

I. Statement of the Case

The Award in this case arises from a grievance by the Union that the Department assigned certain officers to do investigative work that would entitle them to a higher rate of pay under the parties' collective bargaining agreement ("CBA").

Article 26, section 2 of CBA provides that an employee who is assigned or detailed for more than 90 days to a position carrying additional compensation "shall receive the higher rate of pay beginning the first full pay period following the 90-day period." (Request, Ex. 2 at 28.) The Union invoked this provision in a first step grievance it filed May 29, 2009, on behalf of Officers José Nieves-Campos, Tiffany Wells, and Kim Miller ("Grievants"). In the grievance the Union asserted that after the Grievants were assigned to the Department's Domestic Violence Intake Center ("DVIC") they did the work of investigators/detectives. The Award states that the grievance sought the higher rate of compensation paid investigators/detectives from 2002 to the present, the time frame that they allege they were assigned duties of the higher paying job. (Award 2, 4.) The Award also states that the Grievants "cite August 1, 2007 as the date that the violation of the CBA began." (Award 4.) A letter dated April 7, 2009, advised the Grievants that as of April 12, 2009, investigative assignments in the Sixth and Seventh districts would be discontinued.

In view of the April 7, 2009 notice and the April 12, 2009 discontinuance of assignments, the Department contended that the May 29, 2009 grievance was untimely as it was not "presented by the employee to management at the Oral Step of this process not later than ten (10) business days from the date of the occurrence giving rise to the grievance or within ten (10) business days of the employee's knowledge of the occurrence" as stated in article 19, section 2 of the CBA. The arbitrator held that the Union did not prove that the grievance was filed within ten days of the Grievants' knowledge of the occurrence. (Award 13-14.) He held that the grievance would be timely as to any underpayment that occurred within ten days of the filing of the grievance or thereafter. (Award 18.)

The Arbitrator made the following findings regarding the merits of the grievance.

Based on an analysis of the record the undersigned arbitrator is persuaded that the work done at DVIC by the grievants between 2007 and 2009 was clearly and substantially in the nature of investigative work not normally done by officers. For two years the employees were directed to take on significant additional investigative assignments. The work assigned from the Sixth and Seventh districts was clearly not voluntary in nature. . . . The work was withdrawn because the Employer concluded that the grievants should not be doing investigative work. The clear inference is that they obviously had been doing investigative work prior to that time.

(Award 17.) As to the period after assignments from the Sixth and Seventh districts were withdrawn, the arbitrator stated that he was “persuaded that activities commensurate with that of an investigator’s job duties did in fact continue to be carried out even after the assignments to the Sixth and Seventh districts had ceased.” (Award 19.)

Turning to the remedy, the arbitrator denied the Union’s request for a retroactive promotion of the Grievants but stated that he was authorized to award retroactive compensation. (Award 17.) The arbitrator determined that the award of retroactive compensation must be limited by the ten-day rule:

Since a first step oral grievance was filed on May 29, 2009, any violations of the CBA from May 19, 2009 forward are clearly covered by the grievance filed as of May 19, 2009. Consistent with the authorities cited, back pay for such a continuing grievance would only be awarded going forward from the date 10 days prior to the grievance being filed and not retroactively prior to that time.

(Award 18.)

As noted, a month before the compensable period began, the Department stopped assigning the Grievants cases from the Sixth and Seventh districts. The arbitrator opined that the amount of detective and investigative work the Grievants did subsequently required further clarification. For that reason, the arbitrator ordered the Department to have its Human Resources Classification Specialist perform a desk audit of the Grievants’ work during the compensable period—May 19, 2009 to the present. “If the audit determines that the DVIC officers have been performing work commensurate with that of an investigator then they are entitled to a higher level of pay consistent with Article 26 of the CBA,” the arbitrator wrote. (Award 19-20.) The coverage of any award to Officer Nieves-Campos would be limited to the period before he was promoted to investigator in June 2009. (Award 20.)

II. Discussion

The Union’s arbitration review request contends that the Award is contrary to law and public policy for two reasons. First, the Union objects that the Award does not completely resolve the issue of back pay and due to its incompleteness the Board should remand the Award back to the arbitrator. Even more objectionable from the Union’s perspective, the Award makes completion of the back pay issue depend upon a desk audit by the Department, “a party adverse to the Grievants . . . with a clear conflict of interest.” (Request 8.) Second, the Union contends that a grievance involving unpaid compensation is a continuing violation, and a continuing compensation violation “is an exception to time limitations of grievances.” (Request 8.) Because of this alleged exception, the arbitrator’s limitation of the remedy to May 19, 2009 and thereafter is, the Union contends, contrary to law and public policy.

