Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Health,	
Petitioner,	PERB Case No. 13-A-01
v.	Opinion No. 1383
American Federation of Government Employees, Local 2725, AFL-CIO,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Petitioner District of Columbia Department of Health ("Petitioner" or "Agency") filed the above-captioned Arbitration Review Request ("Request"), seeking review of Arbitrator Salvatore Arrigo's Arbitration Award ("Award"). Petitioner asserts that the Arbitrator exceeded his jurisdiction in issuing an Award that promoted Grievants Sharon Cave and Neng Fang[1] ("Grievants") from a DS-9 position to a DS-11 position, with back pay. (Award at 4). Additionally, Petitioner alleges that the portion of the Award granting attorneys' fees to Respondent American Federation of Government Employees, Local 2725 ("Respondent" or "Union") under the Federal Back Pay Act ("BPA") is contrary to law and public policy. (Award at 5).

Respondent filed an Opposition to the Arbitration Review Request ("Opposition"), denying the Petitioner's allegations, and raising six affirmative defenses: (1) the Request is not in compliance with Board Rule 538; (2) the Request is untimely; (3) the Agency improperly raised its BPA argument for the first time before PERB; (4) the Agency's arguments are based on a mere disagreement with the Arbitrator's interpretation of the parties' collective bargaining

[1] The underlying grievance filed in this case lists Grievant Fang's name as alternately "Fang" or "Fung." (Request Exhibit 3). The Award and Request use the name "Fang," as will the Board in this Decision and Order.

agreement ("CBA"); (5) the Agency failed to assert any positive law violated by the Award; and (6) the Board has ruled that the employees in Compensation Units 1 and 2 are covered by the BPA. (Opposition at 6).

The Request and Opposition are now before the Board for disposition.

II. Discussion

A. Award

The Award is based on a grievance filed by the Union on behalf of eleven[2] (11) sanitarians employed by the Agency. (Award at 2). The sanitarians are responsible for inspecting food establishments, food purveyors, mobile vendors, hotels, swimming pools, massage parlors, beauty salons, and barber shops for compliance with government regulations pertaining to safety and hygiene. *Id.* The grievance sought to have the eleven (11) grievants, paid at the DS-9 and DS-11 levels, promoted to a DS-12 position with back pay. (Award at 5). The Union described the issue to be determined by the Arbitrator as: "Is the District of Columbia Department of Health in Violation of Article 26, Section E[3], of the collective bargaining agreement by failing to pay its food inspection sanitarians equally for performing the same work and, if so, what shall be the remedy?" (Award at 5). The Agency stated the issues as: "(a) Whether this grievance is precluded by Article 26, Section G of the collective bargaining agreement as a classification/equal pay for equal work appeal, thus making the issue substantially non-arbitrable; and (b) Whether any of the 12 grievants are performing substantially similar work as Mr. Taylor performed when he was grade 12 Sanitarian from 2001 to 2006." (Award at 5-6). The Arbitrator found the issues to be determined as: (1) whether Article 26, Section G of the CBA precluded the grievance; (2) whether a "career ladder" to a DS-12 position was created by a 1998 job opening announcement; and (3) "the application of the contractual requirement of 'equal pay for substantially equal work.'" (Award at 6).

The Arbitrator dismissed the Union's request to have all eleven (11) grievants promoted to a DS-12 level, finding that while Article 26, Section G of the parties' CBA did not preclude the grievance, there was no career ladder to a DS-12 position. (Award at 10, 16). Neither the Petitioner nor the Respondent object to this portion of the Award. (Award at 16).

Each of the sanitarians held DS-11 positions except Grievants Cave and Fang, who held DS-9 positions. Though the Arbitrator refused to promote all of the grievants, including Grievants Cave and Fang, to a DS-12 position, he determined that "[e]ven considering that the

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[2] The pleadings show an apparent disagreement as to the number of grievants involved in the grievance and arbitration proceedings. The grievance and Intent to Arbitrate list thirteen (13) grievants (Request Exhibit 3). The Award mentions eleven (11) grievants (Award at 1), while the Request states that there are twelve (12) grievants (Request at 4). As the exact number of grievants in the underlying grievance is not relevant to the outcome of this Decision and Order, the Board will refer to eleven (11) grievants, consistent with the Award at issue in this case.

