Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

District of Columbia
Public Employee Relations Board

In the Matter of:	)	
	)	
District of Columbia Department of Corrections,	)	
	)	
Petitioner,	)	PERB Case No. 10-A-14
	)	
and	)	
	)	Slip Opinion No. 1326
Fraternal Order of Police/ Department of Corrections Labor Committee,	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

I. Statement of the Case

On February 2, 2010, the District of Columbia Department of Corrections ("DOC", "Petitioner" or "Agency") filed and arbitration review request ("Request") in the above-captioned matter. DOC seeks review of Arbitrator Joyce M. Klein's supplemental award ("Supplemental Award") which granted the Fraternal Order of Police/Department of Corrections Labor Committee's ("FOP", "Union" or "Respondent") motion for attorney's fees. DOC contends that the Arbitrator exceeded her authority in granting attorneys' fees to the Union. FOP opposes the Request.

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. Background

The grievance underpinning the instant matter concerned the removal of correctional officers Felix Ball, SaTonya Eggleston and Roman Morris. The grievance proceeded to arbitration and on October 23, 2009, Arbitrator Klein issued an award[1] finding that:

> [t]he charges against Officers Felix Ball, SaTonya Eggleston and Roman Morris are sustained in part and reversed in part. The charges are sustained to the extent that the Agency has cause to discipline Officers Felix Ball, SaTonya Eggleston and Roman Morris. The charges are denied to the extent that the Agency did not have cause to terminate Officers Felix Ball, SaTonya Eggleston and Roman Morris.

(Award at p. 42).

Arbitrator Klein adjusted the discipline from terminations to ten-day suspensions for Officers Ball and Morris and a fifteen-day suspension for Officer Eggleston. (*Id.*). The Arbitrator retained jurisdiction over the issue of attorney fees sought by the FOP. The Union submitted its motion for attorney fees on November 9, 2009, and supplemented the motion on November 13, 2009. The Agency submitted its opposition to the Union's motion on December 11, 2009. On January 12, 2010, Arbitrator Klein ruled on the Union's motion and granted the Union attorney fees in the amount of $52,206.00. (Supplemental Award at p. 17).

III. Discussion

In its Request, the Agency contends that "Arbitrator Klein exceeded her jurisdiction by awarding attorneys' fees in conflict with the express provisions of the parties' collective bargaining agreement (CBA)." (Request at pg. 3). DOC argues that the Arbitrator's Supplemental Award of attorneys' fees is not derived from the essence of the agreement. Specifically, DOC asserts:

> Article 10 § 6(B) of the CBA states that "[a]ll parties shall have the right, *at their own expense*, to legal and/or stenographic assistance at the hearing." (Emphasis added). The plain meaning of that provision is that each party *shall* pay their own attorney's fees. To find that the cost of the Union's legal representation could be shifted to the Agency at the conclusion of the arbitration would render the phrase "at their own expense" meaningless. When the Union agreed to this provision at the bargaining table, it accepted responsibility for paying its own legal expenses. It cannot now

[1] Arbitrator Klein's October 23, 2009 award will be cited as "Award."

> shift that cost back to the Agency pursuant to an authority outside of the CBA.

(Request at p. 4).

In support of its position, DOC relies on an arbitrator's decision to deny attorneys' fees in an arbitration case between the District of Columbia Public Schools and the Washington Teachers Union. (Request at p. 4). The Agency asserts that the arbitrator, in that case, interpreted a similar collective bargaining provision to constitute a waiver of the union's right to recover attorney fees under the Federal Back Pay Act.[2] DOC requests that the Board reverse the Arbitrator's award of attorneys' fees and adopt this interpretation of the parties' CBA.[3]

Thus, the issue before the Board is whether Arbitrator Klein exceeded her authority as to her decision to grant the Union's motion for attorneys' fees.

When a party files an arbitration review request, the Board's scope of review is extremely narrow.[4] Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances where:

1. "the arbitrator was without, or exceeded, his or her jurisdiction";

2. "the award on its face is contrary to law and public policy"; or

3. the award "was procured by fraud, collusion or other similar and unlawful means."

D.C. Code § 1-605.02(6) (2001 ed.).

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[2] 5 U.S.C. § 5596

[3] DOC's Request erroneously requests "that the Arbitration Award be modified to state that the Agency is not required to reinstate the Grievant, because the Grievant's termination was for cause. (Request at p. 6). The Agency has not filed a request for review of the Arbitrator's Award on the merits of this case and no such determination is warranted here.

