

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In The Matter Of:

International Brotherhood of
Police Officers, Local 445
(On behalf of Officer
Cecyl A. Nelson),

Petitioner,

and

District of Columbia Department
of Administrative Services,

Respondent.

PERB Case No. 91-A-05
Opinion No. 300

DECISION AND ORDER

On June 14, 1991, the International Brotherhood of Police Officers, Local 445 (IBPO), filed an Arbitration Review Request (Request) with the District of Columbia Public Employee Relations Board (Board) seeking review by the Board of an arbitration award (Award) issued on May 15, 1991. The Award sustained a grievance filed by IBPO over a decision by the District of Columbia Department of Administrative Services (DAS) to suspend Officer Cecyl A. Nelson (Grievant). IBPO contends in its Request that the Award is contrary to law and public policy. DAS filed an Opposition to Arbitration Review Request on July 24, 1991. ^{1/}

Under the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Section 1-605.2(6), the Board is authorized to, "[c]onsider appeals from arbitration awards pursuant to grievance procedures: Provided, however, that such awards may be reviewed only if... the award on its face is contrary to law and public policy...." Although the Arbitrator sustained the Grievance, ^{2/}

^{1/} Pursuant to Board Rule 501.1, the Executive Director granted Respondent's request for an extension of time to file its opposition.

^{2/} IBPO also requested that the "uncontested aspects of the award...not be delayed pending the outcome of this Request for Review." (Req. at 8.) As noted in the text, the Board's authority to review grievance arbitration awards is extremely narrow in scope. The power to direct compliance with or enforce the award is not included within the scope of that authority.

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he denied IBPO's request for attorney fees. IBPO contended that the Arbitrator based his decision "upon his analysis of equity principles" and, consequently, his denial of attorney fees on such a basis has rendered that portion of the Arbitrator's Award contrary to applicable law and public policy. (Req. at 3.)

The Board has reviewed the Award, the pleadings of the parties, and applicable law and, for the reasons that follow, finds that the Award with respect to IBPO's request for attorney fees is contrary to law and public policy. ^{3/}

There is no disagreement between the parties that the applicable law at issue is the Federal Back Pay Act, 5 USC 5596 ^{4/}, which under Sec. 5596(b)(1)(A)(ii) provides in relevant part:

....reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701(g) of this title;

(Footnote 2 Cont'd)

See D.C. Code Sec. 1-605.2(6). Cf., Fraternal Order of Police/- Metropolitan Police Department Labor Committee and District of Columbia Metropolitan Police Department, DCR, Slip Op. No. 295 at n.3, PERB Case No. 91-U-18 (1992).

^{3/} Pursuant to Board Rule 538.2, "[i]f the Board finds that there may be grounds to modify or set aside the arbitrator's award, it shall notify the parties who will then have fifteen (15) days from the time of notice to file briefs concerning the matter...." The parties, however, have chosen to incorporate such briefs in their initial pleadings, i.e., Arbitration Review Request and Opposition to Arbitration Review Request. Having already availed themselves of this opportunity, we find the provisions of Board Rule 538.2 fulfilled. We therefore proceed to render this Decision and Order pursuant to Board Rule 538.4.

^{4/} There currently exists no established system promulgated by the District of Columbia for the awarding or calculation of attorney fees. The District has recognized the Back Pay Act as the prevailing law in this regard for District Government employees until replacement is enacted. Mayor's Memorandum Number 81-53, July 17, 1981, at 2; Memorandum of the Corporation Counsel, July 15, 1981, at 2.

