Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Housing and Community Development,	
Petitioner,	
and	PERB Case No. 09-A-08
	Opinion No. 1228
American Federation of Government Employees, Local 2725,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On June 5, 2009, the District of Columbia Department of Housing and Community Development ("DHCD", "Agency" or "Department") filed an Arbitration Review Request ("Request") in the above captioned matter. DHCD seeks review of an arbitration award ("Award") that sustained a grievance filed by the American Federation of Government Employees, Local 2725 ("Union" or "AFGE") on behalf of Annie Fitzgerald ("Grievant"), and promoted the Grievant to a grade 11 position effective June 21, 2007, with full retroactive back pay and benefits. (See Request at p. 4). DHCD asserts that the Arbitrator was without authority and exceeded his jurisdiction by directing DHCD to create a grade 11 position and promote the Grievant. (See Request at p. 4). The Union opposes the Request on substantive issues and also pleads for the Board to dismiss the Department's Request as untimely.

The issue before the Board is whether: (1) Petitioner's Request is timely pursuant to Board Rule 504.2; and (2) "the arbitrator was without, or exceeded his or her jurisdiction". D.C. Code § 1-605.02(6) (2001 ed).

II. Discussion:

"The [G]rievant is a long term career employee, having worked over twenty years in the [D.C.] Government. In September of 2002, she was promoted and appointed to a DS-9 position, Program Specialist, in the Residential and Community Services Division (RCS) of the Agency." (Award at p. 21). In February 2004, the [G]rievant was reassigned from RCS to the Development Finance Division ("DFD"), and was designated to work under the same position description ("PD") in a newly awarded grant program named Lead Safe Washington ("LSW"). (See Award at p. 21; Request at p. 2).

After being reassigned to DFD, the Grievant inquired with her RCS Supervisor, Mr. Mulderig, about being promoted to grade DS-11. (See Award at pgs. 21-22; Request at p. 3). Mr. Mulderig informed the Grievant that "she needed to be in the job for at least one year before he would consider any promotion." (Award at p. 22). "During 2005, [the Grievant] made numerous attempts to progress toward a promotion." (Award at p. 22). Several months intervened without resolution of the PD revision or her request for a promotion. (See Award at p. 22). "Between 2005 and 2007, [the Grievant] made several inquiries about her promotional status, but again the situation was not resolved in her favor." (Award at p. 22).

Although the Grievant was not granted a promotion, the Department "detailed [her] to a new division that was being established called the Property Acquisition and Disposition Division (PADD)." (Request at p. 3). However, the Grievant was dissatisfied with the transfer to PADD, and her position at PADD failed to provide her new opportunities for promotion. (See Award at p. 29; Request at p. 3).

Pursuant to the parties' collective bargaining agreement ("CBA" or "Agreement"), the Union submitted the matter to the grievance/arbitration provisions for resolution. The grievance proceeded to arbitration, and the issue presented for resolution was:

> Did the Agency violate the [CBA] and/or the [District Personnel Manual ("DPM")] when it allegedly treated the grievant unfairly and inequitably in regard to her reassignment/detail, and failure to promote. If so, what is the proper remedy?

(Award at p. 3).

The Union's position at the arbitration hearings asserted that:

> the [G]rievant [w]as . . . treated unfairly and inequitably. Moreover . . . the Agency illegally detailed and reassigned the [G]rievant into an ineffective position, where she was given no duties, no equipment, and poor working conditions. In addition, the . . . Agency failed to rightfully promote the grievant after she had received excellent performance evaluations, and she had performed admirably on the job.

(Award at p. 3).

Based upon these facts, the Union argued that the Agency "violated Articles 3, 9, 27, and 28 of the Agreement, and Chapter 8 of the DPM along with other pertinent parts and sections of the DPM." (Award at p. 3).

