Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Corrections,	
Petitioner,	
v.	PERB Case No. 10-A-03
Fraternal Order of Police/Department of Corrections Labor Committee,	Opinion No. 1380
Respondent.	**Motion for Reconsideration**

DECISION AND ORDER

I. Statement of the Case

On September 15, 2009, Arbitrator Stephen E. Alpern issued an award ("Award") that reinstated an employee who had been terminated by the District of Columbia Department of Corrections ("Department" or "Complainant"), reduced the penalty to a suspension without pay, and provided the Fraternal Order of Police/Department of Corrections Labor Committee the opportunity to file a motion for attorney's fees. The Arbitrator concluded that he had the authority to award attorney's fees under the Back Pay Act, 5 U.S.C. § 5596. (Award at p. 26).

The Department filed an arbitration review request, arguing that the Arbitrator's conclusion that he had authority to award attorney's fees exceeded his jurisdiction and was on its face contrary to law and public policy.[1] The Board found no basis for setting aside the Award and denied the arbitration review request. *D.C. Dep't of Corrections and FOP/Dep't of Corrections Labor Comm.*, Slip Op. No. 1306, PERB Case No. 10-A-03 (Aug. 18, 2011). The Department filed a motion for reconsideration ("Motion") on August 23, 2012, arguing again that the Arbitrator exceeded his jurisdiction and that the Award was on its face contrary to law and public policy. Specifically, the Department disputes the Arbitrator's interpretation of a provision of the parties' collective bargaining agreement ("Agreement") providing that "[a]ll parties shall have the right, at their own expense, to legal and/or stenographic assistance at the hearing." The Department contends that this provision requires parties to pay their own legal fees and waives their right under the Back Pay Act to collect attorney's fees.

[1] *See* D.C. Code § 1-605.02(6); PERB R. 538.3.

III. Discussion

A. Jurisdiction of the Arbitrator

An arbitrator derives his jurisdiction from the collective bargaining agreement and any applicable statutory or regulatory provision. *D.C. Water & Sewer Auth. v. AFSCME, Local 2091*, Slip Op. No. 1276 at p. 3, PERB Case No. 04-A-24 (June 12, 2012). The question of when an arbitrator's award is within that jurisdiction was "addressed in *Steel Workers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960), wherein the Court stated that the test is whether the Award draws its essence from the collective bargaining agreement." *D.C. Pub. Schs. v. AFSCME, District Council 20 (on behalf of Johnson)*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987).

As it did in its arbitration review request, the Department relies in its Motion upon a superseded four-part inquiry concerning whether an award draws its essence from the collective bargaining agreement. The four-part inquiry was formulated by the Sixth Circuit in *Cement Divisions, National Gypsum Co. v. United Steelworkers of America*, 793 F.2d 759 (6th Cir. 1986), and formerly used by the Board in its arbitration review cases. The Department cites one of those cases, *D.C. Water and Sewer Authority and AFGE Local 631*, in which the Board paraphrased the four-part inquiry of *Cement Divisions*:

> An arbitration award fails to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement.

49 D.C. Reg. 11123, Slip Op. No. 687 at p. 6, PERB Case No. 02-A-02 (2002). In its Motion, Complainant asserts that "PERB cannot uphold a contract if <u>any</u>, not necessarily all, of the foregoing conditions apply." (Motion at p. 3).

Although Complainant regards the four-part inquiry of *Cement Divisions* as binding, we specifically note that the Sixth Circuit and this Board no longer do. The Sixth Circuit explained subsequent developments in the law in *Michigan Family Resources, Inc. v. SEIU Local 517*:

> During the 20 years since *Cement Divisions*, the Supreme Court has refined the standard of review in this area in two cases, [*United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987) and *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (2001),] both of which suggest that *Cement Divisions*

> gives federal courts more latitude to review the merits of an arbitration award than the Supreme Court permits. . . . Accordingly, instead of continuing to apply *Cement Divisions'* four-part inquiry, a test we now overrule, we will consider the questions of "procedural aberration" that *Misco* and *Garvey* identify. *Misco*, 484 U.S. at 40 n.10. Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract"? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made "serious," "improvident" or "silly" errors in resolving the merits of the dispute.

