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

In the Matter of:)	
)	
American Federation of)	
Government Employees, Local 2725,)	
)	PERB Case No. 13-A-13
Complainant,)	
)	Opinion No. 1444
v.)	
)	
District of Columbia Department of)	
Consumer and Regulatory Affairs,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Petitioner American Federation of Government Employees, Local 2725 (“Union,” “AFGE,” or “Petitioner”) filed the above-captioned Arbitration Review Request (“Request”), seeking review of Arbitrator Homer LaRue’s Arbitration Award (“LaRue Award”). Petitioner asserts that the Arbitrator’s Award is contrary to “well-defined and dominant law” and should be remanded. (Request at 2).

Respondent District of Columbia Dep’t of Consumer and Regulatory Affairs (“Agency,” “DCRA,” or “Respondent”) filed an Opposition to the Union’s Arbitration Review Request (“Opposition”). The Request and Opposition are now before the Board for disposition.

II. Procedural History

A. Background

On July 25, 2008, the late Arbitrator John Truesdale issued an Arbitration Award (“Truesdale Merits Award”) sustaining the Union’s grievance and awarding back pay for two grievants. (Request at 2; Opposition at 2). The Agency filed an Arbitration Review Request with the Board, challenging the Truesdale Merits Award. (Request at 2-3; Opposition at 2).

While that Arbitration Review Request was pending, the Union submitted a Petition for Attorney fees to Arbitrator Truesdale, which was granted on January 16, 2009 (“Truesdale Fee Award”). (Request at 2; Opposition at 2). The Agency filed a second Arbitration Review Request with the Board, challenging Arbitrator Truesdale’s award of attorneys’ fees at the rate allowed. (Request at 2-3; Opposition at 2). On September 30, 2009, the Board denied both Arbitration Review Requests, dismissing the merits Arbitration Review Request as untimely, and dismissing the attorneys’ fees Arbitration Review Request for failure to meet the criteria for reversal under D.C. Code § 1-605.02(6). *D.C. Dep’t of Consumer and Regulatory Affairs v. American Federation of Government Employees, Local 2725*, 59 D.C. Reg. 5392, Slip Op. No. 978, PERB Case No. 09-A-01 (2009); *D.C. Dep’t of Consumer and Regulatory Affairs v. American Federation of Government Employees, Local 2725*, 59 D.C. Reg. 5502, Slip Op. No. 992, PERB Case No. 09-A-03 (2009).

The Agency petitioned for review of the Board order regarding attorneys’ fees to the D.C. Superior Court. (Request at 3; Opposition at 2). On August 19, 2010, the D.C. Superior Court affirmed the Board’s order on attorneys’ fees. (Request at 4; Opposition at 2; *See D.C. Dep’t of Consumer and Regulatory Affairs v. D.C. Public Employee Relations Board*, No. 2009 CA 008104 B (D.C. Super. Ct. Aug. 19, 2010)). Following the D.C. Superior Court’s decision, the Union petitioned Arbitrator Truesdale for supplemental fees, and Arbitrator Truesdale issued an order for additional briefing on the matter. (Request at 4). The Agency challenged Arbitrator Truesdale’s order for additional briefing before the Board, alleging procedural and substantive defects in the briefing order. *See D.C. Dep’t of Consumer and Regulatory Affairs v. American Federation of Government Employees, Local 2725*, 59 D.C. Reg. 15198, Slip Op. No. 1338, PERB Case No. 11-A-01 (2012). On October 18, 2012, the Board dismissed the Agency’s challenge, finding that a briefing order is not a final arbitration award and is thus not appealable. *Id.* at 2.

Prior to the issuance of Slip Op. No. 1338, Arbitrator Truesdale passed away. (Request at 4; Opposition at 2). The parties selected Arbitrator LaRue to arbitrate the Union’s claim for supplemental attorneys’ fees. (Request at 5; Opposition at 2). On July 31, 2013, Arbitrator LaRue ruled in favor of the Agency, finding that he lacked jurisdiction to consider and grant the Union’s second petition for attorneys’ fees. (Request at 5; Opposition at 2). The Union appealed the LaRue Award, and this appeal is the matter presently before the Board.

