Government of the District of Columbia
Public Employee Relations Board

In the Matter of: University of the District of Columbia, Petitioner, v. American Federation of State, County, and Municipal Employees, Council 20, Local 2087, Respondent.	PERB Case No. 12-A-01 Opinion No. 1333

DECISION AND ORDER

I. Statement of the Case

Petitioner University of the District of Columbia ("Petitioner" or "UDC") filed an Arbitration Review Request ("Request") seeking review of a supplemental arbitration award ("Supplemental Award") in which the Arbitrator found that UDC must pay reasonable attorneys' fees to Respondent American Federation of State, County, and Municipal Employees, Council 20, Local 2087 ("Respondent" or "Union") under the federal Back Pay Act ("BPA"). (Supplemental Award at 29). In its Request, UDC alleges the Arbitrator exceeded his authority, and that the Award is contrary to law and public policy. (Request at 3). The Union filed an Opposition to the Arbitration Review Request ("Opposition").

Arbitrator Michael Wolf was presented with the following issues: (1) whether the Union is entitled to recover attorney fees and transcript costs; and (2) if so, what is the appropriate amount of the fees and costs. (Supplemental Award at 2). The Arbitrator found that: (1) the Union is entitled to reasonable attorneys' fees, but is not entitled to transcript costs; and (2) the issue of the proper amount of the attorney fees and the rates on which they should be based is remanded to the parties for further consideration. (Supplemental Award at 29).

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

II. Discussion

A. Background

The underlying case arose from UDC's decision to terminate the employment of two employees ("grievants"). (Supplemental Award at 2). On December 29, 2010, the Arbitrator issued an arbitration award which held in part that:

> [t]he grievance is sustained in part and denied in part. The terminations of the Grievants' employment are rescinded. The Grievants are instead to be given 30-day suspensions as a penalty for misusing University funds. Except for the period of the 30-day suspensions, the Grievants are entitled to be made whole with respect to lost pay, benefits and seniority.
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> The parties are additionally directed...to file briefs on the questions of the applicability of the Back Pay Act to this case.

(Supplemental Award at 2). Both parties submitted post-award briefs. According to the Arbitrator, the Union claimed that under the provisions of the BPA, it was entitled to recover the cost of its attorneys' fees and transcript costs. (Supplemental Award at 2). UDC contended that the BPA did not apply to the case and that, even if it did apply, the Union did not meet the requirements established by law for the recovery of fees or costs. (Supplemental Award at 2).

In the Supplemental Award, issued September 12, 2011, the Arbitrator denied the Union's request for reimbursement of transcript costs, granted the Union's request for "reimbursement of reasonable attorney fees," and remanded "to the parties further consideration of the proper amount of such fees and the rates on which they should be based." (Supplemental Award at 29). On October 3, 2011, UDC filed the instant arbitration review request.

B. The Supplemental Award

The Arbitrator granted the Union's request for attorneys' fees based on his conclusion that the BPA applies to UDC. (Supplemental Award at 10). According to the Arbitrator, the D.C. Court of Appeals held in *White v. District of Columbia Water and Sewer Authority*, 962 A.2d 258 (D.C. 2008), that a D.C. government agency that develops its own "personnel regulations, including comprehensive provisions governing employee compensation," is exempt from the compensation provisions of the CMPA and the attorneys' fees provisions of the BPA. (Supplemental Award at 5); *White*, 962 A.2d at 259. The Arbitrator further stated that, under *White*, the D.C. Water and Sewer Authority ("WASA") was not subject to the BPA because it had adopted a new personnel and compensation system that supplants application of the BPA.

(Supplemental Award at 5). The Arbitrator then asked whether UDC had similarly exempted itself from the BPA "by adopting regulations creating a comprehensive personnel and compensation system for its employees." *Id.* In answering this question, the Arbitrator observed that "the statute governing WASA states that 'no provision of [the Comprehensive Merit Personnel Act ("CMPA")] shall apply to employees of [WASA]' except for a very limited number of provisions." (Supplemental Award at 6).

The Award states that although Educational Service employees are exempted from portions of the CMPA, those exemptions do not include Career Service employees like the grievants in this matter. (Supplemental Award at 6, n.2; 7). Ultimately, the Arbitrator concluded that:

> A review of the foregoing provisions of the D.C. Code, the DCMR, and collective bargaining agreements leads to the conclusion that, contrary to the University's arguments, it has not adopted or implemented a comprehensive personnel and compensation system for its career service employees. Although the University has implemented regulations on the various topics authorized by 8 DCMR §1100.3, they represent only a portion of the overall personnel/compensation system governing UDC's Career Service. Major aspects of the personnel and compensation system are governed by the CMPA. In actual practice, the University has not negotiated separate compensation agreements for its Career Service employees; those agreements are bargained jointly with employees from other District of Columbia agencies that are also subject to the CMPA.

