

OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

United States Capitol Police,)
Appellee)
v.)
Fraternal Order of Police,)
District of Columbia Lodge No. 1,)
U.S. Capitol Police Labor Committee)
Appellant.)

Case Number: 15-LMR-02 (CA)

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors ("Board") pursuant to petitions for review filed by the Office of Compliance General Counsel ("General Counsel") and the U.S. Capitol Police Labor Committee ("FOP"). The General Counsel seeks review of the Hearing Officer's September 29, 2015 Order, which granted the U.S. Capitol Police's ("USCP") motion to dismiss. The FOP seeks review of the same. The Hearing Officer concluded that the FOP did not file the unfair labor practice charge within 180 days of becoming aware of the alleged unfair labor practice, and therefore granted the USCP's motion and dismissed the complaint.

Upon due consideration of the Hearing Officer's Order, the parties' briefs and filings, and the record in these proceedings, the Board reverses the dismissal of the complaint and remands for further proceedings.

I. Background

Arbitration Award and Exceptions

According to the General Counsel's complaint, the FOP filed a grievance on behalf of discharged USCP Officer Andrew Ricken in accordance with the Collective Bargaining Agreement ("CBA") between the FOP and the USCP.

On May 13, 2014, the Arbitrator issued an Award ("Arbitrator's Award"), which found the grievance sustained in part and denied in part. The Arbitrator reduced Ricken's firing to a 30-day suspension and granted him lost wages and benefits.

The USCP later filed with the Board eight exceptions to the May 13, 2014 Arbitrator's Award. On December 12, 2014, the Board denied the USCP's exceptions. See *FOP/U.S. Capitol Police Labor Committee v. The United States Capitol Police*, 14-ARB-01 (Dec. 12, 2014).

After the Board denied exceptions filed by the USCP to the Arbitrator's Award, the Arbitrator, by letter dated December 16, 2014, informed the parties that he was removing the stay that had been put on the implementation of his May 13, 2014 Award. The Arbitrator directed the USCP to reinstate Officer Ricken and provide the FOP with documentation in response to the FOP's earlier May 22, 2014 information request.

On January 26, 2015, the Arbitrator sent a letter to the parties asking whether the USCP had complied with the Arbitrator's Award. That same day, the FOP told the Arbitrator that Ricken had not been reinstated and not been compensated. The FOP also stated that the USCP had ignored all of the information requests regarding damages owed and that the FOP had contacted the USCP twice in the past 10 days but the FOP had not received a response.

On February 11, 2015, the FOP emailed the Arbitrator to request assistance and clarification on the implementation of the Arbitrator's Award. By email dated February 18, 2015, the Arbitrator directed the USCP to comply with the Arbitrator's Award, by reinstating Ricken, and promptly providing the FOP with all the requested information sought. The Arbitrator also advised the parties to contact him in the next 30 days if the USCP had not fully implemented the Arbitrator's Award.

On March 13, 2015, the USCP emailed the FOP that it would not comply with the Arbitrator's Award because the USCP believed that the Arbitrator "did not retain jurisdiction over the matter." The FOP then informed the Arbitrator, on March 19, 2015, that the USCP would not supply the requested information nor would it comply with the Arbitrator's Award. The Arbitrator forwarded the parties a letter, on March 23, 2015, which explained the procedures he would use to determine the amount of back pay, damages, and associated fees and costs for Ricken.

On June 17, 2015, the Arbitrator issued an Order clarifying and supplementing the Arbitrator's Award. The Arbitrator directed the USCP to reinstate Ricken immediately. The Arbitrator awarded Ricken \$340,487.70 in back pay, less offsets, and interest; \$648.60 for expenses; and attorney fees in the amount of \$265,183 and expenses for \$8,723.84. In addition, the Arbitrator stated that the back pay and expenses would increase if Ricken was not reinstated within 30 days of the Arbitrator's June 17, 2015 Order.