"The Department maintain[ed] that it [did] not violate[] the Agreement or any provisions of the DPM. The Agency [argued] that it . . . treated the grievant fairly and . . . that the [G]rievant was not in a career ladder position. Moreover, the Agency posits that the [G]rievant did not fulfill the requirements for a career ladder position. In addition, the Agency assert[ed] that it ha[d] justly exercised its Management right as provided in the CBA between the parties." (Award at p. 3).

Upon consideration of the parties' testimony and the evidence presented at the hearings, and assessing the credibility of the witnesses, the Arbitrator found that "the [Grievant's] position in question was set forth as a career ladder position." (Award at p. 24). The Arbitrator made the qualified observation that "[b]ecause a position is a career ladder position does not mean that the incumbent in the position is entitled to an automatic promotion. As has been previously discussed, certain conditions and requirements need to be met. Even when these have been attained, there is no requirement that an employee has an automatic entitlement to a promotion." (Award at p. 24). In addition, the Arbitrator noted that:

> the parties' "CBA . . . set[] forth obligations and responsibilities to which the parties have agreed. Article 28, POSITION MANAGEMENT AND CLASSIFICATION, addresses a number of issues. Sections A and B require that members of the bargaining unit be furnished with an accurate and up to date PD. Section C states in part: "The position description shall be kept current and accurate" At issue in this case is the question of whether the grievant was performing duties that were not accurately reflected in her PD.

(Award at p. 24).

Based on his assessment of the parties' testimony and evidence, the Arbitrator found that: (1) the Grievant had met the conditions for promotion and had been performing the duties of a DS 11; and (2) the Department had failed to provide the Grievant with an accurate PD, performance rating and promotion to DS 11 position. (See Award at pgs. 24-27). Accordingly, the Arbitrator found that "the Agency . . . violated Article 28A, B, C, and E of the CBA along with . . . [DPM] Chapter 8, specifically, sections 837 and 838."

The Arbitrator also found that after the Grievant was transferred to the PADD program, the Department failed to assign her any duties or provide a suitable working environment. (See Award at p. 28). Specifically, the Arbitrator observed:

> In sum, even if we assume that Director Edmond's had good intentions pertaining to the detail of the grievant, the subsequent events certainly give the appearance of retaliation. The fact is that the grievant was transferred without any prior consultation. She was placed in uncomfortable working conditions, and she was given no work assignments. It is difficult then to assume that the Agency action was in accordance with, i.e., "fully utilizes staff and maximizes its resources to achieve its goals and objectives." Accordingly, the Agency has violated Article 3, A1 and 3, Article 17B, and Article 27A (2) and (6) of the CBA. This is not to say that the Agency did not have the Management right to transfer the grievant. Rather, it is to say that the detail appears to have been a pretext, and that it was not a good faith effort to improve the effectiveness or efficiency of the Agency or to provide the grievant with a new opportunity.

(Award at p. 28-29) (citation omitted).

The Arbitrator also found that the Union made "a convincing argument for an award of retroactivity because of the testimony on the record." (Award at p. 30). In particular, the Arbitrator noted the Agency's failure to properly supervise the Grievant or comply with its duties under the CBA to provide a current and accurate account of her duties and responsibilities. (See Award at pgs. 30-31). Additionally, the Arbitrator stated that "[a]lthough the Agency did not have an absolute requirement to promote the [Grievant], her placement in a career ladder position entitled her to be promotion eligible to grade level 11 after she met the appropriate requirements. It appears that she did satisfactorily meet all of the basic requisites for promotion." (Award at p. 30-31). As a result, and based on his interpretation of the parties' CBA, the Arbitrator accepted the Union's proposed remedy of a retroactive temporary promotion, beginning June 21, 2007, the date the Agency issued the Notice of Detail to the Grievant. (See Award at p. 31). The Arbitrator commented that "[g]iven the treatment that the [G]rievant received regarding her "temporary detail," such an imposition could be viewed as being more punitive rather than constructive. However, the Agency could have acted constructively and promoted the grievant at that time. Instead, it chose a "temporary detail" assignment, subjecting the [G]rievant to an uncomfortable work situation. The evidence and testimony on the record point toward the detail as nothing more than a pretext, hence a retaliatory action. Instead of the [G]rievant being promoted, she was victimized. Accordingly, the constructive thing to do is to promote the [G]rievant as of June 21, 2007, the date of her Notice of Detail." (Award at p. 31).

