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

In the Matter of:)	
)	
District of Columbia Department of Consumer and Regulatory Affairs,)	
)	PERB Case No. 09-A-03
Petitioner,)	
)	Opinion No. 992
and)	
)	
American Federation of Government Employees, Local 2725,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

On February 10, 2009, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA" or "Agency") filed a "Second Arbitration Review Request" ("Request") seeking review of the Arbitrator's January 16, 2009 "Decision on Attorney Fees" ("Award") in which the Arbitrator granted attorney fees to the American Federation of Government Employees, Local 2725 ("AFGE" or "Union"). DCRA is seeking review of the Award, asserting that the Arbitrator was without jurisdiction and that the Award is contrary to law and public policy. (Request at p. 6). AFGE opposes the Arbitration Review Request ("Opposition").

II. Discussion

In an award on the merits of this case, the Arbitrator granted two grievants a retroactive

temporary promotion with back pay.¹ (See Award at pgs. 3-4). In his July 26, 2008 award, the Arbitrator retained jurisdiction for 60 days until September 24, 2008, for clarification of the award if needed and for any request for attorney fees. (See Award at p. 1). On September 24, 2008, AFGE petitioned the arbitrator for attorney fees. (See Award at p. 1).² The Arbitrator's Award resolving the petition for attorney fees issued on January 16, 2009. (See Award at p. 14).

The Arbitrator was presented with the issue of "[w]hether the Union's petition for attorney[] fees has merit, and if so, in what amount." (Award at p. 2). In its petition, AFGE argued that the Back Pay Act allows for attorney fees in instances where the employee lost pay due to an employer's unjustified personnel action, and successfully appeals the action. AFGE maintained that under the Back Pay Act the "basis for attorney fees . . . depends on three factors: [1] the extent to which the grievant prevailed; [2] whether the number of attorney hours expended was reasonable; and [3] whether the hourly rates were reasonable." (Award at p. 4). AFGE maintained that it met each criterion and requested attorney fees for 93.10 hours at the rate of \$440.00 an hour based on the *Laffey* matrix rates. (See Award at p. 6).

Before the Arbitrator, DCRA contested the number of work hours claimed by the Union on two dates as well as the hourly rate stating that it was excessive and quoting \$140.00 an hour as the appropriate rate. DCRA claimed that "the instant case . . . does not rise to the level of complex federal litigation [and the] Union did not submit the decisions in cases for which it said counsel was paid at the *Laffey* rate, so one cannot compare [those cases] with the instant case." (Award at p. 6).

The Union responded by providing the Arbitrator with prior cases in which the arbitrators in those cases awarded the Union attorney fees based on the *Laffey* matrix rates. (See Award at p. 7). DCRA countered that the cases cited did not honor two of the criteria for granting fees at the *Laffey* rate: (1) "complex federal litigation" and (2) "market rate". (See Award at p. 8).

DCRA countered that an award of attorney fees "would violate the clear and unambiguous provision[s] of the CBA which state that certain expenses shall be borne equally by the parties. [According to DCRA,] [r]equiring the Agency to pay the Union's legal expenses would exceed the authority granted to the Arbitrator under Article 10 § E.11. . . . [which] states that '[t]he Arbitrator

¹ On November 10, 2008, DCRA filed an Arbitration Review Request seeking review of the Arbitrator's July 26, 2008 award to grievants Gerald Roper and Sandra McNair in PERB Case No. 09-A-01. The Board denied the Request finding that it was untimely filed.

² DCRA requested and was granted a 30-day extension and filed an Opposition to the attorney fee request on October 24, 2008. (See Award at p. 1). The parties continued to make submissions to the Arbitrator beyond the 30-day extension. AFGE filed a reply to DCRA's Opposition on October 29 and October 30, 2008. DCRA filed a response to AFGE's submission on December 19, 2008. AFGE's final reply was submitted on January 7, 2009. (See Award at p. 1).

shall not have the power to add to, subtract from, or modify the provisions of this Agreement through the award. The Arbitrator shall confine his/her award to the issue(s) presented'." (Award at p. 8).

Furthermore, DCRA asserted that "to be entitled to . . . attorney[] fees, a party must be authorized to receive them by operation of statute or contract. [DCRA maintained that] [t]here is neither a statutory nor a contractual basis to grant the Union's request for attorney's fees." (Award at pgs. 8-9).

In his January 16, 2009 Award, the Arbitrator determined that he was an appropriate authority under the federal Back Pay Act and that attorney fees were warranted in the interest of justice under 5 U.S.C. § 77 (g) (1).³ (See Award at pgs. 10-11). Using the *Laffey* matrix, he awarded AFGE \$40,964.00 in attorney fees.⁴ (See Award at pgs. 13-14). The Arbitrator rejected DCRA's arguments that: (a) because the collective bargaining agreement does not provide for attorney fees he may not grant the Union's petition; (b) the case did not involve complex federal litigation; and (c) there is neither a contractual or statutory basis for noting that an arbitrator is an appropriate authority under the Back Pay Act. The Arbitrator instructed DCRA to deposit the money directly into the Union's bank account.⁵

DCRA is seeking review of the Award, asserting that the Arbitrator exceeded his authority on several grounds. DCRA also asserts that the Award on its face is contrary to law and public policy because the Arbitrator rendered an award when he had no jurisdiction. (See Request at pgs. 3-4).