[3] Article 26, § E states: "The parties agree that the principle of equal pay for substantially equal work shall be applied to all position classifications and personnel actions in accordance with the D.C. Code." (Request Exhibit 2 at p. 31).

thrust of the grievance sought the promotion of all grievants to grade 12, I find the grievance subsumes the issue of obtaining equal pay for substantially equal work for all employees, thereby opening for inquiry whether Ms. Cave and Mr. Fang are performing substantially equal work as the grade 11 sanitarians." (Award at 16-17).

After considering the Grievants' work histories, the Arbitrator concluded that "the facts herein support the finding that Ms. Cave and Mr. Fang are performing substantially equal work as that of existing grade 11 sanitarians," and determined that the Grievants should receive equal pay, be promoted to DS-11 as of the day the grievance was filed, and receive back pay to that date. (Award at 18).

In addition, the Arbitrator awarded the Union attorneys' fees pursuant to the BPA, to the extent that the grievance was sustained. (Award at 18).

B. Position of the Agency before the Board

In its Request, the Agency makes two allegations: first, that the Arbitrator exceeded his authority in resolving a dispute that was never committed to arbitration, and second, that the award of attorneys' fees is contrary to law and public policy. (Request at 4-6).

The Agency cites to Article 10, Section E(3) of the parties' CBA, which states that an arbitrator shall hear and decide only one grievance in each case unless the parties mutually agree to consolidate grievances. (Request at 4; Request Ex. 2 at p. 15). The Agency states that in the grievance, the Union requested that the eleven (11) sanitarians be promoted to a DS-12 level, based upon the Union's assertion that the sanitarians were performing the same level 12 work performed by a former DS-12 sanitarian in their department. (Request at 4). The Agency alleges that:

> [a]t no time was there any request or mention by the union to modify its grievance to request that Ms. Cave and Mr. Fang be promoted to a grade 11...[i]n each step of the grievance process the union stated that the remedy requested was the same remedy requested in its step one grievance, namely, that all [eleven] grievants be promoted to a grade 12. (Request at 4-5).

Further, the Agency argues that "[w]hile likely based on the same principle of equal pay for equal work espoused in Respondent's grievance," a remedy requesting that Grievants Cave and Fang be promoted to grade 11 would change the nature of the grievance. (Request at 5). Specifically, an assertion that the Grievants have been doing the work of the DS-11 sanitarians is a separate assertion requiring a separate remedy than the underlying grievance in this case, which contended that the eleven (11) sanitarians were doing the same work as a former grade 12 sanitarian. *Id.* The Agency alleges that in awarding Grievants Cave and Fang a promotion to DS-11, the Arbitrator "essentially ruled on a second grievance issue that was never presented to the Agency for a response and therefore never committed to arbitration." *Id.*

Additionally, the Agency alleges that the award of attorneys' fees is contrary to law and public policy. (Request at 5). The Agency states that the BPA "allows an employee who, *on the basis of a timely appeal*, is found to have been affected by an unwarranted personnel action resulting in the reduction of pay to collect reasonable attorneys' fees." *Id.* (emphasis in original). Further, the Union argued in its post-arbitration brief that it was entitled to attorneys' fees under the BPA if the grievance was sustained. *Id.* The Agency asserts that the Award did not sustain the grievance because the Award exceeded the Arbitrator's jurisdiction. (Request at 6). Further, because a grievance requesting Grievants Cave and Fang be promoted to grade 11 was never filed, there was no Agency decision on that issue from which to make a timely appeal. *Id.* The Agency alleges that since the grievance involving Cave and Fang's promotion "was not sustained and the award was not based on a timely appealed Agency decision, the award of attorneys' fees is contrary to law and public policy and should be overturned." *Id.*

As a second prong to its law and public policy argument, the Agency asserts that the BPA does not apply to the Grievants. (Request at 6-10). Specifically, the Agency contends that any application of the BPA was negated on February 4, 2005, when the D.C. government published final compensation regulations which implemented a new compensation system for Career, Legal, Excepted, and Management Supervisory Services. (Request at 7). The Agency states that the D.C. government's statutory and regulatory provisions do not provide for the award of attorneys' fees. *Id.*