Based upon the foregoing, the Arbitrator concluded that the Agency violated the "provisions of the CBA, namely Articles 3, A1 and 3, Article 17B, Article 27A(2) and (6), and Article 28 A and B." (Award at pgs. 31-32). Having sustained the Union's grievance, the Arbitrator ordered the Agency to comply with the following:

> 1. The [G]rievant's detail to the Home Again program will be terminated immediately and she will be returned and promoted to a permanent assignment. The promotion date is June 21, 2007, and the [G]rievant will receive all back pay and benefits in accordance with rule and regulation.
>
> 2. The [G]rievant will be provided with a current up to date PD to reflect grade 11 duties, functions, tasks, duties and responsibilities.
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> 3. DHCD will comply with the terms of Article 28, Section E of the CBA and the DPM Merit Staffing Plan and promote the [G]rievant retroactively, effective June 21, 2007, to a grade 11 position, pursuant to the upgraded functions she has performed for the Agency.
>
> 4. The Agency is ordered not to engage in any form of retaliation against the [G]rievant.

The Agency filed the instant Request alleging that "the [A]rbitrator exceeded his authority", as the award conflicts with provisions of the parties' CBA and, as such, is not derived from the essence of the agreement. (Request at p. 2).[1] The Union opposes the Request and contends that; (1) "the ARR is untimely, as it was required to be filed on June 2, 2009, and was not filed until June 5, 2009"; and (2) the Award does not fail to draw its essence from the Collective Bargaining Agreement as it does not conflict with CBA Article 28, Section G or Article 4, A., the Management Rights clause." (Opposition at p. 1).

The Union filed a pleading styled "Motion to Strike Agency "Response" to the Union's Opposition to Arbitration Review Request" ("Motion"). The Union submits that the Board's Rules relating to grievance arbitration review requests do not provide for a response to an opposition to an arbitration request for review. "For this reason and the reasons cited in the Union's Opposition to the Agency's [Request], the Union requests that the [Board] deny the Agency's [Request] in its entirety." (Motion at p. 1).

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

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

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[1] Board Rule 538.3(a) provides "[t]hat 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.

2. If "the award on its face is contrary to law and public policy"; or
3. If the award "was procured by fraud, collusion or other similar and unlawful means."

D.C. Code § 1-605.02(6) (2001 ed.).

A. Timeliness: Agency Response to Union's Opposition and Union's Motion to Strike.

Concerning the issue of timeliness, the Union asserts that the Agency's request does not comply with the twenty (20) day requirement of Board Rule 538.1. In support of this position the Union states that:

> [t]he . . . Board Rules require that an Arbitration Review Request must be filed "not later than twenty (20) days after service of the award" to be timely. [Board] Rule 538.1. Those rules further provide for five extra days "whenever a period of time is measured from the service of a pleading and service is by mail" [Board] Rule 501.4. The five extra days applies only to service by mail however and not by email.

(Opposition at p. 4).

The Union claims that "the Arbitrator submitted his award dated May 11, 2009, by email dated May 13, 2009 . . . . at the Agency counsel's request." (Opposition at p. 4). As evidence of its claim, the Union offered the attached document styled "Exhibit D"; an email from the Arbitrator to the OLRCB, dated May 13, 2009, which provides:

> In response to Ms. Akers [Agency Counsel's] request I am forwarding an email copy of the award in the above referenced case.

(Opposition at p. 4).

