred to arbitration as a threshold issue." (See R&R at p. 3).

In addition, it should be noted that the Union and DCRA were in negotiations for a new contract. However the parties' agreed that the current CBA, although expired, remained in effect during the negotiations. (See R&R at p. 3).

² The dispute before Arbitrator Vaughn pertained to both arbitrability and the merits of the grievance.

³ See Note 7, *infra*.

An arbitration hearing was held on the merits of the grievance. Neither of the Respondents attended the hearing. In his Award, Arbitrator Vaughn found that DCRA had improperly rated the Grievant as Satisfactory, where the Union demonstrated that the Grievant was entitled to a rating of Outstanding. (See R&R at p. 4). As a remedy, the Arbitrator directed DCRA to: (1) change the Grievant's performance rating from Satisfactory to Outstanding; and (2) make the grievant whole for any wages and/or benefits lost as a result of the improperly lowered rating. (See R&R at p. 4). Concerning fees and expenses, Arbitrator Vaughn ordered that his "fees and expenses [be] divided equally between the Parties, as provided in the Agreement, except that the Agency shall, in consequence of its conduct, reimburse the Union, following the Union's payment of its share of the fees and expenses for the Union's half of the fees and expenses for the cost of the proceeding through issuance of the Decision and Order's Motion to Dismiss." (Award at p. 11; See also R&R at p. 4).⁴ Neither of the Respondents filed a request for review of Arbitrator Vaughn's Award.

DCRA did not implement the Arbitrator Vaughn's Award. As a result, the Union filed an unfair labor practice complaint. At the unfair labor practice hearing the Union argued that DCRA committed an unfair labor practice by failing and refusing to comply with Arbitrator Vaughn's Award. (See R&R at p. 4). In support of this argument, the Union asserted that Board precedent provides that when a party simply refuses or fails to implement an arbitration award when no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and an unfair labor practice under the CMPA. (See R&R at p. 4). In addition, the Union contended that D.C. Code § 1-605.02(6) provides that the exclusive process for review of an arbitration award is before the Board. (See R&R at p. 5). Whereas DCRA filed no request for review of the Award, the Union claimed that no legitimate reason existed for DCRA's refusal to implement the Award. (See R&R at p. 5). In addition, the Union stated that DCRA's position presented a challenge to the Arbitrator's Award which could only have been raised before the Board in an arbitration review request. (See R&R at p. 5).

DCRA countered that it did not commit an unfair labor practice because a grievance concerning an employee's performance evaluation is not substantively arbitrable. (See R&R at p. 6). DCRA claimed that judicial determinations of substantive arbitrability involve two prongs: (1) whether an agreement to arbitrate exists; and (2) whether the dispute is one the parties agreed to submit to arbitration. (See R&R at p. 6,

The Board has long held that "arbitrability is an initial question for the arbitrator to decide" *American Federation of State, County and Municipal Employees, Council 20, AFL-CIO v. District 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).

⁴ The Hearing Examiner found that the record established that DCRA had failed to comply with the Award and had not paid Arbitrator Vaughn for his professional services and expenses. (R&R at p. 4). By fax dated October 18, 2007, Arbitrator Vaughn acknowledged that DCRA made payment in full for his invoices for services and expenses pertaining to the arbitration case. However, there is no indication that it has reimbursed the Union in accordance with Arbitrator Vaughn's Award.

