

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

)	
In the Matter of:)	
)	
Fraternal Order of Police/Protective Services Division Labor Committee)	
)	PERB Case No. 23-A-07
Petitioner)	
)	Opinion No. 1853
v.)	
)	
District of Columbia Department of General Services)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On September 19, 2023, the Fraternal Order of Police/Protective Services Division Labor Committee (FOP) filed an Arbitration Review Request (Request) seeking review of an arbitration award (Award) dated August 30, 2023, pursuant to the Comprehensive Merit Personnel Act (CMPA)¹. The Award denied the grievance FOP filed on behalf of three special police officers (SPO) employed with the District of Columbia Department of General Services (DGS).² FOP seeks review of the Award on the grounds that the Arbitrator exceeded his authority, and the Award is contrary to law.³ DGS filed an Opposition to FOP’s Request.

Upon consideration of the Arbitrator’s conclusions, applicable law, and the record presented by the parties, the Board holds that the Arbitrator did not exceed his authority, and the Award is not contrary to law. Therefore, the Board denies FOP’s Request.

¹ D.C. Official Code § 1-605.02(6).

² Award at 8.

³ See Request at 12.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings.⁴ On July 14, 2021, FOP requested that DGS convert FOP's three most senior bargaining unit members (Grievants) from SPO term positions to permanent SPO career positions.⁵ In its request, FOP asserted that DGS was required "make a reasonable effort" to convert the Grievants by the end of the fiscal year,⁶ pursuant to the parties' Collective Bargaining Agreement (CBA) and the Compensation Collective Bargaining Agreement (Compensation Agreement).

On September 16, 2021, FOP made a second request for DGS to convert the Grievants.⁷ DGS asserted that it did not have authority to hire or convert term SPOs at that time, due to a hiring freeze.⁸ DGS told FOP that it would follow up regarding conversion of the Grievants from term to permanent career employees.⁹ However, DGS did not follow up.¹⁰

On October 6, 2021, FOP again requested that DGS convert the Grievants to permanent career positions.¹¹ DGS did not convert the Grievants, but issued letters extending their terms for three months (from October 1, 2021, through December 31, 2021).¹² On October 21, 2021, FOP received information that DGS threatened to terminate one of the Grievants "if he did not immediately sign the letter agreeing that his term would be extended until December 31, 2021."¹³

On October 27, 2021, FOP filed a grievance, arguing that DGS violated the CBA and Article 17 of the Compensation Agreement when it declined to convert the Grievants to permanent career positions.¹⁴ FOP also asserted that DGS violated District Personnel Manual (DPM) Chapter 2, § 209.2 when it extended the Grievants' terms for a period of less than twelve months.¹⁵ DGS asserted the alleged DPM violation was not grievable or appealable, an assertion which FOP viewed as a violation of the Grievants' due process rights.¹⁶ DGS denied the grievance and FOP invoked arbitration.¹⁷

⁴ The parties did not dispute the documentary record before the Arbitrator. Award at 2.

⁵ See Award at 4.

⁶ Award at 3-5.

⁷ Award at 4-5.

⁸ Award at 5.

⁹ Award at 5.

¹⁰ Award at 5.

¹¹ Award at 5.

¹² Award at 5.

¹³ Award at 5. The Award does not indicate the source of this information and does not state whether the information was accurate.

¹⁴ Award at 1, 4-5. The initial grievance included a fourth grievant—a term SPO who was subsequently converted to a permanent position through DGS' competitive process. Award at 6.

¹⁵ Award at 4-5.

¹⁶ Award at 5.

¹⁷ Award at 5.

B. Arbitrator's Findings

The parties submitted the following issues to the Arbitrator for consideration:

(1) Did the Agency violate the CBA,¹⁸ Compensation Agreement account I and II or any applicable personnel regulations by not converting the employees in question from the term to permanent status?

(2) If so, what should the remedy be?¹⁹

The Arbitrator reviewed Article 17 of the Compensation Agreement, titled "Term and Temporary Employees." Section C of Article 17 provides:

The agency shall convert bargaining unit temporary and term employees identified by the joint labor-management committees, who perform permanent services, who are in a pay status as of September 30, 2017, and are paid from appropriated funding to the career service prior to the end of the FY 2018-FY 2021 Compensation Agreement.

Section D of Article 17 provides:

Prior to the end of the FY 2018-FY 2021 Compensation Agreement, to the extent not inconsistent with District or Federal law and regulation, the District shall make reasonable efforts to convert to the career service temporary and term bargaining unit employees identified by the joint labor-management committees who perform permanent services, are in a pay status as of September 30, 2017, are full-time permanent positions, and are paid through Intra-district funding or federal grant funding.