The Unfair Labor Practice Charge and Complaint

On July 28, 2015, the FOP filed an unfair labor practice ("ULP") charge against the USCP. The ULP charge alleged that the USCP committed an ULP when it failed to implement the May 13, 2014 Arbitrator's Award that had been supplemented and clarified by the Arbitrator's June 17, 2015 Final Order.

After investigating the ULP charge, the General Counsel filed an administrative complaint with the Office of Compliance on August 31, 2015. In the complaint, the General Counsel alleged that the USCP committed two ULPs: (i) failing to comply with the Arbitrator's February 18, 2015 Order to furnish data and information to the FOP and (ii) failing to take the actions required by the Arbitrator's June 17, 2015 Final Award.

On September 16, 2015, the USCP filed a motion to dismiss the complaint. The USCP contended that the ULP charge was untimely. The General Counsel submitted an opposition on September 25, 2015. The FOP did not file an opposition brief.

On September 29, 2015, the Hearing Officer granted the USCP's motion to dismiss. The General Counsel filed a petition for review appealing the Hearing Officer's Dismissal on October 27, 2015. The FOP filed its petition for review the next day.

II. Hearing Officer's Decision

Finding that the ULP charge was untimely, the Hearing Officer focused on two dates to conclude that the USCP had put the FOP on notice that the USCP would not comply with the Arbitrator's Award: December 16, 2014 and January 26, 2015. The Hearing Officer found that it was indisputable that Ricken was not reinstated immediately following the Arbitrator's December 16, 2014 Directive and the record did not show that the USCP took any steps during December 2014 to comply with the May 13, 2014 Arbitrator's Award. The Hearing Officer reasoned that, at a minimum, the FOP was put on notice that, as of December 16, 2014, the USCP was refusing to comply with the requirements of the Arbitrator's Award. The Hearing Officer further found that by not taking any action to implement the Arbitrator's Award, the USCP affirmatively failed to comply after the deadline for taking the action had passed. The Hearing Officer concluded that the FOP should have filed the subject ULP charge in June 2015 to be in compliance with the six-month statute of limitations requirement (within 180 days after December 16, 2014).

Alternatively, the Hearing Officer found that the FOP was on notice as of January 26, 2015 that the USCP had not complied with the Arbitrator's Award. It was on that date that the FOP informed the Arbitrator that the USCP had not reinstated or properly compensated Ricken, and that the USCP had failed to provide requested information. The Hearing Officer determined that the FOP knew or should have known on or before January 26, 2015, that the USCP had not taken any steps to comply with the Arbitrator's Award. The Hearing Officer found that the ULP

charge was untimely because the FOP did not file the ULP charge until July 28, 2015, which was not within 180 days of either December 16, 2014 or January 26, 2015.

As part of its opposition to the USCP's motion to dismiss, the General Counsel argued to the Hearing Officer that the July 28, 2015 charge was timely because, as stated in the complaint, the USCP's refusal to provide the requested information was in response to the Arbitrator's February 18, 2015 Order. In response to this argument, the Hearing Officer found that the July 28, 2015 ULP charge did not independently allege a refusal by the USCP to furnish necessary and relevant information to the FOP and that, therefore, the General Counsel could not now pursue relief for a failure to provide information ULP. The Hearing Officer granted the motion to dismiss.

III. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c). *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

IV. Analysis

For the reasons stated below, the Board reverses the Hearing Officer's Order and remands the case for further proceedings.

The Federal Rules of Civil Procedure provide for a liberal system of notice pleading. *See Fed. R. Civ. P. 8(a)*. The Board has held in the past that a complaint may only be dismissed for failure to state a claim "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Solomon v. Office of the Architect of the Capitol*, Case No. 02-AC-62 (RP) (Dec. 7, 2005). In a motion to dismiss, a court must accept as true all well-pleaded factual allegations contained in the complaint and draw all reasonable inferences in the plaintiff's favor. *Duncan v. Office of the Architect of the Capitol*, Case No. 02-AC-59 (RP) (Aug. 5, 2004) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424-25 (3d Cir. 1997)).