B. Truesdale Award on Attorneys’ Fees

Arbitrator Truesdale was asked to determine whether the Union’s petition for attorneys’ fees had merit, and if so, in what amount fees should be granted. (Truesdale Fee Award at 2). Arbitrator Truesdale noted that in the Union’s post-hearing brief in the underlying grievance proceedings, the Union requested that he retain jurisdiction for the purposes of resolving any disputes involved in effecting the underlying award, and for the purpose of determining any attorneys’ fees to which the Union may be entitled based upon his findings. (Truesdale Fee Award at 4). The Arbitrator concluded that contrary to the Agency’s arguments, the parties’ collective bargaining agreement (“CBA”)’s silence with respect to attorneys’ fees did not deprive

him of jurisdiction to decide and award attorneys' fees, nor was the *functus officio*¹ doctrine controlling. (Truesdale Fee Award at 10). Instead, Arbitrator Truesdale determined that the Federal Back Pay Act ("BPA"), 5 U.S.C. §5596, conferred jurisdiction to decide the Union's petition for attorneys' fees. *Id.* After addressing the BPA's standards for evaluating attorneys' fee requests, and the prerequisites for an award of attorneys' fees, the Arbitrator concluded that an award of attorneys' fees was appropriate, and awarded the Union's attorney \$40, 964.00. (Truesdale Fee Award at 10-14).

C. LaRue Award on Supplemental Attorneys' Fees

Following Arbitrator Truesdale's death and the Board's refusal to halt the processing of the Union's supplemental attorneys' fee request, Arbitrator LaRue was asked to consider the Union's supplemental fee petition. (Request at 5; Opposition at 2). Arbitrator LaRue was asked to determine whether he had jurisdiction to consider and grant the Union's supplemental petition for attorneys' fees. (LaRue Award at 5).

Arbitrator LaRue first analyzed the application of the doctrine of *functus officio* to the supplemental attorneys' fee petition. (LaRue Award at 13). Arbitrator LaRue found that he "stands in the shoes of Arb[itrator] Truesdale as to the issue of the arbitrator's jurisdiction to hear this matter." (LaRue Award at 14). He noted that in Slip Op. No. 1338 (the Agency's challenge to Arbitrator Truesdale's briefing order), the Board "was quite clear that it dismissed the [Agency's] [arbitration review request] because it was premature." *Id.* However, Arbitrator LaRue noted that in dismissing the Agency's arbitration review request, the Board "express[ed] no opinion on the questions the arbitrator directed the parties to brief." *Id.*; citing Slip Op. No. 1338 at p. 2. Further, Arbitrator LaRue found that the Board made no findings of fact or conclusions of law on the question of whether the doctrine of *functus officio* applied to Arbitrator Truesdale's authority to hear the supplemental fee petition. *Id.*

Arbitrator LaRue then examined a portion of Slip Op. No. 992 (regarding the Truesdale Fee Award), in which the Board wrote:

DCRA first argues that the arbitrator issued the present award [i.e., the attorneys' fee award] "after his jurisdiction ended on October 24," and therefore he exceeded his jurisdiction. [Citation omitted]. Where the Board has no precedent on an issue, it looks to precedent set by other Labor Relations Authorities such as the Federal Labor Relations Authority ("FLRA"). It is well settled that an Arbitrator may retain jurisdiction after issuing a final and binding award on the merits for the purpose of resolving questions relating to attorney fees. [Footnotes omitted]. Moreover, the retention of jurisdiction by the Arbitrator for the purpose of resolving questions relating to attorney fees does not interfere in

¹ *Functus officio* is defined as "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." *Black's Law Dictionary* (9th ed. 2009).

any way with the Agency's right to file exceptions to the award on the merits. [Footnote omitted].

