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

\_\_\_\_\_)  
In the Matter of )  
District of Columbia )  
Department of Corrections, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
Fraternal Order of Police/ )  
Department of Corrections Labor Committee )  
(On behalf of Stephen Amobi), )  
 )  
Respondent. )  
 )  
\_\_\_\_\_)

**PERB Case No. 08-A-05**

**Slip Opinion No. 1243**

**DECISION AND ORDER**

**I. Statement of the Case**

This matter concerns an Arbitration Review Request (“Request”) filed by the District of Columbia Department of Corrections (“DOC”, “Agency” or “Petitioner”) on July 31, 2008. The Fraternal Order of Police/Department of Corrections Labor Committee (“Respondent”, “FOP” or “Union”) filed its Opposition to the Arbitration Review Request (“Opposition”) on August 18, 2008. On December 21, 2007, the Arbitration Opinion and Award (“Award”) was issued in the Union’s favor. The December 21<sup>st</sup> Award resolved a dispute between the Union and the DOC regarding the August 29, 2006 discharge of Stephen Amobi (“Grievant”), Correctional Officer, District of Columbia Jail. The Award sustained the Union’s grievance and required the Agency to reinstate the grievant with full backpay and benefits. In its post-hearing brief, the Union requested that the Arbitrator grant all costs, including attorney costs, if the Union prevailed. A second Arbitrator’s Award (“Fees Award”) of July 3, 2008, resolved the Parties’ dispute over the Union’s claim for attorney’s fees. The Agency’s standing Arbitration Review Request concerns this July 3<sup>rd</sup> Fees Award and is before the Board for disposition.

The issue before the Board is whether “the arbitrator was without, or exceeded his or her jurisdiction.” D.C. Code § 1-605.02(6) (2001 ed.).

## II. Discussion

Pursuant to D.C. Code §1-605.02(6), “the Board shall have the power to....consider appeals from arbitration awards pursuant to a grievance procedure; provided, however, that such awards may be modified or set aside or remanded, in whole or in part, only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means...” The Agency states the following reasons for appealing the award:

a. The Arbitrator exceeded his authority. The Arbitrator's authority is specifically derived from the provisions of the Parties' [collective bargaining agreement (“CBA”)]. The CBA specifically states in relevant part, that “the arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision on the issue(s) presented and shall confine his/her decision solely to the precise issue(s) submitted for arbitration.” In the instant case, the Arbitrator exceeded his authority when he invited the Parties to brief the issue of attorneys' fees and when he ultimately ruled on and granted the Union's request for attorneys' fees.

b. The negotiated language in the CBA specifically precluded attorneys' fees. The CBA in relevant part provides that “All parties shall have the right, at their own expense, to legal and/or stenographic assistance at this hearing.” By granting attorneys' fees the Arbitrator has changed specific provisions of the CBA and has ignored the Parties intent at the time the CBA was negotiated.

(See Arbitration Review Request at p.2-3)

### Payment of Attorney's Fees

On January 22, 2008, the Union filed its *Motion for Attorney's Fees Filed on Behalf of the Union* (“Motion”). The Motion sought \$19,922.00 in attorney's fees for partner, associate, law clerk and administrative assistant hours.

On February 21, 2008, the Employer filed the *Agency's Opposition to Motion for Attorney's Fees Filed on Behalf of the Union* (“Opposition To Motion”). The Opposition asserted that the Motion must be denied because the Federal Back Pay Act (“FBPA”), 5 USC § 5596, had been superseded by D.C. Comprehensive Merit Personnel Act (“CMPA”) and back pay regulations and, in the alternative, because the Parties' CBA required each Party to bear their own legal expenses.

On March 27, 2008, the Union filed its *Reply to Agency's Opposition to Motion for Attorney's Fees Filed on Behalf of the Union* (“Reply”) in which the Union sought \$27,165.50 in attorney's fees for representing the Grievant. On April 18, 2008, DOC filed the *Agency's Sur-reply to FOP'S Reply to Agency's Opposition to Motion for Attorney's Fees Filed on Behalf of the Union* (“Sur-reply”).