Based on this email, the Union presents the following argument:

> [because] the award, rendered on May 11, 2009, was served by email on May 13, 2009, the Agency is not entitled to the extra five days for service of the award by mail. This is particularly so in light of the Agency's specific request for service by email. As a result, the Agency's [Request] was due 20 days following May 13, 2009 — that is, June 2, 2009. The Agency did not file its [Request] with the [Board], however, on June 2, the day the filing was due. Instead, it filed the [Request] on June 5, 2009. As such, the Agency's [Request] filing was three days late. As this was an

> initial filing, there are no exceptions for this late filing. [See Board] Rule 501.1 and 501.3. The [Board] has held time and again that its time limitations are mandatory and jurisdictional. See, e.g., *Public Employee Relations Board D.C. Metropolitan Police Department,* 593 A.2d 641 (1991). As such, the PERB does not have jurisdiction to consider this ARR and it must be dismissed in its entirety.

(Opposition at pgs. 4-5) (footnote omitted).[2]

In addition, the Union asserts that the Board in *AFSCME, District Council 20, Local 2401 and Office of the Attorney General, District of Columbia,* 54 DCR 2951, Slip Op. No. 856, PERB Case No. 07-A-01 (March 30, 2007), "found that an Arbitrator's email of an award — particularly when requested by the parties — constitutes service. It further found that the party seeking [Board] review of the Arbitrator's award had twenty (20) days from the date of the email and not twenty (20) plus five (5) days to file any [Request] (finding that the five extra days for mail service under PERB Rule 501.4 did not apply to email service)." (Opposition at p. 5).

Continuing with its analysis of Slip Op. No. 856, the Union states that the:

> [Board] considered AFSCME's claim that under [Board] Rule 501.16 service by email did not constitute proper service of the Arbitrator's award. The [Board] held otherwise, noting that [Board] Rule 501.16, which describes service as personal delivery, postal service, and facsimile applies to service to the Board, but did not apply to service of an award by an Arbitrator. This was especially so given that the parties had agreed that the award "could be issued by [email]." In the instant case, the Agency not only agreed, but requested to receive the award by email. See Exhibit D. As such, the email transmission of the Award constituted service by the Arbitrator, such that the Agency was not entitled to the five extra days for mail service of the Arbitrator's Award, rendering the [Request] due [to be filed with] [the Board] on June 2, 2009. As the time requirements for filing are jurisdictional, mandatory, and subject to no exceptions for initial pleadings (as this was), the Agency's [Request] is untimely and must be dismissed.

(Opposition at pgs. 5-6).

The Agency submitted a pleading styled "Response to Respondent's Opposition to Petitioner's Arbitration Review Request" ("Response to Opposition"), in which it refuted the

[2] The Union also contends in a footnote (FN 2), that it did not receive the Request until June 12, 2009, "despite [Board] Rule 501.1 and 501.3, stating that service must be made concurrently upon the other party." The Union, as evidence, offers the attached Exhibit C.

Union's allegations regarding the timeliness of its Request. The Agency disagrees with the Union's interpretation of Slip Op. No. 856, and maintains that:

> the facts in that case are completely inapplicable to this case. In *AFSCME, District Council 20 and Office of the Attorney General,* the Board based its decision that the Arbitrator's award had been served by email on the fact that the transcript reflected that the parties agreed that the Arbitrator could issue the award via electronic mail in a [PDF] format. *Id.* at 11. There was no such agreement in this case.

(Response to Opposition at p. 2).

In rebuttal to the Union's claims, the Agency offered the following factual scenario:

> What happened in this case was that on May 11, 2009, the Arbitrator sent DHCD an invoice for his services. No [A]ward was attached to the invoice. See Exhibit A. DHCD then forwarded the invoice to OLRCB. Upon reviewing the invoice, OLRCB attorney Darnita Akers noticed that the invoice listed an incorrect suite number for OLRCB. Ms. Akers then called the Arbitrator and left him a message stating that she believed the [A]ward and invoice may have been misdirected and requested that he forward another copy of the [A]ward to OLRCB. See Exhibit B. The Arbitrator responded by emailing a copy of the [A]ward on May 13, 2009. See Exhibit C. OLRCB never considered this emailed copy of the Award to be the official [A]ward for two reasons. First, the emailed copy of the [A]ward was not signed. Second, the Arbitrator emailed the [A]ward in Word Perfect format. Because OLRCB computers do not have the appropriate software to read Word Perfect files, the emailed document had to be converted. This caused the document to have formatting errors. OLRCB did not contact the Arbitrator about these problems with the emailed copy of the [A]ward, because the next day, May 14, 2009, OLRCB received a signed copy of the [A]ward in the mail. OLRCB at all times considered receipt of the signed [A]ward by mail to be service of the [A]ward.

