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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. 16-A-17
)	
v.)	Opinion No. 1619
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Introduction

On August 04, 2016, the District of Columbia Metropolitan Police Department (“MPD”) filed an Arbitration Review Request (“Request”) seeking review of the supplemental arbitration award (“Award”) to the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”) of attorneys’ fees and expenses. The issue before the Board is whether the Arbitrator exceeded his authority in his supplemental award. The Board has reviewed the Arbitrator’s conclusions, the pleadings of the parties and applicable law, and concludes that the Arbitrator did not exceed his jurisdiction. Therefore, Petitioner’s Request is denied.

II. Statement of Facts

On April 3, 2016, the Arbitrator found in his Merits Award that MPD failed to prove by a preponderance of the evidence that the 18-day suspension of Officer Durham was for cause.¹ The Arbitrator retained jurisdiction to resolve the dispute between FOP’s Petition for Attorneys’ Fees and Expenses and MPD’s Agency’s Opposition to Fee Petition.² The Supplemental Award was issued on July 14, 2016, finding that FOP was entitled to attorneys’ fees.³

¹ Request at 2.

² *Id.*

³ *Id.*

III. Arbitrator's Supplemental Award

The Arbitrator found that Article 19, Part E of the parties' Collective Bargaining Agreement (CBA) does not prevent FOP from seeking and recovering attorneys' fees.⁴ According to the Arbitrator, Article 19, Part E, § 5 states that both parties have the right to legal assistance at hearings at their own expense, but this language does not limit the equitable powers of the Arbitrator to fashion an appropriate remedy.⁵ Furthermore, the Arbitrator stated that it does not exceed the equitable power of the Arbitrator to fashion a remedy, unless expressly restricted by the CBA, and an arbitrator does not modify the CBA by awarding attorneys' fees as a remedy.⁶

According to the Arbitrator, an award of attorneys' fees is not constrained by the CBA but is subject to analysis under Back Pay Act (BPA) statutory standards established under 5 USC § 7701 (g).⁷ The Arbitrator looked to the Merit Systems Protection Board's (MSBP) long-standing precedent to set out the requirements under § 7701(g)(1) that attorneys' fees must be (1) incurred, (2) the employee must be the prevailing party, (3) the award of attorneys' fees must be in the interest of justice and (4) the attorneys' fees must be reasonable.⁸ Using this standard, the Arbitrator granted FOP's Petition for Attorneys' Fees and Expenses in part and denied it in part. The Arbitrator found that MPD must pay the FOP's attorneys' fees and expenses except the charges for scheduling, rescheduling and then canceling stenographic assistance, which the Arbitrator found to be unreasonable.⁹

IV. Discussion

MPD seeks review of the Supplemental Award on the grounds that the Arbitrator exceeded his jurisdiction in "finding that attorney's fees were authorized under the parties' labor agreement."¹⁰ As it argued before the Arbitrator, MPD asserts that Article 19, Part E, § 5(3) of the parties' collective bargaining agreement expressly provides that the legal costs are to be borne by the parties at their own expense.¹¹ MPD also notes that the language of Article 19, Part E, § 5(3) stands in contrast to Article 19, Part E, § 5(7) of the collective bargaining agreement, which states that the arbitrator's fee and expense "shall be borne by the losing party."¹² MPD argues that the contrast in these two sections shows that the language chosen by the parties in § 5(3) was "express and deliberate," and demonstrates that the parties intended for the each side to bear their own legal expenses at arbitration.¹³ MPD contends that since there is no authority for

⁴ Supplemental Award at 9.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 9-10.

⁹ *Id.* at 12.

¹⁰ Request at 2.

¹¹ Request at 3. Article 19, Part E, § 5(3) states, in pertinent part: "All parties shall have the right at their own expense to legal and/or stenographic assistance at this hearing."

¹² Request at 4. Article 19, Part E, § 5(7) states, in pertinent part: "The fee and expense of the arbitrator shall be borne by the losing party, which shall be determined by the Arbitrator."

