GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: District of Columbia Public Schools, Petitioner, and Washington Teachers' Union, Local 6, American Federation of Teachers, Respondent.	PERB Case No. 93-A-01 Opinion No. 349

DECISION AND ORDER

On January 5, 1993, the District of Columbia Public Schools (DCPS), filed an Arbitration Review Request (Request) with the Public Employee Relations Board (Board). DCPS seeks review of an arbitration award (Award) issued December 14, 1992, that decided a grievance filed by the Washington Teachers' Union, Local 6 (WTU), on behalf of Jeanette Feely, the Grievant. DCPS asserted in its Request that the Arbitrator exceeded his authority. WTU filed an Opposition to Arbitration Review Request (Opposition) on January 27, 1993, denying that any basis exists for DCPS' request for review.

Upon an initial review of the Request, the Board found that there may be grounds to modify or set aside the Arbitrator's Award. Therefore, pursuant to Board Rule 538.2, the parties were provided notice to file briefs addressing certain issues that the Board determined as critical in deciding whether to grant review of the Award. On March 26, 1993, the parties filed their respective briefs.

Under the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-605.2(6), the Board is authorized 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...."

The Award granted a grievance finding in favor of WTU that DCPS had raised, by one grade, the grades of students taught by the Grievant without regard to contractually agreed-upon procedures. In so finding, the Arbitrator decided, also in favor

of WTU, a threshold issue concerning the timeliness of the grievance.

In its first ground for review, DCPS contends, in the main, that the Arbitrator's conclusion that the grievance was timely filed is contrary to the parties' collective bargaining agreement regarding the filing of grievances and therefore, by so concluding, the Arbitrator exceeded his authority. This contention, however, merely disputes the factual findings made by the Arbitrator to support his conclusion that the grievance was filed timely in accordance with the applicable contractual provisions. We have held that "[b]y agreeing to submit a matter to arbitration the parties also agree to be bound by the Arbitrator's decision which necessarily includes the Arbitrator's interpretation of the parties' agreement...as well as his evidentiary findings and conclusions upon which the decision is based." University of the District of Columbia Faculty Association/NEA and University of the District of Columbia, ___ DCR____, Slip Op. No. 320 at 2, PERB Case No. 92-A-04 (1992). Therefore, no basis for our review exists on this ground.

DCPS raises a second argument concerning the arbitrability of the grievance as grounds for review. DCPS contends that the Arbitrator failed to address "a material argument made at the hearing and on brief that Respondent did not follow the required Step 1 grievance procedures" (Req. at 5.) The negotiated procedure requires, when a grievance is raised by an individual employee, that the grievant "execute a form showing the date, time, place, persons involved in the discussion, a written statement of the grievance discussed and the relief requested." (Art. VI. 2. a.) According to this provision, if the grievant fails to execute such a form, "he shall have no further right to press the grievance." Id. DCPS contends that the Arbitrator's omission of this "issue of arbitrability rendered the decision on the merits [] outside the confines of the authority and jurisdiction granted him under the contract." (DCPS Br. at 2.)

A review of the Award reflects that the Arbitrator did not address this issue of arbitrability. The question, however, is whether or not this constitutes a basis for the Board's jurisdiction to review the Award. An arbitrator's failure to consider an issue properly presented before him does not necessarily render the award contrary to law and public policy, unless law and public policy mandates that the issue be considered to determine, in whole or in part, the award. DCPS neither cites nor are we aware of any law and public policy requiring the consideration of this issue of arbitrability to determine any of the issues actually addressed by the Award. A question remains, however, whether or not an arbitrator exceeds his jurisdiction by failing to consider an issue which was placed

within his jurisdiction.

We have ruled that, absent agreement by the parties, an arbitrator exceeds his jurisdiction by reassuming jurisdiction in a closed arbitral proceeding to rule on an issue that was submitted during the arbitral proceeding but omitted in his award. University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991). We further stated that "arbitral error is within the outcomes that the parties accept when they agree that otherwise unresolved grievances under their collective bargaining contract shall be determined by arbitration." Id., Slip Op. at p.8. Thus, while the Board possesses the authority to reopen an arbitral proceeding by remanding an award to the arbitrator, pursuant to Board Rule 538.4, we rule that our authority does not extend to allow arbitrators to exceed the jurisdictional authority that they would not otherwise possess. Therefore, we find that by neglecting to rule on the issue of arbitrability, the Arbitrator did not exceed his jurisdiction, but rather failed to fully exercise his authority with respect to all matters over which he had jurisdiction. Such nonfeasance does not constitute a statutory basis for review.

