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

In the Matter of:)
)
)

Fraternal Order of Police/Department of)
Corrections Labor Committee (on behalf of)
Carl B. Butler),)

Petitioner,)

PERB Case No.10-E-03

v.)
)

Opinion No. 1022

District of Columbia Department of Corrections,)

Petition for Enforcement

Respondent.)
)

DECISION AND ORDER

I. Statement of Case

On March 5, 2010, the Fraternal Order of Police/Department of Corrections Labor Committee ("FOP" or "Union"), filed a document styled "Petition for Enforcement of PERB Decision and Order" ("Petition"), regarding PERB Case No. 09-A-04 (Slip Op. No. 996). FOP alleges that the District of Columbia Department of Corrections ("DOC") has failed to comply with Slip Op. No. 996 which was issued on December 3, 2009. Specifically, FOP claims that DOC has failed to implement the terms of an arbitration award ("Award") issued on February 17, 2009 and affirmed by the Board on December 3, 2009. (See Petition at pgs. 4-5). FOP is asking the Board to enforce its Decision and Order of December 3, 2009. (See Petition at p. 9).

DOC opposes FOP's Petition. FOP's Petition and DOC's opposition are before the Board for disposition.

II. Discussion

On December 18, 2004, Carl Butler was observed at his workplace giving a plastic bag to two inmates in their cell. (See Award at p. 3). During an investigation of the incident, Mr. Butler testified that the bag contained fried fish from his home. (See Award at p. 3). On May 27, 2005, Mr. Butler was discharged because of the December 18, 2004 incident. (See Award at p. 3). The Union filed a grievance concerning Mr. Butler's discharge which proceeded to arbitration. (See Award at p. 3). An arbitration award was issued on December 1, 2005, which reversed the termination and reinstated

Mr. Butler with back pay and benefits. (See Award at p. 3). In addition, the Arbitrator directed that Mr. Butler be docked 45 days of pay and benefits. (See Award at p. 3). DOC filed an arbitration review request concerning the December 1, 2005 arbitration award. The Board denied the request and Mr. Butler was reinstated to his position on October 29, 2006. (See Award at pgs. 3-4; and see *District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, 54 DCR 2699, Slip Op. 824, PERB Case No. 06-A-01 (2006)).

“On November 27, 2006, DOC issued a letter informing Mr. Butler that his 13-month Term Appointment of July 2004 would expire on November 29, 2006. (See Award at p. 4). The Union asserted that the November 27 letter was authored by DOC Director Brown, and stated:

In light of the forty-five (45) day suspension you received for cause of Malfeasance, I have decided not to retain you. Although your appointment will expire on November 29, 2006, I am setting your expiration date for the close of your shift on December 9, 2006, in order to provide you with reasonable notice that you will not be retained.” *District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, Slip Op. No. 996 at p. 3, PERB Case No. 09-A-04 (2009).

Based upon the November 2006 discharge of Mr. Butler, FOP filed a grievance. In an Award issued on February 17, 2009, Arbitrator Gary T. Kendellen indicated “that the issue before him was whether ‘the reasons relied upon by the Agency in its November 27, 2006 letter to Carl Butler [were] valid bases for the Agency not to retain him? If not, what shall be the remedy?’ ” (Slip Op. No. 996 at pgs. 3-4). Arbitrator Kendellen found that “the evidence demonstrate[d] that the Agency and the Union had developed a practice of (1) employing returning RIFed employees as Term and (2) converting them to Permanent as positions became available.” (Slip Op. No. 996 at pgs. 3-4). In addition, the Arbitrator determined that the “Permanent positions were likely to become quickly and regularly available.” (Award at p. 16). Furthermore, the Arbitrator noted that DOC was “entitled to hire Mr. Butler as a Term employee in 2004.” (Award at p. 17). The Arbitrator also determined that “the record [did] not contain sufficient evidence to support the Union’s argument that Mr. Butler should have been converted to Permanent status long before being disciplined for the [December 2004] fried fish incident.” (Award at p. 18).

