

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
District of Columbia Department of Consumer and Regulatory Affairs,)	
)	PERB Case No. 09-A-01
Petitioner,)	
)	Opinion No. 978
and)	
)	
American Federation of Government Employees, Local 2725,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case:

On November 10, 2008, the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA” or “Agency”), filed an Arbitration Review Request (“Request”) in the above-captioned matter. DCRA is requesting that the Board reverse an arbitration award (“Award”) which granted bargaining unit members Gerald Roper and Sandra McNair (“Grievants”) retroactive promotions with back pay. DCRA contends that the Arbitrator exceeded his authority and that the Award is contrary to law and public policy. (See Request at pgs. 3, 4 and 6). Specifically, DCRA asserts that the Arbitrator’s decision regarding the selected remedy is inconsistent with the parties’ collective bargaining agreement. (See Request at p. 6).

The American Federation of Government Employees, Local 2725 (“AFGE”) opposes the Request. The issues before the Board are: (1) whether DCRA’s Request is timely; (2) whether the Arbitrator “exceeded his authority”; and (3) whether “the award on its face is contrary to law and public policy”. (Request at p. 6).

II. Discussion

Gerald Roper, Sr. began working as a Hearing Examiner in 1974 until 1979 in the District of Columbia Rental Accommodation Office. From 1979 until his retirement in August

2006, he served mainly as a Hearing Examiner, DS-12, for the Rental Accommodation and Conversion Division ("RACD") of the District of Columbia Department of Consumer and Regulatory Affairs. Sandra McNair was hired in 2002 by RACD of the District of Columbia Department of Consumer and Regulatory Affairs in August 2002 as a Hearing Examiner, DS-12. (See Award at p. 3). Faenelle Zapata was hired as the RACD Rent Administrator in 2002, prior to Ms. McNair's arrival. At that time Mr. Roper was the only Hearing Examiner at RACD. (See Award at p. 3).

"Ms. Zapata brought with her as contract employees her staff from her private practice: Mr. Timothy Handy, Mr. Keith Anderson, and Ms. Odette Abraham. . . . Mr. Handy became [Ms. McNair's and Mr. Roper's] DS-14 direct supervisor, reporting to Ms. Zapata. Following a Position Vacancy Announcement in March 2003, Mr. Anderson applied for and received a regular appointment effective April 20, 2003, as a DS-13 Hearing Examiner." (Request- Exh. 1, "Arbitrator's Opinion and Award" hereinafter called "Award"). (See Award at p. 3).

The Union filed a grievance on behalf of Sandra McNair and Gerald Roper arguing that all the hearing examiners were performing the same level of work. The grievance was denied at all four (4) Steps of the contractual grievance procedure and AFGE invoked arbitration. (See Award at p. 3). At arbitration, AFGE argued that the collective bargaining agreement provides for temporary promotions to higher positions. Therefore, if an employee is assigned higher graded duties, that employee is entitled to be paid for the performance of those duties. AFGE asserted that since the Grievants were performing the grade controlling duties of the DS-13 Hearing Examiner position, they were entitled to retroactive temporary promotions. (See Award at p. 11). Additionally, AFGE maintained that "McNair did not receive equal pay for substantially equal work." (Award at p. 12).

DCRA countered that the testimony presented by the Grievants "that they had been working out of grade or met the criteria to receive the DS-13 grade-level pay," was not corroborated. (See Award at p. 12). Furthermore, DCRA claimed that through its witnesses it distinguished between DS-12 and DS-13 positions and established that neither of the two Grievants performed DS-13 work. (See Award at pgs. 13-14). DCRA asserted that because Mr. Roper did not complain about his DS-12 rate of pay in all the years before the grievance was filed, and that after seventeen years the *status quo* had become "the law of the shop" and he could not now challenge his DS-12 assignment. (See Award at p. 13). DCRA argued that "neither grievant requested a desk audit and therefore failed to mitigate their damages", and that the DCRA has the inherent right and responsibility to run the agency". (Award at p 14).

The Arbitrator was presented with the issue of "[w]hether the Grievants are entitled to back pay and retroactive promotion from April 20, 2003 forward due to the contract[ual] right to equal pay and temporary promotion, and in the case of Ms. McNair the Equal Pay Act." (Award at p. 2).