(LaRue Award at 15; *citing* Slip Op. No. 992 at p. 4). Arbitrator LaRue found it clear from the language cited in Slip Op. No. 992 that the Board "premised its conclusion of law as to the issue of *functus officio* on the finding that Arb[itrator] Truesdale retained jurisdiction at the time that he issued the Merits Award" for the purpose of considering a request for attorneys' fees. (LaRue Award at 15). He concluded that "law-of-the case" in the Slip Op. No. 992 "goes only to the authority of Arb[itrator] Truesdale to issue an attorney fee award after the award on the merits where the award on the merits contained a clear retention of jurisdiction by the arbitrator," but that Board's decision in Slip Op. No. 992 did not speak to the question of Arbitrator Truesdale's authority to hear and decide the Union's request for a supplemental fee award following the issuance of the initial fee award in which there was no retention of jurisdiction. *Id.* at 15-16. In other words, "[t]he condition precedent for Arb[itrator] Truesdale's exercise of jurisdiction to hear and to decide the initial fee award request does not exist in the instant matter." (LaRue Award at 16). Arbitrator LaRue concluded that he could not exercise authority which Arbitrator Truesdale did not possess after issuing the initial fee award. *Id.*

Next, Arbitrator LaRue determined that the BPA is not an independent basis for arbitral jurisdiction. (LaRue Award at 16-18). Arbitrator LaRue rejected the Union's contention that the *functus officio* argument against jurisdiction does not apply in a dispute regarding attorneys' fees under the BPA. *Id.* at 16. The Arbitrator found that the Union had cited no cases supporting its position that an arbitrator has jurisdiction to consider a request for attorneys' fees "independent of the CBA and the law applicable thereto." *Id.* Further, Arbitrator LaRue found that while Section 7701(g) of the BPA outlines the standards for the award of attorneys' fees, it "does not establish the BPA as the jurisdiction basis for the seeking of such fees." *Id.* Arbitrator LaRue interpreted the language of Section 5596(b)(1) of the BPA to mean that employees "found by an appropriate authority under applicable law, rule, regulation, or collective bargaining agreement" to have been adversely affected by a wrongful personnel action are entitled to an award of attorneys' fees, but the arbitrator "must look to the CBA and the law pertaining to arbitration under a collective bargaining agreement for his source of authority" to entertain the petition in dispute in the instant case. *Id.* at 17. He concluded that only if the parties' CBA grants an arbitrator authority to act does the BPA "set the basis" for that action. *Id.*

Arbitrator LaRue found that there was nothing in the language of the BPA to provide an independent basis for arbitral jurisdiction over the Union's supplemental fee petition. (LaRue Award at 17). Instead, the Arbitrator concluded that the doctrine of *functus officio* applied to the instant case, and he did not have authority to hear or decide the issue of supplemental attorneys' fees raised by the Union before Arbitrator Truesdale. *Id.*²

² Additionally, Arbitrator LaRue noted that the parties argued "other points" in their briefs on the supplemental fee petition. (LaRue Award at 18). The Arbitrator stated that he "need not address all of those other issues of contract interpretation or equity irrespective of their merit." *Id.*

Finally, Arbitrator LaRue determined that the limited nature of the inquiry in the instant case did not cure the jurisdictional defect. (LaRue Award at 18-19). In so concluding, he considered the Union's argument that:

[G]iven that the instant Arbitrator will have before him an extremely limited inquiry, that is, he need only determine whether the attorney fees were reasonable for the oppositions the Union had to file to defend the late Arbitrator Truesdale's awards, there is no rational basis for determining that he cannot make such an inquiry.

