GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
University of the District of Columbia, Petitioner,	
and	PERB Case No. 90-A-08 Opinion No. 262
University of the District of Columbia Faculty Association/NEA, Respondent.	

DECISION AND ORDER

On May 4, 1990, the University of the District of Columbia (UDC) filed an Arbitration Review Request with the Public Employee Relations Board (Board) seeking review of an Arbitrator's Award issued on April 11, 1990. The Arbitrator sustained a grievance filed by the University of the District of Columbia Faculty Association/NEA, (Union), on behalf of Robert Artisst (Grievant), a member of the UDC faculty, Department of Media Services, Learning Resources Division. UDC contended that (1) the Arbitrator exceeded his jurisdiction, (2) the award on its face was contrary to law and public policy, and (3) the award was procured by fraud, collusion or other similar and unlawful means "[i]n that evidence central to [UDC's] position was arbitrarily and wrongfully excluded and thereby the Award does not draw its essence from the parties' collective bargaining agreement." UDC further contended that "[t]he [A]rbitrator was without, or exceeded his jurisdiction by extending his award to a disciplinary action that was not an issue in this arbitration." (Arbitration Review Request, p.2)

On June 21, 1990, the Union timely filed a response opposing the Board's review of the Arbitration Review Request in which it asserted that the Arbitrator was within his authority in "exercis[ing] his broad discretionary judgement in deciding what [evidence] should and should not be admitted." Regarding UDC's second ground for review, the Union contended that UDC's objection to the relief fashioned by the Arbitrator in sustaining the grievance before him does not present any statutory basis for review, since arbitrators are free to devise remedies for contractual violations.

For the reasons addressed below, we conclude that the objections raised by UDC do not establish a statutory basis for review of this Award and therefore deny its request.

The Arbitrator concluded that UDC's actions violated Article VII Section C (prohibition against harassment) and Article XIX(K)(2) (jury-duty leave policy) of the parties' Fourth Master Agreement. [1]/ While the Arbitrator acknowledged that "management has broad authority to assign and schedule work" he concluded that it "must assign employees and make work schedule changes in a manner consistent with and not in violation of the Agreement." (Award, pp. 21 and 22)

The Arbitrator's decision was based on his conclusion that the Grievant had reasonably conformed to the work schedule and the Learning Resources Division policy that he believed to be in effect during the week in question. The Arbitrator found that notwithstanding UDC's authority to change the Grievant's work schedule, it did not refute the testimonial and documentary evidence that it had failed to consult with the Grievant as required by the governing collective bargaining agreement before

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[1]/ Article VII Section C of the Fourth Master Agreement provides:

> A bargaining unit member shall be free from unwarranted interference or harassment in the performance of duty. Members of the Administration shall be free from unwarranted interference or harassment by the Association and any of its representatives.

Article XIX Section K(2) provides:

> A faculty member who serves as a member of a jury shall be permitted to be absent from duties without loss of pay and without charge against any leave. If, after reporting for jury duty, it is determined that the faculty member's services are not required and the person is dismissed, if time permits, the person is required to return to work. If the person is paid for jury duty, the check must be endorsed to the University unless the individual has been granted leave of absence without pay.

allegedly changing that schedule, nor had it provided the Grievant reasonably adequate notice before making the asserted change. The Arbitrator found that the Union had provided substantial evidence of UDC's disparate treatment of the Grievant so as to justify a finding of harassment in violation of Article VII Section C of the parties' agreement. The Arbitrator also concluded that UDC violated Article XIX Section K(2), concerning the jury leave policy which was, as stipulated by the parties, an issue before the Arbitrator. Based on these findings, the Arbitrator reversed UDC's actions against the Grievant and awarded a make-whole remedy.