In support of this contention, the Agency cites to *White v. D.C. Water and Sewer Authority*, 962 A.2d 258 (D.C. 2008), where the D.C. Court of Appeals found that the D.C. Water and Sewer Authority ("WASA") exempted itself from any entitlement to attorneys' fees under the BPA by establishing a comprehensive personnel system for its employees. (Request at 7-8). The Agency argues that the court in *White* "did not recognize any continued employee entitlement to attorneys' fees under the federal Back Pay Act which existed under the earlier compensation system." (Request at 8). Further, the Agency states that the D.C. Court of Appeals has consistently held that the BPA applies where there are no back pay provisions to replace it, and that the D.C. Council has "unequivocally specified in D.C. Official Code § 1-632.02(a)(5)(G)(2006 Repl.) that the federal Back Pay Act would one day cease to apply to District Employees." *Id., citing Zenian v. D.C. Office of Employee Appeals*, 598 A.2d 1161 (D.C. 1991); *District of Columbia v. Brown*, 739 A.2d 832, 835, 841 (D.C. 1991). The Agency concludes by stating that:

> [a] review of the [Comprehensive Merit Personnel Act], the District government's statutory authority for its employees and Chapter 11 of the new D.C. Personnel Regulations on compensation, in particular § 1149 on back pay, indicates that there is no provision for attorneys' fees in the instant case. Accordingly...given that there is no express federal or District statutory or regulatory authority that permits the award of attorneys' fees in this matter, each party should be responsible for its own counsel fees. (Request at 9).

C. Position of the Union before the Board

The Union disputes the Agency's assertion that the grievance was based on the Union's assertion that the eleven (11) sanitarians were performing grade 12 work, and that there was never a request to modify the grievance to request that Grievants Cave and Fang be promoted to grade 11. (Opposition at 2-3). The Union avers that it submitted the following issue to the Arbitrator:

> Is the District of Columbia Department of Health in violation of Article 26, Section E, of the collective bargaining agreement by failing to pay its food inspection sanitarians equally for performing the same work and if so, what shall be the remedy? (Opposition at 2; Award at 5).

The Union contends that during the arbitration hearing and in its briefs, the Agency never argued that the Union's presentation of the issue was beyond the scope of the original grievance. (Opposition at 2-3). Further, the Union states that the parties' CBA specifically authorizes an arbitrator to determine the issue or issues to be heard. (Opposition at 3; *citing* CBA Article 10, § E(8)[4], Opposition Exhibit B). The Union denies that the Arbitrator exceeded his authority in awarding a remedy less than the remedy initially requested, and points to Article 10, §E(12) of the CBA, which states that the arbitrator shall have full authority to award a remedy. (Opposition at 3).

On the matter of attorneys' fees, the Union alleges that it made its request for attorneys' fees in its opening statement the arbitration hearing[5], and fully briefed the issue in its brief to the Arbitrator. (Opposition at 3; Opposition Exhibit D) The Union contends that Agency did not raise its objections to the Union's request for attorneys' fees before the Arbitrator, and the Arbitrator did not rule on these objections. (Opposition at 3). The Union asserts that the Agency's argument against the award of attorneys' fees was waived and is not properly before the Board. *Id.* Further, it argued that the Agency has failed to state a law, public policy, or source of public policy violated by the Award, and the Agency's arguments were a mere disagreement with the Arbitrator's conclusions. (Opposition at 3-4).

In its Opposition, the Union raises six affirmative defenses: (1) the Request is not in compliance with Board Rule 538; (2) the Request is untimely; (3) the Agency improperly raised its BPA argument for the first time before the Board; (4) the Agency's arguments are based on a mere disagreement with the Arbitrator's interpretation of the parties' CBA; (5) the Agency failed

[4] Article 10, § 10(E)(8) of the parties' CBA states: "If the parties fail to agree to a joint submission of the issue for arbitration, each shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard consistent with this Agreement."

[5] At the hearing, the Union's counsel stated: "The Union asks that you order the promotions to be retroactive and award back pay to the date of the grievance and direct [the Agency] to pay the Union's attorneys' fees, in accordance with the federal Back Pay Act." (Opposition Exhibit C at 189).

to assert any positive law violated by the Award; and (6) the Board has ruled that the employees in Compensation Units 1 and 2 are covered by the BPA. (Opposition at 6).

D. Analysis

The Comprehensive Merit Personnel Act ("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 ed.).