citing the District of Columbia Court of Appeals in *American Federation of Government Employees, Local 3721 v. District of Columbia*, 563 A. 2d 361 (D.C. 1989). DCRA claimed that D.C. Code § 1-613.53(b)⁵ prohibits the District of Columbia's performance evaluation system from "the ambit of collective bargaining and as a result from the applicability of a collectively bargained grievance or arbitration procedure." (R&R at p. 6). DCRA argued that only the Superior Court can determine if D.C. Code § 1-613.53(b) renders the grievances of performance evaluations non-arbitrable. (See R&R at p. 6). DCRA also asserted that the Arbitrator was without authority to rule on the issue of substantive arbitrability. (See R&R at p. 6). Moreover, DCRA contended that Arbitrator Vaughn denied them due process because his ruling on arbitrability may have been fee-driven and, therefore, biased. (See R&R at p. 7). Lastly, DCRA argued that the Board has held that a performance evaluation system is non-negotiable. (See R&R at p. 8). In *American Federation of Government Employees, Local 1403 and District of Columbia Office of Corporation Counsel, _DCR_*, Slip Op. No. 709, PERB Case No. 03-N-02 (2003), the Board addressed a negotiability appeal filed by AFGE, Local 1403 regarding a proposal concerning performance evaluations. In that case AFGE, Local 1403 prevailed because the Board found that D.C. Code § 1-613.53(b) contained an exception for attorneys employed by the Office of Corporation Counsel. (See R&R at p. 8). In the present case, DCRA argued that absent an explicit exception, it cannot be forced to negotiate the inclusion of performance evaluations into a grievance and arbitration process. (See R&R at p. 8).

III. The Hearing Examiner's Report and Recommendation and DCRA's Exceptions

Based on the pleadings, the record developed at the hearing and the parties' post hearing briefs, the Hearing Examiner identified two issues for resolution. These issues, his findings and recommendations are as follows:

1. The Unfair Labor Practice Charge.

The Hearing Examiner stated that the Union had "the burden of proving the allegations in its Complaint by a preponderance of the evidence. (PERB Rule 520.11)." (R&R at p. 9). The Union alleged that DCRA and OLRCB violated D.C. Code § 1-617.04(a)(1) and (5) by failing and refusing to comply with Arbitrator Vaughn's June 2, 2006, Arbitration Award.⁶

⁵ D.C. Code § 1-613.53 - Transition provisions, provides in pertinent part as follows:

(b) Notwithstanding any other provision of law or any collective bargaining agreement, the implementation of the performance management system established in this subchapter is a non-negotiable subject for collective bargaining.

⁶ D.C. Code § 1-617.04. Unfair Labor Practices, provides in pertinent part as follows:

The Hearing Examiner found that DCRA violated D.C. Code § 1-617.04(a)(1) and (5), and DCRA's only defense for non-compliance was its disagreement with the Arbitrator's Award finding the grievance arbitrable. (See R&R at p. 13). The Hearing Examiner indicated that the exclusive method for review of an arbitrator's award was before the Board. (See R&R at p. 13).⁷ The Hearing Examiner noted that Board Rule 538.1 states that:

A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board not later than twenty (20) days after service of the award.

The Hearing Examiner noted that DCRA did not request review of Arbitrator Vaughn's Award on either arbitrability or on the merits. (See R&R at p. 14). The Hearing Examiner determined that DCRA's challenges to the Award are untimely, and cannot now be considered by the Board. (See R&R at p. 14). The Hearing Examiner found that "despite the express language of the CBA establishing that an arbitrator's award is binding on the Parties, the Respondents' have failed and refused to comply with Arbitrator Vaughn's merits Award." (R&R at p. 14). The Hearing Examiner concluded that the Respondents' conduct constitutes a failure to bargain in good faith and an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) and (5). (See R&R at p. 14).

(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.

⁷ 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.

DCRA filed exceptions to the Hearing Examiner's R&R. First, it contends that "performance evaluations made pursuant to the [District of Columbia's] statutory review process are not arbitrable." (Exceptions at p. 4). DCRA argues that the Arbitrator lacked the authority to make a ruling on the issue of substantive arbitrability. Therefore, DCRA asserts, it did not violate the CMPA by not complying with the Award because the Arbitrator did not have jurisdiction over the case. (See Exceptions at pgs. 5-6).

In support of this argument, DCRA claims that performance evaluations are non-negotiable. (See Exceptions at p. 2). This position is based on its interpretation of D.C. Code § 1-613.53(b). Specifically, the Code provides that "implementation of a performance management system established in this subchapter is a non-negotiable subject for collective bargaining." D.C. Code § 1-613.53(b). In addition, DCRA argues that the Board's decision in *AFGE, Local 1403 and District of Columbia Office of Corporation Counsel, supra*, supports its claim that where no exception exists to D.C. Code § 1-613.53(b), the Agency is not required to negotiate regarding the inclusion of a performance management system into the grievance and arbitration process. (See Exceptions at p. 5). DCRA asserts that because it is prohibited from making a performance evaluation system a subject of collective bargaining, "the Union's purely contractual right to grieve and arbitrate cannot be stretched to encompass an issue statutorily excluded from the contract." (Exceptions at p. 5).

