

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

In the Matter of:)	
)	
District of Columbia Public Schools)	
Petitioner)	PERB Case No. 20-A-04
)	
v.)	Opinion No. 1740
)	
Washington Teachers' Union, Local 6)	
American Federation of Teachers, AFL-CIO)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

Pursuant to a joint request for clarification of a Reinstatement Award, on December 28, 2019, the Arbitrator issued the award herein (Award). On January 21, 2020, the District of Columbia Public Schools (DCPS) filed this Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-605.02(6). DCPS argues that the Arbitrator exceeded his jurisdiction and that the Award is contrary to law and public policy. On February 13, 2020, the Washington Teachers' Union (WTU) filed an Opposition to the Arbitration Review Request (Request).¹

Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Board concludes that the Arbitrator did not exceed his jurisdiction and that the Award is not contrary to law and public policy. Therefore, the Board denies DCPS's Request.

II. Arbitration Award

On July 9, 2018, an Arbitrator issued an award (Reinstatement Award), which granted a grievance filed by WTU. The Arbitrator ordered the Grievant reinstated to his former position with

¹ PERB granted WTU's consent motion for an extension of time to file an Opposition to the Arbitration Review Request.

back pay, including benefits, and awarded attorney fees to WTU. DCPS appealed the Reinstatement Award to the Board, arguing that the Reinstatement Award was contrary to law and public policy. On December 20, 2018, the Board denied DCPS's request for review.²

Following the Board's decision, DCPS and WTU went back to the Arbitrator who issued the Reinstatement Award and requested an extension of his jurisdiction to clarify the remedy.³ The parties put the following questions before the Arbitrator:⁴

- (1) Whether the Grievant was required to mitigate losses and whether the back pay award should be reduced for interim earnings from employment and for the periods where the Grievant did not try to mitigate the losses.
- (2) Whether the damages should be apportioned between the parties.⁵
- (3) Whether WTU is entitled to attorney fees under the Back Pay Act.⁶

Before the Arbitrator, DCPS asserted that the Grievant was obligated to seek employment in order to mitigate the losses resulting from his termination. DCPS argued that the back pay award should have been reduced for periods in which the Grievant "failed to make sustained efforts to mitigate. . . ."⁷ DCPS argued that the Grievant should not "reap a windfall" from the delayed pursuit of the grievance, and requested a reduction in the amount of back pay by two-thirds.⁸

DCPS also argued that the collective bargaining agreement (CBA) required each party to pay its own legal expenses and that the express language of the CBA constituted a waiver of any entitlement to attorney fees under the Back Pay Act.⁹ DCPS requested a finding that WTU is responsible for its own attorney fees.¹⁰

² *DCPS v. WTU, Local 6*, Slip Op. No. 1692, PERB Case No. 18-A-13 (2018). DCPS did not seek further review from the Board or the Superior Court of the District of Columbia, making the Reinstatement Award final and binding on DCPS. *E.g., WTU, Local 6 v. DCPS*, 60 D.C. Reg. 13718, Slip Op. No. 1417 at 4, PERB Case No. 05-U-14 (2013) ("[A]n agency waives its right to appeal an arbitration award when it fails to file a timely arbitration review request with the Board or otherwise appeal for judicial review of the award in accordance with D.C. Code § 1-617.13(c)."); *see also, MPD v. FOP/MPD Labor Comm.*, 65 D.C. Reg. 6416, Slip Op. No. at 8, PERB Case No. 18-A-08 (2018) ("The Arbitrator's retention of jurisdiction does not affect the finality of the First Award with respect to the issues it decided").

³ The Arbitrator retired before clarifying the remedy and the parties selected a new Arbitrator to clarify the remedy awarded in the Reinstatement Award.

⁴ Award at 3.

⁵ Award at 10-11. The Arbitrator found that the record was clear that the delay in reaching arbitration was not attributable to the Grievant or WTU. The Arbitrator denied the request for apportionment. This is consistent with the Board's decision in PERB Case 18-A-13, and not contrary to law and public policy.

⁶ 5 U.S.C § 5596.

⁷ Award at 3.

⁸ Award at 3-4.

⁹ Award at 4.

¹⁰ Award at 4.

