GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
D.C. Public Schools	)	
Petitioner	)	PERB Case No. 23-A-03
v.	)	Opinion No. 1844
Washington Teachers' Union, Local #6, AFT, AFL-CIO	)	
Respondent	)	

DECISION AND ORDER

I. Statement of the Case

On April 24, 2023, the District of Columbia Public Schools (DCPS) filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA) seeking review of an arbitration award (Award) dated March 31, 2023.[1] The parties stipulated that DCPS improperly terminated the Grievant as an employee and limited the scope of the arbitration to the appropriate remedy. The Arbitrator ordered a "make-whole" remedy in the Award. DCPS seeks review of the Award on the grounds that the Award is contrary to law and public policy.[2] The Washington Teachers' Union, Local #6 (WTU) filed an opposition requesting that the Board deny DCPS's Request (Opposition).[3]

Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Board concludes that the Award is not contrary to law and public policy. Therefore, the Board denies DCPS's Request.

[1] D.C. Official Code § 1-605.02(6). While the Award is dated March 31, 2023, DCPS has provided evidence that it received a copy of the Award on April 3, 2023, making its Request timely under Board Rule 538.1. DCPS Ex. 1.
[2] Request at 4.
[3] Opposition at 1.

II. Arbitration Award

A. Background

The Grievant taught at Dunbar High School for nearly five (5) years.[4] The Grievant also worked with the after-school Twilight program, which is administered directly by DCPS and for which wages are paid by DCPS and incorporated into teachers' regular paychecks as "administrative pay."[5] The Grievant was an elected WTU building representative and supporter of WTU.[6] The Grievant was actively involved in a 2018 investigation by the D.C. Office of the State Superintendent of Education (OSSE) that concluded Dunbar High School had significant problems with "mismanagement or fraud in connection with inflated grades and falsified school attendance records."[7] During the 2018-2019 school year, the Principal and Assistant Principal of Dunbar High School each conducted in-class observations of the Grievant. The Principal and Assistant Principal posted low scores from each observation that resulted in an "Ineffective" rating and subjected the Grievant to immediate termination.[8] However, the Grievant was not terminated until June 25, 2019.[9]

The Grievant initiated the grievance process after the first observation and questioned whether the instructional observations were scheduled and conducted appropriately.[10] The grievance was denied on September 11, 2019.[11]

The grievance advanced to a hearing after a significant delay of over two (2) years.[12] The DCPS Hearing Officer found that the Principal and Assistant Principal at Dunbar High School "had not implemented the IMPACT evaluation system correctly, and that Grievant's termination therefore was in error and must be reversed."[13] The Hearing Officer cited a lack of thorough documentation of the second in-class observation to the extent that she questioned whether the observation had been performed at all.[14] The Hearing Officer issued three decisions on April 27, May 16, and May 17, 2022, all ordering that the Grievant be reinstated to his position at Dunbar High School.[15]

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[4] Award at 2.
[5] Award at 2.
[6] Award at 2.
[7] Award at 2.
[8] Award at 3.
[9] Award at 3.
[10] Award at 3.
[11] Award at 3.
[12] Award at 4.
[13] Award at 4.
[14] Award at 4.
[15] Award at 5.

Throughout the grievance process, the Grievant struggled to find employment in the education field as a result of being discharged by a major school system "for cause."[16] However, in August 2021, the Grievant was hired as a full-time teacher at Mount Vernon High School in Fairfax County, Virginia.[17] The Grievant accepted a salary at Mount Vernon High School significantly lower than his previous salary at Dunbar High School.[18] The Grievant also attested to, among other damages, a lost opportunity to apply for the forgiveness of his federal student loans through the Federal Teacher Loan Forgiveness program and, therefore, an obligation to continue making student loan payments. The Grievant further attested to his inability to complete the "Mind, Math and Multiliteracies Institute" graduate program at Georgetown University that required participants to make presentations to the schools at which they were employed, a condition the Grievant could not meet after he was terminated.[19]