475 F.3d 746, 751-53 (2007).

The Board recognized the overruling of *Cement Divisions* in its original opinion in this matter, *District of Columbia Department of Corrections*, Slip Op. No. 1306 at p. 7, and in many other opinions issued over the past three years in which the Board has made clear that it will use the above test adopted in *Michigan Family Resources* and not the test adopted in *Cement Divisions*. *See F.O.P./Metro. Police Dep't Labor Comm. (on behalf of James) and D.C. Metro. Police Dep't*, Slip Op. No. 1293 at p. 12, PERB Case No. 10-A-10 (July 11, 2012); *D.C. Water & Sewer Auth. v. AFSCME, Local 2091*, Slip Op. No. 1276 at p. 4 & n.2, PERB Case No. 04-A-24 (June 12, 2012); *F.O.P. Dep't of Corrections Labor Comm. v. D.C. Dep't of Corrections*, 59 D.C. Reg. 9798, Slip Op. 1271 at p. 7, PERB Case No. 10-A-20 (2012); *D.C. Dep't of Fire & Emergency Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. No. 1258 at pp. 3-4, PERB Case No. 10-A-09 (2012); *D.C. Dep't of Consumer & Regulatory Affairs v. AFGE, Local 2725*, Slip Op. No. 1249 at p. 4, PERB Case No. 10-A-06 (Mar. 27, 2012); *D.C. Dep't of Hous. & Cmty. Dev. and AFGE, Local 2725*, 59 D.C. Reg. 12610, Slip Op. No. 1228 at p. 15, PERB Case No. 09-A-08 (2011); *Nat'l Ass'n of Gov't Employees (on behalf of Geter) and D.C. Office of Unified Commc'ns*, 59 D.C. Reg. 6832, Slip Op. No. 1203 at pp. 6-7, PERB Case No. 10-A-08 (2011); *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm. (on behalf of Baldwin)*, 59 D.C. Reg. 6787, Slip Op. No. 1133 at pp. 7-8, PERB Case No. 09-A-12 (2011); *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm. (on behalf of Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. at p. 9 & n.2, PERB Case No. 08-A-01 (2010).

The Board's original opinion in this matter applied the *Michigan Family Resources* test and found that it was satisfied, and thus it properly found that the award drew its essence from the Agreement. *D.C. Dep't of Corrections*, Slip Op. No. 1306 at pp. 7-8. Despite all of the cases cited above, which were issued before the Department filed its Motion, the Department analyzes the case according to the superseded *Cement Divisions* test. In the midst of that analysis, the Department alludes only briefly to the *Michigan Family Resources* test, asserting that "the

Arbitrator rendered the contractual provision so meaningless that he cannot be said to have 'arguably construe[ed] or appl[ied] the contract.'" (Motion at pp. 5-6) (citing *D.C. Dep't of Corrections and F.O.P./Dep't of Corrections Labor Comm.*, Slip Op. No. 1306, PERB Case No. 10-A-03 (Aug. 18, 2011)). This assertion is nothing more than a disagreement with the Arbitrator's interpretation. The Arbitrator did not render the provision meaningless; rather, he quite reasonably gave it a different meaning than the Department advocates:

> The language merely states that the parties have the right, at their own expense, to legal or stenographic assistance (which is not recoverable under the Back Pay Act) at the hearing. Nothing in the language "clearly and unmistakably" states that a grievant may not subsequently make a claim for fees under the Back Pay Act when an arbitrator determines that a personnel action was unwarranted.

(Award at p. 26).

In so stating, the Arbitrator was clearly construing and applying the contract. The Department says nothing about the other grounds for reversal in the *Michigan Family Resources* test. More particularly, the Department does not allege that the Arbitrator resolved a dispute not committed to arbitration, committed fraud, had a conflict of interest, or acted dishonestly. Accordingly, the Motion offers no reason to reconsider the Board's decision that the Award drew its essence from the Agreement and, consequently, that the Arbitrator did not exceed his jurisdiction.

B. Law and Public Policy

A petitioner claiming that an arbitration award is contrary to law and public policy has the burden to specify applicable law and definite public policy that mandate that the arbitrator arrive at a different result. *Univ. of D.C. v. AFSCME, Council 20, Local 2087*, 59 D.C. Reg. 15167, Slip Op. No. 1333 at p. 3, PERB Case No. 12-A-01(2012). The Department relies on the case of *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), in which the Supreme Court held that a clear and unmistakable requirement of a collective bargaining agreement between the Service Employees International Union and the Realty Advisory Board on Labor Relations ("RAB") to arbitrate ADEA claims was enforceable. Complainant asserts that in this case "the Supreme Court reasoned that it 'must respect [the] choice' of parties to arbitrate, when such choice was 'freely negotiated.'" (Motion at p. 7) (quoting *Pyett*, 556 U.S. at 260). Although Complainant asserts that this reasoning qualifies as definite public policy (Motion at p. 7 n.16), Complainant has not shown it to be definite public policy as Complainant altered the quotation from *Pyett* to overstate what the Court actually held. The choice that the Court said must be respected was a choice of Congress, not the parties:

> The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the

> ADEA. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.

