GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In The Matter Of:	
Teamsters Local Union No. 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (on behalf of Officer Frank Jones),	
Petitioner,	PERB Case No. 91-A-06 Opinion No. 304
and	
District of Columbia Department of Corrections,	
Respondent.	

DECISION AND ORDER

On September 18, 1991, Teamsters Local Union No. 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America AFL-CIO (Teamsters), filed an Arbitration Review Request (Request) with the Public Employee Relations Board (Board). The Request seeks review of an arbitrator's award (Award) issued on August 27, 1991, which denied a grievance concerning the termination of Officer Frank Jones (Grievant), an employee of the District of Columbia Department of Corrections (DOC). The Teamsters contended that the Award is contrary to law and public policy and that the Arbitrator exceeded his authority. On October 8, 1991, DOC filed an Opposition to Arbitration Review Request (Response) urging that the Board deny review of the Award. [1]/

The Arbitrator did not reach the underlying merits of the grievance, but rather based his Award on a determination of a procedural issue that "the grievance was not timely appealed to arbitration in accordance with the express requirements of Article 10, Section 3.g. Step 5, and Section 5." (Award at 19.) D.C. Code Section 1-605.2(b) authorizes the Board to consider appeals from arbitration awards pursuant to a grievance procedure only if any of three statutory grounds is met. Here, the

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[1]/ The briefs submitted by the parties provided an adequate explication of the issues and opportunity for the parties to express their views and concerns to the Board. We therefore deny the Teamsters' request for oral argument in this matter pursuant to Board Rule 538.2.

Teamsters contended that review of the Arbitrator's Award is warranted on two of these grounds, i.e., "the [A]ward on its face is contrary to law and public policy" and "the [A]rbitrator was without, or exceeded, his or her jurisdiction[.]" For the reasons that follow, the Board concludes that the Teamsters have failed to demonstrate that any of the statutory criteria for review exists in this proceeding.

The Teamsters first contended that the Arbitrator exceeded his jurisdiction "[b]y [r]elying on [n]on-existent [e]vidence." (Req. at 4.) Teamsters argue that the arbitrator should have drawn an adverse presumption from the failure of DOC to produce a witness, who the Teamsters asserted had authorized a retroactive extension of time to advance the grievance to arbitration. This contention, however, ignores the Arbitrator's finding that, notwithstanding the existence of a retroactive extension of time, the Arbitrator concluded that there was "absolutely no record of the Union having made any such request [for arbitration] to FMCS on, or about August 20, 1989[.]" [2]/ He further concluded that the Teamsters "alleged 'second' [and only other] request for an arbitration panel... was dated September 19, 1990, which is four days beyond the purported retroactive extension[.]" (Award at 21.) We have held that assessing what weight and probative value to attribute record evidence, or the lack thereof, is surely within the jurisdiction of the Arbitrator. See, e.g., American Federation of Government Employees, Local 872 and District of Columbia Department of Public Works, ___ DCR ___, Slip Op. No. 290, PERB Case No. 91-A-01 (1992) and University of the District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248 at n.8, PERB Case No. 90-A-02 (1990). We find no basis for finding that the Arbitrator exceeded his jurisdiction by making these findings on the record before him. [3]/

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[2]/ The Arbitrator further found, with respect to the Teamsters alleged first request for arbitration, that there was no record that the Teamsters complied with the operative contractual provision requiring written notice of an intent to proceed to arbitration be provided to the Director of DOC and the Office of Labor Relations and Collective Bargaining (OLRCB).

[3]/ We have observed, generally, that the party seeking "to change the present state of affairs" or to benefit from a given fact, e.g., the existence of a timely request to appeal the grievance to arbitration, "has the burden of pleading [the] fact [and] will have the burdens of producing evidence and of persua[sion]" with respect to its existence. E. McCormack on Evidence, Section 337 at 948-949 (3rd ed. 1984.) See, Teamsters Local 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of

Next, the Teamsters contend that the Arbitrator's rulings on procedural arbitrability [4]/ are contrary to law and public policy in that it "misconstrues on its face, the provisions of the parties' agreement[.]" [5]/ (Req. at 9.) The Teamsters advance no specific argument under this contention concerning how the parties' collective bargaining agreement has been misconstrued by the Arbitrator. As noted by DOC, with nothing more, we have held that "a party's disagreement with an arbitrator's interpretation of a provision in the parties' collective bargaining agreement does not mean that the arbitrator exceeded his jurisdiction" or, as we hold now, that the Award is rendered on its face contrary to law and public policy. See, University of the District of

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(Footnote 3 Cont'd)
Columbia Department of Corrections, ___ DCR ___, Slip Op. No. 296 at n.6, PERB Case No. 87-A-11 (1992). Thus, contrary to the Teamsters' assertion, the Arbitrator did not base his award on an alleged impermissible reliance on non-existent evidence, but rather on his determination that the Teamsters failed to meet its burden of proof. Such an assessment of the evidence, as noted in the text, is clearly within the arbitrator's jurisdiction.