WTU argued that the Reinstatement Award was final. WTU argued that the Arbitrator lacked jurisdiction to grant relief because DCPS waived its arguments with respect to mitigation and attorney fees by failing to raise them in its post-hearing brief, in its appeal before PERB, and by failing to appeal to the Superior Court of the District of Columbia.¹¹ In addition, WTU argued that DCPS's arguments were without merit and should be rejected.¹²

WTU asserted that the attorney fees award was within the jurisdiction of the Arbitrator and that the parties' CBA did not operate as a clear and unmistakable waiver of remedies under the Back Pay Act.¹³

The Arbitrator determined that he had jurisdiction to resolve issues related to the remedy awarded in the Reinstatement Award. The Arbitrator determined that the argument for mitigation was subject to waiver and the burden rested with the employer. The Arbitrator found that at each stage of the litigation DCPS could have raised the issue of mitigation but failed to do so.¹⁴ The Arbitrator found that DCPS did not present any persuasive excuse for its failure to raise the affirmative defense at an earlier stage of the proceedings.¹⁵ The Arbitrator held that DCPS "waived its right to the affirmative defense of Grievant's failure to mitigate his damages."¹⁶ The Arbitrator found that, even if DCPS had raised the defense, it lacked merit because "the grave injustices visited upon the Grievant could not but have interfered with his ability to obtain employment."¹⁷

Further, the Arbitrator found that DCPS waived its arguments challenging the attorney fees remedy by failing to assert the argument before PERB.¹⁸ The Arbitrator found that the CBA did not constitute a clear and unmistakable waiver of the remedies under the Back Pay Act and denied DCPS's request to find the remedy contrary to law and public policy.¹⁹

The Arbitrator held that the remedy granted in the Reinstatement Award met the requirements for attorney fees under the Back Pay Act and that an award of attorney fees was in the interest of justice.

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an arbitrator was without, or exceeded, his or her jurisdiction; (2) if the award on its face is contrary to law and

¹¹ Award at 5.

¹² Award at 5.

¹³ Award at 7.

¹⁴ Award at 10.

¹⁵ Award at 10.

¹⁶ Award at 10.

¹⁷ Award at 10.

¹⁸ Award at 12.

¹⁹ Award at 12.

public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.²⁰ DCPS requests review on the grounds that the Award is contrary to law and public policy and that the Arbitrator exceeded his jurisdiction.

DCPS argues that the Arbitrator misapplied the Back Pay Act,²¹ and exceeded his jurisdiction by ignoring the language in the CBA dealing with legal expenses.²² Moreover, DCPS argues that the Arbitrator erred in applying the Back Pay Act without analysis of the interest of justice standards.²³

A. The Arbitrator's clarification of the Award under the Back Pay Act does not violate law and public policy

DCPS asserts that the "Back Pay Act does not apply to this case."²⁴ DCPS cites to the parties' CBA, in which Article VI(5)(9) states that "DCPS and WTU shall have the right, at their own expense, to legal and or/ stenographic assistance at [arbitration]."²⁵ DCPS argues that Article VI(5)(9) has been interpreted by an arbitrator to "ensure that there would be no fee shifting award" and that the "union waived its right to recover attorney fees under the Back Pay Act."²⁶ DCPS argues that the prior arbitral interpretation of Article VI(5)(9) is binding precedent on the parties and the Board.²⁷

Overturing an arbitration award on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to the arbitrator's interpretation of the contract.²⁸ "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy.'"²⁹ A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well-defined, public policy grounded in law or legal precedent.³⁰ Furthermore, DCPS has the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result."³¹ The D.C.

²⁰ D.C. Official Code § 1-605.02(6).

²¹ Request at 5.

²² Request at 7.

²³ Request at 8.

²⁴ Request at 5.

²⁵ Request at 5.

²⁶ Request at 7 (citing American Arbitration Association Case #16-390-629-06, Grievant Jerry Fluellen, 2008 (Wolf, Michael)).

²⁷ Request at 6-7.

²⁸ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019) (citing *Am. Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986), accord *MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 8, PERB Case No. 09-A-05 (2014); *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. No. 925 at 11-12, PERB Case No. 08-A-01 (2012)).

²⁹ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

³⁰ *Id.*

³¹ *MPD v. FOP/MPD Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

Court of Appeals has reasoned, “Absent a clear violation of law[,] one evident on the face of the arbitrator’s award, the [Board] lacks authority to substitute its judgment for the arbitrator’s.”³²

Here, DCPS’s argument is unpersuasive. The Board has held that each arbitration stands on its own and that “arbitrations do not create binding precedent even when based upon the same collective bargaining agreement.”³³ Moreover, the Board has previously upheld an arbitrator’s interpretation that language identical to Article VI(5)(9) did not constitute a clear waiver of the rights afforded under the Back Pay Act.³⁴ DCPS disagrees with the Arbitrator’s application of the Back Pay Act to the remedy, but fails to identify a violation of any specific law and public policy, which mandates a different result. Therefore, the Arbitrator’s decision is not contrary to law and public policy.