(LaRue Award at 18). Additionally, the Arbitrator noted the Union's contention that the Agency should not be able to "bollix up the case sufficiently such that the delay that ensues may mean that the arbitrator will not be alive to hear the petition of legitimate attorney fees." *Id.* Arbitrator LaRue agreed with the Union that the Agency's "dilatory tactics" seemed contrary to the purpose of the attorneys' fees provision of the BPA, as well as that the inquiry before him would be limited in nature and practically feasible to accomplish, should he be able to reach the merits of the dispute. *Id.* However, the Arbitrator found that "[n]o matter how appealing the policy or prudential reasons might be for the assertion of jurisdiction in the instant matter, the arbitrator is a creature of the contract and must be bound by its terms." *Id.* at 18-19. He went on to note that a fundamental element of the parties' agreement to arbitrate a dispute is that "once the arbitrator's work has been completed – defined as the issuance of a final award – the arbitrator may take no further action absent the retention of jurisdiction beforehand." *Id.* at 19.

III. Discussion

A. Union's Position before the Board

In its Request, the Union alleges that Arbitrator LaRue's determination that he lacked jurisdiction to hear the supplemental fee petition because jurisdiction to hear such a petition was not specifically retained by the Arbitrator is contrary to "well-defined and dominant law, ascertained by significant legal precedent." (Request at 2). The Union contends that the BPA provides an independent statutory basis for an award of attorneys' fees following an award of back pay, and does not require any specific retention of jurisdiction by the arbitrator. *Id.* The Union asks the Board to remand the matter to Arbitrator LaRue with instructions to consider the Union's supplemental fee petition. *Id.*

Before elaborating on the merits of its Request, the Union points to several factual discrepancies in Arbitrator LaRue's Award. First, the Union states:

In his Award, Arbitrator LaRue stated that the D.C. Superior Court issued 'orders of denial' of the Agency's challenges to the '[Board] decisions, which had affirmed the Merits Award as well as the Fee Award' on August 19, 2010, and October 18, 2012, respectively. [Citation omitted]. This statement is untrue, as the D.C. Superior

Court did not issue any order regarding this case on October 18, 2012, or on any date close thereto; the D.C. Superior Court did not hear a petition for review of the merits award, as the Agency did not challenge the merits award in D.C. Superior Court; the decision that issued on August 19, 2010, was a fee award decision from the D.C. Superior Court [citation omitted], not a merits award decision; the October 18, 2012, Order was a [Board] Order, not a D.C. Superior Court Order, as stated by Arbitrator LaRue; and that Order was not affirming the fee award as stated by Arbitrator LaRue, but was instead the [Board's] denial of the Agency's challenge to a simple scheduling order for briefing issued by Arbitrator Truesdale on September 2010 regarding the Union's supplemental petition for fees.

(Request at 3-4). The Union contends that none of these matters were disputed by the parties, and were part of the record of this case before both the Board and the D.C. Superior Court. *Id.* at 4. The Union states that it is also undisputed that the Union did not seek supplemental attorneys' fees until after the D.C. Superior Court decision affirming the original fee award, and not prior to the issuance of the D.C. Superior Court decision, as stated by Arbitrator LaRue. *Id.*; citing LaRue Award at 5.

In its Request, AFGE contends that Arbitrator LaRue's Award is contrary to law because the BPA does not require an arbitrator to specifically retain jurisdiction to hear a fee petition because the BPA provides an independent statutory basis for fee awards. (Request at 6). In support of this contention, the Union cites to several FLRA cases as "well-defined and dominant law" showing that the BPA is "legally an independent basis for jurisdiction over an award of attorney fees." (Request at 6-7). First, the AFGE points to *Philadelphia Naval Shipyard and Philadelphia Metal Trades Council (Philadelphia Naval Shipyard)*, 32 FLRA 417 (1998). (Request at 7). In that case, the union appealed an arbitrator's determination that he lacked jurisdiction to decide the merits of a fee petition filed after the successful resolution of the underlying case. (Request at 7-8). According to AFGE, the FLRA found that the arbitrator's position was contrary to law, noting that "where the Back Pay Act confers statutory jurisdiction on an arbitrator to consider an attorney fees request, the *functus officio* doctrine does not preclude an arbitrator from considering the request. We conclude, therefore, that the Back Pay Act confers jurisdiction on an arbitrator to consider an attorney fees request filed after an arbitrator's decision awarding backpay." (Request at 8; citing *Philadelphia Metal Trades Council*, 32 FLRA at 421). Further, AFGE asserts that the FLRA determined that under the BPA, "the specific retention of jurisdiction by the Arbitrator to hear a petition for attorney fees is unnecessary to establish arbitral jurisdiction to hear that petition." (Request at 9).