Pyett, 556 U.S. at 260.

Not only is the alleged public policy indefinite, but also the Department's position on *Pyett* is indefinite as well. The Department contends in one part of its Motion that *Pyett* is analogous and in another part that it is distinguishable. The Department submits that the arbitration clause in *Pyett*[2] is analogous to the Agreement's provision that "[a]ll parties shall have the right, at their own expense, to legal and/or stenographic assistance at the hearing." In *Pyett*, the Department notes, the Court found that the parties negotiated a provision that required arbitration of ADEA claims and Congress had not terminated the parties' authority to do so. (Motion at p. 7). The Department claims that in the present case the parties to the Agreement similarly negotiated a provision requiring the parties to pay their own legal fees, and the Back Pay Act did not terminate the parties' authority to do so. (*Id.*). "Just as the Supreme Court did in *Pyett*, the PERB must respect the freely negotiated choices reached by the parties . . ." (*Id.* at 8).

Having drawn that analogy, the Department then distinguishes *Pyett*, apparently because the Arbitrator cited it: "To the extent that the Award relied on *Pyett*, such reliance is misplaced. *Pyett* examined whether a contractual clause may waive a substantive right (*i.e.*, right to not be age-discriminated against in the workplace). It did not examine whether a contractual clause may waive a remedy (*e.g.*, attorney fees), which is at issue here." (*Id.* at p. 8 n.17). The case is distinguishable but not for the reasons given by the Department, the first of which is false and the second of which conflicts with the Department's argument. First, *Pyett* did not examine whether a contractual clause may waive a substantive right. To the contrary, the Court took it as a given that "federal antidiscrimination rights may not be prospectively waived"[3] but closely examined whether the procedural right to litigate in federal court could be waived. Second, although it is true that the Court did not consider whether a contractual clause could waive a remedy, the Department's argument is that the waiver of ADEA procedural rights is analogous to the alleged waiver of a remedy in the instant case. If it is significant that the waiver in *Pyett* was not a waiver of a remedy, then the Department's analogy fails.

The correct distinction between *Pyett* and the instant case was drawn by the Arbitrator, who stated in his Award that the Court held

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[2] "There shall be no discrimination against any present or future employee by reason of race, creed, color, age, . . . or any other characteristic protected by law, including, but not limited to . . . the Age Discrimination in Employment Act . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations." *Pyett*, 556 U.S. at 252.
[3] 556 U.S. at 265.

> that the Union may waive the employee's procedural right to bring claims in federal court by "clearly and unmistakably" requiring the employee to arbitrate the claims. Whether or not the right to attorney's fees is a substantive right, the fact is that the language of the Agreement does not "clearly and unmistakably" waive the right to collect fees under the Back Pay Act. The language merely states that the parties have the right, at their own expense, to legal or stenographic assistance (which is not recoverable under the Back Pay Act) at the hearing. Nothing in the language "clearly and unmistakably" states that a grievant may not subsequently make a claim for fees under the Back Pay Act when an arbitrator determines that a personnel action was unwarranted.

(Award at p. 26).

The Department disagrees with the Arbitrator's interpretation of the Agreement and insists that the Agreement "requires, without exception, the parties to pay for their legal counsel." (Motion at p. 7). The Department's entire argument that *Pyett* is analogous and that the Award is contrary to law and public policy rests upon this rival interpretation of the Agreement. Notwithstanding, the Department's disagreement with the Arbitrator's interpretation of the parties' contract does not render the Award contrary to law and public policy. *AFGE, Local 1975 and Dep't of Pub. Works*, 48 D.C. Reg. 10955, Slip Op. No. 413 at pp. 2-3, PERB Case No. 95-A-02 (1995).

Where the Board's decision was reasonable, supported by the record, and based on Board precedent, we will find no basis for reversal of the Board's decision. *F.O.P./Metro. Police Dep't Labor Comm. and D.C. Metro. Police Dep't*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at p. 6, PERB Case No. 08-U-19 (2011). Such is the case here, where the Department "has failed to allege any error of law or in the Board's reasoning which requires reconsideration of its decision." *F.O.P./Metro. Police Dep't Labor Comm. and D.C. Metro. Police Dep't*, Slip Op. No. 1283 at p. 2, PERB Case No. 07-U-10 (2008). Therefore, we deny Complainant's Motion for Reconsideration.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department of Corrections' Motion for Reconsideration 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.

April 30, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-03 is being transmitted to the following parties on this the 30th day of April 2013.

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