“After making the above-noted findings, Arbitrator Kendellen considered the issue of whether the November 27, 2006 termination letter to Mr. Butler presented valid bases for his separation from employment. To resolve the issue, the Arbitrator posed two questions: (1) did the Agency’s November 27, 2006 letter accurately describe Mr. Butler’s status at reinstatement: an employee who would serve out the remainder of his Term Appointment, which would have expired on August 12,

2005?; and (2) 'was the Agency, in deciding whether to retain Mr. Butler, permitted to consider the disciplinary penalty issued by the arbitrator in the December 2004 fried fish/plastic bag incident.' ” (Slip Op. No. 996 at p. 4).

In light of the above, Arbitrator Kendellen determined that the “Agency’s reasons not to retain Mr. Butler were not valid.” (Award at p. 25). In addition, he determined that the “Agency’s position that Mr. Butler had a Term Appointment that would have expired on August 12, 2005[,] ignores and is in direct conflict with the plain meaning of the arbitrator’s [December 1, 2005] reinstatement award fully restoring Mr. Butler to his former position.” (Award at p. 25). As a result, Arbitrator Kendellen directed that the Agency “withdraw the [November 27, 2006] letter and reinstate Mr. Butler to his former position with back pay, as well as holiday and vacation pay and other benefits to which he is entitled, less interim earnings.” (Award at p. 26).

As a remedy, the Arbitrator also directed that DOC make a determination of Mr. Butler’s employment status upon the reinstatement. (See Award at p. 26). In making this determination, the Arbitrator instructed DOC to:

base its determination upon his status as a Term employee with uninterrupted service since July 13, 2004, who had returned to work from a Reduction-In-Force and who had been subject upon his return to the practice of the Agency and the Union of such Term employees being converted to Permanent when openings occurred. The Agency, when making its determination, may not consider the disciplinary penalty issued to Mr. Butler in the December 1, 2005 arbitration award. As part of the Agency’s determination, it shall also determine whether Mr. Butler at any time prior to his reinstatement herein would have been converted or offered an opportunity to convert from Term status to Permanent, compared to similarly situated employees.

If the Agency’s determination of Mr. Butler’s employment status demonstrates that he would have been converted or offered an opportunity to convert to Permanent status prior to his reinstatement herein, it shall convert him or offer him an opportunity to convert to Permanent status. The Agency shall also determine at what point Mr. Butler’s conversion or offer of an opportunity to convert would have taken place and make any conversion that results effective in his employment record as of the date the conversion would have occurred.

(Award at pgs. 26-27).

Lastly, the Arbitrator directed DOC to provide Mr. Butler with a letter describing the outcome of its determination and the steps taken to reach that outcome. (See Award at p. 27).

On March 12, 2009, DOC filed an Arbitration Review Request ("Request") seeking review of the February 17, 2009, Award which rescinded the termination of Carl Butler and directed that Mr. Butler be reinstated. DOC alleged that the Award was contrary to law and public policy. "DOC state[d] that the Arbitrator was without authority or exceeded his jurisdiction. (See Request at p. 2). However, [we noted that] DOC [did] not provide[] any argument in support of this contention. Therefore, [we determined that] there [was] no legal argument for the Board to consider. As a result, the Board turn[ed] to DOC's other claim that the Award [was] contrary to law and public policy because the Arbitrator: (1) 'illegally ignored the law'; and (2) ' ignored binding law to craft an illegal decision and order.' (Request at p. 3) Specifically, the Request assert[ed] that the Award [was] in violation of D.C. Code § 1-103, which provides that the Mayor and the members of City Council shall be deemed and taken as officers of the municipal corporation of District of Columbia. (See Request at p. 3). DOC contend[ed] that the authority granted under D.C. Code § 1-103: (a) provided the District the authority to promulgate rules and regulations through the District Personnel Manual (DPM); and (b) that Chapter 8 of the DPM, relating to Term Employees was ignored by the Arbitrator. (See Request at pgs. 4-5)." (Slip Op. No. 996 at p. 6). As a result, DOC asserted that the Award violated the District Personnel Manual (DPM).