DCRA also contends that grievance arbitration is not appropriate for disputes concerning performance evaluations because there is already a review system in place. Specifically, DCRA cites D.C. Code § 1-606.03, which states that appeals from a final agency decision affecting a performance rating that results in removal of an employee may be taken to the Office of Employee Appeals. See D.C. Code § 1-606.03. In addition, DCRA cites the District Personnel Manual, Chapter 14, as providing a process for review of "an unfair evaluation." (Exceptions at p. 5).

The Board believes that the Respondents' defense to their failure to comply with the Award rests in their disagreement with the Arbitrator's ruling that the issue of performance evaluations was arbitrable. The Board has long held that "arbitrability is an initial question for the arbitrator to decide" *American Federation of State, County and Municipal Employees, Council 20, AFL-CIO v. District 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). The Respondents' exclusive remedy for appealing the Arbitrator's ruling on arbitrability was to request the Board's review of Arbitrator Vaughn's Award. (See D.C. Code § 605.02(6)). Board Rule 538.1 states that a party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board not later than twenty (20) days after service of the award. The arbitrability Award was

issued on March 27, 2006. DCRA and OLRCB did not request review of the Award within twenty days of March 27, or at any point thereafter.⁸

In addition, the Respondents did not request review of the Award on the merits. Instead, 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. The Board has held that "when a party simply refuses 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." *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 6278, Slip Op. No. 585 at p. 3, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999). Whereas the Respondents did not request review of the merits Award, and have at no time disputed the terms of the Award, we believe that the Respondents' refusal to implement the Award constitutes a failure to bargain in good faith and is a violation of D.C. Code § 1-617.04(a)(1) and (5). Consequently, the Board finds that their exception to the Hearing Examiner's R&R is merely an untimely challenge to the Arbitrator Vaughn's Award concerning the issue of arbitrability and that Respondents have waived any challenge of this issue.

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner. See *Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 DCR 5585, Slip Op. No. 375 at p. 2, PERB Case No. 93-U-11 (1994). The Board finds that the Hearing Examiner's findings and conclusions are reasonable, supported by the record and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's findings and conclusions that the Respondents' conduct in refusing to implement Arbitrator Vaughn's Award constitutes a failure to bargain in good faith in violation of D.C. Code § 1-617.04(a)(1) and (5).

⁸ As in the present case, the Respondents in *AFSCME v. DCGH and OLRCB*, argued that an issue was non-negotiable and, therefore, was also not grievable and thus not arbitrable. The Board rejected that argument, finding that an agency was still obligated to bargain in good faith over the impact of the exercise of a management right. *Id.* In the present case, although the implementation of the performance evaluation system is a non-negotiable subject of collective bargaining, DCRA was obligated to bargain in good faith over the adverse impact a performance evaluation may have on the terms and conditions of the Grievant's employment. It should also be noted that in the Board decision cited by the Respondents, *AFGE, Local 1403 and D.C. Office of Corporation Counsel*, the Board ruled that a proposal to allow performance evaluations to be subject to the contractual grievance and arbitration proceedings was negotiable. Specifically, the Board found that the language in the statute regarding the review of performance evaluations did not prohibit submitting such matters to the grievance and arbitration process. See *AFGE, Local 1403 and D.C. Office of Corporation Counsel*, Slip Op. No. 709 at p. 9. The Board finds that there is no language in D.C. Code § 1-606.03, D.C. Code § 1-613.53(b), or in the DPM which prohibits an employee from grieving or arbitrating an unfavorable performance evaluation.