(Supplemental Award at 9-10).

C. The Arbitration Review Request

The CMPA authorizes the Board to modify or set aside an arbitration award in 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).

In the instant case, UDC first alleges that the Award on its face is contrary to law and public policy. (Request at 3). A petitioning party 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 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000); *see also, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). Absent a clear violation of law evident on the face of the arbitrator's award, PERB lacks authority to substitute its judgment for the arbitrator's. *FOP/DOC Labor Committee v. PERB*, 973 A.2d 174, 177 (D.C. 2009).

In its Request, UDC states that the Award violates the precedent set forth by the Court of Appeals in *White*:

> The Back Pay Act only applies to District of Columbia employees hired before the enactment of the Comprehensive Merit Personnel Act ("CMPA") and does not apply to those District of Columbia agencies that have created their own comprehensive personnel systems. *White v. District of Columbia Water & Sewer Auth.*, 962 A.2d 258, 259 (D.C. 2008); District of Columbia v. Brown, 739 A.2d 832, 1999 D.C. App. LEXIS 256, at *26-27 (D.C. Nov. 4, 1999); *Zenian v. District of Columbia Office of Employee Appeals*, 598 A.2d 1161, 1163 (D.C. 1991). Arbitrator Wolf did not address the argument that the Back Pay Act does not apply to employees hired after the enactment of the CMPA, and, thus, his conclusion that the Back Pay Act applies to UDC is contrary to law. UDC has enacted its own comprehensive personnel system, *see* DCMR 8-B-1100 (General Personnel Policies), 8-B-1300 (Leave and Benefits), 8-B-1500 (Adverse Actions), 8-B-1600 (Grievances), 8-B-1800 (Reduction in Force), which includes a section on classification and compensation where the majority of the provisions set forth therein apply across the board to employees of UDC and not solely to faculty. *See* DCMR 8-B-1200 *et seq.* (Classification and Compensation) and specifically DCMR 8-B-1215 (Basis for Payment) and 8-B-1216 (Overtime, Holiday, and Other Premium Pay and Compensatory Time). Indeed, the D.C. Code grants UDC the authority to establish its own compensation and personnel policies. *See* D.C. Code §§ 1-611 *et seq.* Thus, Arbitrator Wolf's conclusion that UDC is subject to the Back Pay Act because it has not implemented a comprehensive personnel and compensation system for Career Service employees is a violation of law.

(Request at 3-4).

The Union opposes UDC's allegations, stating that the argument "is merely the University's disagreement with the Arbitrator's findings and conclusions as to the meaning and applicability of the Back Pay Act, which is insufficient ground for overturning an arbitration award." *See District of Columbia Department of Consumer and Regulatory Affairs v. American Federation of Government Employees, Local 2725*, PERB Case No. 09-A-03, Slip Op. No. 992 at 6 (2009)." (Opposition at 2). Further, the Union contends that:

> [t]he University and the Union both fully briefed their positions to the Arbitrator regarding the applicability of the Federal Back Pay Act to UDC. The Arbitrator considered UDC's arguments and rejected them. UDC now seeks a second bite of the apple by

> inviting the Board to adopt its interpretation of the law. The Board has made it clear that it will [not] do this, and one party's disagreement with the Arbitrator's interpretation of the law does not render an award contrary to law or public policy.

(Opposition at 2) (citations omitted).

D. Award is not Contrary to Law and Public Policy

Unlike the Water and Sewer Authority ("WASA") employees in *White*, UDC has not adopted its own comprehensive personnel and compensation systems. Similarly, although the D.C. Code provisions governing WASA specifically exempt WASA employees from the CMPA, UDC's governing statutes do not. *See* D.C. Code §§ 34-5201.1, 5204.1, 5210.1, 1-602.03. UDC's Career Service employees are members of Compensation Units 1 and 2. These employees are represented in negotiations by the Mayor's Office of Labor Relations and Collective Bargaining, which acts on behalf of multiple D.C. agencies with employees in the same Compensation Unit of the Career Service. Although UDC has implemented various regulations under 8 DCMR § 1100.3, these regulations do not constitute a *comprehensive* personnel and compensation system.

Simply put, an agency has not exempted its employees from the CMPA unless those employees have also been removed from Compensation Unit 1 or 2. As the Arbitrator determined, UDC's Career Service employees are members of Compensation Units 1 and 2, and are therefore subject to both the CMPA and the BPA. UDC has failed to show that the Arbitrator's determination is contrary to law and public policy, and this allegation is dismissed.

