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

In the Matter of:)	
)	
District of Columbia Water and Sewer Authority,)	
)	
Petitioner,)	PERB Case No. 04-A-05
and)	
)	Opinion No. 779
American Federation of Government Employees,)	
Local 872,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the case

The District of Columbia Water and Sewer Authority ("WASA") filed an Arbitration Review Request ("Request"). WASA seeks review of an arbitration award ("Award") that ordered WASA to pay the Fiscal Year 2001 Wage Adjustment, plus applicable interest, to those employees who were on workers' compensation at the time the adjustment was scheduled to be paid. (See, Award at p. 7) WASA contends that the: (1) Arbitrator was without authority to grant the Award and (2) Award on its face is contrary to law and public policy (See, Request at paragraphs 5-9 and 10). The American Federation of Government Employees, Local 872 ("AFGE, Local 872" or "Union"), opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the arbitrator was without or exceeded his or her jurisdiction..." D.C. Code § 1-605.02(6) (2001 ed.).

II. Discussion:

In August 1999, a coalition of five bargaining units, including AFGE, Local 872, began negotiating wages with WASA.¹ During these negotiations the parties reached impasse. As a result, the parties went to mediation. In July 2001 an Agreement was reached in mediation. However, AFGE, Local 872 did not ratify the Agreement. Subsequently, the parties went to arbitration and a tripartite arbitration panel determined, that: (1) the Agreement was binding and (2) WASA was not obligated to bargain on additional proposals.² (See, Award at p. 4) This Agreement became effective on October 4, 2001.

The new Agreement provided for retroactive wage payments. (Request at p. 2) Part A of Article I of the Agreement provides in pertinent part that "[a]s soon as practical following approval by AFGE, AFSCME, NAGE and...[WASA] of this Agreement...[WASA] shall make a lump sum payment to each employee equal [to] three tenths (0.30) of a percent of the employee's annual base compensation for the pay period beginning December 19, 1999...up to a maximum of \$2000. Only employees who are employed by [WASA] on the date of the execution of this Agreement are entitled to the lump sum payment." The Agreement also provided for additional wage adjustments for Fiscal Years 2000 and 2001:

Fiscal Year 2000 Wage Adjustment

Effective with the pay period beginning December 19, 1999, the salary then in effect shall be increased by three percent (3%) in accordance with past methods of increasing base salary schedules.

Fiscal Year 2001 Wage Adjustment

Effective with the pay period beginning on after October 1, 2000, the salary then in effect shall be increased by three percent (3%) in accordance with past methods of increasing base salary schedules.

The Arbitrator indicated that employees represented by AFGE, Local 872, with the exception of an undisclosed number of employees who had been temporarily on workers' compensation,³

¹The coalition of bargaining units included, AFGE, Locals 872, 631 and 2553, AFSCME, Local 2091 and NAGE, Local R3-06.

²The tripartite panel issued their award on September 28, 2001.

³The Arbitrator used this term to distinguish these employees from those employees who retired on disability or who otherwise were no longer working for WASA as a result of their

received payment for both periods by January 25, 2002. However, in February 2002 those employees who had been on workers' compensation received the retroactive payment for Fiscal Year 2000 but not for Fiscal Year 2001. AFGE, Local 872 filed a Step 3 group grievance alleging that WASA violated Article 1 of the Agreement and associated side agreements, when it failed to provide retroactive payment for Fiscal Year 2001 to employees who had been on workers' compensation. WASA denied the grievance and AFGE, Local 872 invoked arbitration.

In arbitration, the Union argued that nothing in the Agreement excludes employees who are on workers' compensation from being able to receive the retroactive wage adjustments. In addition, the Union claimed that two of the employees who were on workers' compensation were also negotiators for AFGE, Local 872. They asserted that those two employees had been told, orally and in writing, that they would receive the payments. WASA countered that there was no documented evidence that WASA told anyone from AFGE, Local 872 that employees on workers' compensation would receive the FY 2001 wage adjustment. Furthermore, WASA claims that nothing in the Agreement refers to payments to those on workers' compensation. As a result, WASA argued that there was no ambiguity to reconcile and no basis to allow parole evidence pertaining to the meaning of the Agreement. Also, since AFGE, Local 872 failed to introduce any side agreements, evidence concerning them should not be considered.

