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

In the Matter of:)	
)	
Metropolitan Police Department)	
)	
Petitioner)	PERB Case No. 18-A-08
)	
v.)	Opinion No. 1654
)	
)	Motion to Consolidate
)	and Motion for Immediate Stay
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee (on behalf of)	
Lawrence Bailey))	
)	
Respondent)	

DECISION AND ORDER

Before the Board are two motions that were filed with an arbitration review request appealing an arbitration award issued on December 18, 2017. The two pending motions are a motion for a stay of the arbitration award and a motion to consolidate this case with an earlier arbitration review request challenging orders the arbitrator previously issued. The motions are denied for the reasons set forth below.

I. Statement of the Case

On April 22, 2011, petitioner Metropolitan Police Department (“the Department”) discharged Lawrence Bailey (“the Grievant”) for disobeying orders. Respondent Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) filed a grievance contesting the Grievant’s dismissal. The Union invoked arbitration. The Union contended that the Grievant was not served with a notice of proposed adverse action and as a result was not able to request an adverse action hearing. The Union requested that the Arbitrator dismiss the discipline and reinstate the Grievant or alternatively that the Arbitrator conduct a hearing in the arbitration on the charges against the Grievant. The parties agreed to submit the following issues to the Arbitrator: “Whether this matter is arbitrable before this Arbitrator in this arbitration based on the alleged procedural irregularity and, if not arbitrable before this Arbitrator, what should the remedy be?”

On September 4, 2017, the Arbitrator, Homer C. LaRue, issued the first of two awards in the arbitration, which he entitled “Decision & Award” (“the First Award”). The First Award concluded in the following manner:

Having heard the evidence and the arguments of the parties, the Arbitrator awards as follows:

1. This matter is not arbitrable before this Arbitrator in this arbitration based on the found procedural defects.

Order of Remedy

2. The Department is ordered to provide Officer Bailey with a hearing before the Adverse Action Panel to determine whether Officer Bailey is to be disciplined and/or discharged.
3. The decision of the Adverse Action Panel shall be subject to review in arbitration by this Arbitrator pursuant to the Collective Bargaining Agreement and General Order 120.21.

Retention of Jurisdiction

4. This Arbitrator’s jurisdiction over this matter is continuing until the conclusion of the review of the Panel’s decision by this Arbitrator, if demanded, or unless the Panel dismisses the Proposed Adverse Action.

Allocation of the Arbitrator’s Fees and Expenses

5. The parties shall share equally the fees and expenses for the Arbitrator’s services in the instant matter[.]¹

The Union asked the Arbitrator to clarify whether the Grievant must be reinstated and must receive back pay and other make-whole remedies. On September 12, 2017, the Arbitrator sent the parties an e-mail responding that the Grievant’s discharge is to be rescinded and the Grievant is to be placed in the status he would have been in on February 11, 2011, and made whole for any wages and lost benefits from the date of his discharge to the date of his return to work. The Arbitrator subsequently denominated this order as “Post-Award Order No. 01.”

On November 22, 2017, the Arbitrator issued “Post-Award Order No. 02,” which recited “the clarification of the Order of Remedy issued on September 12, 2017 (Post-Award Order No. 01)” and ordered the parties to make a written submission by November 28, 2017, on the authority of the Arbitrator to issue sanctions against the Department for failing to reinstate the

¹ First Award 22.

Grievant with back pay. The Arbitrator instructed the Department to include in its submission its authority for not reinstating the Grievant.

The parties made their submissions on that date, whereupon the Arbitrator issued “Post-Award Order No. 03.” Post-Award Order No. 03 again recited Post-Award Order No. 01’s clarification requiring reinstatement of the Grievant, and it ordered the parties to make another written submission on the sanctions question by December 8, 2017, this time discussing a case² that the Arbitrator said was persuasive in nature. The parties complied with that briefing order.

On December 12, 2017, the Department filed with the Board an arbitration review request, Case No. 18-A-06, challenging the Arbitrator’s authority to issue Post-Award Order Nos. 02 and 03.

On December 19, 2017, the Arbitrator issued the second of the two awards in the arbitration, which he entitled “Final Partial Award” (“the Second Award”). The Second Award incorporated Post-Award Nos. 01 through 03. The Second Award found that the Department failed to fully implement the First Award, as clarified, and that this failure was bad faith conduct that caused the Union to incur expenses to seek compliance and warranted the imposition of sanctions. The Second Award issued the following orders to the Department:

Sanctions

a. Attorney’s Fees

5. The District of Columbia Metropolitan Police Department (the “MPD”) is responsible for and shall pay all the attorney’s fees for the Fraternal Order of Police/Metropolitan Police Department Labor Committee (the “FOP”) dating from September 12, 2017, the date of Post-Hearing Order No. 01 up to and including the final resolution of the instant dispute.

b. Arbitration Fees

6. The “MPD” is responsible for and shall pay all the arbitration, dating from September 12, 2017, the date of Post-Hearing Order No. 01 up to and including the final resolution of the instant dispute.
 - a) The MPD shall reimburse the FOP for any arbitration fees which shall have been paid by the FOP following the issuance of the Award, dated September 4, 2017.
 - b) The FOP shall pay one-half of the arbitration fees associated with this Award, dated December 19, 2017.