The Union contends that the FLRA's holding in *Philadelphia Metal Trades Council* is a "well-defined and dominant legal principle." (Request at 9). As an example, the Union cites to *Dep't of Defense, DLA and AFGE Local 2004*, 47 FLRA 791, 794 (1993), in which the FLRA remanded a case to an arbitrator with instructions to consider a fee petition because "no law or regulation...prohibits an arbitrator from considering a request for attorney fees filed within a

reasonable time after an award becomes final and binding.” (Request at 9). AFGE states that the FLRA’s holding “of course means that the failure to specifically retain jurisdiction for purposes of an attorney fee petition does not prohibit the arbitrator from considering that petition.” *Id.* at 9-10. Further, AFGE points to *Alabama Ass’n of Civilian Technicians and Alabama Nat’l Guard*, 51 FLRA 1262, 1263-64 (1996), in which the FLRA held:

[I]t is well-established that, under the Back Pay Act, 5 U.S.C 5596, and implementing regulations, 5 C.F.R. Part 550, an arbitrator may retain jurisdiction after issuing an award for the purpose of considering requests for attorney fees. (Citation omitted). However, an arbitrator is not required to do so in order to entertain a request for attorney fees. (Citation omitted.) Instead, as the Back Pay Act confers statutory jurisdiction on an arbitrator to consider an attorney fees request, such a request may be submitted to an arbitrator after issuance of an award...”

(Request at 10). Additionally, the Union notes that the BPA applies to DCRA, as the D.C. Court of Appeals has held that the attorney fee provision of the BPA was a component of the compensation system in effect as of December 31, 1979, and therefore applicable to District government employees. (Request at 11; *citing Zenian v. D.C. Office of Employee Appeals*, 589 A.2d 1161, 1163-4 (D.C. 1991) and *D.C. v. Hunt*, 520 A.2d 300, 304 (D.C. 1987)).

Finally, the Union contends that “it does not appear that the Arbitrator actually reviewed the Union’s legal authority on the subject, as there is not a single reference in the Award to the above cases, to which the Union cited in its Brief.” (Request at 11-12; *citing* Union Brief at 14-15). The Union hypothesizes that Arbitrator LaRue read only the Union’s introductory paragraph on the subject in its Brief, which did not contain the legal authority, and “appears to have reviewed only the cases the Union provided for purposes of establishing that the Federal Back Pay Act applies to District of Columbia agencies, including the instant agency.” (Request at 12; *citing* LaRue Award at 16, Union Brief at 12, n. 4). Additionally, the Union alleges that the Arbitrator misunderstood the Board’s precedent regarding “the independent, statutory authority conferred by the Back Pay Act for purposes of attorney fee petitions.” (Request at 12). The Union points to the Arbitrator’s consideration of Slip Op. No. 992, from which he concluded that “[i]t is clear from the language cited that the PERB premised its conclusion of law as to the issue of *functus officio* on the finding of fact that Arb[itrator] Truesdale retained jurisdiction at the time that he issued the Merits Award.” (Request at 12; *citing* LaRue Award at 15). AFGE states that contrary to Arbitrator LaRue’s interpretation, the Board:

fully explained in the decision that Arbitrator Truesdale had only retained jurisdiction to hear a petition for attorney fees until October 24, 2008, and he rendered his attorney fee decision on January 16, 2009, after the retained jurisdiction expired. Despite that expiration, the PERB found that the Arbitrator had not exceeded his jurisdiction. It is further clear that the above case does not stand for the proposition that the Arbitrator must