In Slip Op. No. 996 we observed that "[a]lthough DOC refer[red] to specific provisions of the DPM concerning Term employment, DOC's argument fail[ed] to specify how the DPM was violated. [Furthermore, we noted that in the case before the Board], the Arbitrator directed DOC to reinstate Mr. Butler. [Also,] [t]he Award [did] not return Mr. Butler as a permanent employee or as a 'perpetual' employee as alleged in the Request. In fact, DOC clearly concede[d] that the Award does not require an illegal act by reinstating Mr. Butler as a permanent employee. (See Request at p. 6). The Award only requires that Mr. Butler be reinstated and that DOC make a determination as to his employment status. (See Award at p. 26). In addition, the Arbitrator noted that Mr. Butler's May 27, 2005 termination was reversed pursuant to the December 1, 2005 arbitration award. (See Award at p. 26). As a result, the Arbitrator directed that this determination not take into account the reversal of Mr. Butler's May 27, 2005 termination for the fried fish/plastic bag incident, or the 45 days of docked pay imposed by the December 1, 2005 arbitration award. Instead, the Arbitrator directed that DOC take into account the procedure agreed upon between the Agency and the Union concerning the conversion of RIFed employees, reinstated as term appointments, to permanent status. (See Award at p. 27)." (Slip Op. No. 996 at p. 8).

In Slip Op. No. 996, the Board determined that DOC's Request did not meet the requirements for reversing Arbitrator Kendellen's Award. Specifically, we noted that DOC had the

burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at a different result’ . . . We found that DOC failed to specify any applicable law or definite public policy that mandates that the Arbitrator arrive at a different result. As a result[,] we determined that DOC merely disagreed with the Arbitrator’s findings that: (1) the November 27, 2006 letter, terminating Mr. Butler, inaccurately stated that Mr. Butler’s term appointment had expired and that his employment could be terminated because of previous disciplinary action; and (2) the letter’s inaccuracies could not serve as valid bases for Mr. Butler’s termination. (See Award at. p. 26).” (Slip Op. No. 996 at p. 8).

“In light of the above, [we determined] that DOC’s disagreement with the Arbitrator’s findings [was] not an appropriate ground for review. Moreover, we [found] no merit to DOC’s arguments. [Also, we stated that] [t]he Arbitrator’s conclusions [were] based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy or in excess of his authority. Therefore, [we found that] no statutory basis exists for setting aside the Award.” (Slip Op. No. 996 at p. 9).

On March 5, 2010, FOP filed the current Petition with the Board. FOP contends that DOC has failed to comply with Slip Op. No. 996. Specifically, FOP asserts that despite the Board’s denial of DOC’s Request, DOC has not complied with Arbitrator Kendellen’s Award. Specifically, FOP claims that:

As of the date of this filing, Officer Butler has not yet been returned to work. More than one year has passed since the issuance of the February 17, 2009 Award, and three months has elapsed since PERB’s Decision and Order. Moreover, while Officer Butler has completed the requisite steps to return to the Agency, there has been no suggestion of any firm date on which he will be returned to work, receive his back pay, nor has there been any indication of when the entirety of the Award will be implemented. The Agency is in willful noncompliance of both the February 17, 2009 Award and the Board’s Decision and Order upholding it. Therefore, the Petitioners respectfully request enforcement of PERB’s Decision and Order to compel the DOC to comply with the February 17, 2009 Award, or, in the alternative, to bring an action in the Superior Court of the District of Columbia to compel the DOC to comply with the Board’s Decision and Order. (Petition at p. 5).

In view of the above, FOP is requesting that the Board enforce Slip Op. No. 996 and compel DOC to comply with the terms of Arbitrator Kendellen’s Award.

