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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. 17-A-07
)	
and)	Opinion No. 1643
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee (on behalf of Robert Wigton),)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Introduction

On June 22, 2017, the Metropolitan Police Department (“MPD”) filed this Arbitration Review Request (“Request”) pursuant to the Comprehensive Merit Personnel Act (“CMPA”), D.C. Official Code § 1-605.02(6). MPD seeks review of a supplemental arbitration award (“Supplemental Award”) granting an award of attorneys’ fees and interest on back pay to the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) on behalf of Officer Robert Wigton (“Grievant”). MPD seeks review of the Arbitrator’s Supplemental Award on the grounds that the Arbitrator exceeded his jurisdiction and that the Award was procured by fraud, collusion or other similar unlawful means.¹

In accordance with the CMPA, the Board is permitted to modify or set aside an 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 public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.² Having reviewed the Arbitrator’s conclusions, the pleadings of the parties, and applicable law,

¹ Request at 2; *See* D.C. Official Code § 1-605.02(6).

² D.C. Official Code § 1-605.02(6).

the Board concludes that the Arbitrator did not exceed his jurisdiction and that the Award was not procured by fraud, collusion or other similar and unlawful means. Therefore, the Board lacks the authority to grant the requested Review.

II. Statement of the Case

The Grievant was an officer with MPD in the Special Operations Division, Canine Unit (“Canine Unit”).³ As punishment for events that occurred on April 30, 2011, MPD suspended the Grievant for three days and transferred the Grievant to Patrol Services and School Security Bureau.⁴ On March 21, 2012, the Union demanded arbitration.⁵ On April 19, 2016, the Arbitrator issued an Opinion and Award (“Award”), ordering the following: (1) MPD shall rescind a finding that the Grievant violated General Order 120.21 and remove all references and records from its data base and the Grievant’s personnel file; (2) MPD shall rescind the three day suspension and offer reinstatement to his former position in MPD’s Canine Unit; (3) MPD shall make the Grievant whole for any wages, allowances, annual leave, sick leave, or other benefits during the period of the transfer from the Canine Unit and three day suspension; (4) MPD shall pay the Arbitrator’s fee.⁶ The Arbitrator retained jurisdiction of the case “pending implementation of [the Award].”⁷

On March 3, 2017, the Union requested from the Arbitrator clarification and affirmation of the Award. The Union alleged that MPD had not fully complied with the Award.⁸ The Union alleged that MPD failed to restore the Grievant’s canine trainer classification.⁹ Additionally, the Union requested attorneys’ fees and back pay, pursuant to the federal Back Pay Act, 5 U.S.C. § 5596(b)(2)(A)(B)(i)-(iii). The Union also claimed that the Grievant was entitled to a time-and-one-half overtime pay rate for dog care performed for MPD from January 15, 2012, to August 6, 2016, as well as reimbursement for sick and annual leave after the Grievant was transferred.¹⁰

III. Arbitrator’s Award

In the Supplemental Award, the Arbitrator addressed the Union’s complaint that MPD had not complied with the Arbitrator’s directive that MPD “offer [the Grievant] reinstatement to his former assignment as a canine trainer and dog handler in MPD’s Special Operations Division, Canine Patrol Section.”¹¹ The Union asserted that MPD insisted upon delaying the reinstatement

³ Award at 6.

⁴ Award at 2.

⁵ Award at 13.

⁶ Award at 18.

⁷ Supplemental Award at 1.

⁸ Supplemental Award at 1.

⁹ Supplemental Award at 1.

¹⁰ Supplemental Award at 1.

¹¹ Supplemental Award at 3.

of the Grievant until he successfully completed an MPD instructor classification class.¹² The Arbitrator explained that the “clear meaning of the Award’s language is that MPD is obligated unconditionally to reinstate [the Grievant] to the assignment which MPD employed him on January 15, 2012 when the Agency wrongfully transferred him out of the Canine Patrol Section.”¹³ The Arbitrator also noted that MPD conceded that the Grievant was a certified canine instructor.¹⁴ Therefore, the Arbitrator clarified that the Award granted “immediate and unconditional reinstatement.”¹⁵

Second, the Arbitrator addressed the Union’s request for attorneys’ fees and back pay. The Arbitrator countered MPD’s assertion that the Arbitrator did not have jurisdiction by pointing to recent arbitration awards in which the arbitrator retained jurisdiction over a party’s petition for attorneys’ fees.¹⁶ In determining whether to award attorneys’ fees and back pay, the Arbitrator analyzed the federal Back Pay Act, 5 U.S.C. § 5596(b)(1) and (2)(A) and 5 U.S.C. § 7701(g)(1).¹⁷ Noting that in the Award it was determined that MPD violated disciplinary procedures enumerated in the parties’ collective bargaining agreement, the Arbitrator found that the Union was entitled to reasonable attorneys’ fees and interest on back pay.¹⁸ The Arbitrator then determined that the expenses sought by the Union were reasonable.¹⁹ Additionally, the Arbitrator found that the Grievant was entitled to interest on the back pay award as prescribed by 5 U.S.C. § 5596(b)(2)(A) and (B).²⁰