In granting the USCP's motion to dismiss, the Hearing Officer failed to draw all reasonable inferences in favor of the General Counsel, as the General Counsel's complaint alleged sufficient facts, if taken as true, to prove that the ULP charge was timely filed. We therefore reverse the Hearing Officer's dismissal of the complaint.

The General Counsel's complaint alleged that on February 18, 2015, the Arbitrator directed the USCP to comply with the Arbitrator's Award, to reinstate Ricken, and to promptly provide the FOP with all the requested information. The Arbitrator instructed the parties to contact him in

the next 30 days if the Arbitrator's Award was not fully implemented. The complaint further alleged that on March 13, 2015, counsel for the USCP notified FOP counsel that the USCP would not be complying with the Arbitrator's Award on grounds that the Arbitrator had failed to retain jurisdiction in the matter.

In judging the timeliness of a ULP charge alleging a failure to comply with an arbitration award, we are persuaded by the legal standard articulated by the Federal Labor Relations Authority ["FLRA"] in *U.S. Dep't. of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146 (2005), in construing the limitations period in Section 7118(a)(4)(A) of the FLRA.¹ In that case and on remand from the U.S. Court of Appeals for the District of Columbia Circuit, the FLRA held that the statutory period for filing such a ULP charge may be triggered in one of two ways: "(1) when a party expressly notifies a party that it will not comply with the obligations required by an award, or (2) when an award establishes a deadline for implementing obligations required by the award and the deadline passes without the party taking any action to implement the award." *Id.* at 150.

Here, taking the allegations of the General Counsel's complaint as true and drawing all reasonable inferences in his favor, we conclude that the motion to dismiss was improperly granted. Thus, as alleged in the General Counsel's complaint, the February 18, 2015 directive from the Arbitrator imposed a deadline for compliance -- March 17, 2015.² The complaint further alleged that on March 13, 2015, the USCP expressly advised the FOP, by email, that it would not comply with the Arbitrator's Award. The ULP charge was filed on July 28, 2015, a date that was within 180 days of both March 17, the deadline set by the Arbitrator for implementing the obligations required by the award, and March 13, when the USCP expressly notified the FOP that it would not comply with the award. Under the legal standard articulated in *U.S. Dep't. of the Treasury, IRS, Wash., D.C.*, 61 FLRA at 150, the statutory period for filing the ULP charge could have been triggered by either of these dates. We therefore find that the allegations in the General Counsel's complaint were sufficient to overcome the motion to dismiss on the timeliness of the ULP charge as it is not "clear that no relief could be granted under any set of facts that could be proved consistent with the allegation." *Solomon v. Office of the Architect of the Capitol*, Case No. 02-AC-62 (RP) (Dec. 7, 2005).

¹ Section 7118 is generally made applicable to the Legislative Branch by Section 220(c)(2) of the Congressional Accountability Act, 2 U.S.C. Section 1351(c)(2). While Section 7118(a)(4)(A) of the FLRA prescribes a six month limitations period, and Section 220(c)(2) prescribes a 180-day limitations period, the two statutes use virtually identical language regarding the event that triggers the limitations period: the FLRA refers to the time when the "alleged unfair labor practice . . . occurred" and the CAA refers to "the occurrence of the alleged unfair labor practice." Given the similarity in wording, the Board believes Section 220(c)(2) should be construed in the same manner as Section 7118(a)(4)(A) of the FLRA.

² Although the Arbitrator's December 16, 2014 correspondence removing the contractual stay on implementation of the award (referencing Section 32.18.3 of the parties' CBA) directed the USCP to provide documentation to the FOP as necessary to calculate the back pay, it did not impose a deadline for compliance.

Accordingly, we find that the motion to dismiss was improperly granted.

ORDER

For the foregoing reasons, the Board reverses the Hearing Officer's Decision to dismiss the complaint and remands for further proceedings.

It is so ORDERED.

Issued, Washington, DC on September 27, 2016