After the Hearing Officer released her decisions, WTU demanded arbitration. DCPS communicated to the Union that it would not challenge the impropriety of the Grievant's termination or his reinstatement.[20] The parties agreed to arbitrate only the remedy.[21] WTU attempted to secure an offer of reinstatement from DCPS prior to Mount Vernon High School's teacher commitment deadline of June 15, 2022. However, DCPS did not make an offer to the Grievant for the 2022-2023 school year until September 8, 2022.[22] The Grievant, unable to rely on the pending offer from DCPS, renewed his position at Mount Vernon High School, which subjected him to severe penalties if he resigned that position before the end of the 2022-2023 academic year.[23]

B. Arbitrator's Findings

The Arbitrator relied on his broad equitable powers to fashion an appropriate "make-whole" remedy.[24] The Arbitrator noted that the parties had a basic agreement to reinstate the Grievant and provide backpay but did not agree as to the calculation of backpay or to any other remedies.[25]

WTU sought multiple remedies for the Grievant and the Union. WTU requested that DCPS tender an offer of reinstatement to the Grievant prior to June 15, 2023.[26] WTU argued that the Grievant's lost income from the Twilight after-school program should be included in the calculation of backpay for lost wages.[27] WTU also requested that backpay calculations factor in the impacts of the new collective bargaining agreement (CBA) negotiated in 2022, including: (1)

[16] Award at 5.
[17] Award at 5.
[18] Award at 5.
[19] Award at 6.
[20] Award at 5.
[21] Award at 5.
[22] Award at 7.
[23] Award at 7.
[24] Award at 7-8.
[25] Award at 8.
[26] Award at 8.
[27] WTU Ex. 1, November 16, 2022, Tr. at 70:16-21.

any retroactive pay increases or pay supplements as if the Grievant had never been discharged; and (2) any step increases to which the Grievant would have been entitled.[28] WTU sought a backpay interest award at a rate of 4% per annum in order to mitigate the impact of depreciation on the value of the lump sum of the Grievant's backpay over time.[29] WTU further requested remedies to mitigate the impact of the Grievant's improper termination on his student loan payments, interest and eligibility for loan forgiveness.[30] These remedies included payment in the amount of the balance of his student loans at the time of the implementation of the Award and reimbursement for payments the Grievant made since the end of the 2020 academic year.[31] WTU also sought compensation for the Grievant's opportunity losses associated with the Georgetown University and OSSE "Mind, Math and Multiliteracies Institute," including the amount of the stipend the Grievant would have received and the estimated value of the academic credit-hours the Grievant would have earned.[32] WTU requested the Grievant receive a monetary "tax gross-up;" an additional lump sum to mitigate the taxation of the Grievant receiving the backpay award as a lump sum rather than as wages over multiple years.[33] Finally, WTU sought attorney fees.[34]

DCPS opposed several of the remedies sought by WTU. DCPS opposed the inclusion of the Grievant's lost income from the Twilight after-school program in backpay calculations because (1) the part-time Twilight program work was separate and apart from the Grievant's full-time teaching job; and (2) the Grievant was rendered ineligible for the Twilight program work after termination.[35] DCPS also opposed the award of attorney fees to WTU.[36] DCPS argued that an award of attorney fees conflicted with the express terms of the parties' CBA.[37] DCPS further argued that the Federal Back Pay Act did not apply to the case.[38]

The Arbitrator ordered the reinstatement of the Grievant's full seniority rights as if the termination had never occurred.[39] The Arbitrator further ordered that the Grievant's backpay calculations include retroactive pay increases or supplements and step increases–resulting from the parties' renegotiation of their CBA in 2022–as if the termination had never occurred.[40]

The Arbitrator determined that DCPS's oversight of the Twilight after-school program meant that the ancillary loss of the Twilight program's income stemmed directly from DCPS's

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[28] Award at 9.
[29] Award at 10.
[30] Award at 12.
[31] Award at 13.
[32] Award at 13. The Grievant also requested compensation related to moving expenses and increased transportation costs as a result of his termination, which the Arbitrator declined to award to the Grievant. Award at 12-13.
[33] Award at 16.
[34] Award at 13.
[35] Award at 9.
[36] Award at 13.
[37] Award at 13.
[38] Award at 14.
[39] Award at 8.
[40] Award at 9.