Section E of Article 17 provides:

Employees in term or temporary appointments shall be converted to permanent appointments, consistent with the D.C. Official Code.²⁰

¹⁸ Although the Arbitrator focused his analysis on the Compensation Agreement, the Arbitrator also acknowledged several provisions of the CBA, including Article 3, titled "Union Security." Award at 3. Article 3, Section A, Part 4 provides that DGS "will not restrain or coerce any employee in the exercise of any rights granted under [the CBA] and will not discriminate against or take reprisals against any employee for exercising any rights granted under [the CBA]." Award at 3. Article 3, Section H provides that nothing in the CBA "is intended to waive the legal rights of any employee unless clearly and unequivocally expressed [in the CBA], including the right to employee or personnel benefits and policies generally available to [DGS] employees which have not been abridged by [the CBA]." Award at 3.

¹⁹ Award at 2.

²⁰ Award at 2-3.

The Arbitrator established that FOP had the burden to prove, by a preponderance of the evidence, that DGS violated Article 17, Section D of the Compensation Agreement by “fail[ing] to make reasonable efforts to convert to the career service temporary and term bargaining unit [SPOs].”²¹

At arbitration, FOP argued that the “reasonable efforts” provision of Article 17, Section D required DGS to automatically convert the Grievants and other eligible SPOs²² to permanent positions prior to the expiration of the Compensation Agreement.²³ DGS disagreed, asserting that DGS met the “reasonable efforts” requirement by continuing its past practice of selecting SPOs for conversion based on a competitive process.²⁴

The Arbitrator discussed DGS’ past practice argument, finding that pursuant to National Labor Relations Board (NLRB) precedent, the existence of a past practice is a “commonsense determination” made by “comparing the challenged action to the employer’s past actions.”²⁵ The Arbitrator found that DGS provided uncontroverted testimony that it had “established a past practice of using a competitive process to convert its term employees,” rather than a system of automatic conversion, and had employed this practice for three years without previous challenge from FOP.²⁶ The Arbitrator found that DGS had a past practice of using a competitive process to select SPOs for conversion.²⁷ The Arbitrator further determined that DGS’ competitive process constituted “reasonable efforts” to convert eligible SPOs, in compliance with the parties’ Compensation Agreement.²⁸ Accordingly, the Arbitrator found that FOP failed to meet its burden of proof.²⁹

Additionally, the Arbitrator discussed DGS’ management rights, as established under the CMPA.³⁰ The Arbitrator observed that D.C. Official Code § 1-617.08(C)(2) of the CMPA provides that management “shall retain the sole right, in accordance with applicable laws, rules, and regulations...[t]o hire, promote transfer, assign, and retain employees....”³¹ The Arbitrator found that District courts have long upheld the management rights provisions, unless specifically abridged and abrogated by the agreement between the parties.³² The Arbitrator also found that Article 17, Sections C, D, and E must be interpreted in conjunction because if Section C mandated

²¹ Award at 5.

²² The Arbitrator did not explicitly find that the Grievants met the conversion criteria established in Article 17, Section D of the Compensation Agreement. However, neither the Award nor DGS’ Opposition to the Request indicate that the Grievants’ eligibility is disputed.

²³ See Award at 5-6.

²⁴ See Award at 6.

²⁵ Award at 6 (quoting *ABF Freight Systems, Inc. v. International Brotherhood of Teamsters, Local 957*, 369 N.L.R.B. 107 (2020)).

²⁶ Award at 6.

²⁷ Award at 6-8.

²⁸ Award at 6-8.

²⁹ Award at 5.

³⁰ Award at 6-8.

³¹ Award at 4, 8.

³² See Award at 7 (citing *AFGE, Local 3721 v. D.C.*, 563 A.2d 361 (1989)).

conversion, Section D would be rendered meaningless.³³ Thus, the Arbitrator determined that Section C was not mandatory, and found that the broad language of Article 17, Section D allowed DGS to make “reasonable efforts” to convert eligible SPOs using various processes, including the longstanding competitive process.³⁴

Lastly, the Arbitrator addressed FOP’s allegation that DGS violated Chapter 2, § 209.2 of the DPM.³⁵ Section 209.2 states that term employees shall be appointed “for a limited period of no less than twelve (12) months and no more than four (4) years.” The Arbitrator determined that DGS committed a “technical violation” of that provision when it extended the Grievants’ terms by a period of only three months.³⁶ However, the Arbitrator found that automatic conversion of the Grievants was not an appropriate remedy for DGS’ violation of the DPM.³⁷ The Arbitrator determined that there was no appropriate remedy, and instructed the parties to “address technical violations of the DPM in their future negotiations and document drafting.”³⁸

The Arbitrator issued an Award, denying the grievance.³⁹ FOP seeks review of the Award.