(Response to Opposition at pgs. 2-3).

Additionally, the Agency contends that Board Rule 501.16 does not provide for service by email. (See Response to Opposition at p. 3). The Agency argues that, in light of its alleged facts and reading of Board Rule 501.16, the holding in *AFSCME, District Council 20, Local 2401 and Office of the Attorney General, District of Columbia*, Slip Op. No. 856, is not

controlling. (See Response to Opposition at p. 3). As a result, the Agency requests that the Board reject the Union's Opposition.

Board Rules 538.1, 501.4 and 501.5 provide in relevant part as follows:

538.1 – Filing

> A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board **not later than twenty (20) days after service of the award.**

(Emphasis added).

538.2 - Opposition

> An opposition to the arbitration review request may be filed with the Board by the other party to the arbitration proceeding not later than fifteen (15) days after service of the request. If the Board finds that there may be grounds to modify or set aside the arbitrator's award, it shall notify the parties who will then have fifteen (15) days from the time of notice to file briefs concerning the matter. Oral arguments may be permitted at the discretion of the Board.

501.4 - Computation - Mail Service

> Whenever a period of time is **measured from the service of a pleading and service is by mail, five (5) days shall be added to the prescribed period.**

(Emphasis added).

As noted above, AFGE argues that pursuant to the Board's holding in *AFSCME, District Council 20, Local 2401*, Slip Op. No. 856 *infra*, service *via* email is sufficient when the party to be served has consented in writing to service *via* email. AFGE asserts that because DHCD provided their consent, as evidenced by the email from the Arbitrator to OLRCB on May 13, 2009, that the Agency had until June 2, 2009, to file a request. Therefore, AFGE argues that the Agency's filing on June 5, 2009, is untimely.

As to the applicability of Board Rule 501.16, the Board has held:

> that Board Rule 501.16, concerns the service of a pleading filed with the Board and not the service of an award issued by an arbitrator on parties that participated in an arbitration proceeding. Even assuming *arguendo* that Board Rule 501 .16 is applicable in

> this case, we have previously found that "[the] Board's Rules exist to establish and provide notice of a uniform and consistent process for proceeding in matters properly within our jurisdiction. In this regard, we do not interpret our rules in such a manner as to allow form to be elevated over the substantive objective for which the rule was intended." *District of Columbia General Hospital and Doctors' Council of the District of Columbia General Hospital*, 46 DCR 8345, Slip Op. No. 493 at p. 3, PERB Case No. 96-A-08 (1996).

AFSCME, District Council 20, Local 2401, Slip Op. No. 856 at p. 12.

The present case is distinguishable from the Board's holding in *AFSCME*. First, the parties' pleadings do not indicate that the parties agreed to accept service of the Arbitrator's award *via* email or stipulate to the Board that service of the award *via* email would be sufficient under the Board Rules. Although the Award may have been transmitted to OLRCB on May 13, 2009, AFGE does not dispute that the Award was initially served by U.S. Postal Service. Moreover, neither party contends that the Award transmitted by email on May 13, 2009, differs in any way from the Award issued through the U.S. Postal Service on May 11, 2009. Furthermore, we find no reasonable *basis for* discounting [OLRCB's] receipt of the May 11, 2009 Award for purposes of commencing the time that DHCD had to file its Arbitration Review Request under Board Rule 538. In light of the above, the Board finds that AFGE's argument is not persuasive and without merit. See *Id.* Furthermore, there is no dispute that the Award was served to the parties by mail through the U.S. Postal Service on May 11, 2009. Therefore, pursuant to Board Rule 538.1, DHCD's Request filed on June 5, 2009, was within twenty-five days after the May 11, 2009 service date. Thus, DHCD's filing is deemed timely.