The Arbitrator observed that “this case does not involve job classifications or desk audits, *per se* . . . the question is whether Mr. Roper and Ms. McNair were doing work on a DS-13 basis, not [whether] they [were] performing it at, below, or above the level of Mr. Anderson.” (Award at pgs. 14-15). In addition, the Arbitrator indicated that “when the substance of a grievance concerns whether the Grievant is entitled to a temporary promotion under a collective bargaining agreement by reason of having performed the duties of a higher-graded position, the grievance does not concern the classification of a position.” (See Award at p. 15). The Arbitrator found that the Grievants performed the same duties as other employees who earned higher pay. He determined that this violated provisions of the collective bargaining agreement pertaining to temporary promotion and equal work for equal pay. (See Award at pgs. 17-18). Therefore, he sustained the grievance. As a remedy, the Arbitrator awarded the Grievants a retroactive promotion and back pay. (See Award at p. 18).

In addition, the Arbitrator “retain[ed] jurisdiction for sixty days *for the purpose of clarifying the remedy if needed, upon request of the parties and to consider any request, if any, for attorney fees* (support for any such request should be briefed.)” (emphasis added). (Award at p. 18). In a footnote, the Arbitrator stated as follows: “It appears from the record that Ms. McNair is now back at RACD as a DS-12 [Hearing] Examiner. Although the record is not clear as to the circumstances of her current situation, it appears that the remedy should be extended to this aspect of her employment.” (Award at p. 18).

In its Request, DCRA argues that the Arbitrator exceeded his authority because he applied the remedy of back pay to Ms. McNair at a new agency, where she is now employed. (See Request at p. 6). DCRA claims that it cannot be held responsible for paying Ms. McNair at the DS-13 level, because McNair currently works in a different District of Columbia agency that was not a party to the grievance and arbitration proceeding. (See Request at pgs. 3-4). Furthermore, DCRA contends that the remedy contained in the footnote is contrary to law and public policy because the new agency was denied due process, as it was not a party to these proceedings. (See Request at p. 6).

AFGE opposes DCRA’s Request on the grounds that: (a) DCRA’s submission is untimely; (b) DCRA has failed to establish a statutory basis for the Board’s review; and (c) the Arbitrator’s remedy is appropriate. (See Opposition at pgs. 1-2).

The Board will first address AFGE’s claim that the Request was untimely filed. AFGE asserts that the Arbitration Award was served on July 26, 2008. (See Opposition at p. 3). AFGE argues that consistent with Board Rule 538, DCRA’s Request was due no later than August 20, 2008. (See Opposition at p. 3). However, DCRA filed the Request on November 10, 2008. As a result, AFGE contends that the filing is untimely.

DCRA counters that the “Arbitrator’s initial decision to hold jurisdiction for 60 days mean[s] that [his] July 26, 2008 award was not final in twenty or twenty-five days, and thus, the Arbitration Review Request could not be filed within that time.” (Request at p. 5). Specifically,

DCRA argues that the Arbitrator asserted jurisdiction until October 24, 2008. (See Request at p. 2). Moreover, DCRA asserts that “[n]ow that the Arbitrator has released jurisdiction [-] this Arbitration Review Request is appropriate and timely [filed]. . . .” (Request at p. 5).

Board Rules 538.1, 501.4 and 501.5, provide in relevant part as follows:

538.1 - Filing

A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board *not later than twenty (20) days after service of the award. . . .* (emphasis added).

501.4 - Computation - Mail Service

Whenever a period of time *is measured from the service of a pleading* and service is by mail, *five (5) days shall be added* to the prescribed period. (emphasis added).

501.5 - Computation - Weekends and Holidays

In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included *Whenever the prescribed time period is eleven (11) days or more, Saturdays, Sundays and District of Columbia Holidays shall be included in the computation.* (emphasis added).

In the present case, the Arbitrator retained jurisdiction “for sixty days for the purpose of clarifying the remedy, if needed, upon request of the [p]arties and to consider a request, if any, for attorney fees. . . .” (Award at p. 18). DCRA’s argument that its Request is timely filed, is based on its belief that the date on which the Arbitrator released his extended jurisdiction is the operative date which triggers the computation of the twenty-day filing requirement noted in Board Rules 538.1. Therefore, in light of the facts presented, the first issue to be determined is the date which starts the computation of the twenty-day filing requirement, in this case.