The Respondents' second exception asserts that "Arbitrator Vaughn lacked subject matter jurisdiction to adjudicate the underlying legal dispute." (Exceptions at p. 6). Specifically, with regards to the Hearing Examiner's R&R, the Respondents contend that "binding precedent" requires the Board to reject the Arbitrator's and Hearing Examiner's findings that the Arbitrator had jurisdiction over the matter. (See Exceptions at p. 13). The Respondents claim that "[a] party may refuse to arbitrate on substantive grounds if there is: (1) a dispute about whether a valid agreement to arbitrate exists between the parties[,] or (2) a dispute exists as to whether, in a valid agreement, the parties agreed to submit such matters to arbitration." (Exceptions at p. 6).

The Respondents acknowledge that the parties' CBA states that the parties shall agree to submit to the grievance and arbitration procedure allegations of violation or misapplication of law, rule or regulation which affects the terms and/or conditions of employment. However, the Respondents assert that because of the restriction against bargaining over the implementation of performance evaluations (D.C. Code § 1-613.53), it is the Superior Court of the District of Columbia that must determine whether this issue is substantively arbitrable. (See Exceptions at pgs. 6-7). In support of this argument, the Respondents cite D.C. Code § 16-4302, concerning the Superior Court's proceedings to compel or stay arbitration. (See Exceptions at p. 7). DCRA claims that this Code provision gives the Superior Court original jurisdiction to determine substantive arbitrability. (See Exceptions at p. 7). Also, DCRA relies on a District of Columbia Court of Appeals decision to support its position. In *American Federation of Government Employees, Local 3721 v. District of Columbia*, 563 A. 2d 361, 362 (D.C. 1989), 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 argue that the court must rule that an issue is arbitrable if the parties' CBA is "susceptible of an interpretation that covers the dispute." *Id.* at 364. The Respondents contend that since DCRA was prohibited from bargaining over the implementation of the performance management system, "the language of the [CBA] cannot supersede that of the law." (Exceptions at p. 8).

The Respondents also argue that even if their interpretation of the D.C. Code is in error, DCRA/OLRCB could only be compelled to arbitrate after the Superior Court ruled on the matter. (See Exceptions at p. 8). The Respondents assert that FMCS and Arbitrator Vaughn attempted to force the Respondents to arbitrate the matter of the Grievant's performance evaluation. Respondents believe the matter had to be presented to the Superior Court on the issue of substantive arbitrability before FMCS could appoint an arbitrator. Respondents further contend that:

Arbitrator Vaughn has acted beyond the scope of his authority and encroached on the court's jurisdiction to hear the instant matter, contrary to settled law. The parties' collective bargaining agreement at Article 10, Section E(11) provides that "the arbitrator shall not have the power

to add to, subtract from, or modify the provisions of this Agreement through the award." The arbitrator's decision itself violates the terms of the parties' agreement.

(Exceptions at p. 8).

The Respondents claim "that an issue of law existed in the arbitration that, as one of substantive arbitrability, could only have been resolved by the court." (Exceptions at p. 4). The Respondents' argument is based on a number of cases which stand for the proposition that it is a trial court, and not the arbitrator, which determines whether the parties have an agreement to arbitrate, as well as what issues the parties have agreed to submit to arbitration.⁹ (See Exceptions at pgs. 7-13).

The cases cited by the Respondents can be distinguished from the present matter. Most importantly, the cases cited by Respondents do not concern grievance arbitrations under the CMPA. Instead, those cases involve federal labor management relations law. Also, none of the cases cited by the Respondents require the party invoking arbitration to first go to a trial court (or in this case, the Superior Court) to determine the arbitrability of the grievance. In fact, Article 10, Section E – Arbitration, ¶ 1, of the parties' CBA specifically provides that "[i]f either party refuses to participate [sic] in the selection of an arbitrator, FMCS or AAA may be requested to appoint one." (R&R at p. 3). Consequently, where Respondents agreed to this procedure, their argument that the Union was required to go to Superior Court to compel arbitration is wholly without merit. Moreover, the Respondents had the opportunity pursuant to D.C. Code § 16-4302(b) to apply to the Superior Court for a Motion to Stay upon a showing that there was no agreement to arbitrate.¹⁰ The Respondents were also informed by FMCS that if the Respondents disagreed with the FMCS' decision to appoint an arbitrator, they could appeal to a court of competent jurisdiction. (See Complaint Attachment No. 10). Here, the Respondents have not established that any such appeal or application to the Superior Court was ever initiated.