The Agency alleges that the Arbitrator exceeded his jurisdiction by resolving a dispute not committed to arbitration. (Request at 4). The Agency contends that by determining that Grievants Cave and Fang should be promoted to DS-11, the Arbitrator effectively created a second grievance, in violation of Article 10, § E(3) of the parties' CBA, which states that "[t]he arbitrator shall hear and decide only one (1) grievance in each case unless the parties mutually agree to consolidate grievances." (Request at 4; Request Exhibit 2 at p. 15). The Union contends that the parties' CBA permits an arbitrator to determine the issue or issues to be heard. (Opposition at 3). Article 10, § E(8) of the parties' CBA states that "[i]f the parties fail to agree to a joint submission of the issue for arbitration, each shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard consistent with this Agreement." (Request Exhibit 2 at p. 15). The Union frames the DS-11 promotions not as a second grievance, but as an exercise of the Arbitrator's "full authority to award a remedy." (Opposition at 3; *citing* Article 10, § E(12), Opposition Exhibit B at p. 15).

An arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions." *D.C. Department of Public Works and AFSCME Local 2091*, 35 D.C. Reg. 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). By submitting a matter to arbitration, the parties agree to be bound by the arbitrator's interpretation of the parties' CBA, related rules and regulations, and evidentiary findings and conclusions. *See D.C. Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000). It is the Arbitrator's interpretation, and not the Board's, that the parties have bargained for. *See University of the District of Columbia v. University of the District of Columbia Faculty Association*, 39 D.C. Reg. 9628, Slip Op. No. 320 at p. 2, PERB Case No. 02-A-04 (1992).

One of the tests that the Board has used to determine whether an arbitrator has exceeded his jurisdiction is "whether the Award draws its essence from the collective bargaining agreement." *D.C. Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). The Board has adopted the Sixth Circuit's analysis of "essence of the agreement" issues:

> Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing

> the award? And in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract?"

N*ational Ass'n of Government Employees, Local R3-07 v. D.C. Office of Communications*, 59 D.C. Reg. 6832, Slip Op. No. 1203, PERB Case No. 10-A-08 (2011) (*citing Michigan Family Resources, Inc. v. SEIU Local 517M*, 475 F.3d 746, 753 (2007). The Agency has not alleged that the Arbitrator committed fraud, had a conflict of interest or otherwise acted dishonestly, or that he was not arguably construing or applying the CBA.

In the instant case, the Board finds that the Arbitrator did not act outside his authority by determining that Grievants Cave and Fang were doing work substantially equal to a grade 11 sanitarian. Consistent with Article 10, § E(8) of the CBA, each of the parties submitted a separate statement of the issues, and the Arbitrator determined the issues to be heard. (Award at 5-6). The Arbitrator's formulation of the issues, specifically "the application of the contractual requirement of 'equal pay for substantially equal work,'" is broad enough to cover his consideration of the issue of whether Grievants Cave and Fang were being paid equally for substantially equal work. (Award at 6). As the Arbitrator stated, the grievance encompassed the issue of obtaining equal pay for substantially equal work for all employees, including whether Grievants Cave and Fang were receiving equal pay for performing work substantially equal to that of the grade 11 sanitarians. (Award at 16-17). After concluding that the grievants were not being paid equally, in violation of Article 26, §E of the parties' CBA, the Arbitrator exercised his equitable power to fashion a remedy of promotion to DS-11 and back pay for Grievants Cave and Fang. (Award at 17-18).

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 and FOP/MPDLC*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Rather than expressly limit the Arbitrator's ability to formulate a remedy, the parties' CBA specifically grants the Arbitrator "full authority to award a remedy." (Article 10, § E(12), Request Exhibit 2 at p. 15). Arbitrators bring their "informed judgment" to bear on the interpretation of CBAs, and that is "especially true when it comes to formulating remedies." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The Agency's disagreement with the Arbitrator's decision to consider the positions of Grievants Cave and Fang, and his formulation of a remedy, do not present a statutory basis for review. *See Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 59 D.C. Reg. 3446, Slip Op. No. 845, PERB Case No. 05-A-01 (2006).

Next, the Agency alleges that the Arbitrator's award of attorneys' fees to the Union under the BPA is contrary to law and public policy. (Request at 4-6). In support of this allegation, the Agency argues that the Award does not meet the requirements for awarding attorneys' fees under the BPA because the grievance was not sustained, and that the BPA does not apply to D.C. government employees like Grievants Cave and Fang. (Request at 4-10). The Union contends that the Agency waived this argument by not raising it at the arbitration or in its briefs. (Opposition at 3).