Finally, the Arbitrator addressed what the Union characterized as MPD’s failure to pay the Grievant for overtime he performed caring for MPD’s Canine Unit police dog as well as sick and annual leave owed during his transfer from January 15, 2012 to August 6, 2016.²¹ The Arbitrator found that the Union did not offer any evidence to support its claim that MPD failed to pay the amount of overtime pay required by the Award.²² However, the Arbitrator found merit to the Union’s argument that MPD failed to provide the amount of overtime it paid the Grievant and explain the calculations used to arrive at that amount.²³ The Arbitrator denied the Union’s request for sick and annual leave during the back pay period, from January 12, 2012 to August 6, 2016.²⁴ The Arbitrator sided with MPD’s assertion that the Grievant was not deprived of sick or annual leave during the back pay period.²⁵

¹² Supplemental Award at 3.

¹³ Supplemental Award at 3.

¹⁴ Supplemental Award at 3.

¹⁵ Supplemental Award at 3.

¹⁶ Supplemental Award at 3-4.

¹⁷ Supplemental Award at 5.

¹⁸ Supplemental Award at 6.

¹⁹ Supplemental Award at 6.

²⁰ Supplemental Award at 6.

²¹ Supplemental Award at 7.

²² Supplemental Award at 8.

²³ Supplemental Award at 8.

²⁴ Supplemental Award at 8-9.

²⁵ Supplemental Award at 8-9.

In a Supplemental Award, the Arbitrator ordered MPD to do the following: pay attorneys' fees, expenses, and interest on back pay, including overtime, from the period of January 15, 2012 to August 6, 2016; set forth in writing the amount of overtime for dog care paid to the Grievant for the period of January 15, 2012 to August 6, 2016; and explain the calculations used in accordance with 29 U.S.C. § 207(k) of the FLSA.²⁶ The Arbitrator retained jurisdiction in order to assist the parties in resolving any disputes which may arise regarding the Supplemental Award.²⁷

I. Discussion

A. The Arbitrator's Supplemental Award does not exceed his jurisdiction.

In its Request, MPD stated that the Arbitrator had no jurisdiction or authority to issue the Supplemental Award.²⁸ Specifically, MPD contended that the Arbitrator exceeded his jurisdiction since only PERB is entitled to enforce arbitration awards.²⁹ MPD stated that the Union should have filed an arbitration review request or an unfair labor practice complaint with PERB instead of requesting that the Arbitrator intervene a year after he issued the Award.³⁰ MPD also argued that it never consented to the Arbitrator's jurisdiction and maintained its objection throughout the proceedings.³¹ Finally, MPD asserted that the Arbitrator was without legal authority to reopen this case and amend the Award.³² MPD argued that the doctrine of *functus officio* prevented the Arbitrator from considering remedies previously requested but not awarded.³³

The test the Board uses to determine whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining agreement."³⁴ The arbitrator's authority to review the actions of MPD in the instant case constitutes an exercise of his equitable powers arising out of the parties' collective bargaining agreement. The Board has held that an arbitrator does not exceed his authority by exercising his equitable powers, unless these powers are expressly restricted by the parties' collective bargaining agreements.³⁵

²⁶ Supplemental Award at 9.

²⁷ Supplemental Award at 9.

²⁸ Request at 4.

²⁹ Request at 4.

³⁰ Request at 4.

³¹ Request at 4-5.

³² Request at 5-6.

³³ Request at 6.

³⁴ *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm. (on behalf of Jacobs)*, 60 D.C. Reg. 3060, Slip Op. 1366, PERB Case No. 12-A-04 (2013); *See Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm. (on behalf of Johnson)*, 59 D.C. Reg. 3959, Slip Op. 925, PERB Case No. 08-A-01 (2012) (quoting *D.C. Pub. Sch. v. AFSCME, Dist. Council 20*, 34 D.C. Reg. 3610, Slip Op. 156, PERB Case No. 86-A-05 (1987)). *See also Dobbs, Inc. v. Local No. 1614, Int'l Bhd. of Teamsters*, 813 F.2d 85 (6th Cir. 1987).

³⁵ *E.g., Univ. of D.C. v. AFSCME, Council 20, Local 2087*, 59 D.C. Reg. 15167, Slip Op. 1333, PERB Case No. 12-A-01 (2012); *Metro. Police Dep't v. Fraternal Order of Police/ Metro. Police Dep't Labor Comm.*, 59 D.C. Reg.