B. Attorney Fees Award

DCPS argues that the Arbitrator exceeded his jurisdiction by looking outside of the CBA to provide a remedy of attorney fees in the Reinstatement Award.³⁵ DCPS argues that Article VI(5)(9) of the CBA provides that each party shall have the right, at their own expense, to legal and or/ stenographic assistance at arbitration.³⁶ DCPS asserts that the plain language of Article VI(5)(9) requires the parties to be responsible for their own legal expenses. DCPS contends that the Arbitrator exceeded his jurisdiction by ignoring the plain language of the CBA and awarding attorney fees.³⁷

DCPS waived this argument by not presenting it in its appeal of the Reinstatement Award. The Arbitrator awarded attorney fees in the Reinstatement Award. The argument presented by DCPS in the instant case challenges the merits of awarding attorney fees rather than challenging the clarification of the attorney fees award. The Reinstatement Award was appealed to the Board. The Board issued its decision in PERB Case No. 18-A-13. DCPS did not appeal the Board’s decision. The Reinstatement Award is final and binding. Thus, DCPS’s challenge to the merits of an award of attorney fees is waived.³⁸ Notwithstanding the Board’s finding that the argument has been waived by DCPS, the Board also finds that the argument also fails as a matter of law.

³² *Fraternal Order of Police/Dep't of Corr. Labor Comm. v. District of Columbia Pub. Emp. Relations Bd.*, 973 A.2d 174, 177 (D.C.2009).

³³ *DCPS v. WTU, Local 6*, Slip Op. No. 1692 at 5, PERB Case No. 18-A-13 (2018) (quoting *MPD v. FOP/MPD Labor Comm.*, 59 D.C. Reg. 6881, Slip Op. No. 1210 at 3, PERB Case No. 10-A-11a (2012); *See generally*, Elkouri & Elkouri: *How Arbitration Works* 575-78 (Ruben ed., BNA Books 6th ed. 2013) (“Prior labor arbitration awards that interpreted the existing terms of a contract between the same parties are not binding in exactly the same sense that authoritative legal decisions are. . .”).

³⁴ *DOC v. FOP/DOC Labor Comm.*, 59 D.C. Reg.12702, Slip Op. No. 1326 at 5-6, PERB Case No. 10-A-14 (2012) (interpreting Article 10 §6(B) of the DOC/FOP collective bargaining agreement, which stated that all parties shall have the right, at their own expense, to legal and/or stenographic assistance at the hearing).

³⁵ Request at 7.

³⁶ Request at 7.

³⁷ Request at 7.

³⁸ *Battle v. District of Columbia*, 80 A. 3d 1036, n. 2 (2013) (citing *Speights v. 800 Water St., Inc.*, 4 A.3d 471, 476 (D.C.2010) (“points not raised on appeal are deemed waived”)).

The Board has previously upheld an arbitrator's interpretation of language identical to Article VI(5)(9) and found that the arbitrator did not exceed his jurisdiction by applying the Back Pay Act and awarding attorney fees.³⁹ The Arbitrator did not exceed his authority in determining the remedy. When determining if an arbitrator exceeded their authority in rendering an award, the Board analyzes whether the award "draws its essence from the parties' collective bargaining agreement."⁴⁰ The relevant questions in this analysis are whether the arbitrator acted outside their authority by resolving a dispute not committed to arbitration, and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.⁴¹ The Board has held that an arbitrator does not exceed his or her authority by exercising his or her equitable powers, unless these powers are expressly restricted by the parties' collective bargaining agreements.⁴²

In the case of the Reinstatement Award, the remedy drew its essence from the parties collective bargaining agreement. The Arbitrator provided a "make whole" remedy, which put the Grievant back in the position he would have been in if he had not been terminated. The Award did not modify or delete provisions of the CBA, and the remedy was not expressly restricted by the parties' collective bargaining agreement.

By submitting a grievance to arbitration, parties agree to be bound by the arbitrator's interpretation of the contract, rules, and regulations; and agree to accept the arbitrator's evidentiary findings and conclusions.⁴³ The Board finds that the remedy in the Award was within the Arbitrator's jurisdiction to order.

C. The Award of attorney fees under the Back Pay Act is not contrary to law and public policy

DCPS argues that the Award of attorney fees under the Back Pay Act requires a showing that the award is in the interest of justice.⁴⁴ DCPS contends that the Arbitrator in the Reinstatement Award took "a broad-brush" approach and found that the Grievant was discharged without cause and awarded DCPS attorney fees.⁴⁵ DCPS contends that WTU failed to make a showing that attorney fees are in the interest of justice.⁴⁶

³⁹ *DOC v. FOP/DOC Labor Comm.*, 59 D.C. Reg. 12702, Slip Op. No. 1326 at 5-6, PERB Case No. 10-A-14 (2012) (interpreting Article 10 § 6(B) of the DOC/FOP collective bargaining agreement which stated that all parties shall have the right, at their own expense, to legal and/or stenographic assistance at the hearing).

