

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify the office of any formal 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.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD**

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In the Matter of:	)	
	)	
District of Columbia	)	
Department of Corrections,	)	
	)	
Petitioner,	)	PERB Case No. 96-A-02
	)	Opinion No. 459
and	)	
	)	
Fraternal Order of Police/	)	
Department of Corrections	)	
Labor Committee,	)	
	)	
Respondent.	)	

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**DECISION AND ORDER**

On December 13, 1995, the Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of the District of Columbia Department of Corrections (DOC) filed an Arbitration Review Request in the above-captioned proceeding. OLRCB seeks review of an arbitration award (Award) that sustained in part and denied in part a grievance pursued to arbitration by the Fraternal Order of Police/Department of Correction Labor Committee (FOP) on behalf of Wayne Luck, a bargaining unit employee (Grievant). The Arbitrator concluded that DOC had violated certain provisions of the parties' collective bargaining agreement when it failed to compensate the Grievant at higher-grade pay during his extended involuntary detail to a higher-grade position. However, the Arbitrator denied the Grievant's request that he be permanently and noncompetitively promoted to the higher-grade position. The Award included a make-whole remedy of backpay with interest.

OLRCB contends that the Arbitrator was without authority or exceeded the jurisdiction granted to him and that the Award is contrary to law and public policy. OLRCB requests, for reasons stated in its Arbitration Review Request, that the Board allow the parties to present briefs on the merits of its request to review the Award in accordance with Board Rule 538.2. FOP filed an Opposition to the Arbitration Review Request contending that OLRCB has presented no statutory basis for review, and that the Request should be dismissed.

Under the Comprehensive Merit Personnel Act, D.C. Code Sec. 1-605.2(6), the Board is authorized to "[c]onsider appeals from arbitration awards pursuant to grievance procedures: Provided, however, that such awards may be reviewed only if the arbitrator

was without, or exceeded his or her jurisdiction; the award on its face is contrary to law and public policy... ." The Board has considered the basis of OLRCB's request for review of the Arbitrator's Award, the pleadings of the parties and applicable law, and concludes that the Request presents no statutory basis for review of the Award. <sup>1/</sup>

OLRCB states that the parties' collective bargaining agreement limits a grievance to the issues contained in the step 2 filing. OLRCB asserts that the Arbitrator exceeded his authority by awarding backpay with interest despite the fact that the interest was not requested by the Grievant at step 2 of the grievance proceeding. It is well settled that an arbitrator possesses the equitable authority to fashion an award to make the grievant whole for the violation found. See, D.C. General Hospital and AFGE, Local 631, AFL-CIO, 41 DCR 2734, Slip Op. No. 316, PERB Case No. 92-A-03 (1992), and the cases cited therein. OLRCB does not contend that the violation found concerned an issue not before the arbitrator. Unless expressly restricted by contract or law, we have recognized awards of backpay that included interest as within an arbitrator's equitable remedial authority to make a grievant whole for the loss of pay as well as the period of forbearance from this pay. See, e.g., University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, Slip Op. No. 321, PERB Case No. 92-A-05 (1992).

OLRCB further contends that the Award is contrary to law and public policy because "the [A]rbitrator relied on 'promises' made to the Grievant as a basis for making the [A]ward retroactive to the earliest possible date." OLRCB cites no law or public policy that the Award contravenes by turning, in part, on assurances, promises or other representations made by DOC officials to the Grievant.<sup>2/</sup> An arbitrator may properly base his decision on the

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<sup>1/</sup> Pursuant to Rule 538.2, the parties are afforded an opportunity to file briefs "[i]f the Board finds that there may be grounds to modify or set aside the arbitrator's award... ." In view of our determination that OLRCB's Arbitration Review Request presents no statutory basis for review, no grounds exist for setting aside or remanding the Award. Therefore, OLRCB's request is denied.

<sup>2/</sup> OLRCB quotes an Office of Employee Appeal decision, Franklin v. D.C. Dep't of Human Services, OEA 1602-0024-88, citing Riplinger v. United States, 695 F 2d. 1163 (1993), which states as follows: "We note that government employees are not entitled to rely on the promises by government officials concerning an appointment to a particular grade. The appointment of government  
(continued...)"

evidence before him. The Board lacks jurisdiction to review an arbitrator's findings of fact based on credibility determinations and assessments of the probative value of record evidence. See, University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 38 DCR 1580, Slip Op. No. 262, PERB Case No. 90-A-08 (1990). As previously discussed, the Arbitrator possessed the equitable authority to make the Grievant whole retroactively to the time the violation is determined to have occurred unless otherwise expressly limited.

Accordingly, OLRCB has not presented grounds to support a statutory basis for modifying or setting aside the Award; its request for review is therefore denied.

ORDER

**IT IS HEREBY ORDERED THAT:**

The Arbitration Review Request is denied.

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

January 17, 1996

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<sup>2</sup>(...continued)  
employees is a discretionary act and the emoluments they are entitled to receive is determined by statute (or regulation) not by prior representations respecting grade or pay." However, nothing in this dictum can be construed as precluding an arbitrator from considering such representations as "a basis" in rendering an award concerning a dispute over such matters. Moreover, OLRCB cites no "statute (or regulation)" governing the issue before the Arbitrator which the Award contravenes.