The Board finds no merit to MPD's argument that the Arbitrator exceeded his authority in issuing the Supplemental Award. MPD does not cite to any provisions of the collective bargaining agreement that restrict the Arbitrator's authority to determine an appropriate remedy in this case. Furthermore, the doctrine of *functus officio* is not applicable here. *Functus officio* provides that an arbitrator's jurisdiction ends when a final award is issued.³⁶ This doctrine does not apply here, as the issue of remedies was not decided in the Arbitrator's initial Award. The Board has held that an arbitrator's wide latitude in drafting awards includes the authority to retain jurisdiction.³⁷ When an arbitrator is accorded the authority to retain jurisdiction after an award is made, the arbitrator may make determinations only on issues that have not already been previously arbitrated.³⁸ Therefore, for purposes of Board review, each award is final when rendered with respect to the issues decided therein. In the instant proceeding, the Arbitrator did not make determinations on issues previously arbitrated. Therefore, the Board rejects MPD's claim that the Arbitrator exceeded his jurisdiction by issuing the Supplemental Award.

B. The Arbitrator's Award was not procured by fraud, collusion or other similar unlawful means.

MPD alleges that the Arbitrator engaged in *ex parte* communications with Union counsel, and that these communications are grounds to conclude that the Award was procured by fraud, collusion, or similar unlawful means.³⁹ MPD stated that in the Union's attorneys' fees invoice, it discovered that the Arbitrator called Union counsel and requested an affidavit for attorneys' fees and sent the Union an "example fax."⁴⁰ MPD argued that it was not notified of or present for this call and was not given the opportunity to review the example fax.⁴¹

For support, MPD cited to a D.C. Court of Appeals case, *Thompson v. Lee*.⁴² In *Thompson v. Lee*, the court cited to a Minnesota Supreme Court case, *Crosby-Ironton Federation of Teachers, Local 1325 v. Independent School District No. 182*,⁴³ wherein the court opined that during arbitration, *ex parte* contacts made "orally or in writing, in regard to issues under dispute, without notifying all other parties to the dispute, will raise a strong presumption that the ultimate award made was procured by corruption, fraud or other undue means, and thus subject to

12709, Slip Op. 1327, PERB Case No. 06-A-05 (2012); *D.C. Metro. Police Dep't and FOP/MPD Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633, PERB Case No. 00-A-04 (2000).

³⁶ *AFGE, Local 2725 v. Dep't of Consumer and Reg. Affairs*, 61 D.C. Reg. 7565, Slip Op. 1444 at 10, PERB Case No. 13-A-13 (2013).

³⁷ *See AFGE, Local 1000 v. Dep't of Emp't Servs.*, 60 D.C. Reg. 5247, Slip Op. No. 1368 at p. 2, PERB Case No. 13-U-15 (2013)

³⁸ *UDC v. UDC Faculty Ass'n*, 41 D.C. Reg. 3830, Slip Op. 321, PERB Case No. 92-A-05 (1994).

³⁹ Request at 7-9.

⁴⁰ Request at 8.

⁴¹ Request at 8.

⁴² 589 A.2d 406, 412 (D.C. 1991).

⁴³ 285 N.W.2d 667, 670 (Minn.1979).

vacation.” Accordingly, MPD argued that the Supplemental Award should be vacated since the Arbitrator engaged in *ex parte* communication.⁴⁴

The Board finds MPD has not presented it with a basis of concluding that the Award was procured by fraud, collusion, or other similar and unlawful means. In *Crosby-Ironton Federation of Teachers*, the arbitrator therein attempted to change the award three days after it was issued, after being unilaterally contacted by one of the parties.⁴⁵ Here, MPD has not alleged that the attorneys’ fee award was invalid. In fact, as the Arbitrator noted, MPD did not challenge the Union’s statement of attorneys’ fees.⁴⁶ Therefore, the Board rejects MPD’s claim that the Supplemental Award was procured by fraud, collusion or other similar and unlawful means.

II. Conclusion

Based on the foregoing, the Board finds that the Arbitrator did not exceed his authority and that the Arbitrator’s Supplemental Award was not procured by fraud, collusion or other similar and unlawful means. Accordingly, MPD’s Request is denied and the matter is dismissed in its entirety with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby 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 unanimous vote of Board Members Mary Anne Gibbons, Barbra Somson, and Douglas Warshof.

October 19, 2017

Washington, D.C.

⁴⁴ Request at 9.

⁴⁵ *Crosby-Ironton Fed’n of Teachers*, 285 N.W.2d at 670.

⁴⁶ Request at 6.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 17-A-07, Opinion No. 1643 was sent by File and ServeXpress to the following parties on this the 30th day of October, 2017.

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