improper termination of the Grievant in his full-time teaching job.[41] The Arbitrator further ordered that the amount of backpay owed would be reduced by any unemployment compensation or interim income earnings the Grievant received between his termination and his reinstatement.[42] The Arbitrator also ordered the payment of interest on net back wages at a rate of 4% per annum, as proposed by WTU.[43] The Arbitrator found the proposed 4% rate reasonable and supported by the CMPA.[44] The Arbitrator further ordered DCPS to pay the Grievant the amounts that DCPS would have paid for all the benefits the Grievant would have received under the CBA between the time of his termination and projected reinstatement.[45]

The Arbitrator determined that the Grievant's loss of a monetary stipend and credit hours from the Georgetown University graduate program were a direct result of the Grievant's improper termination.[46] As such, the Arbitrator ordered payment of the lost stipend and the monetary value of the academic credit hours that the Grievant would have received.[47]

The Arbitrator rejected DCPS's argument that the parties' CBA precluded the application of the Federal Back Pay Act regarding WTU's request for attorney fees.[48] The Arbitrator noted that the Board had rejected this argument made by DCPS in a previous case in 2020.[49] The Arbitrator found that, while he had "not heard a full presentation of the evidence presented [to the DCPS Hearing Officer],"[50] the Hearing Officer's assessment indicated that the Agency's actions were "clearly without merit," "wholly unfounded," and "taken in bad faith."[51] The Arbitrator further concluded that the Hearing Officer's findings support the award of attorney fees.[52] The Arbitrator further noted that DCPS's untimely processing of the Hearing Officer's order to reinstate the Grievant forced the Grievant's hand in renewing his position at Mount Vernon High School, and that, if DCPS had made a timely offer, the matter might have been resolved at Step 2 of the grievance process without the need for arbitration or the Grievant and WTU incurring attorney fees.[53]

Finally, the Arbitrator determined that, despite a backpay settlement nominally equaling the amount of wages lost, the Grievant might receive a materially lower amount as a result of the tax differential in receiving the monetary amount of the award in a lump sum rather than incrementally over the span of multiple years.[54] The Arbitrator cited a growing concern among

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[41] Award at 9.
[42] Award at 10.
[43] Award at 10.
[44] Award at 11.
[45] Award at 11.
[46] Award at 13.
[47] Award at 13.
[48] Award at 13-14.
[49] Award at 14 (citing *DCPS v. WTU*, 67 D.C. Reg. 4654, Slip Op. No. 1740 at 7, PERB Case No. 20-A-04 (202)).
[50] Award at 15.
[51] Award at 15.
[52] Award at 15.
[53] Award at 15.
[54] Award at 16.

adjudicators regarding the differential between the nominal amount of an award and the net post-taxation amount and a trend of awarding prevailing employee grievants a "tax gross-up."[55] Accordingly, the Arbitrator ordered DCPS to pay the Grievant an additional sum "to account for the difference in taxes he will owe on his award."[56]

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an arbitrator was without, or exceeded, his or her jurisdiction; (2) if the award on its face is contrary to law and public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.[57]

A. The Award is not contrary to law and public policy.

DCPS requests the Board's review of the Award on the grounds that the Award is contrary to law and public policy.[58] The Board's review of an arbitration award on the grounds that it is contrary to law and public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling.[59] The narrow scope limits potentially intrusive judicial review under the guise of public policy.[60] The petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result."[61] The Board may not modify or set aside an Award as contrary to law and public policy in the absence of a clear violation on the face of the Award.[62]

DCPS contests the monetary award in the amount of the Grievant's student loan balance. DCPS argues that the Arbitrator "bypassed any inquiry to determine whether the Grievant's loan would have been legally eligible for forgiveness,"[63] therefore substituting the judgment of Congress and the Secretary of the Department of Education with his own.[64] However, the Arbitrator has not made any determination on the Grievant's eligibility for student loan forgiveness or ordered DCPS "to pay off the Grievant's student loans,"[65] but rather provided a lump sum *in*

