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

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| In the Matter of: |) | |
| |) | |
| District of Columbia Public Schools |) | |
| |) | PERB Case No. 24-A-04 |
| Petitioner |) | |
| |) | Opinion No. 1875 |
| v. |) | |
| |) | CORRECTED COPY |
| Washington Teachers Union, Local #6 |) | |
| |) | |
| Respondent |) | |
| _____ |) | |

DECISION AND ORDER

I. Statement of the Case

On January 26, 2024, 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 January 16, 2024. The Award reinstated a terminated sixth grade social studies teacher (Grievant) with backpay, including tax gross-up relief. DCPS challenges the Award’s tax gross-up relief on the basis that it is contrary to law. The Washington Teacher’s Union, Local # 6 (Union) filed a brief in opposition to the Request.

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.

II. Arbitration Award

A. Background

On December 17, 2021, the Arbitrator issued an Award, in which he found that DCPS improperly exceeded the Grievant.¹ The Award provided for the parties to negotiate and resolve

¹ Award at 1.

any issues relating to backpay and benefits or subject those issues to a supplemental hearing.² The Arbitrator retained jurisdiction for the sole purpose of resolving any disputes that might arise out of the implementation of this Award.³

The Union sought the following: (1) that interest is included in the make-whole remedy; (2) the Grievant is entitled to the 4% retention bonus that he would have received under the collective bargaining agreement had he not been improperly excessed; (3) the make whole interest include compensation for the added tax burden caused by the Grievant's receipt of a lump sum award rather than the annual salary he would have earned if he had not been wrongfully terminated; and (4) the Grievant is entitled to recover the amounts DCPS would have paid for all benefits he would have received under the collective bargaining agreement.⁴

DCPS argued before the Arbitrator that the Award precludes the payment of interest on backpay.⁵ DCPS further argued that the Grievant is not entitled to a tax gross-up.⁶ DCPS contended that a tax gross-up is an additional expense that was not included in the Award and counters the Federal Back Pay Act.⁷ DCPS also argued that tax gross-up awards are not permitted in the District.⁸

The Arbitrator rejected DCPS's argument.⁹ The Arbitrator noted that the Grievant was improperly excessed at the end of the 2017-2018 school year and reinstated at the beginning of the 2023-24 school year, almost five full years later.¹⁰ Had the Grievant not been improperly excessed, the Arbitrator found, he would have been taxed each year at his normal, appropriate rate, instead of the lump sum he received in payment.¹¹ The Arbitrator found that it cannot be doubted that the Grievant's federal and D.C. tax burden was higher than would have been the case absent the excessing.¹² The Arbitrator determined that the Grievant suffered a loss in the form of a higher tax burden, the proximate cause of which was his improper excess.¹³ Therefore, the Arbitrator found that the Grievant's back pay should include a tax gross-up to account for the tax burden resulting from the lump sum payment.¹⁴

² Award at 1.

³ Award at 1.

⁴ Award at 2.

⁵ Award at 4.

⁶ Award at 10.

⁷ Award at 10.

⁸ Award at 11.

⁹ Award at 13-14.

¹⁰ Award at 13.

¹¹ Award at 13.

¹² Award at 13.

¹³ Award at 13-14.

¹⁴ Award at 14.

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.¹⁵

DCPS requests review on the grounds that the Award is contrary to law and public policy. To set aside an award as contrary to law, the moving party bears the burden to present applicable law that mandates that the arbitrator arrive at a different result.¹⁶ Absent a clear violation of law—one evident on the face of an arbitrator’s award—the Board lacks authority to substitute its judgment for an arbitrator’s simply because the Board might reach a different conclusion as to a legal issue decided by the arbitrator.¹⁷ DCPS argues that the Award’s tax gross-up relief is, on its face, contrary to District statutory law, District personnel regulations, and District case law.¹⁸

DCPS first argues that the Award’s tax gross-up remedy is contrary to D.C. Code § 1-611.16(a), which states in relevant part that, “no employee of the District of Columbia government shall be authorized to receive pay in excess of that provided for in this subchapter.”¹⁹ DCPS asserts that the Grievant was authorized to receive pay in amounts reflected in his applicable salary schedules for each fiscal year under the parties’ collective bargaining agreement.²⁰ DCPS claims that, unlike interest, which is authorized under the federal Back Pay Act, a tax gross-up remedy is not expressly permitted under District law or federal law.²¹ DCPS contends that an award of a tax gross-up is an award of pay in excess of the amount that the D.C. Council or Congress “authorized [an employee] to receive,” in contravention of D.C. Code § 1-611.16(a).²²