In an Award issued on December 22, 2003, the Arbitrator agreed with WASA that AFGE, Local 872 did not produce documentary evidence of the existence of any side agreements or additional statements about those employees who were on workers' compensation. However, he indicated that the absence of any specific language excluding employees on workers' compensation from the wage adjustment meant that the burden was on WASA to demonstrate that there was such an exclusion.

The Arbitrator noted that Article I, Section A, of the Agreement (Wages), identified those "employed by [WASA]...on the date of execution of this Agreement" as the only ones who would receive the additional bonus of 0.30 percent. He also took note of the language of Article I, Section B (Gain-sharing), which specifies that "[t]o be eligible to receive a performance award, an individual must be actively employed on the last day of the fiscal year." In light of the above, the Arbitrator concluded that when WASA wanted to limit the pool of recipients it was able to express such a limitation.

Additionally, the Arbitrator found no evidence "that those [employees] who were temporarily on workers' compensation were not regarded as employees or were not eligible for retroactive payments given to the rest of the workforce because of anything in law pertaining to the status of those on workers' compensation, because of any past practice, because of analogous treatment of such employees elsewhere in the Agreement, or because of anything else that could be considered

injuries or disease.

precedential.” (Award at p. 5).

The Arbitrator also noted that Mr. Cook, WASA’s Labor Relations Manager, testified “that the issue of workers’ compensation status did not arise during negotiations.” (Award at p. 6) As a result, the Arbitrator found no evidence that WASA indicated to AFGE, Local 872 its intent to exclude employees on workers’ compensation from receiving the wage adjustments, or that it had such an intent at all. (See, Award at p. 6). In light of WASA’s demonstrated ability to specify exclusions in other provisions of the Agreement, the Arbitrator concluded that the absence of such an exclusion concerning the wage adjustment, meant that no such exclusion was intended.

As a remedy, the Arbitrator ordered WASA to pay within 60 days from the Award the FY 2001 wage adjustments that should have been paid to those employees who were on workers’ compensation. (See, Award at p. 7) In addition, he ordered interest on such back pay in the amount prescribed by law when payments are not made in a timely manner because of an improper action of the employing agency. (See, Award at pgs. 6-7). Interest was to accrue from January 26, 2002. (See Award at p. 7).

WASA takes issue with the Award. As noted above, WASA claims that the: (1) Award is contrary to law and public policy and (2) Arbitrator exceeded his authority.

WASA contends that the Arbitrator “exceeded his authority by expanding the payment obligations of [WASA] beyond the provisions of the governing agreement.” (Request at paragraph 5). In WASA’s view, there was no indication in the Agreement that the FY 2001 three percent wage adjustments would apply to those persons on workers’ compensation. In fact, WASA asserts the following:

the Agreement specifically provides that wage adjustments and other payments are based on salary and earnings during the previous pay period. Employees absent on workers’ compensation during the applicable time period did not receive a salary and thus there is no basis upon which to calculate their wage adjustment. By enlarging the contract to include persons on workers’ compensation, the Arbitrator has improperly gone beyond the express terms of the Agreement and imposed additional responsibilities on [WASA]...that are not contemplated in the contract.

(Request at paragraph 7.)

We have held that “[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator’s interpretation, not the Board’s, that the parties have bargained for.” University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248 at pgs. 3-4, PERB Case No. 90-A-02 (1990). Also, we have found that by submitting a matter to arbitration, “the parties agree to be bound by the Arbitrator’s interpretation

of the parties' agreement and related rules and regulations as well as his evidentiary findings and conclusions upon which the decision is based." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).

Given that the Arbitrator was interpreting terms of the parties' CBA in finding that the FY 2001 three percent wage adjustment would apply to those employees on workers' compensation, we must affirm the Award. We have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for PERB or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the collective bargaining agreement." District of Columbia General Hospital v. Public Employee Relations Board, No. 9-92 (D.C. Super. Ct. May 24, 1993). Also see, 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.