specifically retain jurisdiction to hear an attorney fee petition under the Back Pay Act because the PERB cited approvingly in [Slip Op. No. 992] to Dep't of Treasury, Customs Services, Nogales and Nat'l Treasury Employees Union Chapter 116, 48 FLRA 938, 940-42 (1993), which relied upon Philadelphia Naval Shipyard, the dominant case holding that the Back Pay Act confers independent, statutory jurisdiction upon an arbitrator for purposes of awarding attorney fees. From these points, it is clear that the PERB was not stating in the [Slip Op. No. 992] case that the Arbitrator himself had specifically retained jurisdiction to hear a petition for attorney fees (and therefore he had authority to hear the petition), but that jurisdiction was retained within the Arbitrator via the Back Pay Act.

(Request at 12-13). Therefore, AFGE concludes that Arbitrator LaRue's determination that he lacked authority to hear a petition for fees is contrary to well-defined and dominant law, as ascertained by legal precedent, and that the violation is clear on the face of the LaRue Award. (Request at 13).

B. Agency's Position Before the Board

In its Opposition, the Agency contends that a recent U.S. Supreme Court case, *Oxford Health Plans, LLC v. John Ivan Sutter*, 133 S. Ct. 2064 (2013) mandates that the Board affirm Arbitrator LaRue's conclusion that he lacks jurisdiction to consider the supplemental fee petition. (Opposition at 3). The Agency asserts that in *Oxford*, the Supreme Court concluded that "[s]o long as an arbitrator 'makes a good faith attempt' [to] interpret a contract, 'even serious errors of law or fact will not subject his award to vacatur.'" 133 S.Ct. at 2068, citing *Sutter v. Oxford Health Plans, LLC*, 675 F.3d 215, 220 (3rd Cir. 2012). The Agency further notes that the Court found that "an arbitral decision 'even arguably construing or applying the contract' must stand regardless of a court's view of its (de)merits." *Id.*; citing *Eastern Associated Coal v. Mine Workers*, 531 U.S. 57 (2000).

The Agency draws further parallels between its case and *Eastern Associated Coal*, stating that the Supreme Court found that the parties' CBA gave the arbitrator the authority to interpret the agreement, and concluded that the parties had bargained for the arbitrator's construction of their agreement. (Opposition at 5-6; citing *Eastern Associated Coal*, 531 U.S. at 62). The Agency states that "[w]hen considering the public policy argument Eastern presented, [the] Court looked to the essential holding of *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983)," which required the public policy at issue to be explicit, well-defined, and dominant. (Opposition at 6; citing *Eastern Associated Coal*, 531 U.S. at 62).

Next, the Agency states "DCRA reviews the last five arbitration review request decisions that PERB issued. With the exception of the Schools case, all affirm the arbitrator's decision and all contain the jurisprudence of *Oxford* and *Eastern*. Thus, PERB is in harmony with the broad

outline of these precedents.” (Opposition at 7). The Agency then lists, with no explanatory text, the following five cases:

- 1) *D.C. Public Schools v. Council of School Officers, Local 4, American Federation of School Administrators*, 60 D.C. Reg. 12075, Slip Op. No. 1402, PERB Case No. 13-A-09 (2013).
- 2) *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, Slip Op. No. 1396, PERB Case No. 04-A-01 (July 1, 2013).
- 3) *D.C. Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 60 D.C. Reg. 9281, Slip Op. No. 1390, PERB Case No. 12-A-07 (2013).
- 4) *Office of the Chief Technology Officer v. American Federation of State, County, and Municipal Employees, District Council 20, Local 2776*, 60 D.C. Reg. 7218, Slip Op. No. 1386, PERB Case No. 12-A-06 (2013).
- 5) *D.C. Dep't of Health v. American Federation of Government Employees, Local 2725*, 60 D.C. Reg. 7196, Slip Op. No. 1382, PERB Case No. 13-A-01 (2013).

(Opposition at 7).