Section 7701(g) referenced above provides in pertinent part:

Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

All of IBPO's arguments stem from its assertions that by employing "principles of equity" rather than the "standards established under section 7701(g)" to deny IBPO's request for attorney fees, the Arbitrator has engendered an Award with respect to attorney fees that is not in accordance with applicable law and public policy. In its Opposition to Arbitration Review Request, DAS cited case law and made references to the record which it contends supports the Arbitrator's Award as being consistent with the established standards under Section 7701(g).^{5/} Notwithstanding the merits of DAS' arguments, it is clear that there is no reference in the Award to this established applicable standard indicating that the Arbitrator relied upon it as the basis for denying IBPO's request for attorney fees. A determination of whether or not the Arbitrator in fact employed the standards set forth under Section 7701(g) is, thereby, precluded by the record before us. Since it appears that the proper legal standard was not used, we are compelled to find the resulting Award with respect to attorney

^{5/} DAS contended, as a threshold matter, that the Board lacks the authority to award attorney fees, citing University of the District of Columbia Faculty Association / NEA v. University of the District of Columbia, ___ DCR ___, Slip. Op. No. 272, PERB Case No. 90-U-10 (1991). Unlike the issue we addressed in the above-cited case, the instant issue does not invoke or call into question the Board's authority to provide the contested remedial relief pursuant to D.C. Code Sec. 1-618.13. Rather the Request seeks our review, under the limited statutory scope of review, of the propriety of the Arbitrator's authority with respect to his Award concerning attorney fees. See n.7, infra.

fees is, on its face, contrary to law and public policy. ^{6/}

However, it is impossible for us to speculate whether IBPO's request for attorney fees would have been granted if the proper legal standard was applied since nothing under 5 USC Section 5596 and Section 7701(g) mandates a certain result on the record before us. Accordingly, we grant the Arbitration Review Request, set aside the Award with respect to attorney fees, and remand this issue to the Arbitrator with directions to issue an award in accordance with this decision. ^{7/}

^{6/} In an arbitration review case cited by DAS, Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25 (1986), the Federal Labor Relations Authority (FLRA), in clarifying the analytic framework for determining an award of attorney fees under the Federal Back Pay Act, stated:

In the application of the standards set out under 5 U.S.C. Sec. 5596 and 5 U.S.C. 7701(g), the arbitrator is to provide a fully articulated, reasoned decision granting or denying the request for attorney fees. [cite omitted] The decision must contain independent and specific analysis, findings, and conclusions on each pertinent statutory requirement including the reasonableness of the amount of fees are awarded. *Id.*, Slip Op. at 140.

The FLRA further stated that the absence of this approach to such a determination, "create[s] an analytical void" for "the parties, the public and the reviewing bodies." *Id.* As we stated in the text, there is no indication that the Arbitrator even used the standards provided under Section 7701(g), rendering impossible review with respect to conformance to these standards.

^{7/} In its prayer for relief, IBPO requested that the Board either "remand jurisdiction to the Arbitrator solely to rule on the reasonableness of the attorneys' fees petition which Petitioner will submit, or in the alternative, that PERB itself rule on the reasonableness of the Petition IBPO will submit upon request, if the parties cannot successfully resolve this matter once the PERB has ruled on Petitioner's Arbitration Review Request." (Req. at 8.) Decisions concerning the merits of issues brought before the Arbitrator remain in the Arbitrator. Providing or substituting our judgment concerning the merits of such issues, exceeds our limited statutory authority to review arbitration awards. District of Columbia Metropolitan Police

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ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Award denying the International Brotherhood of Police Officers, Local 445's request for attorney fees is set aside and the matter remanded to the Arbitrator with instructions to issue an Award on this issue in accordance with this decision.

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

March 12, 1992

(Footnote 7 Cont'd)

Department and Fraternal Order of Police Metropolitan Police Department Labor Committee, _____ DCR _____, Slip Op. No. 288, PERB Case No. 91-A-03 (1991) and University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248, PERB Case No. 90-A-02 (1990).

The extent of our authority in our disposition of arbitration review requests is to "make a determination which may reject a request for lack of jurisdiction or sustain, set aside or remand the award in whole or in part." Board Rule 538.4. In remanding this aspect of the Award to the Arbitrator, the Board expresses no opinion as to the merits of IBPO's request for attorney fees.