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[55] Award at 16.
[56] Award at 16.
[57] D.C. Official Code § 1-605.02(6).
[58] DCPS states that the Arbitrator "lacked authority to issue an award granting additional money to cover the Grievant's future tax liability." Request at 9. However, that statement by DCPS falls under the Agency's argument that the Arbitrator's tax "gross-up" remedy is contrary to law. DCPS does not explicitly seek to overturn the Award on the grounds that the Arbitrator exceeded his authority.
[59] *MPD v. FOP/MPD Labor Comm.*, 59 D.C. Reg. 3959 Slip Op. No. 925 at 12, PERB Case No. 08-A-01 (2012).
[60] *Id.*
[61] *Id.*
[62] *See D.C. DYRS and DCHR v. FOP/D.C. DYRS Labor Comm.*, 68 D.C. Reg. 46, Slip Op. No. 1800 at 8, PERB Case No. 21-A-09 (2021) (holding that an arbitrator did not exceed his jurisdiction in deciding an issue stipulated by the parties where the language of the CBA did not expressly limit the arbitrator's equitable power).
[63] Request at 6.
[64] Request at 6.
[65] Request at 6.

the amount of the Grievant's outstanding student loan debt as part of a "make-whole" remedy.[66] Furthermore, during the grievance process, DCPS offered to pay off "the principal of [the Grievant's] [Federal Family Education Loan],"[67] undercutting DCPS's assertion that a payment in the amount of the Grievant's outstanding student loan balance substitutes the judgment of Congress and the Secretary of the Department of Education.

DCPS also opposes the remedy of a monetary sum in the amount of the estimated value of the graduate-level academic credits that the Grievant could have earned.[68] DCPS argues that awarding the monetary value of the credit hours the Grievant would have received if he had completed the graduate program at Georgetown University violates the Anti-Deficiency Act, which prohibits D.C. agency employees from "[obligating] the District for the payment of money before an appropriation is made."[69] However, in this case the payment is not an "appropriation" for the theoretical earning of credits, but a monetary lump sum awarded by the Arbitrator as part of a "make-whole" remedy for a grievance put before that Arbitrator mutually by the parties. Therefore, the Anti-Deficiency Act is not relevant to the determination of the suitability of that remedy.

DCPS argues that the Arbitrator lacked authority to grant "additional money to cover the Grievant's future tax liability."[70] DCPS cites two D.C. Circuit Court cases where the court declined to extend case law to explicitly provide for the court's provision of tax gross-up remedies.[71] However, both cases have received negative treatments in more recent 9th Circuit and Court of Federal Claims cases.[72] Furthermore, a more recent D.C. Circuit Court case has held that neither of the cases explicitly foreclosed "any claim for tax gross-ups."[73] Also, recent National Labor Relations Board rulings have created precedent for such "tax gross-up" remedies.[74] In the

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[66] Award at 18.

[67] WTU Ex. 1, November 16, 2022, Tr. at 23:4-10.

[68] Request at 7.

[69] Request at 8. *See* D.C. Official Code § 47-355.01 *et seq.*

[70] Request at 9.

[71] *See Dashnaw v. Pena*, 12 F.3d 1112, 1116 (D.C. Cir. 1994). *See also Fogg v. Gonzales*, 492 F.3d 447, 456 (D.C. Cir. 2007).

[72] *See Clemens v. CENTURYLINK INC.*, 874 f.3D 1113, 117 (9th Cir. 2017) (holding that *Dashnaw* ignored previous decisions allowing tax gross-ups by other circuit courts and the Supreme Court). *See also Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 764, 96 S. Ct. 1251, 1264, 47 L. Ed. 2d 444 (1976) (holding that Title VII of the Civil Rights Act of 1964 give courts wide discretion in exercising their equitable powers to fashion the most complete relief possible); *Sonoma Apartment Associates v. United States*, 127 Fed. Cl. 721, 732 (2016) (holding that tax neutralization payments are not necessarily foreclosed where plaintiffs present a preponderance of evidence that their overall tax burden would be increased by damages awards that compensate for lost income and that the tax differential can be ascertained with reasonable certainty).

[73] *But see McKinney v. United States Postal Serv.*, 11-CV-00631 (CRC), 2015 WL 13680781 (D.D.C. May 18, 2015) (holding that tax gross-ups were a speculative and inappropriate remedy for the 3000+ class members where the monetary remedies primarily comprised either untaxable insurance payments or interest on those insurance payments).