In its next grounds for review, DCPS argues that the Arbitrator exceeded his jurisdictional authority by going "beyond the agreement to enforce his own brand of justice." (Req. at 4.) DCPS bases this contention on its assertion that the Arbitrator concluded that DCPS violated a contractual provision which he stated had "no direct relevance to the dispute." (Req. at 4; Award at 9.) DCPS suggests that by so doing the Arbitrator "compose[d] new obligations or restrictions which cannot fairly be wrung from the contract as the parties negotiated it." (Req. at 4.) The very predicate upon which DCPS bases this contention, however, acknowledges that the Arbitrator's Award turned, at least in part, on his conclusion that DCPS had violated a provision contained in the parties' collective bargaining agreement. DCPS neither cites authority nor advances specific arguments supporting its proposition that the relevance an arbitrator attaches to a given factor considered in rendering an award is determinative of whether or not the arbitrator has exceeded his authority or jurisdiction. All this contention amounts to is an objection to the Arbitrator's evaluation of certain evidence and the significance that should be accorded that evaluation with respect to the Award. The Board has held on numerous occasions that such objections do not raise the asserted statutory basis for review. See, e.g., University of the District of Columbia Faculty Association/NEA and University of the District of Columbia, ____DCR____, Slip Op. No. 320, PERB Case No. 92-A-04 (1992). Moreover, a review of the Award reveals

that the Award did not turn only on the Arbitrator's interpretation of the asserted contract provision.

Next, DCPS contends that the Arbitrator exceeded his jurisdiction by considering evidence submitted for the first time as an attachment to WTU's post-hearing brief. In the Award, it appears that in making certain findings and conclusions, the Arbitrator drew inferences from this evidence, which consisted of (1) a Board Decision and Order and related Report and Recommendation concerning an unfair labor practice violation involving DCPS' principal agent in the arbitration, and (2) a previous arbitration award concerning the Grievant. The documents were not considered so much for their rulings on the issues addressed therein, but rather for their probative value as the Arbitrator determined it related to the weight, significance and veracity of the evidence presented during the arbitration hearing. (See pp. 11-13 of the Award.)

The Arbitrator's acceptance of WTU's belated evidence raises a due process issue, specifically, DCPS notes, with respect to DCPS' right to cross examine and present evidence to rebut. [1]/ The Board addressed a somewhat similar issue in American Federation of Government Employees, Local 872 and District of Columbia Department of Public Works, 39 DCR 5989, Slip Op. No. 290, PERB Case No. 91-A-01 (1992). In that case, the Board found an arbitrator's apparent reliance on a document presented at hearing, but not introduced into the record, did not render the award contrary to law and public policy, since the Board's review of the award revealed that the arbitrator, in making his decision on the issue, "relied on the complete record before him... ." Id. at 2. The Board went on to state that the petitioner in that case had cited no law and public policy contravened by the arbitrator's consideration of such documents.

Unlike the facts in the above-cited case, WTU never presented or discussed the evidence in question during the arbitration hearing, but rather introduced the documents after the hearing closed. For further guidance in assessing the effect, if any, such irregularities in arbitral proceedings have on the legal sufficiency of the resultant award, we turn to the standard of fundamental fairness employed by the federal courts. See, e.g., Sunshine Mining Co. v. Steelworkers, 823 F.2d 1289 (1987). Under this standard, the arbitral proceeding is fundamentally fair if it meets the minimum requirements of fairness, i.e., adequate notice, a hearing on the evidence, and

---

[1]/ Under D.C. Code Sec. 16-4305(b), a statutory right to cross-examine in arbitration proceedings is limited to witnesses appearing at the hearing.

an impartial decision by the arbitrator. See, Ficek v. Southern Pacific Co., 338 F.2d 655 (9th Cir. 1964), cert. denied, 380 U.S. 988 (1965). [2] DCPS' contention essentially takes issue with the second requirement.