⁴⁰ *AFGE Local 2725 v. DCHA.*, 61 D.C. Reg. 9062, Slip Op. No. 1480 at 5, PERB Case No. 14-A-01 (2014).

⁴¹ *Mich. Family Resources, Inc. v. Serv. Emp' Int'l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. 1258 at 4, PERB Case No. 10-A-09 (2012).

⁴² *See, e.g., MPD v. FOP/MPD Labor Comm. ex rel. Wigton*, 64 D.C. Reg. 133394, Slip Op. No. 1643 at 3, PERB Case No. 17-A-07 (2017).

⁴³ *MPD v. FOP/MPD Labor Comm. ex rel. Sims*, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000).

⁴⁴ Request at 8.

⁴⁵ Request at 9.

⁴⁶ Request at 9.

Back pay is authorized under the Back Pay Act when (1) an employee was affected by an unjustified or unwarranted personnel action; (2) the unjustified or unwarranted personnel action resulted in a withdrawal or reduction in the pay, allowances, or differentials of the employee; and (3) the withdrawal or reduction would not have occurred but for the unjustified action.⁴⁷ Furthermore, the Back Pay Act requires that an award of attorney fees follow the standards established by § 5 U.S.C. 7701(g), meaning that an award of attorney fees must be in the interest of justice.

The D.C. Court of Appeals and the Board have accepted the non-exhaustive, illustrative list of examples in *Allen v. U.S. Postal Service*⁴⁸ to aid in determining whether an award of attorney fees is in the interest of justice.⁴⁹ *Allen* introduced factors to consider in determining whether attorney fees under the Back Pay Act are in the interest of justice.⁵⁰ *Allen* held that attorney fees may be awarded where: (1) the agency engaged in a prohibited personnel practice; (2) the agency's actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency's actions are taken in bad faith; (4) the agency committed gross procedural error; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.⁵¹

DCPS's argument is not supported by the record. The Arbitrator clarified the Reinstatement Award and found that "the Union meets the requirements of entitlement to attorney fees under the Back Pay Act."⁵² The Arbitrator made the specific findings that satisfied the test under *Allen*:

The Back Pay Act clearly establishes the Union's entitlement to such fees: Grievant was subject to an unwarranted and unjustified personnel action which resulted in loss of pay. The Union was the prevailing party in the action which protested that action. The Employer was held responsible for the payment of lost wages and benefits. An award of such fees is, by any reasonable assessment, in the interest of justice.⁵³

In reviewing the record, the Arbitrator determined that the refusal to undo the termination "after the errors in the appraisals which led to Grievant's termination and after the performance appraisal system was discredited" worsened the stigma of termination.⁵⁴ The Arbitrator found that DCPS caused "the grave injustices" experienced by the Grievant.⁵⁵

⁴⁷ *Fed. Aviation Admin., Washington, D.C. & Prof'l Airways Sys. Specialists, MEBA*, 27 FLRA 230, 234–35 (May 29, 1987).

⁴⁸ 2 MSPR 420 (1980).

⁴⁹ *AFGE, Local 1975 v. DMV, Slip Op. No. 1697 at 3*, PERB Case No. 18-A-18 (2019) (citing *Surgent v. District of Columbia*, 683 A. 2d 493, 495 (D.C. 1996)).

⁵⁰ *Allen v. U.S. Postal Service*, 2 MSPR 420 (1980).

⁵¹ *Allen* at 429.

⁵² Award at 14.

⁵³ Award at 12.

⁵⁴ Award at 10.

⁵⁵ Award at 10.

Here, DCPS disagrees with the Arbitrator's conclusion concerning the clarification of the remedy. The Board has held that a disagreement with an arbitrator's choice of remedy does not render the Award contrary to law and public policy.⁵⁶ Therefore, the Board finds that the Award is not contrary to law and public policy.

IV. Conclusion

The Board rejects DCPS's arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, DCPS's Request is denied and the matter is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
2. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By a unanimous vote of Board Chairperson Douglas Warshof, Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

March 19, 2020
Washington, D.C.

⁵⁶ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6734, Slip Op. No. 1705 at 7, PERB Case No. 19-A-02 (2019) (citing *DCHA v. Bessie Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999)).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 20-A-04, Slip Op. No. 1740 was sent by File and ServeXpress to the following parties on this the 26th day of March 2020.

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