[74] *See Latino Express, Inc.*, 359 NLRB 518, 520 (2012) (holding that tax gross-up awards prevent employees who receive lump sum awards as a result of an improper termination from being disadvantaged a second time and ensure such employees are "truly made whole").

absence of any contractual restrictions, we find the ability to order monetary remedies such as the "tax gross-up" are within the arbitrator's authority to determine an appropriate equitable remedy.[75]

Finally, DCPS argues, in the alternative, that if the Board does not set aside the disputed remedies, the case should be remanded back to the Arbitrator, citing the U.S. Supreme Court case *Florida Power & Light v. Lorion* in support of the request for a remand.[76] DCPS cites a portion of *Florida Power & Light v. Lorion* stating:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.[77]

However, the Arbitrator here is not an "agency" or a "reviewing court" that lacks a sufficient factual record to evaluate a challenged agency action. In addition, DCPS stipulated to the impropriety of its action as an Agency in firing the Grievant. DCPS's arguments are mere disagreements with the Arbitrator's findings and interpretation of applicable laws. A mere disagreement with the Arbitrator "does not make the award contrary to law"[78] and public policy.[79]

DCPS has not sufficiently demonstrated that the remedies provided for in this Award are inappropriate. Therefore, the Board finds that the Award is not on its face contrary to law and public policy.

B. WTU's request for costs is granted in part.

The Arbitrator granted actual, reasonable attorney fees to WTU for the grievance and arbitration process, which DCPS has not disputed in this Request. The Board need not disturb nor address the Arbitrator's award of attorney fees to WTU for that proceeding.

WTU argues that DCPS's Request is "meritless and frivolous,"[80] and therefore WTU should receive reasonable costs and attorney fees for litigating the Arbitration Review Request itself.[81] The Board has awarded attorney fees specifically in unfair labor practice cases and declines to extend that authority in this case.[82] However, the Board has long held that it will award

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[75] *See MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 867, Slip Op. No. 1686 at 5, PERB Case No. 18-A-11 (2019).
[76] Request at 10.
[77] Request at 10 (citing *Florida Power & Light v. Lorion*, 470 U.S. 729, 744 (1985)).
[78] *MPD v. FOP/MDP Labor Comm*, Slip Op. No. 1516 at 3, PERB Case No. 14-A-12 (2015) (quoting *MPD v. FOP*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008).
[79] *Id.* at 7.
[80] Opposition at 20.
[81] Opposition at 20.
[82] *FOP/Protective Services Div. Labor Comm. v. D.C. DGS*, Slip Op. No. 1839 at 12, PERB Case No. 18-U-01 (2023).

other reasonable costs on a case-by-case basis.[83] The Board has adopted a test to determine whether an award of costs is "in the interest of justice

> 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 situation [sic] 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 representative.[84]

Here, DCPS stipulated to the Arbitrator that the Grievant was improperly terminated. DCPS relies primarily on semantic arguments regarding the "forgiveness" of student loans rather than a monetary award in the amount of the Grievant's outstanding student loans and inapplicable sections of the CMPA such as the Anti-Deficiency Act. DCPS should have known that it would not prevail on the merits in bringing this Request before the Board. Therefore, although the Board does not award attorney fees for this arbitration review request proceeding, the Board finds that awarding WTU reasonable costs for litigating this Request is in the interest of justice.

IV. Conclusion

The Board rejects DCPS's arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, DCPS's Request is denied, and the matter is dismissed in its entirety.

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[83] *FOP/MPD Labor Comm. v. MPD*, 63 D.C. Reg. 974, Slip Op. No. 1554 at 7, PERB Case No. 11-U-17 (2015) (citing *AFSCME, D.C. Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245 at 4-5, PERB Case No. 89-U-02 (1990).

[84] *DCNA v. D.C. Dept. of Mental Health*, 59 D.C. Reg.15187, Slip Op. No. 1336 at 4, PERB Case No. 09-U-07 (2012).

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is denied;

2. The District of Columbia Public Schools must pay the Washington Teachers' Union reasonable costs for the litigation of the arbitration review request;

3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
By vote of Board Chairperson Douglas Warshof and Members Renee Bowser and Mary Anne Gibbons.

June 15, 2023
Washington, D.C.

APPEAL RIGHTS

A final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.