The Board believes that this exception also addresses the Arbitrator's arbitrability determination. However, the Respondents did not appeal the Award. Consequently, the Arbitrator's Award cannot be reviewed now. The issue before the Board concerns the Respondents' failure to implement the Award. The Respondents did not request review of the substantive Award either. Upon review of the Respondents' contentions, the Board concludes that DCRA's reasons for failing to implement the Award do not constitute a genuine dispute over the terms of the final and binding Award and therefore constitute a failure to bargain in good faith.

⁹ The Respondents cite: *Masurovsky v. Green*, 687 A. 2d 198, 204 (D.C. 1996); *Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Wiley & Son v. Livingston*, 376 U.S. 543 (1964); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643 (1986).

¹⁰ See *American Federation of Government Employees, Local 3721 v. District of Columbia*, *supra*.

The Respondents' third exception argues that "[t]he Hearing [Examiner] is in error when he writes Respondents waived their claim regarding subject matter jurisdiction." (Exceptions at p. 13). The Respondents claim that the issue of subject matter jurisdiction cannot be waived. (See Exceptions at p. 14). The Respondents assert that since the Arbitrator did not have subject matter jurisdiction, the Award was invalid. (See Exceptions at p. 14). The Respondents contend that since the Award was invalid, they cannot be forced to comply with its terms. (See Exceptions at p. 14).

The Board finds that the Respondents have provided no authority for this contention. The authorities cited by the Respondents do not state that issues of subject matter jurisdiction cannot be waived.¹¹ Moreover, the proper forum for Respondents' to challenge the Arbitrator's Award was in a timely Request for Review to the Board. No such request was made by the Respondents. Therefore, it is the Respondents' right to appeal the Award that has been waived. The Board finds that the Hearing Examiner's findings and conclusions are reasonable and supported by the record. The Board adopts the Hearing Examiner's finding that the time for the Respondents to have requested Board review has passed, and that the Award is now final and binding upon the parties.

In their fourth exception, the Respondents challenge the Hearing Examiner's finding that the parties agreed that the Arbitrator would first rule on the issue of substantive arbitrability. (See Exceptions at p. 15). The Respondents assert that they never consented to proceed to arbitration or have the Arbitrator make a ruling on the issue of substantive arbitrability. In a letter to the FMCS dated September 13, 2005, the Respondents stated that they disagreed with the appointment of an arbitrator citing the same authorities discussed above in support of their position. (See Complaint Attachment No. 8). The Respondents also sent a letter to FMCS inquiring as to whether FMCS appointment of an arbitrator was a final agency action. (See Complaint Attachment No. 9). FMCS responded in the affirmative and informed the Respondents that FMCS' decision could be appealed to a court of competent jurisdiction, and that the Respondents' arguments concerning arbitrability would be addressed by Arbitrator Vaughn. (See Complaint Attachment No. 10). Arbitrator Vaughn sent the parties letters dated October 3 and 9, 2005, informing the Respondents that he would decide the issue of arbitrability and invited them to make a written submission seeking dismissal of the grievance as not arbitrable. In addition, the Arbitrator indicated that upon filing of a judicial proceeding enjoining the arbitration, he would halt further proceedings. (See Complaint Attachment No.'s 11 and 13). On November 10, 2005, the Respondents submitted a letter which presented its arguments as to why the grievance was not arbitrable. (See Complaint Attachment No. 14). There is no indication that the Respondents applied to any court to enjoin the proceedings.

¹¹ In support of this contention, the Respondents cite to: *Louisville & N. R. Co. v. Mottley*, 211 U.S. 149 (1911); Federal Rule of Civil Procedure, Rule 12(h); and D.C. Superior Court Rule SCR 12(h). Each of the cited authorities indicates that the federal courts or the D.C. Superior Court will dismiss a matter when it appears that they do not have jurisdiction over the subject matter.