[4]/ We have observed, as a general proposition, that "[i]t is well settled that arbitrators are permitted to decide questions of procedural arbitrability. See, American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO and District of Columbia General Hospital, 37 DCR 6172, Slip Op. No. 253, PERB Case No. 90-A-04 (1990), citing Wiley & Sons v. Livingston, 376 U.S. 543 (1964) and Washington Hospital Center v. Service Employees International Union, 746 F.2d. 1503 (1983). The Board case cited by the Teamsters in support of this contention, Teamsters Local 1714, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO and District of Columbia Department of Corrections, 38 DCR 5080, Slip Op. No. 284, PERB Case No. 87-A-11 (1991), did not have, as a threshold matter, an issue concerning procedural arbitrability. Therefore we find the Teamsters' reliance upon that decision is without relevance to the argument raised by the Teamsters in support of its statutory basis for review.

[5]/ The Teamsters also argued that the Arbitrator's ruling on procedural arbitrability was contrary to law and public policy by denying the grievance because the Award violated the Grievant's statutory right under D.C. Code Sec. 1-617.3(a)(1)(D) and District Personnel Manual Section 1604.38. However, these arguments go to the underlying merits of the grievance, which, as discussed above, the Arbitrator did not have to reach based upon his ruling on procedural arbitrability.

Columbia and the University of the District of Columbia Faculty Association/NEA, 38 DCR 5024, Slip Op. No. 276 at 5, PERB Case No. 91-A-02 (1991). This is the case "even if the arbitrator misconstrued the contract, for it is the arbitrator's interpretation for which the parties bargained." Id.

Finally, the Teamsters contend that the Arbitrator should have employed the equitable principle of estoppel to rule that DOC should not be permitted to rely on the parties' contractual provisions concerning grievance arbitration since, it asserts both parties "demonstrated a laxness... in strictly adhering to contractual time limitations." (Req. at 11.) This contention by the Teamsters stems from Article 10, Section 7.b of the parties' grievance and arbitration procedures which provides for strict observance of all time limits unless the parties mutually agree to extend the time limits. The Arbitrator found this provision applicable to the facts before him. The Teamsters, however, cite to the Arbitrator's finding that the parties often agreed to extend time limits under this provision. Notwithstanding this finding, however, the Teamsters cite no law and public policy, or other authority that required the Arbitrator to employ principles of estoppel under these facts. Furthermore, the Teamsters fail to demonstrate that employing such principles under these facts compelled a contrary finding by the Arbitrator. Therefore, we cannot find the Award, as a result of the analysis or rationale employed by the Arbitrator, to be on its face contrary to law and public policy.

Teamsters present a related argument that DOC should not have been permitted to raise the procedural arbitrability argument on timeliness because (1) it did not raise the defense "during each discussion of the grievance at each appropriate step" and (2) DOC effectively "waived such a defense when [it] signed the final [retroactive] extension." (Req. at 12.) However, as DOC pointed out, its defense to the grievence does not concern the timeliness of advancing the grievance through the steps prior to arbitration, but rather the request to invoke the arbitration procedures. The Teamsters provide no basis for its contention that the consideration of the procedural arbitrability issue was not appropriately presented in the first instance before the Arbitrator. [6]/

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[6]/ The Arbitrator found that "[t]here [was] no showing by the Union that the Department or the OLRCB had a contractual obligation to have raised this procedural defense prior to receipt of the request for an arbitration panel dated September 19, 1990." (Award at 21.) Further, notwithstanding whether such an obligation existed, the Arbitrator found that "the Parties
(Footnote 6 Cont'd)

With respect to the Teamsters' second argument, as discussed previously, this argument is of no avail in view of the Arbitrator's finding that the Teamsters failed to meet the date, i.e., September 15, 1990, of the alleged retroactive extension as well as to comply with other requirements under Article 10. [7]/ Again, the Teamsters have presented no law and public policy to support its contention principles of that equitable estoppel should have prevailed given the record before the Arbitrator, or that employing such principles would have compelled a different result. [8]/

Accordingly, the Teamsters have not shown a statutory basis for review of the Award, and therefore its request for Board review must be denied.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Review Request is denied.

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

April 22, 1992

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agreed to present the procedural issue and the merits in the instant Arbitration proceeding." Id.

[7]/ The Arbitrator concluded that under such circumstances, he could not "find that the Agency waived its right to raise this issue prior to its receipt of the request to FMCS for an arbitration panel dated September 19, 1990." (Award at 21.)

[8]/ Article 10, Section 7.b., as found by the Arbitrator, provides that "any grievance not advanced to the next step within the time limits provided 'shall be deemed abandoned'[.]" (Award at 19.) Thus, notwithstanding the Teamsters argument that in discharge cases, "both the law and arbitrators abhor a forfeiture" (Req. at 12), it appears that the Arbitrator was within his authority to find that forfeiture, i.e., abandonment, was, consistent with the authority cited by the Teamsters, "the unmistakable intention of the parties to the document" when they agreed to Article 10, Section 7.b. of their collective bargaining agreement. Elkouri & Elkouri, How Arbitration Works, at 356-357 (4th ed. 1985).