In its Request, UDC further alleges that:

> it is a violation of public policy to penalize UDC for being part of Compensation Units 1 and 2. Multi-employer bargaining is consensual and, at some point in time, UDC voluntarily chose to be a part of Compensation Units 1 and 2. *See, e.g., District of Columbia Dep't of Corrections and Fraternal Order of Police/Dep't of Corrections Labor Committee*, PERB Case No. 05-A-02, Slip Op. No. 820 (June 22, 2006) (finding that award is contrary to law and public policy where a statutory basis exists to set aside award).

(Request at 4). The Union contends that this allegation is a simple disagreement with the Arbitrator's conclusion, and that there is no basis in the law for this assertion of "supposed" public policy. (Opposition at 3-4). The Board agrees, and finds that UDC's bare assertion that it is penalized by the Award for being part of Compensation Units 1 and 2 does not demonstrate "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *MPD*, Slip Op. No. 633 at p. 2. This allegation is dismissed.

E. Arbitrator Did Not Exceed His Jurisdiction

UDC alleges that the Arbitrator's Award did not draw its essence from the collective bargaining agreement. (Request at 4). Further, UDC states that the parties' collective bargaining agreement does not provide for an award of attorneys' fees, nor are attorneys' fees an employment right. (Request at 5). "By awarding attorneys' fees to the Union, the Arbitrator imposed additional requirements that are not provided for in the CBA, and his Award is without rational support or cannot be rationally derived from the terms of the CBA." *Id.*

In its Opposition, the Union states that the Board has previously rejected UDC's argument, stating that "an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement." *D.C. Dep't of Consumer & Regulatory Affairs v. AFGE, Local 2725*, Slip Op. No. 992, PERB Case No. 09-A-03 (September 30, 2009)." (Opposition at 4). The Union contends that as the parties' CBA does not expressly limit the Arbitrator's ability to award attorneys' fees, the Arbitrator was within his authority to award attorneys' fees to the Union. (Opposition at 5).

As the Union correctly stated, the Board has long 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." *See MPD v. FOP/MPDLC*, Slip Op. No. 1327, PERB Case No. 06-A-05 (August 27, 2012). As the parties' collective bargaining agreement does not specifically prohibit an arbitrator from awarding attorneys' fees, the Arbitrator has not exceeded his jurisdiction, and the Award is upheld.

F. Market Rate for Attorneys' Fees

In the Award, the Arbitrator granted the Union's request for reimbursement of attorneys' fees, but stated that "the exact amount of such fees must await further proceedings." (Supplemental Award at 27). The Arbitrator "[r]emanded to the parties further consideration of the proper amount of such fees and the rates on which they should be based." (Supplemental Award at 29). If the parties were unable to agree, the Arbitrator directed them to submit additional pleadings regarding market rates for management and union attorneys who litigate labor arbitrations. (Supplemental Award at 29-30). The Arbitrator retained jurisdiction for the purpose of resolving disputes over the implementation of remedies. *Id.*

In the Request and Opposition, the parties dispute the applicable market rate for calculating attorneys' fees. (Request at 6; Opposition at 7). As the Arbitrator did not issue a final ruling on this question, the matter is not properly before the Board for review. *See* Board Rule 538.1. This issue is remanded to the Arbitrator for a final decision.

G. Mr. Meskel's Classification as a Career Service Employee

UDC states that if the Board concludes that attorneys' fees are recoverable, UDC should not be responsible for the full amount of fees because one of the grievants, Mr. Meskel, is classified as an Educational Service employee. (Request at 5). Further, "[c]ontrary to the

Arbitrator's reference in his Supplemental Opinion and Award, UDC's last word on this issue was that Mr. Meskel was an Educational Service employee. The Arbitrator sought further confirmation of this, but issued his Supplemental Opinion and Award before UDC had the opportunity to respond." (Request at 5-6).

The Union contends that disagreement with an arbitrator's factual findings or evaluation of the evidence does not present a valid reason for disturbing the Award. (Opposition at 5). Disagreement with the Arbitrator's finding that Mr. Meskel is an Educational Service employee does not fall under the Board's three statutory bases for review. *See* D.C. Code § 1-605.02(6). Therefore, UDC's request for review of this issue is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. UDC's Arbitration Review Request is denied.

2. The issue of the proper market rate for calculating attorneys' fees is remanded to the Arbitrator, consistent with his Supplemental Award.

3. 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.

October 3, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-A-01 was transmitted via U.S. Mail and e-mail to the following parties on this the 3rd day of October, 2012.

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