[4] Board Rule 538.3 - Basis For Appeal - provides:

> In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:
>
> (a) The arbitrator was without authority or exceeded the jurisdiction granted;
> (b) The award on its face is contrary to law and public policy; or
> (c) The award was procured by fraud, collusion or other similar and unlawful means.

The Board has long recognized the applicability of the Federal Back Pay Act to District of Columbia employees and its application in arbitration awards. *International Brotherhood of Police Officers, Local 445 (On behalf of Officer Cecyl A. Nelson) and District of Columbia Office of Administrative Services*, 41 D.C. Reg. 1597, Slip Op. No. 300, PERB Case No. 91-A-05 (1992).[5] The basis of DOC's contention rests with the assertion that the parties have waived any right to recovery of attorney fees by agreeing to the provisions set forth in Article 10, Section 6(b) of the parties' CBA. As a result, DOC argues that application of the Federal Back Pay Act is in excess of the authority granted under the parties' CBA.

One of the tests that the Board has used when determining whether an arbitrator has exceeded her jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining agreement." *D.C. Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). See also, *Dobbs, Inc. v. Local No. 1614, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987). The U. S. Court of Appeals for the Sixth Circuit in *Michigan Family Resources, Inc. v. Service Employees Int'l Union Local 517M*, has explained what it means for an award to "draw its essence" from a collective bargaining agreement by stating the following standard:

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[5] The Federal Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii), provides:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
>
> (A)
> ...
>
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title;

5 U.S.C.A. §7701(g)(1) provides:

> Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

> [(1)] Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration?[; (2)] Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award?[; and (3)] 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, 753 6th Cir. (2007), (overruling *Cement Division, Nat'l Gypsum Co. v. United Steelworkers for America, AFL-CIO, Local 135*, 793 F.2d 759 (C.A.6 1986)).

In the present case, nothing in the record suggests that fraud, a conflict of interest or dishonesty infected the arbitrator's decision or the arbitral process. In addition, the parties do not dispute that the collective bargaining agreement committed this grievance to arbitration, nor that this arbitrator was selected by the parties to be eligible to resolve this dispute. The arbitrator, in short, was acting within the scope of her authority. This leaves the question of whether Arbitrator Klein's interpretation of the parties' CBA was "arguably construing" the collective bargaining agreement. "This view of the 'arguably construing' inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the finality clause in most arbitration agreements, ... [stating that] 'the arbitrator shall have full authority to render a decision which shall be final and binding upon both parties' and a view whose imperfections can be remedied by selecting [different] arbitrators." *Id.* at 753-754.

In the present case, the Arbitrator's opinion has all the hallmarks of interpretation. Arbitrator Klein refers to, and analyzes the parties' positions, and at no point does she say anything indicating that he was doing anything other than trying to reach a reasonable interpretation of the contract. "Neither can it be said that the [A]rbitrator's decision on the merits was so untethered from the agreement that it casts doubt on whether [s]he was engaged in interpretation, as opposed to the implementation of his 'own brand of industrial justice.'" *Id.* at 754. "Such an exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that." *Id.* at 753. For the reasons cited above, we find that the Arbitrator's Award draws its essence from the collective bargaining agreement.

Furthermore, we have held that "an arbitrator does not exceed his authority by exercising his equitable powers, unless these powers are expressly restricted by the parties' collective bargaining agreement. *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, - D.C. Reg. -, Slip Op. No. 933, PERB Case No. 07-A-08 (2008). In the instant matter, we find no such provision in the parties' CBA limiting the arbitrator's equitable authority. The Arbitrator determined that Article 10, Section (b) of the parties' agreement did not provide any clear waiver of the rights afforded

under the Federal Back Pay Act. We have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the [CBA]." *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, United *Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Therefore, the Board will not substitute its, or DOC's, interpretation of the CBA for that of the Arbitrator. Thus, DOC has not presented a ground establishing a statutory basis for review. Thus, we find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to have exceeded his authority.

Based upon the foregoing, the Board finds no basis for turning aside Arbitrator Klein's Award. Therefore, we deny the Request in this matter.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia District 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.

August 23, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-14, Slip Opinion No. 1326 was transmitted *via* U.S. Mail and e-mail to the following parties on this the 29th day of August, 2012.

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