Government of the District of Columbia
Pubic Employee Relations Board

Constance R. DiAngelo and Doctor's Council of the District of Columbia Complainants, v. District of Columbia Government Office of The Chief Medical Examiner, Respondent.	PERB Case Nos. 05-U-47 and 07-U-22 Opinion No. 1006 **Motion for Reconsideration**

DECISION AND ORDER

I. Statement of the Case:

On September 30, 2009, the Board issued a Decision and Order in Slip Op. No. 993 finding that the District of Columbia Government Office of the Chief Medical Examiner ("Respondent" or "OCME") violated the Comprehensive Merit Personnel Act by failing to comply with all the terms of a settlement agreement. In that Decision, the Board denied the request for costs made by the Doctor's Council of the District of Columbia and Constance R. DiAngelo ("Complainants" or "Union"). (See Slip Op. No. 993 at p. 9). On October 15, 2009, Complainants filed a Motion for Reconsideration of the Board's denial of costs in the above-captioned case. The Respondent filed a document styled "Opposition to the Union's Motion for Reconsideration of PERB's Decision to Deny the Award of Costs" ("Opposition").

On November 30, 2009, the parties submitted "Respondent's and Complainant's Joint Stipulation" ("Stipulation") requesting that the Board: (1) remove the individual's name from the caption of the case as agreed upon by the parties in the settlement agreement; (2) delete footnote 1 from Slip Op. No. 993; and (3) correct in Slip Op. No. 993 at p. 5 the fact that the Complainant resigned (and did not "retire"). The Complainants' Motion and Respondent's Opposition are before the Board for consideration.

II. Discussion

In Slip Op. No. 993, the Board noted that the award of costs was recommended by the Hearing Examiner. The Hearing Examiner based his recommendation, in part, on the fact that OCME repeatedly failed to comply with the settlement agreement at issue, stating that this constituted a pattern and practice of refusing to comply with the settlement agreement in this case. The Board disagreed with this characterization of the term "pattern and practice". The Board clarified that in the past, it has found a "pattern and practice" when a party repeatedly fails to comply with settlement agreements as evidenced by findings of a violation of the CMPA in previous unfair labor practice complaints before the Board. The Board stated: "In determining whether to award reasonable costs the Board uses an interest of justice standard. See *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pgs. 4-5, PERB Case No. 98-U-02 (2000)."[1]

In cases which involve an agency's failure to implement an arbitration award or a negotiated settlement, the Board has not frequently awarded costs. See, *AFGE, Local 2725 v. D.C. Housing Authority*, 46 DCR 6278, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999), and *American Federation of Government Employees, Local 2725*, 51 DCR 11393, Slip Op. No. 752, PERB Case No. 03-U-18 (2004). However, the Board has awarded costs when it has been determined that the agency has engaged in a pattern and practice of failing to implement arbitration awards or negotiated settlement agreements. (See *AFGE Local 2715 v. D.C. Housing Authority*, 46 DCR 8356, Slip Op. No. 597 at p. 2, PERB Case No. 99-U-23 (1991).

The Complainants took exception to the Board's findings on this issue, asserting that the Board has never made "a pattern and practice of failing to implement a settlement agreement" a standard for awarding costs. In support of their position, the Complainants cited cases where

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[1] In *AFSCME, Council 20*, the Board addressed the criteria for determining whether a successful unfair labor practice complainant should be awarded costs, as follows:

> First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.
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> Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . . What we can say here is that among the situations in which such an award *is* appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonable foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

costs have been awarded when there is no finding of a "pattern and practice" of failing to implement settlement agreements or arbitration awards. After considering the Complainants' arguments, the Board denied Complainants' exceptions, which is the basis of the Complainants' Motion for Reconsideration. The Board must determine whether its decision in Slip Op. No. 998 is contrary to law.

Complainants request reconsideration of: (1) the standard enunciated by the Board for awarding costs in cases involving breach of a settlement agreement; and (2) the denial of costs. The Complainants rely on the legal arguments previously raised in pages 11-19 of their exceptions to Slip Op. No. 993. In the referenced text, the Complainants cite Board case law. The Complainants assert that the award of costs should not be limited "only to cases where a demonstration can be made of an Agency's pattern and practice of failing to implement settlement agreements." (Motion at p. 3).