UDC objected to the Arbitrator's exclusion of certain evidence concerning the Grievant's receipt of a disputed notice of a change in his work schedule. UDC argued that the evidence was "central and decisive" to its position and thus its exclusion has resulted in a decision based on the lack of this relevant evidence. UDC contended that the Arbitrator thereby exceeded his authority and effectively denied UDC "what it had bargained for, a reasonably fair determination through arbitration." (Petitioner's Points and Authorities, p.10). Consequently, the Award is said to be contrary to law and public policy. UDC further argued that the evidentiary exclusions have engendered an award procured by unlawful means "in that it was made after arbitrarily excluding the University's relevant evidence." (Arbitration Review Request, p. 10)

D.C. Code Section 1-605.2(6) authorizes the Board to review grievance arbitration awards "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[.]" With respect to UDC's first objection, we cannot say that by such evidentiary exclusions, the Arbitrator's actions or the Award meet any of the above statutory criteria for review. The crux of UDC's argument is that the excluded evidence was "central and decisive" [2]/ to its position and that the Arbitrator's Award was based on the lack of evidence. The flaw in UDC's objection is the impossibility of concluding that, as it would characterize

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[2]/ UDC cites Hoteles Condado Beach et al. v. Union de Tronquistas de Puerto Rico, Local 901, 763 F.2d 34 (1st Cir. 1985), for the proposition that the exclusion of central and decisive evidence so affects the rights of a party that it may be said that the party was deprived of a fair hearing. That case, of course, was decided under a different statute and a specific provision with no counterpart in the CMPA provision governing our review (see 763 F.2d at 40, citing 9 U.S.C. Sec. 10(c)). We treat the asserted standard for reversal hereafter at p. 7 - 8.

the Award, the Arbitrator's result was possible only because the evidence in question was excluded, i.e., that the evidence was indeed "central and decisive." We note first that the evidence in question went to whether the Grievant was given reasonable notice of a change in his work schedule, a matter relevant to the harassment allegation of the grievance but not the only factor upon which the Arbitrator based his conclusion that the Grievant had been harassed in violation of the agreement. [3]/

Three pieces of evidence were excluded: a profferred document described as a revised work schedule for the Grievant; testimony by the Grievant's supervisor that the witness had assigned his secretary to deliver to Grievant a copy of the revised work schedule and that the secretary informed the witness that she had done so; and testimony by the secretary as to delivery. The first two pieces of evidence are hearsay -- neither, if fully credited, could establish as a fact that the Grievant was provided notice. We may assume that it would have been better practice for the Arbitrator to have admitted each of these items, that is, to have erred on the side of inclusion of profferred evidence since this case was tried to the Arbitrator who was authorized to determine the appropriate weight to which any piece of evidence was entitled. But the CMPA does not give us general supervisory power over grievance arbitrators, and in any event it cannot be said that the exclusion of hearsay is fatal to a decision for the other side.

We are left, then, with the exclusion of the secretary's testimony. Assuming arguendo that the exclusion of testimony that "so affects the rights of a party that it may be said that

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[3]/ Among the other factors were: (1) the charge of absence-without-leave notwithstanding the fact that Grievant worked the maximum of 5 full days permitted by the agreement, Article XVII, Section B (7), during the week in question, (2) the fact that the Grievant had a substantial accumulation of leave time when these events occurred and had no record of abusing leave, and (3) his superiors' refusal to grant the Grievant educational leave on an equal basis with other employees prior to the week to which the 12 hours of AWOL were attributed but within the period of his jury service. See Award pp. 22-23. Moreover, the Arbitrator also based his Award on his conclusion that UDC had also violated Article XIX Section K(2), the other alleged contractual violation concerning jury-leave policy which the parties stipulated was before the Arbitrator. The Arbitrator concluded "that management's purported changes of the [G]rievant's work schedule during the period of his jury duty made such jury duty more burdensome and was an interference with his court leave rights under the Master Agreement." (Award, p.23).