The Board denies the Union's Motion to Strike for the following reasons. Although the Board Rules contain no provision for the submission of a response to the opposition to an arbitration review request, we have also found no provision under our rules expressly prohibiting supplemental pleadings (*i.e.* reply briefs, response to opposition, *etc.*). See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip Op. No.282, PERB Case No. 87-A-04 (1991). Also, the Agency's Response merely addresses issues raised in the Union's Opposition that merited a reply. As a result, a consideration of the arguments contained in the Agency's Response is appropriate for the Board's disposition of this case.

B. Agency's Request, Union Opposition and Board Analysis

The Agency contends the Arbitrator exceeded his authority "by ordering the Agency to create a grade 11 position and promote Ms. Fitzgerald." (Request at p. 4). Principally, DHCD asserts that the "award conflicts with the express terms of the collective bargaining agreement in place between the parties. Thus, the award fails to derive its essence from the agreement and should be vacated." (Request at p. 5). In support of its position, the Agency cites *Cement*

Division, Nat'l Gypsum Co. v. United Steelworkers for America, AFL CIO, Local 135, which stated that:

> 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.

793 F.24 759, 765 (6th Cir. 1986).

Specifically, the Agency claims that the Award conflicts with two provisions of the parties' CBA:

Articles 4, and 28, Section G of the Parties' CBA

The Agency claims that the:

> award orders the Agency to promote Ms. Fitzgerald to a grade 11 position, "pursuant to the upgraded functions she has performed for the Agency." This remedy is improperly predicated upon the Arbitrator's finding that Ms. Fitzgerald was performing "upgraded functions." In other words, the Arbitrator based his award on his finding that Ms. Fitzgerald was performing grade 11 level work while in a grade 9 position. This is improper because the issue of whether Ms. Fitzgerald was doing higher grade level work was not properly before the arbitrator. Article 28, Section G of the CBA states that "[v]iolations of classification issues/equal pay for equal work shall be appealed through the procedures outlined in the District Personnel Manual, Chapter 1 1A, §1110." Classification issues are not appropriate for the grievance and arbitration process.

(Request at p. 5).

In addition, the Agency suggests that:

> Article 28, Section G, is analogous to § 7121(c)(5) of the Federal Service Labor Management Relations Statute which provides that the classification of any position that does not result in the reduction of pay or grade of an employee is not subject to the grievance and arbitration process. The Federal Labor Relations Authority (FLRA) has interpreted this provision to mean that

> arbitrators have no authority to hear and rule on grievances concerning whether the grievants are entitled to permanent promotions based on the grade level of duties assigned to and performed by the grievants. For example, in *US Dep't of Transp. Fed Aviation Admin.* v. *Prof I Air-Ways Sys. Specialists,* 62 FLRA 519 (2008), the FLRA set aside an arbitration award where the arbitrator had improperly awarded the grievants retroactive permanent promotions. The FLRA has consistently held that classification matters within the meaning of § 7121(c)(5) are excluded from the grievance procedure. *See, e.g., AFGE, Local 987,* 58 FLRA 453, 454-55 (2003); *AFGE,Local2142,* 51 FLRA 1140, 1142 (1996).

(Request at p. 6).[3]

Secondly, the Agency claims that the Award conflicts with Article 4 of the parties' CBA. The Agency alleges that:

> Article 4 of the CBA provides that the right "to hire, promote, transfer assign and retain employees" and "to determine ... the number, types, and grades of positions of employees" is vested solely with management." So, according to the CBA, only the Agency has the authority to create new positions and determine the grade level of existing positions. Arbitrator Fischetti's award forces the Agency to create a grade 11 level position for Ms. Fitzgerald that does not currently exist. This impermissibly infringes on the Agency's authority. The express terms of the CBA provide that only management has the right to determine the number of positions within an organization. By ordering the Agency to create a new position based on Ms. Fitzgerald's perceived upgraded functions, Arbitrator Fischetti's award conflicts with those express provisions. As such, it is clear that Arbitrator Fischetti has exceeded his jurisdiction in this case.