In denying the Complainants' request for costs in Slip Op. No. 993, the Board stated as follows at p. 9:

> In cases which involve an agency's failure to implement an arbitration award or a negotiated settlement, the Board has been reluctant to award costs. See, *AFGE, Local 2725 v. D.C. Housing Authority*, 46 DCR 6278, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999) and AFGE, Local 2725, Slip Op. No. 752, PERB Case No. 03-U-18 (2004). However, the Board has awarded costs when it has been determined that the agency engaged in a pattern and practice of failing to implement arbitration awards or negotiated settlement agreements.
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> The Hearing Examiner recognized that the Board requires that the Complainants establish a pattern and practice of refusing to implement settlement agreements before costs can be awarded. However, we note that, here, the Complainants did not assert that OCME has engaged in a pattern and practice of failing to comply with prior settlement agreements. Nonetheless, the Hearing Examiner found that under the circumstances of this case the awarding of cost is appropriate. In support of this position, the Hearing Examiner asserts the following: "I believe that the pattern and practice is shown here by the successive stages of this case where compliance was repeatedly promised but did not occur, leading to long delay." (R&R at p. 15).

Therefore, the Hearing Examiner granted costs based on a pattern and practice of failing to comply with the terms of the settlement agreement. The Board found that in granting costs, the Hearing Examiner misapplied the term "pattern and practice", as it is used by the Board and

added a new meaning to this phrase. Because the Hearing Examiner's application of the term "pattern and practice" has not been adopted by the Board, the decision to award costs on this basis was overturned. The Board stated:

> We find that the Hearing Examiner's awarding of costs in this case is not consistent with Board precedent because it has not been demonstrated that OCME has been involved in a pattern and practice of failing to implement prior settlement agreements. (See, Slip Op. No. 993 at p. 9). *American Federation of Government Employees v. D.C. Housing Authority, Id.*). In view of the above, we reject the Hearing Examiner's recommendation that reasonable costs be awarded.

In Slip Op. No. 497 (1996), the complainant in that case alleged that an unfair labor practice was committed when the agency simply "fail[ed] to process the payments negotiated in settlement of arbitration proceedings and/or mid-term bargaining obligations". (Slip Op. No. 497 at p. 1). The Board found that "when a party simply refuses or fails to implement an award or a negotiated settlement 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." (emphasis added) (Slip Op. No. 497 at p. 3). Although no costs were sought in that case, clearly, the Board declared the failure to implement a settlement agreement or an arbitration award to be an unfair labor practice, specifically a failure to bargain in good faith.

In Slip Op. No. 585 (April 1999), we found that DCHA's acts and conduct (refusal to comply with an arbitration award) constituted unfair labor practices under the CMPA, citing *Employee, Local 872, AFL-CIO v. D.C. Water and Sewer Authority*, Slip Op. No. 497, PERB Case No. 96-U-23 (1996). In Slip Op. No. 497, the Board held for the first time that "when a party simply refuses or fails to implement an award or negotiated agreement where no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and, thereby, an unfair labor practice under the CMPA.") Therefore, in Slip Op. No. 585 and Slip Op. No. 497, the Board treated the refusal or failure to implement an award or negotiated agreement as similar violations resulting in the same unfair labor practice, i.e., failure to bargain in good faith. As the Complainants pointed out, in Slip Op. No. 585, even though DCHA had previously committed similar violations (constituting a pattern and practice), we denied costs in the interest of justice "[i]n view of the fact that we ha[d] had only one other occasion to consider the issues presented by these [c]omplaints...." (Slip Op. No. 585 at p. 5). The intent was to afford the parties the opportunity to abide by the new case law.

The complainant in Slip Op. No. 597 (June 1999), alleged a refusal to fully implement an arbitration award. Relying on a case with the same parties and a similar fact pattern where the agency refused to implement three (3) arbitration awards, the Board found that the agency established a pattern and practice of refusing to implement arbitration awards and awarded costs in the interest of justice. (Slip Op. No. 597 at p. 2).

Slip Op. No. 741 (2004) involved the agency's failure to implement an arbitration award which rescinded the involuntary transfer of an employee. The Board stated, "In cases which involve an agency's failure to implement an arbitration award, the Board has been reluctant to award costs. [citing Slip Op. No. 585][2]. . . .However, the Board has awarded costs when an agency has demonstrated a pattern and practice of refusing to implement arbitration awards." (citing Slip Op. No. 597).