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 public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.⁴⁰ FOP requests review on the grounds that the Arbitrator exceeded his authority and the award is contrary to law.

The issues before the Board are (1) whether the Arbitrator exceeded his authority, and (2) whether the Award is contrary to law.⁴¹ FOP argues that the Arbitrator exceeded his authority (1) by adopting the management rights clause of the CMPA, in violation of the CBA;⁴² (2) by applying the past practice doctrine, in contravention of testimonial evidence and the language of the Compensation Agreement;⁴³ and (3) by finding a violation of the DPM but declining to grant a remedy for that violation.⁴⁴ FOP also argues that the Award violated the law by declining to grant

³³ Award at 7.

³⁴ Award at 7.

³⁵ Award at 8.

³⁶ Award at 8.

³⁷ See Award at 8.

³⁸ Award at 8.

³⁹ Award at 8.

⁴⁰ D.C. Official Code § 1-605.02(6).

⁴¹ Request at 12.

⁴² Request at 6-8.

⁴³ Request at 8-10.

⁴⁴ Request at 10-12.

a remedy for the identified DPM violation.⁴⁵ In its Opposition, DGS argues that there is no valid basis for the Board to overturn the Award.⁴⁶

A. The Arbitrator did not exceed his authority.

When determining whether an arbitrator exceeded his authority in rendering an award, the Board analyzes whether the award “draws its essence from the parties['] collective bargaining agreement.”⁴⁷ The relevant questions in this analysis are whether the arbitrator acted outside his 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.⁴⁸

The parties committed their dispute to arbitration. Pursuant to Article 8, Section E of the CBA, “Arbitration is the method of resolving grievances which have not been satisfactorily resolved pursuant to the Grievance Procedure” outlined in the CBA.⁴⁹ After DGS denied FOP’s initial grievance in this matter, FOP invoked arbitration.⁵⁰ At arbitration, the parties expressly charged the Arbitrator with the task of determining whether, by not converting the Grievants from term to permanent status, DGS violated the CBA, the Compensation Agreement, or any applicable personnel regulations.⁵¹ The parties also expressly charged the Arbitrator with the task of determining the appropriate remedy, if a violation was found.⁵² The Arbitrator issued the Award, finding that DGS did not violate the CBA or the Compensation Agreement, and determining that although DGS violated Chapter 2, § 209.2 of the DPM, there was no appropriate remedy.⁵³ The Arbitrator based his determinations on the undisputed documentary record, uncontested testimony, and the parties’ post-hearing briefs.⁵⁴

FOP argues that the Arbitrator exceeded his authority when he adopted the management rights clause in D.C. Official Code § 1-617.08(a)(2) and determined that DGS had authority to utilize the competitive conversion process.⁵⁵ FOP asserts that the Arbitrator’s application of the management rights clause directly conflicts with Article 2, Section A of the CBA.⁵⁶ Article 2, Section A of the CBA provides that where any District rules, regulations, issuances, or policies conflict with specific provisions of the CBA, the CBA shall prevail.⁵⁷ FOP asserts that under that provision, Article 17, Section C of the Compensation Agreement overrides the CMPA

⁴⁵ Request at 12.

⁴⁶ Opposition at 4.

⁴⁷ *AFGE Local 2725 v. D.C. Housing Auth.*, 61 D.C. Reg. 9062, Slip Op. 1480 at 5, PERB Case No. 14-A-01 (2014).

⁴⁸ *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. 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).

⁴⁹ FOP submitted the Request with the CBA as Exhibit 2.

⁵⁰ Award at 5.

⁵¹ Award at 2.

⁵² Award at 2.

⁵³ Award at 5-8.

⁵⁴ See Award at 1-2.

⁵⁵ Request at 6-8.

⁵⁶ Request at 7.

⁵⁷ Request at 7.

management rights clause and therefore, DGS was obligated to automatically convert the Grievants.⁵⁸

The Arbitrator construed the Compensation Agreement and found that DGS' competitive process for conversion satisfied the "reasonable efforts" provision of Article 17, Section D of the Compensation Agreement.⁵⁹ Thus, the Arbitrator determined that DGS was not required to automatically convert the Grievants.⁶⁰ The Arbitrator's interpretation of Article 17, Section D is consistent with the management rights clause in D.C. Official Code § 1-617.08(a)(2), which affords DGS the sole right to promote employees. Therefore, the provision regarding conflicting authorities, found in Article 2, Section A of the CBA, does not affect the outcome of this dispute.