DOC filed a timely response to the Petition ("DOC's Reply to Petition"). In addition, DOC filed a document styled "Reply of the Department of Corrections to the Public Employee Relations Board's Call for Mediation/Settlement Conference" ("DOC's Reply to Request for Mediation").¹ In their submissions, DOC does not deny that as of the date of the filing of the Petition it had failed to comply with the Board's December 3, 2009 Decision and Order. In addition, DOC states that its "avenues of appeal are exhausted. . . [and that the] FOP is correct on that topic." (DOC 's Reply to Petition at p.1). Nonetheless, DOC is requesting that the Board dismiss FOP's Petition. (See DOC's Reply to Request for Mediation at p. 2). In support of its position, DOC states the following:

PERB needs only to look at the most recent events in the case as recited in the FOP petition. As FOP recites, the most recent decision is the PERB decision issued on December 3, 2009. See page 5 of FOP's Petition. Prior to the PERB decision, the Arbitrator issued a decision dated February 17, 2009. DOC availed itself of the right of appeal from the Arbitrator's decision. DOC filed the Arbitration Review Request (ARR) on March 12, 2009. After DOC filed its ARR, PERB had to review the appeal. PERB ruled against DOC on December 3, 2009. On or about January 3, 2010, the clock started to run for the reinstatement of Mr. Butler. *Unfortunately, DOC and the D.C. Department of Human Resources have not completed processing Mr. Butler's reinstatement or his back pay award but are working to do so expeditiously.*

* * *

The District of Columbia Human Resources (DCHR) has the Butler matter in the process of expediting the reinstatement of Mr. Butler. In addition, the Agency is working to compute and disburse his back pay. Mr. Butler will be reinstated as soon as the appropriate processes are completed. He will receive his back pay award and be reinstated as soon as the work required to satisfy each prong of the award is completed. As a result, the Agency will not delay

¹On May 7, 2010, the Board's Executive Director transmitted to the parties, a document styled "Notice of Mediation/Settlement Conference" ("Notice"). The Notice informed the parties that a Mediation conference would be held in this case during June 2010. In addition, the parties were informed that mediation is voluntary. Therefore, the parties were instructed to notify the Executive Director if they were not interested in mediation. On May 17, 2010, DOC submitted a document styled "Reply of the Department of Corrections to the Public Employee Relations Board's Call for Mediation/Settlement Conference". In its submission DOC asserted that the matter was moot and that the Board should dismiss FOP's Petition. (See DOC's Reply to Request for Mediation at p. 2).

compliance with one aspect of the award in order to await compliance of the other.

Again, the Agency acknowledges this unfortunate delay. Mr. Butler, of course, will be made whole from the compliance date to the date his reinstatement becomes effective. (DOC 's Reply to Petition at p. 2, emphasis added).

Furthermore, DOC asserts that Mr. Butler went on the payroll on May 12, 2010; therefore, this case is moot. (See DOC's Reply to Request for Mediation at p. 1).

In a letter dated June 1, 2010, FOP informed the Board's Executive Director that Mr. Butler has been reinstated. However, FOP asserts that Mr. Butler has not been made whole as required by the February 17, 2009 Award.² As a result, FOP asserts that the case is not moot.

After reviewing the parties' submissions, we find that the material issues of fact and supporting documentary evidence are undisputed by the parties. Therefore, it is clear that DOC has not fully complied with Arbitrator Kendellen's Award. Specifically, the parties acknowledge that DOC reinstated Mr. Butler on May 12, 2010; however, DOC has not provided Mr. Butler with "back pay, as well as holiday and vacation pay and other benefits. . . less his interim earnings", as required by the Award. (Award at p. 26). In addition, DOC has failed to provide evidence to demonstrate that it has complied with this part of the Award. Also, the Award directs that when DOC, reinstates Mr. Butler it should "credit[] him with uninterrupted service time, starting with his July 13, 2004 return from his 2002 Reduction-In-Force and continuing until his reinstatement pursuant to the [February 17, 2009] Award." (Award at p. 26). In light of the above, the Board must determine if DOC's action is reasonable.