The Complainants' argument that the Board has awarded costs only in cases where there is "a pattern and practice" of failing to implement arbitration awards (and not in cases pertaining to settlement agreements), is not convincing. When the Board defined a violation of the CMPA at 1-617.04(a)(1) and (5) in Slip Op. No. 497, we specified: "when a party simply refuses or fails to implement an award or a negotiated settlement 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." This indicates that we view the failure to implement an award and the failure to implement a settlement in the same light, resulting in a violation of 1-617.04(a)(1) and (5). It follows that we view the issue of awarding costs, in a similar fashion pertaining to this violation. When discussing the awarding of costs based on a pattern and practice of violating the CMPA, the Board now cites cases pertaining to the failure to implement an award, and cases pertaining to the failure to implement a settlement, interchangeably. See Slip Op. No. 796 (2005) at p. 5, where the Board found that the failure to implement a settlement agreement is a violation and awarded costs stating as follows:

> In the cases which involve an agency's failure to implement an arbitration award or a negotiated settlement, this Board has been reluctant to award costs. See, *AFGE, Local 2725 v. D.C. Housing Authority*, 46 DCR 6278, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05, and 99-U-12 (1999) and *American Federation of Government Employees, Local 2725 v. D.C. Department of Health*, 51 DCR 11398, Slip Op. No. 752, PERB Case No. 03-U-18 (2004). However, we have awarded costs when an agency has demonstrated a pattern and practice of refusing to implement arbitration awards or negotiated settlements. See, *AFGE Local 2725 v. D.C. Housing Authority*, 46, DCR 8356, Slip Op. No. 597, PERB Case No. 99-U-33 (1999).

This is not incongruous with the Board's treatment of the two violations, finding that the failure to implement an award or an agreement - both constitute a failure to bargain in good faith.

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[2] The Complainants' argument in the present case that Slip Op. No. 585 does not contain language regarding "a pattern and practice" pertaining to *settlement* agreements is not persuasive. In Slip Op. No. 585, the Board cites the following language: "when a party simply refuses or fails to implement an award or negotiated agreement where no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and, thereby, an unfair labor practice under the CMPA." This shows the Board's intent to treat both scenarios as a similar violation. Furthermore, in Slip Op. No. 585, the Board distinguished its reason for not awarding costs, i.e., "[i]n view of the fact that we have had only one other occasion to consider the issues presented by these [c]omplaints...." (at p. 5).

(See Slip Op. No. 752 (2004). In the present case also, we are being consistent with our treatment of this violation as to the substance of the statutory violation, as well as with our treatment of costs – when we cite cases pertaining to the failure to implement awards, although this case pertains to the failure to implement an agreement.

The Complainants have raised no new arguments which the Board did not previously consider and reject and we find no basis for setting aside our ruling to deny costs in Slip Op. No. 993. Therefore, the Motion for Reconsideration is denied.

The parties' request that the Board remove the name of the Complainant from the caption and substitute the name with the phrase "Individual". From the time they entered into a settlement, the parties have refrained from using the Complainant's name and have called her "Individual". The Complainants claim that the Hearing Examiner has honored their request to use the term "Individual" in his Report and Recommendation, as did the Board in Slip Op. No. 923. The parties have now stipulated that the Complainant should be referred to as "Individual" in the caption of the case and that footnote No. 1 in Slip Op. No. 993 should be deleted.

We note that in Slip Op. No. 923, the Board remanded the case to the Hearing Examiner to determine all issues including the destruction of documents, and refrained from making any final determinations in that case. However, in Slip Op. No. 993, footnote no. 1, the Board denied the parties' request to refer to the Complainant as "Individual" in the caption of the case. There is nothing in the Board's rules providing for the anonymity of an employee filing a complaint before the Board. In effect, the parties wish to pass to the Board the responsibility of concealing the Complainant's identity. This is not feasible since the Board is subject to the Freedom of Information Act and must make available to the public information which is requested under that Act. Also, if others made the same request, it would encumber the Board's resources with ensuring the anonymity of parties. The Board must weigh the needs of the Complainant against the requirement to make information available to the public and the appropriate allocation of Board resources. Pursuant to their settlement agreement, the parties may continue to refer to the Complainant in this case as "Individual" in their own records. However, in view of the foregoing, we deny the parties' joint request to refer to the Complainant as "Individual".

ORDER

IT IS HEREBY ORDERED THAT:

1. The Motion for Reconsideration filed by the Complainants is hereby denied.

2. Pursuant to Board Rule 559.3 this Decision and Order is final upon issuance.

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

December 31, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 05-U-47 and 07-U-22 was transmitted via Fax and U.S. Mail to the following parties on this the 31st day of December 2009.

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