(Request at pgs. 6-7).

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[3] The Agency refers to 5 U.S.C. § 7121 - Grievance Procedures, which provides in pertinent part:

> (c) The preceding subsections of this section shall not apply with respect to any grievance concerning—
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> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

The Union disagrees with the Agency's assertion that the:

> Award conflicts with Article 28, Section G of the CBA, which specifies that "violations of classification issues/equal pay for equal work shall be appealed through the procedures outlines in the District Personnel Manual, Chapter 11A, Section 11 10." It is difficult to understand the basis of this argument as a "classification" is "a determination to establish or change the title, series, grade or pay system of a position based on application of published position classification standards or guides." DPM Section 1 112.1; see also *Soc. Sec. Admin., Office of Hearings & Appeals,* 55 FLEA 778, 779-80 (1999) (quoting 5 C.F.R. § 511.101(c)) (the term "classification" is "the analysis and identification of a position and placing it in a class under the position-classification plan established by [the Office of Personnel Management] under chapter 51 of title 5, United States Code."). There was simply no such determination in the Arbitrator's Award.

(Opposition at p. 6).

In addition, the Union contends that the Arbitrator "made the factual determination that, based upon a previously existing position (that is previously created and previously classified by the Agency), the Grievant was entitled to her career-ladder position, per the CBA and the D.C. regulations. This is simply not a classification decision." (Opposition at pgs. 7-8). Therefore, the Union argues that the neither Article 28 nor 5 U.S.C. § 7121(c)(5) (and the corresponding case law) are applicable in the present matter. (See Opposition at pgs. 7-9).

The Union also claims that the Board has upheld "permanent promotion cases that rest on a career-ladder position, *see D.C. WASA and AFGE Local 631,* 48 DCR 8137, PERB Op. No. 652 (Aug. 24, 2001); *Federal Energy Regulatory Commission and AFGE Local 421,* 58 FLRA 596, 58 FLRA No. 150 (June 12, 2008); *U.S. Environmental Protection Agency, Region 5, Chicago, Illinois and American Federation of Government Employees, Local 704,* 61 FLRA 247, 106 FLRR-1 79, 105 LRP 25633 (Sept. 16, 2005); *NFFE, Local 2030 and US. Dep't of the Interior,* 56 FLRA No. 110, 56 FLRA 667, FLRR 1-1151 (Sept. 21, 2000); *SSA and AFGE Local 3342,* 51 FLRA 1700, 51 FLRA No. 143, 96 FLRR 1-1082 (July 31, 1996), as those cases do not require the Arbitrator to classify a position, as that job has been accomplished already via the Agency's own efforts." (Opposition at p. 9). In addition, the Union asserts that:

> neither *AFGE Local 987,* 58 FLRA 453, nor *AFGE Local 2142,* 51 FLRA 1140, cited by the Agency, ARR, at 6, involve employees seeking promotion pursuant to their career-ladder positions, and in the former case, the grievant merely claimed that, at his previous agency, he had performed similar duties and therefore should be classified at a higher grade at the new agency, plainly a highly problematic case. As such, none of the Agency's cases provide any

> persuasive evidence that the Arbitrator --in this career-ladder case --classified a position, allegedly rendering it violative of Article 28, Section G.

(Opposition at p. 10).