DCPS next argues that the Award’s tax gross-up remedy is contrary to District Personnel Regulation 6-B DCMR § 1149.10.²³ DCPS cites to the regulation’s limiting language, “...but in no case shall the employee be granted more pay or benefits than he or she would have been entitled by law, Mayor’s Order, regulation, or agency policy.”²⁴

¹⁵ D.C. Official Code § 1-605.02(6).

¹⁶ *MPD and FOP/MPD Labor Comm.*, 47 D.C. Reg. 717, Slip Op. 633 at 3, PERB Case No. 00-A-04 (2000).

¹⁷ *Dist. of Columbia Metro. Police Dep’t v. Dist. of Columbia Pub. Employee Relations Bd.*, 282 A.3d 598, 604 (D.C. 2022); *Fraternal Order of Police/Dept. of Corr. Labor Comm. v. Dist. of Columbia Pub. Employee Relations Bd.*, 973 A.2d 174, 177 (D.C. 2009) (quoting *Dist. of Columbia Metro. Police Dept. v. Dist. of Columbia Pub. Employee Relations Bd.*, 901 A.2d 784, 789 (D.C. 2006)).

¹⁸ Request at 3.

¹⁹ Award at 3-4; D.C. Code § 1-611.16(a).

²⁰ Request at 4.

²¹ Request at 4.

²² Request at 4.

²³ Request at 5.

²⁴ Request at 5.

Finally, DCPS argues that the Award's tax gross-up remedy is contrary to well-established case law in the District.²⁵ DCPS cites to two D.C. Circuit Court cases—*Fogg v. Gonzales* and *Dashnaw v. Pena*—where the court declined to extend case law to explicitly provide for the court's provision of tax gross-up remedies.²⁶

DCPS has not established that the Award's remedial compensation for adverse tax consequences exceeds the Grievant's authorized pay under either D.C. Code § 1-611.16(a) or 6-B DCMR § 1149.10. As the Union notes in its Opposition, neither statutory nor regulatory limitation to employee "pay" or "backpay" places a restriction on an arbitrator's authority to fashion a make whole remedy—such as the tax gross up remedy here—for the agency's unlawful conduct.²⁷ Therefore, the Arbitrator's tax gross-up remedy does not on its face clearly violate the plain language in either D.C. Code § 1-611.16(a) or 6-B DCMR § 1149.10.

Further, the Board has previously held that neither *Dashnaw* nor *Fogg* explicitly foreclosed any claim for tax gross-ups in the District.²⁸ The cases concerned discrimination in violation of federal law and are not binding on PERB.²⁹ The Board has also noted that both cases have received negative treatment in more recent 9th Circuit and Court of Federal Claims cases.³⁰

Arbitrators have wide latitude to construct equitable remedies, as long as those remedies are not expressly limited by the parties' collective bargaining agreement.³¹ In the absence of any contractual restrictions, the Board has held that the ability to order monetary remedies such as the "tax gross-up" are within the arbitrator's authority to determine an appropriate equitable remedy.³² DCPS has not 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.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Review Request is denied; and
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

²⁵ Request at 6.

²⁶ See *Fogg v. Gonzales*, 492 F.3d 447, 456 (D.C. Cir. 2007); *Dashnaw v. Pena*, 12 F.3d 1112, 1116 (D.C. Cir. 1994).

²⁷ See *Opposition* at 8-12.

²⁸ See *DCPS v. WTU, Local #6*, 70 D.C. Reg., Slip Op. No. 1844 at 7, PERB Case No. 23-A-03 (2023).

²⁹ Compare *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").

³⁰ See *id.*

³¹ *MPD v. FOP/MPD Labor Comm.*, 60 D.C. Reg. 5326, Slip Op. No. 1373 at 9, PERB Case No. 11-A-05 (2013).

³² *Id.*; *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 867, Slip Op. No. 1686 at 5, PERB Case No. 18-A-11 (2019).

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BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

June 20, 2024

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.