¹³ *Id.* at 4.

the Arbitrator to award attorneys' fees, the Supplemental Award conflicts with Article 19, Part E § 5(4), which prohibits an arbitrator from issuing an award that would modify, subtract from, or add to the collective bargaining agreement.¹⁴

The Board has repeatedly held that an arbitrator does not exceed his or her authority by exercising equitable power to formulate a remedy unless the collective bargaining agreement expressly restricts his or her equitable power.¹⁵ A collective bargaining agreement's prohibition against awards that add to, subtract from, or modify the collective bargaining agreement does not expressly limit the arbitrator's equitable power.¹⁶ Further, the Board has held that Article 19, Part E, § 5 (7) of the parties' collective bargaining agreement does not prevent the Arbitrator from awarding attorneys' fees a¹⁷

Contrary to MPD's allegations, the Board finds that the Arbitrator did not exceed his authority by issuing a remedy that awarded attorneys' fees to the Union.¹⁸ The language of Article 19, Part E, §5 (3) does not provide an express limitation to an arbitrator's equitable power. Accordingly, the Arbitrator did not exceed his authority and the Board will not overturn the Award on this ground. For the Board to overturn an arbitrator's award as in excess of the arbitrator's authority, MPD must show that the collective bargaining agreement expressly limits an arbitrator's equitable power.¹⁹ MPD's attempt to parse the language of Article 19, Part E does not provide the Board with such a limitation.²⁰ Instead, MPD asks the Board to accept its interpretation of the collective bargaining agreement over that of the Arbitrator.²¹

The Board has long held that it will not overturn an arbitration award based simply upon the petitioning party's disagreement with the arbitrator's findings.²² It is well settled 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 ... evidentiary findings and conclusions upon which his decision is based."²³ Therefore, MPD's disagreement with the Arbitrator's award of attorneys' fees does not present a statutory ground for review.

¹⁴ Request at 4-5. Article 19, Part E, § 5(4) states, in pertinent part: "The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision..."

¹⁵ See *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 59 D.C. Reg. 6787, Slip Op. No. 1133 at p. 8, PERB Case No. 09-A-12 (2011); *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

¹⁶ *Id.*

¹⁷ *Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, Slip Op. No. 1382, PERB Case No. 11-A-11 (2013).

¹⁸ In PERB Case Nos. 16-A-06 and 16-A-15 the Board likewise determined that the language of Article 19, Part E, §5 (3) does not provide an express limitation to an arbitrator's equitable power. Accordingly, the Board found the arbitrators did not exceed their authority in awarding attorneys' fees.

¹⁹ *Metro. Police Dep't v. FOP*, Slip Op. 1382 at 3, PERB Case No 11-A-11 (citing *Metro. Police Dep't, supra.*, Slip Op. 1133 at p. 8).

²⁰ *Id.*

²¹ *Id.*

²² *Fraternal Order of Police/Dep't of Corrections Labor Comm. v. Dep't of Corrections*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at p. 6, PERB Case No. 10-A-20 (2012).

²³ *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633 at , PERB Case No. 00-A-04 (2000); *Metro. Police Dep't and Fraternal Order of Police, Metro. Police Dep't*

V. Conclusion

Based on the foregoing, the Board finds that the Arbitrator did not exceed his authority. Accordingly, MPD's Arbitration Review Request is denied and the matter is dismissed in its entirety with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department'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

By the unanimous vote of Board Chairperson Charles Murphy and Members Ann Hoffman and Douglas Warshof.

March 23, 2017

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-A-17, Op. No. 1619 was sent by File and ServeXpress to the following parties on this the 10th day of April, 2017.

Mark Viehmeyer, Esq.
Metropolitan Police Department
300 Indiana Avenue, N.W.
Washington, DC 20001

Mark L. Wilhite, Esq.
Pressler & Senftle, P.C.
1432 K. Street, N.W.
Washington, DC 20005

/s/ Sheryl Harrington
PERB