As to Board precedent, the Union believes that the Board, in *D.C. Fire and Emergency Services Dept. and AFGE Local 3721,* 52 DCR 2505, Slip Op. No. 728, PERB Case No. 02-A-08 (2005) and *University of the District of Columbia v. University of the District of Columbia Faculty Association,* 37 DCR 5666, Slip Op. No. 248, PERB Case No. 90- A-02 (1990), has held that an arbitrator's "award of a career-ladder promotion draws its essence from the CBA." (Opposition at p. 10). In addition, the Union states that in *D.C. WASA and AFGE Local 631,* 49 DCR 11123, Slip. Op. No. 687, PERB Case No. 02-A-02 (2002), a career-ladder case like the instant one, the Board:

> held that the arbitrator did not exceed his authority when ordering a career ladder employee retroactively permanently promoted after the Agency failed to do so. The Board upheld the arbitrator's finding that the grievant was hired into a career-ladder position and "WASA had improperly withheld the grievant's promotion to the DS-13 level . . . [and] as a result . . . ruled that (1) the grievant be promoted to the DS-13 level; and (2) promotion should be retroactive. *Id.* This case — identical to the instant case, except for the absence of a retaliation finding in the WASA case (making the instant case even more compelling) — governs the matter currently before the Board.

(Opposition at p. 11).

The Board has 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 [parties' 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). Furthermore, an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract." *Misco, Inc.*, 484 U.S. at 38. The Board has also explained that by submitting a matter to arbitration "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based." *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); D. *C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

Moreover, in reviewing a labor arbitrator's award, the Court of Appeals held in *Michigan Family Resources, Inc. v. Service Employees International Union Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007), that the Court will consider questions of procedural aberration, asking whether the arbitrator acted outside his authority by resolving a dispute not committed to arbitration, whether the arbitrator committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award, and whether the arbitrator, in resolving any legal or factual disputes in the case, was 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; overruling *Cement Divisions, Nat. Gypsum Co. (Huron) v. United Steelworkers of America, AFL-CIO-CLC, Local 135,* 793 F.2d 759. See *MPD and FOP/MPD Labor Committee*, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001).

In the present case, DHCD's arguments are merely a disagreement with the Arbitrator's findings that the Grievant was performing work at a higher grade. Based upon his interpretation of the parties' CBA and the DPM, the Arbitrator determined that the Agency's failure to promote the Grievant was improper, and an appropriate remedy was to promote the Grievant to a Grade 11. "[T]his Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." *District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246*, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). Here, the parties submitted their dispute to the Arbitrator. Neither DHCD's disagreement with the Arbitrator's interpretation of the articles of the parties' CBA, nor the Agency's disagreement with the Arbitrator's findings and conclusions, are grounds for reversing the Arbitrator's Award. See *MPD and FOP/MPD Labor Committee (on behalf of Keith Lynn)*, Slip Op. No. 845, PERB Case No. 05-A-01 (2006).

Moreover, the Board has held that an Arbitrator has equitable power concerning remedies unless restricted by contract. *D.C. Metropolitan Police Department v. FOP/MPD on behalf of Vernon Gudger*, 48 DCR 10989, Slip Op. No. 663, PERB Case No. 01-A-08 (2001). DHCD has failed to cite any language in the parties' CBA which limits the Arbitrator's equitable powers. As a result, the Board does not have a basis to nullify or reverse the Arbitrator's Award.

The Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.* 363, U.S. 593, 597 (1960), that arbitrators bring their "informed judgment" to bear on the interpretation of collective bargaining agreements, and that is "especially true when it comes to formulating remedies." [Also, t]he . . . courts have followed the Supreme Court's lead in holding that arbitrators have implicit authority to fashion appropriate remedies. . . (See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6 (May 13, 2005).

As stated above, the Agency's disagreement with the Arbitrator's findings and conclusions does not present a statutory basis for review. Furthermore, nothing in the record suggests that fraud, a conflict of interest or dishonesty infected the Arbitrator's decision or the arbitral process. In addition, it is clear that the Arbitrator, in resolving any legal or factual disputes in the case, was arguably construing or applying the parties' CBA. Therefore, the Board

finds that the Arbitrator was acting within the scope of his authority. Thus, the Board cannot reverse the Award on this ground.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The District of Columbia Department of Housing and Community Development'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
Washington, D.C.

November 21, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-A-08 was transmitted *via* Fax and U.S. Mail to the following parties on this the 21st day of November 2011.

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Secretary