The essence of the Respondents' exception is that it disagrees with the Hearing Examiner's finding that the parties agreed that the Arbitrator would first rule on the issue of substantive arbitrability. This Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracey Hatton v. Fraternal Order of Police/Department of Corrections Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995). Furthermore, a challenge to a Hearing Examiner's finding is not a proper exception where the finding is supported by the record. See *American Federation of State, County and Municipal Employees, Local 2401 and Neal v. District of Columbia Department of Human Services*, 48 DCR 3207, Slip Op. No. 644, PERB Case No. 98-U-05 (2001). In the present case, the Arbitrator clearly informed the Respondents that unless judicial proceedings enjoining the arbitration had commenced, he would decide the matter of arbitrability of the grievance. The Respondents did not seek to enjoin the arbitration. Instead, the Respondents submitted written arguments to the Arbitrator as to why the grievance was, or was not, arbitrable.

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed the record, findings, conclusions and recommendations of the Hearing Examiner. See *Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 DCR 5585, Slip Op. No. 375 at p. 2, PERB Case No. 93-U-11 (1994). The Board finds that the Hearing Examiner's findings, conclusions and recommendation are reasonable and supported by the record. Therefore, the Board adopts the Hearing Examiner's finding and conclusion that the Respondent's agreed to submit the issue of arbitrability to the Arbitrator.

2. *Remedy*

The Hearing Examiner found that based on the facts of this case, and pursuant to the provisions of D.C. Code § 1-613.13(d), the Respondents should pay the Grievant back pay with interest and the Union's costs prosecuting the unfair labor practice complaint.¹² (See R&R at p. 15). Specifically, the Hearing Examiner recommended that the Board order the Respondents to:

1. Implement 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 back pay, with interest, to the Grievant William Harris;

¹² The Union's Complaint requests attorney fees. (See Complaint at p. 6). The Hearing Examiner did not specifically recommend denying attorney fees and no exceptions were filed by either party on this issue. However, the Board has held that it has no statutory authority to award attorney fees. See *AFSCME, District Council 20, Local 2921 v. District of Columbia Public Schools*, 50 DCR 5077, Slip Op. No. 712, PERB Case No. 03-U-17 (2003). Consequently, the Board denies the Union's request for attorney fees.

2. Post 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;
3. Pay 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. Any other relief that PERB deems appropriate.

(R&R at p. 16).

No exceptions were filed regarding the Hearing Examiner's recommended remedy. Specifically, the Respondents did not challenge the remedy directing the Respondents to pay the Union's costs in prosecuting the unfair labor practice complaint. Under D.C. Code §1-617.13(d), the Board has "the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as [it] may determine." In *AFSCME, District Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245 at pgs. 4-5, PERB Case No. 89-U-02 (1990), the Board addressed for the first time the circumstances under which it is appropriate to award costs:

First, any such award of costs necessarily assumes that the party to whom the pay 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. This is not to say that we are imposing any limit on the costs that a party may incur, but only that the amount of cost incurred that will be ordered paid by the other party will be limited to that part that the Board finds to be "reasonable". Last, and this of course is the nub of the matter, we believe such an award must be shown to be in the interest of justice.

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 now 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.

In the present case, the Hearing Examiner found: (1) that the reason for DCRA's refusal to implement Arbitrator Vaughn's Award is wholly without merit; and (2) that the Respondents' actions in this case demonstrate bad faith. As previously discussed, the Board found that the Respondents did not have a legitimate reason for not implementing the Award. Thus, we believe that the Hearing Examiner's findings are reasonable, supported by the record and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's recommendation to award costs.

The Hearing Examiner's recommendation to award interest is adopted in part, but is rejected as to the Complainant's costs. 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, Slip Op. No. 202, PERB Case No. 88-U-25 (1989) and *AFSCME v. D.C. 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 p. 17.