The Board's scope of review, particularly concerning the public policy exception, is extremely narrow. A petitioner must demonstrate that the arbitration award compels the violation of an explicit, well defined, public policy grounded in law and or legal precedent. *See United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 43 (1987). Absent a clear violation of law evident on the face of the arbitrator's award, the Board lacks authority to substitute its judgment for the arbitrator's. *Fraternal Order of Police/Department of Corrections Labor Committee v. PERB*, 973 A.2d 174, 177 (D.C. 2009). Disagreement with the arbitrator's findings is not a sufficient basis for concluding that an award is contrary to law or public policy. *Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Comm.*, 31 DC Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984).

The Agency argues that the Award violates the language of the BPA itself. (Request at 5). 5 U.S.C. § 5596(b)(1)(A)(iii) states that "[a]n employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action" is entitled to reasonable attorneys' fees. As we determined above, the "equal pay for substantially equal work" issue regarding Grievants Cave and Fang does not constitute a separate grievance. Therefore, the grievance was sustained in part, and the Award does not violate the language of the BPA.

Additionally, the Agency contends that the BPA does not apply to D.C. government employees. (Request at 6-10). In support of this contention, the Agency cites to *White*, where the D.C. Court of Appeals found that WASA exempted itself from the CMPA, and thus any entitlement to attorneys' fees under the BPA, by establishing a comprehensive personnel system for its employees. (Request at 7-8).

The Board has determined that an agency has not exempted its employees from the CMPA unless those employees have been removed from Compensation Unit 1 or 2. *University of the District of Columbia v. AFSCME District Council 20, Local 2087*, 59 D.C. Reg. 15167, Slip Op. No. 1333 at p. 5, PERB Case No. 12-A-01 (2012). The Department of Health is a subordinate agency of the Executive Office of the Mayor, and its Career Service employees are members of Compensation Units 1 and 2. D.C. Code § 1-603.01(17)(MM). As the Agency has not removed Grievants Cave and Fang from Compensation Units 1 and 2, they have not been exempted from the CMPA and the BPA. *University of the District of Columbia,* Slip Op. No. 1333 at p. 5. The Agency has failed to demonstrate that the Award presents a clear violation of law or compels the violation of an explicit, well defined, public policy grounded in law and or legal precedent. Therefore, this allegation must be dismissed. *Fraternal Order of Police/Department of Corrections Labor Committee,* 973 A.2d at 177.

The Union's first affirmative defense is that the Request is not in compliance with Board Rule 538. (Opposition at 6). The Union does not specify in its affirmative defense which part of Board Rule 538 is violated, but elsewhere in the Opposition asserts that "[t]he pleading emailed to the Union's attorney on October 12, 2012, contained no exhibits or attachments," and that the

pleading mailed to the Union through the Board's electronic filing system contained no exhibits or attachments. (Opposition at 1-2). Board Rule 538 requires the party filing an arbitration review request with the Board include a copy of the arbitration award, and it is to this portion of the rule that the Union presumably objects. *See* Board Rule 538.1(e). The Request filed with the Board via its electronic filing system shows that the Request was filed on October 1, 2012, together with three attachments titled "Exhibit 1, Arbitration Decision and Order," "Exhibit 2, Collective Bargaining Agreement," and "Exhibit 3, Union Grievances and Arbitration Demand." The Board finds that the Agency complied with Board Rule 538.1, and dismisses this affirmative defense.

The Union's second affirmative defense is that the Request is untimely. (Opposition at 6). Board Rule 538.1 states that arbitration review requests must be filed "not later than twenty (20) days after service of the award." The Award was mailed to the parties on September 5, 2012. (Award cover letter, Request Exhibit 1). Board Rule 538.1 provides that when an award is served via U.S. Mail, an additional five days should be added to the prescribed period of time to file a request for review with the Board. Therefore, the last day of the period of time to file the Request was September 30, 2012. As September 30, 2012, was a Sunday, the Request was due by Monday, October 1, 2012, pursuant to Board Rule 501.5. According to the Board's electronic filing system, the Request was filed with the Board on October 1, 2012. Therefore, the Request was timely filed, and this affirmative defense is dismissed.

The Union's third affirmative defense is that the Agency waived its ability to contest the Union's demand for attorneys' fees under the federal Back Pay Act. (Opposition at 6). This issue was decided on alternate grounds in the analysis portion of this Decision and Order.

The Union's remaining affirmative defenses are discussed in the analysis portion of this Decision and Order.

In light of the above, we find that the Arbitrator's ruling cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' CBA. D.C. Code § 1-605.02(6). Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department of Health'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
Washington, D.C.

May 1, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-A-01 was transmitted via File & ServeXpress to the following parties on this the 1st day of May, 2013.

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