On May 13, 2008, the Union filed an *Amended Motion for Attorney's Fees* ("Amended Motion"). This submission was prepared by the FOP based on DOC's request for details on the amount of the requested attorney's fees. The Amended Motion amended the amount of attorney's fees FOP sought in the amount of \$21,565.50 and included billing details on the fees which were requested by DOC. On May 30, 2008, the Employer responded by e-mail to the Amended Motion objecting to the Union's amended request on a number of grounds.

The Agency asserts that the payment of attorney's fees to the FOP is barred by Article 10, § 6(B) and (C)<sup>1</sup> and that the plain language of §6(B) only establishes that each party has the right to legal assistance at the arbitration hearing at their own expense. (See Agency at 4.). As noted by the Arbitrator, the Agency argues that this bars the Union from seeking a statutory award of attorneys' fees after the hearing has concluded, the record is closed and an award in the Union's favor has issued from the Arbitrator. (See Award at p. 6). However, as the Arbitrator further noted in his Award, it is not reasonable to believe that the Union waived its remedial rights to attorney's fees under either 5 USC §5596 or DC code 1-606.02 in a collective bargaining agreement without clear statutory language establishing the waiver of such rights. (See Award at p. 7). Without evidence of any bilateral discussions and clear contract language demonstrating that the Union waived its statutory rights to attorneys' fees under §6(B), the Arbitrator found that the Agency's claims regarding Article 10, §6(B) were without merit. Any other finding would have required the Arbitrator to modify or add to the CBA—which is precisely what §6(B) states is beyond the Arbitrator's power. Thus, consistent with Article 10, §6(B), the Arbitrator found that the Union should recover attorney's fees as the prevailing party and when the payment of such fees is in the interests of justice, pursuant to 5 USC §5596 and DC Code §1-606.02.

The Board has found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.<sup>2</sup> See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Here, the

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<sup>1</sup> The specific CBA language states:

Section 6:

- B. The hearing shall not be open to the public or persons not immediately involved unless the parties mutually agree to such. All parties shall have the right, at their own expense, to legal and/or stenographic assistance at this hearing.
  
- C. The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision on the issue(s) presented and shall confine his/her decision solely to the precise issue(s) submitted for arbitration.

<sup>2</sup> We note that if DOC had cited a provision of the parties' CBA that limits the Arbitrator's equitable power, that limitation would be enforced.

DOC states that the Arbitrator is prohibited from issuing an award that would modify, or add to, the CBA. However, the DOC does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator sustained the Union's grievance on behalf of Officer Amobi and concluded that the discipline of the officer was without cause, he also had the authority to determine the appropriate remedy, including the awarding of attorneys' fees to the prevailing party--in this case the Union. Contrary to the DOC's contention, the Arbitrator did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination and granting attorneys' fees. Thus, the Arbitrator acted within his authority. The Board finds that the DOC's argument asks that this Board adopt its interpretation of the CBA and merely represents a disagreement with the Arbitrator's interpretation. As stated above, the Board will not substitute its, or DOC's, interpretation of the CBA for that of the Arbitrator. Thus, the Agency has not presented a ground establishing a statutory basis for review.

The Board holds that the Arbitrator did not exceed his jurisdiction, nor was his decision contrary to law or public policy. Therefore, the Board denies the DOC's request for an Arbitration Review

**ORDER**

**IT IS HEREBY ORDERED THAT:**

- (1) The District of Columbia Department of Corrections' 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.

Date: February 4, 2012

**CERTIFICATE OF SERVICE**

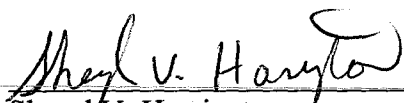
This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 08-A-05 are being transmitted via Fax and U.S. Mail to the following parties on this the 6th day of February, 2012.

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Sheryl V. Harrington  
Secretary