Consistent with the Board's holding in the *UCDFA* case, "we state once again, that [an order directing back pay] expressly and specifically includes 'prejudgment interest' to accrue at the time the back pay . . . became due" and shall be computed at a

rate of four percent (4%) per annum. *UDCFCA v. UDC*, 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. D.C. Metropolitan Police Department*, 37 DCR 2704, Slip Op. No. 242, PERB Case No. 89-U-07 (1990).

Pursuant to the Arbitrator's Award of June 6, 2006, DCRA was to change the Grievant's performance rating to Outstanding and make the Grievant whole for wages and benefits lost due to the improper rating during the period from April 1, 2003 to March 31, 2004. As previously discussed, DCRA has failed to implement the Award. The Board finds that DCRA's failure to implement the Award and pay the Grievant for any loss in wages and benefits has resulted in an economic loss to the Grievant in violation of the CMPA. Therefore, as part of the Board's make whole remedy, DCRA is ordered to pay Grievant Harris his back pay retroactive to April 1, 2003, with interest at the rate of 4% per annum.

As to the award of interest on the Union's costs of prosecuting the unfair labor practice complaint, the Board must reject the Hearing Examiner's recommendation. The Union's costs in prosecuting the Complaint were clearly not part of the Award and do not constitute a "liquidated debt" consistent with the authority cited above. Therefore, the Board rejects that part of the Hearing Examiner's recommended remedy which awards interest for the Union's costs.

The Hearing Examiner also recommended that The Board direct the Respondents to post a notice of their violation of the CMPA. The Board has "recognize[d] 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, the Board adopts the Hearing Examiner's recommendation to 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 the Respondents to post a notice, "bargaining unit employees . . . would know that [the Respondents] [have] 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*, 47 DCR 7773, Slip Op. No. 682 at p. 10, PERB Case Nos. 01-U-04 and 01-S-01 (2002).

ORDER

1. The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA" or "Respondent") and Office of Labor Relations and Collective Bargaining ("OLRCB" or "Respondent") and their officers and agents, shall cease

and desist from refusing to bargain in good faith with the Union by failing to comply with the terms of the January 27, 2006, Arbitration Award.

2. The American Federation of Government Employees, Local 2725's ("AFGE" or "Union") request for attorney's fees is denied for the reasons noted in this Decision and Order.
3. DCRA shall fully implement, forthwith Arbitrator Vaughn's Award in the William Harris Grievance, including the payment of arbitration fees to the Complainant and any backpay, with interest, to the Grievant William Harris.
4. The Union's request for reasonable costs is granted.
5. The Union shall submit to the Public Employee Relations Board, within fourteen (14) days from the date of the issuance of this Decision and Order, a statement of actual costs incurred prosecuting this action. The statement of costs shall be filed together with supporting documentation; The Respondents may file a response to the statement within fourteen (14) days from service of the statement upon it.
6. The Respondents shall pay the Union, its reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.
7. The Respondents shall post conspicuously within ten (10) days from 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, the Respondents shall notify the Public Employee Relations Board ("Board"), in writing that the Notice has been posted accordingly. Also, the Respondents shall notify the Board of the steps taken to comply with paragraphs 3, 6 and 7 of this Order.
9. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

February 19, 2008

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-U-43 was transmitted via Fax and U.S. Mail to the following parties on this the 19th day of February 2008.

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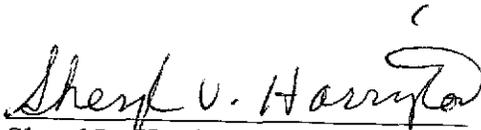
Certificate of Service
PERB Case No. 06-U-43
Page 2

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Sheryl V. Harrington
Secretary



Public
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Board

Government of the
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS. 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. 930, PERB CASE NO. 06-U-43 (FEBRUARY 19, 2008).

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 action and conduct set forth in Slip Opinion No. 930.

WE WILL cease and desist from refusing to bargain in good faith with the American Federation of Government Employees, Local 2725's ("AFGE" or "Union"), by failing to comply with the terms of the January 27, 2006, Arbitration Award.

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

District of Columbia
Department of Consumer and Regulatory Affairs

Date: _____

By: _____
Director

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 any 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. Fax: (202) 727- 9116.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.
February 19, 2008