In light of the above, we find that WASA's assertion that the Arbitrator exceeded his authority by finding that employees who were on workers' compensation were entitled to the FY 2001 three percent wage adjustment, involves only a disagreement with the Arbitrator's findings and conclusions as to the interpretation of Article 1, Section A of the parties' CBA. This is not a sufficient basis for concluding that the Arbitrator exceeded his authority.

In addition, we have held that an Arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194 at p. 2, PERB Case No. 87-A-08 (1988). Furthermore, 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."⁴ See D.C. 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). In the present case, WASA does not cite any provision of the parties' Agreement that limits the Arbitrator's equitable power. Therefore, once the Arbitrator determined that employees who were on workers' compensation were entitled to the FY 2001 wage adjustment, he also had the authority to direct that WASA should, within 60 days, pay them the adjustment, including any applicable interest.

In view of the above, we find that WASA's assertion that the Arbitrator exceeded his authority by ordering payment within 60 days and imposing interest, involves only a disagreement with the Arbitrator's findings and conclusions as to the meaning of the provisions of the parties' CBA. This is not a sufficient basis for concluding that the Arbitrator exceeded his authority.

⁴We note that if the parties' collective bargaining agreement limits the arbitrator's equitable power, that limitation would be enforced.

As a second basis for review, WASA claims that the Award is contrary to law and public policy because it is in direct conflict with applicable District of Columbia Workers' Compensation Law.⁵ Specifically, WASA claims the following:

Workers' compensation payments are made in lieu of regular pay....Those workers absent on workers' compensation are not receiving their regular salaries. Instead, they are being compensated for their injuries. There is nothing on which [WASA] can base any wage adjustments because the absent workers did not receive any salary while they were on workers' compensation. [Footnote omitted] Thus, to require...[WASA] to provide wage adjustments to persons on workers' compensation is not only impractical, but it is inconsistent with the purposes and functions of workers' compensation.

(Request at paragraph 10.)

We have 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 v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also, AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993), and W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983). The Arbitrator implicitly recognized that the wage adjustment payments he found authorized by the Agreement to employees who were on workers' compensation, were adjustments to the salaries of record on which the workers' compensation payments were based. Specifically, the Arbitrator indicated that "although the insurance carrier is the entity that physically made payments, the amount of payments was attributable to the information supplied by WASA." (Award at p. 7.) After reviewing WASA's public policy argument, we find that WASA fails to cite any specific public policy or law that was violated by the Arbitrator's Award. WASA merely cites to the entire of the workers' compensation law, Chapter 15 of Title 32, D. C. Code, and asserts, without specific citation, that the Award violates the intent of this law. Thus, WASA has failed to point to any clear public policy or law that the Award contravenes. Instead, WASA is requesting that we adopt their interpretation of the parties' CBA. Therefore, it is clear that WASA's argument involves a disagreement with the Arbitrator's finding. This Board has held that a "disagreement with the arbitrator's interpretation . . . does not make the award contrary to law and public policy." AFGE Local 1975 and Dept. of Public Works, Slip Op. No. 413, PERB Case No. 95-A-02 at p. 2-3 (1995). Furthermore, WASA has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present, case WASA failed to do so.

⁵ See, the District of Columbia Workers' Compensation Act of 1979, D.C. Law 3-177 as codified under D.C. Code § 32-1501 et seq.

In view of the above, we find that there is no merit to either of WASA's arguments. Also, we believe that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to public law or policy, or in excess of his authority under the Agreement. Therefore, no statutory basis exists for setting aside this Award.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The District of Columbia Water and Sewer Authority'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.

April 15, 2005

CERTIFICATE OF SERVICE

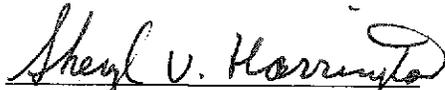
This is to certify that the attached Decision and Order in PERB Case No. 04-A-05 was transmitted via Fax and U.S. Mail to the following parties on this the 15th day of April 2005.

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