² *Reliastar Life Ins. Co. v. EMC Nat’l Life Co.*, 564 F.3d 81 (2d Cir. 2009).

- c) The MPD shall reimburse the FOP for the arbitration fees paid to the Arbitrator connected with this Award, dated December 19, 2017.
- d) The MPD shall reimburse the FOP for any future arbitration fees paid to the Arbitrator by the FOP up to and including the final resolution of the instant dispute.

c. Punitive Damages

- 7. The MPD shall pay directly to the FOP the cumulative penalty of one thousand dollars \$1000.00 per day dating from September 12, 2017, the date of Post-Hearing Order No. 01, up to and including the date that MPD fully complies with the Award, dated September 4, 2017 as clarified.

Interest on Back-Pay

- 8. The MPD shall pay Officer Bailey interest on the back-pay to which he is owed. Such interest shall be at the legal rate of interest permitted by D.C. Code § 28-3302.
 - a) The interest shall be applied to the back-pay owed Officer Bailey beginning September 4, 2017;
 - b) Such interest shall continue to accrue on the principal until the MPD has paid Officer Bailey the total amount of his back-pay, including interest.³

The Arbitrator stated that all of the above portions of the Second Award were final except the amount to be paid by the Department. The Arbitrator retained jurisdiction to determine the amount owed.⁴

On January 9, 2018, the Department filed a pleading styled “Arbitration Review Request, Motion to Consolidate, and Motion for Immediate Stay of the Final Partial Award.” The Union filed an opposition to the motion to stay and an opposition to the arbitration review request.

II. Discussion

The Department moves to consolidate the present case with its earlier arbitration review request, Case No. 18-A-06, which challenged the Arbitrator’s authority to issue Post-Award

³ Second Award 21-22.

⁴ Second Award 22-23.

Order Nos. 02 and 03. The Board has today dismissed Case No. 18-A-06 on the basis of prematurity.⁵ As a result, the motion to consolidate is moot and accordingly is denied.

The Department also requests the Board to issue “an immediate stay with regard to the sanctions imposed against MPD, as stated in the Final Partial Award.”⁶ In support of its motion to stay, the Department argues,

[D]ue to the fact that the amount of damages continues to increase daily pursuant to the Final Partial Award, MPD requests that a stay of the Arbitrator’s Final Partial Award be issued immediately until this appeal is resolved. Otherwise, if it were to comply with the award, MPD would be forced to concede that the Arbitrator was within his jurisdiction to issue the Final Partial Award. As demonstrated in the instant pleading, that is not MPD’s position. To allow the amounts to accrue until the resolution of this appeal would result in prejudice and economic harm not only to MPD but to the general public of the District of Columbia, as the amount to be paid is ultimately derived from public funds. As the potential harm to the District of Columbia Government (potential bankruptcy) far outweighs any harm to Grievant, (not getting his job back), it is imperative that a stay be issued.⁷

In this passage, the Department raises an argument for refraining from paying the Union punitive damages but not for refraining from reinstating the Grievant and thereby allowing the amount of damages to continue to increase. The Department has not challenged the Arbitrator’s jurisdiction to order the reinstatement of the Grievant. The Union correctly responds that the Board does not have authority to grant the requested stay pending its resolution of the arbitration review request. The stay that the Department is seeking is one that would not only delay payment but also would not allow “the amounts to accrue until the resolution of this appeal.” A stay of that nature would be a modification of the Second Award.⁸ The conditions under which the Board may modify an award are the same as those under which it may set aside or remand an award. The statute authorizing appeals to the Board from arbitration awards stipulates 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.”⁹ The Board cannot modify an award before it has made one of those determinations.

⁵ *MPD v. FOP/Metro. Police Dep’t Labor Comm. (on behalf of Bailey)*, Slip Op. No. 1653, PERB Case No. 18-A-06 (Feb. 21, 2018).

⁶ Arbitration Review Req., Mot. to Consolidate, and Mot. for Immediate Stay of Final Partial Award 1.

⁷ Arbitration Review Req., Mot. to Consolidate, and Mot. for Immediate Stay of Final Partial Award 13-14.

⁸ *Cf. In re Winimo Realty Corp.*, Nos. 04 Civ. 7513, 04 Civ. 7549, 04 Civ. 9688, 04 Civ. 9689, 2004 WL 2997784 *5 (S.D.N.Y. Dec. 22, 2004) (holding that a stay of an arbitration award pending judicial review that delayed payment but required segregation of funds into an escrow account was not a modification of the award).

⁹ D.C. Official Code § 1-605.02(6).

Thus, the Board must deny the Department's motion for a stay. However, the Board will give the Department's arbitration review request expedited consideration.

ORDER

IT IS HEREBY ORDERED THAT:

1. The petitioner's motion to consolidate is denied.
2. The petitioner's motion for an immediate stay of the "Final Partial Award" is denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Members Ann Hoffman, Barbara Somson, and Mary Anne Gibbons

Washington, D.C.
February 21, 2018

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.18-A-08 is being transmitted via File & ServeXpress to the following parties on this the 22d day of February 2018.

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