The Board has found that by submitting 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 and related rules and/or regulations as well as his evidentiary findings and conclusions upon which the decision is based."⁶¹ "The Board will not substitute its own interpretation for that of the duly designated arbitrator."⁶² Thus, FOP's disagreement with the Arbitrator's interpretation of the Compensation Agreement is not a sufficient reason to modify, set aside, or remand the Award.

FOP also argues that the Arbitrator exceeded his authority when he found that DGS had a past practice of using a competitive process to convert employees.⁶³ FOP asserts that the Arbitrator ignored testimony which indicated that the competitive process was historically used for hiring new employees—not for converting existing DGS employees.⁶⁴ This is a legal argument which is unrelated to the Arbitrator's authority to interpret the Compensation Agreement. The Board has held that "mere disagreement with the Arbitrator's evidentiary findings and conclusions do[es] not constitute ground for reversal."⁶⁵ FOP's argument constitutes mere disagreement with the Arbitrator's evidentiary findings and does not support reversal of the Award.

Additionally, FOP asserts that the Arbitrator exceeded his authority when he declined to grant a remedy for the identified DPM violation.⁶⁶ FOP states that the CBA "is silent on the issue of remedies for violation of the terms of the agreement."⁶⁷ However, FOP argues that one of the issues the parties committed to the Arbitrator was the determination of an appropriate remedy for any violations found.⁶⁸ FOP also asserts that there is an implicit understanding, in arbitration,

⁵⁸ See Request at 7-8.

⁵⁹ Award at 7-8.

⁶⁰ Award at 7.

⁶¹ *MPD v. NAGE Local R3-5 ex. rel. Burrell*, Slip Op. No. 785 at 4, PERB Op. No. 03-A-08 (2006) (citing *UDC v. UDCFA*, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).

⁶² *FEMS v. AFGE, LOCAL 3721*, 51 D.C. Reg. 4158, Slip Op. 728, PERB Case No. 2-A-08 (2004).

⁶³ Request at 10-12.

⁶⁴ Request at 10.

⁶⁵ *DHS v. AFSCME, Local 2401*, Slip Op. No. 1845 at 9, PERB case No. 23-A-04 (2023).

⁶⁶ Request at 10-12.

⁶⁷ Request at 10.

⁶⁸ Request at 12.

that “an employee who is harmed by a violation of the agreement *is entitled to a remedy*,”⁶⁹ alleging that the Award is unenforceable because the Arbitrator used his own brand of “industrial justice” to reach his decision regarding remedy.⁷⁰

FOP’s argument is unpersuasive. The parties agreed that the issues before the Arbitrator were whether DGS violated the CBA, the Compensation Agreement, or any applicable personnel regulations by not converting the Grievants from term to permanent status and “if so, what should the remedy be?”⁷¹ The parties only submitted the issue of remedy regarding DGS’ decision not to convert the Grievants to permanent positions.⁷² The parties did not submit the issue or seek remedy for DGS’ alleged failure to comply with the DPM term extension requirements to the Arbitrator. FOP does not assert that the Arbitrator resolved a dispute not committed to arbitration and does not allege that the Arbitrator failed to construe the Compensation Agreement or the CBA. Thus, FOP’s argument provides no basis for overturning the Award.

For these reasons stated, the Board finds that the Arbitrator did not exceed his authority.

B. The Award is not contrary to law.

FOP bears the burden of demonstrating that the Award itself violates established law or compels an explicit violation of “well defined public policy grounded in law and or legal precedent.”⁷³ Furthermore, FOP has the burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at a different result.”⁷⁴ The D.C. 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.”⁷⁵

On the final page of the Request, FOP states that “the arbitrator’s refusal to issue a remedy both exceeded his authority and violated the law.”⁷⁶ That is the only instance where FOP explicitly asserts that the Award is contrary to law. FOP does not provide applicable law that mandates that the Arbitrator arrive at different result. 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.⁷⁷ Thus, FOP’s argument is not a basis for overturning the Award.

For these reasons stated, the Board finds that the Award is not contrary to law.

⁶⁹ Request at 10-11 (emphasis in original).

⁷⁰ Request at 11 (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

⁷¹ Award at 2

⁷² See Award at 2.

⁷³ *FEMS*, Slip Op. No. 728.

⁷⁴ *MPD v. FOP/MPD Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at 2, PERB Case No. 00-A-04 (2000).

⁷⁵ *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)

⁷⁶ Request at 12.

⁷⁷ *DCHA v. Bessie Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999).

IV. Conclusion

The Board rejects FOP's arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, FOP'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 vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

December 21, 2023
Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.