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";
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).

³ Citing *U.S. Department of Defense, Alabama State Military Department, Alabama National Guard*, 51 FLRA 1262 (1996), 52 FLRA 1386 (1997).

⁴ See *Laffey v. Northwest Air Lines*, 523 F. Supp. 354 (D.D.C. 1983).

⁵ The instruction was made pursuant to the Union's request for direct deposit in its motion for attorney fees.

DCRA seeks reversal of the Arbitrator's award on several grounds: (a) the Arbitrator exceeded his authority under the theory of *functus officio* because he rendered a decision after his jurisdiction ended on October 24, 2008, stating that "[t]he premise of the doctrine of *functus officio* is that once jurisdiction is exhausted, the Arbitrator's power ends" (Request, p. 4); (b) the Arbitrator exceeded his jurisdiction because DCRA filed an arbitration review request on November 10, 2008, contending that "a trial body (the Arbitrator) and an appellate body (the Board) cannot have concurrent jurisdiction" (Request, p. 5); (c) the Arbitrator "overreaches when he directed the payment of the attorney fees in a detailed and specific manner" (Request, p. 11); and (d) "the collective bargaining agreement does not provide for the arbitrator to have the power to grant fees". (Request, p. 5).

DCRA first argues that the arbitrator issued the present award "after his jurisdiction ended on October 24", and therefore he exceeded his jurisdiction. (See Award at p. 4). Where the Board has no set precedent on an issue, it looks to precedent set by other Labor Relations Authorities such as the Federal Labor Relations Authority ("FLRA"). It is well settled that an Arbitrator may retain jurisdiction after issuing a final and binding award on the merits for the purpose of resolving questions relating to attorney fees.⁶ Moreover, the retention of jurisdiction by the Arbitrator for the purpose of resolving questions relating to attorney fees does not interfere in any way with the Agency's right to file exceptions to the award on the merits.⁷

Furthermore, the Award on attorney fees was issued on January 16, 2009, and DCRA filed its Request on February 10, 2009. We note that DCRA filed its Request only after learning that the Arbitrator's decision was not favorable. The FLRA has found that an exception claiming, only after an award issued, that the award is deficient provides no basis for finding that the award is deficient because it was not issued within an applicable time period.⁸ We find FLRA's reasoning persuasive

⁶ See *Department of Treasury, Customs Service, Nogales and National Treasury Employees Union Chapter 116*, 48 FLRA 938, 940- 942 (1993) (denying reconsideration of the FLRA's dismissal of 47 FLRA 1391 (1993)), where the FLRA as follows: "It is well established that an arbitrator may retain jurisdiction after issuing a final and binding award on the merits for the purpose of resolving questions relating to attorney fees. [citations omitted]. However, the retention of jurisdiction by the Arbitrator merely to resolve questions concerning attorney fees does not affect the finality of the award on the merits. Moreover, the retention of jurisdiction by the Arbitrator for the purpose of resolving questions relating to attorney fees does not interfere in any way with the Agency's right to file exceptions to the award. . . . See, for example, *U.S. Department of Interior, Bureau of Reclamation, Lower Colorado Dams Project Office, Parker and Davis Dams and International Brotherhood of Electrical Workers, Local 640*, 42 FLRA 76, 81 (1991); *U.S. Department of Veterans Administration, Medical Center, Leavenworth, Kansas and American Federation of Government Employees, Local 85*, 38 FLRA 232, 240 (1990).

⁷ See, for example, *U.S. Department of Defense, Army and Air Force Exchange Service, George Air Force Base, California and National Federation of Federal Employees, Local 977*, 40 FLRA 79, 83 (1991).

⁸ See *U.S. Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals and American Federation of Government Employees, Council 215, National Council of Social Security Administration, OHA Locals*, 44 FLRA 550, 555 (1992). See also *West Rock Lodge No. 2120, IAMAW v.*

for the purpose of determining whether the Arbitrator's award is deficient because it was not issued within an applicable time period. The Board finds that no timeliness claim was raised prior to the Arbitrator issuing his award. Only after learning that the award was not favorable, did DCRA file its Request. Therefore, the Request provides no basis for finding that the award is deficient.