Where the Board has no set precedent on an issue, it looks to precedent set by other Labor Relations Authorities such as the National Labor Relations Board and the Federal Labor Relations Authority (“FLRA”). See *Forbes v. IBT, Local 1714*, 36 DCR 7107, Slip Op. No. 229, PERB Case No. 88-U-20 (1989). In *Department of Treasury, Customs Service, Nogales and National Treasury Employees Union Chapter 116*, 48 FLRA 938, 940- 942 (1993) (denying reconsideration of the FLRA’s dismissal of 47 FLRA 1391 (1993)¹), the FLRA addressed the

¹ FLRA’s filing deadline for exceptions to an arbitration award is 30 days after service of the award. In the underlying case in *Dept. of Treasury*, “[t]he Agency [argued] that [a] February 12, 1993, award was an interim award because the Arbitrator retained jurisdiction for 30 days after issuing the award for the purpose of resolving questions concerning attorney fees. The Agency [further] argue[d] that the award became final on March 18, 1993, thirty (30) days after the Agency received the award and that the 30-day period for filing its exceptions did not

issue of when an arbitrator's decision becomes final for purposes of filing exceptions in a case in which the arbitrator retained jurisdiction to address any request for attorney fees.

In *Department of Treasury*, even though the arbitrator retained jurisdiction to address any request for attorney fees, the FLRA found that the arbitrator's award on the merits was final. The FLRA noted that the arbitrator "did not label his . . . award as an interim award and nothing in the award otherwise indicates that the Arbitrator intended it to be interim. Moreover, the Arbitrator did not retain jurisdiction to address any *unresolved* issue concerning the merits of the grievance or the proposed remedy and the Agency makes no claim that the Arbitrator failed to address any outstanding issue of liability or relief. [emphasis added]. Consequently, [the FLRA] conclude[d] that the award was not an interim award and, to be timely, any exceptions to the award had to have been filed within the 30-day period after service of the award on the parties." *Dep't of Treasury*, 48 FLRA 938 at pgs. 940-942.

We find the FLRA's reasoning in *Department of Treasury* persuasive for the purpose of determining when the instant award became final. In the present case, the Arbitrator found a violation of the parties' collective bargaining agreement and awarded the remedy of retroactive promotion and back pay. He did not label his Award as an interim award and he did not retain jurisdiction to address any unresolved issue concerning the merits of the grievance or the proposed remedy. Furthermore, the DCRA makes no claim that the Arbitrator failed to address any outstanding issue of liability or relief.² The only remaining issue to be adjudicated concerned "any request for attorney fees".³

expire until April 17, 1993. [However, the FLRA found that] [o]n February 12, 1993, the Arbitrator issued a final and binding award on the merits and retained jurisdiction 'to make an award' regarding the payment or non-payment of attorney fees.' . . . The Union did not file a request for attorney fees, and the Arbitrator did not issue a subsequent award." "[The Authority noted that] [i]t is well established that an arbitrator may retain jurisdiction after issuing a final and binding award on the merits for the purpose of resolving questions relating to attorney fees. [citations omitted]. However, *the retention of jurisdiction by the Arbitrator merely to resolve questions concerning attorney fees does not affect the finality of the award on the merits. Moreover, the retention of jurisdiction by the Arbitrator for the purpose of resolving questions relating to attorney fees does not interfere in any way with the Agency's right to file exceptions to the award under section 7122 of the Federal Service Labor-Management Relations Statute. . . .* [emphasis added]. Therefore, as the Agency's exceptions were not filed with the Authority within the prescribed time limit, and as the time limit for filing exceptions may not be extended or waived by the Authority, the Agency's exceptions are dismissed." (*Id.*, at pgs. 1391-93).

² Furthermore, there is no claim that, either before or after the Board's 20-day filing period nor within the Arbitrator's 60-day extension of jurisdiction, DCRA exercised the option to request clarification of the remedy. We note FLRA precedent providing that an arbitrator may, under limited circumstances, clarify or correct an award after it has been issued. *See Overseas Federation of Teachers, AFT, AFL-CIO and Dep't of Defense Dependents Schools, Mediterranean Region*, 32 FLRA 410, 414-415 (1987). An arbitrator may clarify or correct an award to correct clerical mistakes or obvious errors in mathematical computation and may clarify an ambiguous award and restate the basis for an award which conforms to the arbitrator's original findings. *See U.S. Dep't of the Army, Army Information Systems Command, Savanna Army Depot and National Ass'n of Government Employees, Local R7-36*, 38 FLRA 1464, 1467 (1991).