he was deprived of a fair hearing" (Newark Stereotypers' Union v. Newark Morning Ledger, 397 F.2d 594, 599 (3rd Cir.), cert. denied, 393 U.S. 954 (1968), quoted in Hoteles Condado Beach, 763 F.2d at 40, cited supra n.2) would invoke one of our statutory grounds of jurisdiction, we cannot say that this testimony would have been decisive so that its exclusion deprived UDC of a fair hearing. This conclusion is based on the following considerations:

The parties disagree as to what UDC, at the hearing, asserted that testimony would establish. UDC asserts in its Points and Authorities that the secretary would have testified "that she had personally handed the notice to [the Grievant]" (P&A at 6), whereas the Union asserts, to the contrary, that the UDC offer was that the secretary would testify "that she placed a copy of the revised schedule in [the Grievant's] mailbox" (Opposition to Arbitration Review Request at 6 n.3). These contradictory assertions are all that is before us, as no transcript was taken of the proceeding.

This, therefore, is the situation before us; the CMPA gives us specifically limited jurisdiction in such a proceeding; the parties disagree in their assertions to us as to what UDC asserted at the hearing concerning the content of the testimony that was excluded; and there is no way for us to resolve the disagreement because of the absence of a transcript. In this situation, we cannot conclude that the exclusion of this testimony provides the first statutory basis for PERB review of the arbitration award.

With respect to UDC's contention that the evidentiary exclusions generated an award that is on its face contrary to law and public policy, UDC does not cite any law that mandates a contrary decision nor a public policy that the Award transgresses. See, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, Council 20, 34 DCR 3605, Slip Op. No. 155, at pp. 4-5, PERB Case No. 86-A-03 (1987).

Finally, we note that D.C. Code Section 1-605.2(6)'s third basis for the Board to review an arbitration award is that it has been "procured by fraud, collusion or other similar and unlawful means[.]" (emphasis added). Under this criterion, the "means" in "similar and unlawful means" is conjunctive, not disjunctive. In this regard, UDC has provided no basis for finding that the Arbitrator's exclusion of "the University's relevant evidence" has resulted in an award procured by unlawful means similar to fraud or collusion. Consequently, we find no basis for this contention.

UDC also objected to the Arbitrator exceeding his jurisdiction "[b]y extending his award to [a] disciplinary reprimand," which was never grieved. Since the issue in arbitration concerned only whether UDC had violated Article VII Section C (concerning prohibition of harassment by the Union or UDC) or Article XIX Section K(2) (concerning jury duty leave policy) of the parties' collective bargaining contract, UDC argued that the Arbitrator lacked the authority to address the separate issue of discipline. We find this objection to be completely without merit.

The Board has on numerous occasions held that an arbitrator has the full range of equitable powers to fashion an appropriate remedy where the parties' contract does not specifically limit this authority. Included within this range of equitable powers is the authority to fashion a remedy that, based on the infraction found, restores the status quo. See e.g., District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee, 36 DCR 3339, Slip Op. No. 218, PERB Case No. 89-A-01 (1989); District of Columbia, Department of Finance and Revenue and American Federation of State, County and Municipal Employees, Council 20, Local 2776, 36 DCR 3334, Slip Op. No. 217, PERB Case No. 88-A-01 (1989), and University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 36 DCR 2472, Slip Op. No. 216, PERB Case No. 87-A-09 (1989). We find that the Arbitrator did not exceed this authority by rescinding those actions, including the disciplinary actions taken by UDC against the Grievant, which he found (1) constituted the Article VII Section C contractual violation, i.e., harassment, and (2) violated Article XIX Section K(2), i.e., jury-leave policy. As previously noted, UDC does not dispute that these contractual provisions were part of the case before the Arbitrator. The Award is clearly based on the collective bargaining agreement.

For the foregoing reasons, the Board concludes that UDC has provided no grounds on which to find a statutory basis for our review. Accordingly, the Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

The Request for Review of the Arbitrator's Award is hereby denied.

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

December 26, 1990