DCRA also asserts that the Arbitrator exceeded his jurisdiction because DCRA filed an arbitration review request on November 10, 2008, appealing the Arbitrator's July 26, 2008 Award. Citing *Gormong v. Local Union 613, IBEW, et al.*, 714 F.2d 1109 (C.A. Ga.) (11th Cir.1983), DCRA claims that "a trial body (the Arbitrator) and an appellate body (the Board) cannot have concurrent jurisdiction." (Request at p. 5). However, the case cited does not support this argument.⁹ In *Gormong*, an issue was settled in a lower court and the *same issue* was erroneously filed with the Georgia court of appeals. Here, in PERB Case No. 09-A-01, the Arbitrator issued an Award on the merits of the case. The present case addresses only attorney fees, not the merits of the case. Therefore, in contrast to *Gormong*, the Board is not considering the same issue considered by the Arbitrator in his July 26 award.

DCRA argues that the Arbitrator "overreaches when he directed the payment of the attorney fees in a detailed and specific manner" (Request at p. 11), and the collective bargaining agreement does not provide the arbitrator the power to grant fees (Request at p. 5). We have held that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.¹⁰ See, *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992); see also, *University of the District of Columbia and University of the District of Columbia Faculty Ass'n/NEA*, Slip Op. No. 216 at p. 2, PERB Case No. 87-A-09, (1989). In the present case, DCRA does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power.¹¹

Geometric Tool Co., 406 F.2d 284 (2d Cir. 1968). Where Article 37 of the parties' agreement did not require the issuance of awards during any particular time period. Therefore, the Union's exception in this regard provided no basis for finding the Arbitrator's award deficient. See also *Local 2029 and U.S. Dep't of Defense, Defense Distribution Region West, Tracy Depot*, 48 FLRA 95 (1993).

⁹ In *Gormong*, the lower court accepted a settlement from the parties and the court clerk erroneously filed the case in the Georgia court of appeals. Rather than asserting jurisdiction of the case and dismiss it, the court of appeals remanded it to the lower court for correction. *Id.*

¹⁰ We note that if DCRA had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

¹¹ Furthermore, we note that there is no disagreement between the parties that the Back Pay Act is the applicable law. See *International Brotherhood of Police Officers, Local 445 (Cecil Nelson) and District of Columbia Department of Administrative Services*, 41 DCR 1597, Slip Op. No. 300 at p. 2-3, PERB Case No. 91-A-05 (1992) (where the Board found that the arbitrator's failure to consider a request for attorney fees under the

Furthermore, 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).

In view of the above, we reject DCRA’s claim that the Arbitrator exceeded his jurisdiction by the method of payment used to implement the award or by making an award of attorney fees. This argument involves only a disagreement with the Arbitrator’s findings and conclusions as to the meaning of the parties’ CBA and the Back Pay Act. This is not a sufficient basis for concluding that the Arbitrator exceeded his authority.¹²

Finally, DCRA argues that the award on its face is contrary to law and public policy because the Arbitrator relied on the table of payment set forth in *Laffey v. Northwest Air Lines*, 572 F. Supp. 354 (D.D.C. 1983), rev’d on other grounds, 746 F.2d 4 (D.C. Cir. 1984) cert. denied, 472 U.S. 1021 (1985), rather than on a case cited by DCRA, *Covington v. District of Columbia*, 57 F.3d 1101, 1103 (D.C. Cir. 1995). (See Request at p. 5). DCRA asserts that “the failure [to apply the precedent in Covington], . . . [gave] the union a windfall”. (Request at p. 6). DCRA maintains the case before the Arbitrator in PERB Case No. 09-A-01 “does not rise to the level of complex federal litigation” and “was not legally complex”. (Request at p. 7). However, DCRA merely cites a case that contains another possible method of calculating attorney fees. *Laffey* has not been reversed regarding the manner of calculating attorney fees.

This Board has held that “to set aside an award as contrary to law and public policy the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” *MPD and Fraternal Order of Police/MPD Labor Committee*, 42 DCR

Federal Back Pay Act was contrary to law and public policy).

¹² DCRA also raises the issue of remedy in the first award, claiming that on its face it is contrary to law and public policy because the Arbitrator awarded a remedy that denied due process to DCRA. However, the Board will not address this issue. The award in PERB Case No. 09-A-01, including the remedy, is final and binding. Therefore, due process arguments pertaining to the remedy in the first award are not properly before us in this case. The Board notes that, contrary to DCRA’s assertion, in the present case, the Arbitrator addresses only AFGE’s petition for attorney fees, and not the remedy awarded in the prior case. The Arbitrator merely has reiterated the remedy he awarded in the first case, making no modification to his award.

7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000); *AFGE Local 631 and Dep't of Public Works*, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). Here, DCRA has cited no law or regulation which would warrant reversal of the decision on attorney fees. Also, we believe that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law or public policy. Therefore, no statutory basis exists for setting aside this Award. As a result, we deny DCRA's Request.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Consumer and Regulatory Affairs' 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.

September 30, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-A-03 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of September 2009.

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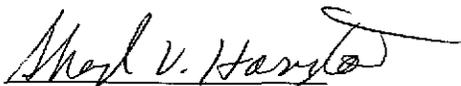
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