A. Alleged Incompleteness of the Award

Notwithstanding the Union’s claim that the Award is incomplete, the Award does not ignore any issue presented to the arbitrator. The arbitrator devised a remedy involving a process

for determination of the amount of back pay compensation due the Grievants during which the arbitrator would retain jurisdiction. That remedy does not mean the Award incomplete; it means that the Award is interim or interlocutory. An interlocutory award is appealable through an arbitration review request, *D.C. Department of Consumer and Regulatory Affairs v. AFGE, Local 2725*,¹ but is not reversible simply because it is interlocutory. An arbitrator's wide latitude in drafting awards includes the authority to retain jurisdiction. See *AFGE, Local 1000 v. D.C. Dep't of Employment Servs.*, 60 D.C. Reg. 5247, Slip Op. No. 1368 at p. 2, PERB Case No. 13-U-15 (2013).

The Union cited no specific law and public policy that an arbitrator would violate by retaining jurisdiction or by directing an agency that was a party to the arbitration to perform an audit or analysis. In *AFGE, Local 2725 v. D.C. Housing Authority*,² the Board upheld as within an arbitrator's jurisdiction and not contrary to law or public policy an award directing an agency to ascertain whether there were mitigating circumstances it should have considered in assessing the appropriate penalty in that case and to provide written results of its assessment to the union. Similarly, neither the interim nature of this Award nor the participation of the Department in the remedy renders the Award contrary to law and public policy.

B. Temporal Limitation on the Remedy

The Union erroneously claims that at page 8 of the Award the "arbitrator acknowledged that a continu[ing] compensation violation is an exception to time limitations of grievances." (Request 8.) The arbitrator did not so acknowledge in the Award, nor does he state that time limitations are inapplicable to a continuing compensation violation. Rather, he described how they have applied to continuing violations:

In the leading treatise on arbitral matters the authors state "Many arbitrators have held that 'continuing' violations of the agreement . . . give rise to 'continuing' grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new 'occurrence.' . . . For example, where the agreement provided for filing 'within ten working days of the occurrence,' it was held that where employees were erroneously denied work, each day lost was considered to be an 'occurrence' and that a grievance presented within 10 working days of any such day lost would be timely." However, any back pay is generally held to accrue from on or after the date the grievance is filed and not from the time frame previous to that.

(Award 10) (quoting Elkouri & Elkouri, *How Arbitration Works* 218-19 (6th ed. 2003)).

The Arbitrator's holding that the Grievants will be compensated with back pay beginning ten days before the grievance was filed is consistent with those principles. The Union objects that the Award is inconsistent with the alleged rule that a continuing compensation violation falls

¹ Slip Op. No. 1249 at pp. 3-4, PERB Case No. 10-A-06 (Mar. 27, 2012).

² 61 D.C. Reg. 9071, Slip Op. No. 1481, PERB Case No. 13-A-11 (2014).

into an exception to time limitations of grievances: “[T]he arbitrator issued a ruling that flatly circumvents well established precedent and is contrary to the law and to public policy when he limited the remedy for the Award to May 19, 2009 and forward.” (Request 8-9.) Despite the claim of well-established precedent, the Union cites no precedent other than arbitration awards. An allegation of a failure to follow arbitration awards—which do not create binding precedent even with respect to the same collective bargaining agreement—does not satisfy a petitioner’s burden to cite specific law and public policy in support of a claim that an arbitration award is contrary to law and public policy. *See F.O.P./Metro. Police Dep’t Labor Comm. (on behalf of Micciche) v. Metro. Police Dep’t*, 59 D.C. Reg. 3892, Slip Op. No. 913 at pp. 8-9, PERB Case No. 04-A-19 (2007).

The arbitrator construed and applied to the facts the time limitation provision in article 19, section 2 of the CBA. In so doing, he did not disregard the continuing nature of the compensation violation. Because the compensation violation was continuing, the arbitrator found the grievance timely even though it was filed more than ten days after the assignment of detective duties began and more than ten days after the April 7, 2009 letter “that alerted the Union to the possibility of a grievance.” (Award 12.) Instead of construing the time limit to begin at either of those times (thereby barring the grievance entirely), he construed the time limit to begin at each underpayment or the discovery of each underpayment. The parties bargained for the arbitrator’s interpretation of the CBA. As no violation of law is evident on the face of the Award, neither the Board nor a court has authority to substitute its interpretation of the CBA for the arbitrator’s. *See D.C. Metro. Police Dep’t v. D.C. Pub. Employee Relations Bd.*, 901 A.2d 784, 789 (D.C. 2006).

In conclusion, the Union has failed to show that the Award is contrary to law and public policy. Accordingly, the Board sustains the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Award is sustained. Therefore, the Union’s 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

By unanimous vote of Board Chairperson Charles Murphy and Members Donald Wasserman and Keith Washington

Washington, D.C.
November 20, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 13-A-06 was transmitted to the following parties on this the 3d day of December 2014.

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