Consistent with the FLRA's reasoning in *Department of Treasury*, we find that July 26, 2008 is the operative date which triggers the computation of the twenty-day filing requirement noted in Board Rule 538.1. This is the date on which the Arbitrator issued his Award resolving all issues except attorney fees. The award was transmitted to the parties by U.S. Mail. Pursuant to Board Rules 538.1, 501.4 and 501.5, to be timely, DCRA's Request had to be filed within twenty-five (25) days after service of the award, namely no later than August 20, 2008. However, DCRA's Request was filed November 10, 2008, one hundred three days after the Arbitrator issued his Award. Thus, DCRA's Request was untimely filed.⁴ However, DCRA's reliance on *Cooper* does not support DCRA's position. In *Cooper*, although the Court determined that it did not have jurisdiction over the issue of undetermined sanctions (i.e., the amount of attorney fees to be awarded as a sanction in that case), the Court considered the district court's dismissal based on the merits of the case to be a final decision. (*Id.* at p. 6). As in *Cooper*, in the present case, we find that the Arbitrator's July 26, 2008 Award is final as to the merits of the case and the remedy granted. As attorney fees have not yet been adjudicated, the Board is not asserting jurisdiction over this issue.

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such they provide the Board with no discretion or exception for extending the deadline for initiating an action.⁵ See *Glendale Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995); and *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d

In the present case, there is no evidence that clarification was requested or that there has been any modification to the Award. See *D.C. Public Schools and AFSCME, Council 20, Local 1959, AFL-CIO (on behalf of Eddie Lanier, Jr.)*, 46 DCR 9399, Slip Op. No. 381 at pgs 2-3, PERB Case No. 94-A-02 (1994), where the Board found that the case on the merits was *not* closed because the parties agreed that "the record would be re-opened for evidence and argument concerning the appropriate remedy" if the grievant in that case prevailed; unlike the present case, when the Arbitrator retained jurisdiction for the purpose of clarification, and not for further adjudication of the remedy. (emphasis added).

³ As stated above, "The retention of jurisdiction by the Arbitrator merely to resolve questions concerning attorney fees does not affect the finality of the award on the merits. Moreover, the retention of jurisdiction by the Arbitrator for the purpose of resolving questions relating to attorney fees does not interfere in any way with the Agency's right to file exceptions to the award . . ." *Dep't of Treasury*, 47 FLRA 1391, 1391-1393 (1993).

⁴ In support of the argument that the Request was timely filed, DCRA relies on *Cooper v. Salomon Brothers*, 1 F.3d 82 (2nd Cir. 1993). Citing *Cooper*, DCRA claims that "[n]ow that the Arbitrator has released jurisdiction this Arbitration Review Request is appropriate and timely. . . . In [*Cooper*], [the] court considered the appeal of an order that had yet to fix attorney fees. Appellate review is limited to 'final' decisions of the district court, decisions in the words of the Supreme Court that 'leave [] nothing for the court to do but execute the judgment.' [citing] *Catlin v. United States*, 325 U.S. 229, 233 (1945). *Cooper* at 84-85." (Request at p. 5).

⁵ Even assuming that the filing should have been made 20 days after the expiration of the 60-day extension of jurisdiction, the filing was still untimely. Specifically, 60 days from July 26, 2008 is September 25, 2008. DCRA's request should have been filed within 20 days after September 25, 2008, i.e., by October 15, 2008. However, DCRA's Request was not filed until November 10, 2008.

641, 643 (D.C. 1991). Therefore, the Board cannot extend the time for filing an Arbitration Review Request. As a result, we dismiss the DCRA's Request because it is untimely.⁶

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Consumer and Regulatory Affairs' Arbitration Review Request is denied.
2. 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.

September 30, 2009

⁶ In light of this determination, it is not necessary for the Board to consider whether "the award on its face is contrary to law and public policy" or whether the Arbitrator "exceeded his authority".

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-A-01 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of September 2009.

Leisha Self, Esq.
AFGE, Local 2725
80 F Street, N.W.
Washington, D.C. 20001

FAX & U.S. MAIL

James T. Langford, Esq.
Attorney Advisor
Office of Labor Relations and
Collective Bargaining
441 4th Street, N.W.
820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Michael Levy, Esq.
Attorney Advisor
Office of Labor Relations and
Collective Bargaining
441 4th Street, N.W.
820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Pamela Smith, Esq.
Assistant Attorney General
441 4th Street, N.W.
Suite 1060-N
Washington, D.C. 20001

FAX & U.S. MAIL

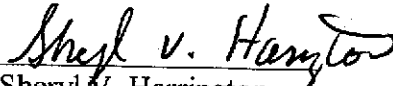
Courtesy Copies:

Natasha Campbell, Esq.
D.C. Office of Labor Relations and
Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

U.S. MAIL

John Truesdale, Arbitrator
7101 Bay Front Drive, Apt. 609
Annapolis, Maryland 21403

U.S. MAIL


Sheryl V. Harrington
Secretary