Under this standard, arbitral proceedings need not rise to the level of procedural protections provided in judicial proceedings to be considered fundamentally fair. Id. At a minimum, however, the arbitrator must provide each party an adequate opportunity to present its evidence and arguments. Id. See, also, Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985.) While WTU's timing and mode of introducing the documents in question clearly precluded DCPS from cross-examining or specifically rebuting the documents during the hearing, WTU's actions did not foreclose DCPS, prior to the issuance of the Award, from objecting to the Arbitrator's consideration of the documents or responding to them. [3]

The Courts have observed that while accepting and considering post hearing evidence may constitute "misbehavior" on the part of the arbitrator, such misbehavior does not deprive the objecting party of a fair hearing or taint the entire decision where, as we find here, the decision is also supported by the evidence presented at hearing. See, e.g., M & A Electric Power v. Local 702, 773 F.Supp. 1259 (DC E MO, 1991). Although the Award clearly reflects that the Arbitrator considered the documents in question, this evidence was cumulative in nature to the evidence presented during the hearing, upon which the

---

[2] The Court in Ficek, quoting from the Third Circuit decision in Bowers v. Eastern Airlines, 214 F.2d 623, 626 - 627 (3rd Cir. 1954), observed that an arbitration award cannot be collaterally attacked as beyond the jurisdiction of the arbitrator if the arbitration proceeding meets "minimal requirements of fairness-notice, 'a full and fair hearing,' and a decision based on an 'honest judgement' of the arbitrators." Id. at 657. The Court further observed that the minimal requirement of fairness "does not mean that the award may be examined for 'alleged mistakes of law and erroneous evaluation of evidence.'" Id.

[3] The arbitration hearing was held on October 20, 1992. The parties' post-hearing briefs, including the documents in question, were submitted to the Arbitrator on November 20, 1992. The Arbitrator issued his Award on December 14, 1992. A period of 23 days elapsed between the submission of the documents by WTU and the issuance of the Award.

Arbitrator's conclusions are more extensively based. [4]/

In view of the above, we conclude that while the Arbitrator's consideration of the post-hearing documents were irregular and nonjudicious, it did not deprive DCPS of a fundamentally fair hearing. Consequently, we cannot find that by such action the Arbitrator exceeded his jurisdiction or rendered the Award contrary to law and public policy.

DCPS' final ground for review concerns the Arbitrator's remedy that DCPS, vis-a-vis the principal at Grievant's school, shall write a letter to the faculty stating that changes in grades were at the principal's direction rather than the Grievant. DCPS contends the remedy is contrary to the authority granted the Arbitrator in the parties' collective bargaining agreement. DCPS cites no provision of the parties' agreement which this remedy contravenes. Moreover, the issue before the Arbitrator concerned whether or not DCPS, vis-a-vis Grievant's principal, adhered to contractual requirements before changing the grades of the Grievant's student. Upon concluding that DCPS had not so complied, the Arbitrator had the authority to fashion an Award in furtherance of restoring the status quo before the violation. District of Columbia General Hospital and American Federation of Government Employees, Local 631, AFL-CIO, ______ DCR______, Slip Op. No. 316, PERB Case No. 92-A-03 (1992).

In lieu of changing student grades back to those determined by the Grievant (which WTU accepted as unrealistic), the remedy merely acknowledges DCPS' contractual violation, i.e., the means by which the grades were determined. We have previously ruled that an Arbitrator possesses broad equitable powers to fashion a remedy and does not exceed his authority by exercising that power unless the remedy is expressly restricted by the parties' contract, or contravenes other governing law and public policy. 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).[5]/

Accordingly, DCPS has not shown a statutory basis for disturbing the Award and therefore its request that the Board

---

[4]/ We note that the documents in question are a matter of public record that were issued in formal proceedings affording due process.

[5]/ We further note that upon the finding of a violation in unfair labor practice proceedings, the Board includes, as an appropriate part of its make-whole remedy, notices to affected employees that acknowledge the unfair labor practice violation(s).

review and set aside the Award must be denied.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Review Request is denied.

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

April 19, 1993