²In the June 1, 2010 letter, FOP states as follows:

The Union does not dispute that Officer Butler has been returned to work within the past 30 days; however, the Agency is fully aware that in no other way has it met its obligations under the Arbitration Award. For example, despite completing the requisite affidavit months ago, Officer Butler has not been issued his back pay, as ordered in the Award. Nor has the Agency credited Officer Butler with uninterrupted service time, as set forth in the Award.

It is clear the Agency has failed to fully comply with the Arbitration Award and the PERB decision and Order upholding it . . . This case is not "moot" simply because Officer Butler is back on the payroll.

Board Rule 560.1 provides as follows:

560.1 - Enforcement

If any party fails to comply with the Board's decision within the time period specified in Rule 559.1, the prevailing party may petition the Board to enforce the order.

In the present case, on March 12, 2009, DOC filed an Arbitration Review Request seeking that the Board reverse Arbitrator Kendellen's February 17, 2009 Award. On December 3, 2009, the Board issued a Decision and Order denying DOC's Request. Pursuant to D.C. Code §1-617.13 (c) "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order in the Superior Court of the District of Columbia by filing a request within 30 days after the final order has been issued." See also, Superior Court Civil Rules, Part XV, Agency Review, Rule 1. Consistent with D.C. Code § 1-617.13(c) and Superior Court Rule 1, DOC could have filed a Petition for Review of Agency decision in the Superior Court of the District of Columbia within thirty days of the Board's December 3, 2009 Decision and Order.³ However, DOC did not file a Petition for Review. Therefore, DOC has waived its right to appeal the Board's December 3, 2009 Decision and Order in the Superior Court of the District of Columbia. In view of the above, we believe that DOC's failure to comply with the terms of the Award is not based on a genuine dispute over the terms of Arbitrator Kendellen's Award, but rather on a flat refusal to comply with the Award.⁴ For the above-noted reasons, we find that DOC has no "legitimate reason" for its on-going refusal to make Mr. Butler whole.

As previously discussed, the Board's Decision and Order was issued on December 3, 2009. Thus, it has been seven (7) months since our Order was issued. We believe that DOC has had more than a reasonable period of time to fully comply with the terms of Arbitrator Kendellen's Award.

³Slip Op. No. 996 was issued on December 3, 2009, and the Order indicated that "[p]ursuant to Board Rule 559.1 the Decision and Order is final upon issuance." (Slip Op. No. 996 at p. 7). Therefore, DOC was required to file its Petition for Review in the Superior Court within thirty (30) days of the issuance of the final order-specifically by January 4, 2010.

⁴We note that Arbitrator Kendellen indicated that he would retain "jurisdiction over this matter for the sole purpose of resolving any issue pertaining to the Agency's reinstatement determination(s) related to this Award." (Award at p. 28). Thus, if DOC had a genuine dispute over the terms of Arbitrator Kendellen's Award, it could have requested that Arbitrator Kendellen settle such dispute. However, there is nothing in the record showing that DOC had a particular issue concerning Mr. Butler's reinstatement and that it contacted the Arbitrator. Therefore, it is reasonable to conclude that DOC did not have a genuine dispute over the terms of the Award.

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For the reasons noted above, we find that DOC has not fully complied with Slip Op. No. 996; therefore, FOP's Petition for Enforcement is granted. As a result, the Board will seek judicial enforcement of our December 3, 2009, Decision and Order, as provided under D.C. Code § 1-617.13(b) (2001 ed.).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Department of Corrections Labor Committee's "Petition for Enforcement of PERB's Decision and Order", is granted.
2. The Board shall proceed with enforcement of Slip Op. No. 996 pursuant to D.C. Code § 1-617.13(b) (2001 ed.), if full compliance with Slip Op. No. 996 is not made and documented to the Board within ten (10) days of the issuance of this Decision and Order.
3. 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.**

July 29, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.10-E-03 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of July 2010.

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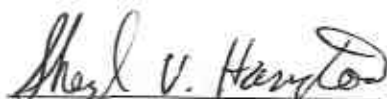
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