Finally, the Agency alleges that the LaRue Award “shows full harmony with the Supreme Court precedent,” and states that “[g]iven the broad powers and deference given to arbitration decisions, DCRA[] should prevail in the instant matter.” (Opposition at 7). The Agency’s argument is as follows:

As his first step [the] Arbitrator understandably drew his jurisdictional power from the collective bargaining agreement. The CBA provides the process for selecting arbitrators and that was the methodology used to choose Arbitrator LaRue. The decision he wrote has a new FMCS docket number on it. The decisions rendered by Arbitrator Truesdale bear a different FMCS docket number. PERB can take “judicial notice” that FMCS’s mission is to supply arbitrators to disputants bound to agreements that call for arbitration. Thus, it is specious when the union claims its petition for supplemental attorney fees has nothing to do with the foundational obligation to arbitrate that the CBA contains. The CBA provides for obtaining arbitrators through the auspices of the American Arbitration Association or the Federal Mediation and Conciliation Service.

Article 10, Section E 12 provides: “The arbitrator shall have full authority to award a remedy.” This sentence could not be clearer.

It grants jurisdiction and empowers the arbitrator to award a remedy.

After Mr. LaRue was selected he inquired about any question about his jurisdiction. DCRA immediately said he had no jurisdiction [and] that the doctrine of *functus officio* barred any further award of fees. Briefs were duly filed and he decided based upon the CBA and Mr. Truesdale's prior decision on fees.

In support of his decision that he lacked jurisdiction [,] Arbitrator LaRue noted that Mr. Truesdale had not held onto jurisdiction in his attorney fee award of January 16, 2009. That meant that once Mr. Truesdale published his attorneys' fees decision to the parties, jurisdiction ended. The doctrine of *functus officio* attached to the entire case.

Second, LaRue looked at the statutes admittedly governing the case. 5 U.S.C. §6696(b)(1) permits attorneys' fees to be awarded but requires a foundational nexus with some personnel event, here the collective bargaining agreement. 5 U.S.C. §7701(g)(1) allows for the award of fees, assuming jurisdiction exists. The statutory text and LaRue's emphasis of it is clear and direct. Without the foundation of the grievance arbitration process no jurisdiction exists to consider attorney fees. Moreover[,] Arbitrator LaRue's analysis is correct, always using the collective bargaining agreement as the foundation of his analysis. Therein he rejects the Union's bizarre idea that the claim for fees can be independent of the CBA. The Union's argument is as illogical as claiming a construction crew can completely build the second story before the crew substantially finishes the first story. Arbitrator LaRue always used the CBA as his foundation. Both *Oxford* and *Eastern* require that standard. Arbitrator LaRue was meticulous with his reading of Mr. Truesdale's attorneys' fees decision. Arbitrator LaRue saw that Mr. Truesdale had decided to relinquish jurisdiction over further fees by not retaining jurisdiction in the attorney fees award that he wrote. Arbitrator LaRue is absolutely correct in his decision: he had no jurisdiction and the matter is concluded.

(Opposition at 8-9; internal citations omitted).

C. 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 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, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *D.C. Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 47 DC Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000); *see also District of Columbia Public Schools v. American Federation of State, County and Municipal Employees, District Council 20*, 34 DC Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (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/Dep't of Corrections Labor Committee v. Public Employee Relations Board*, 973 A.2d 174, 177 (D.C. 2009).

In the instant case, the Union alleges that the LaRue Award violates law from the FLRA establishing the BPA as an independent basis for arbitral jurisdiction over an attorneys' fee petition. (Request at 6-7). The Agency does not oppose the Union's argument directly, but rather contends that the LaRue Award must be upheld because the Arbitrator was arguably construing the parties' CBA, and that the Board must defer to the Arbitrator's interpretation of the CBA. (Opposition at 3-7). The Board will not modify or set aside the LaRue Award unless it falls within one of the three exceptions stated in D.C. Code § 1-605.02(6). *See, e.g., D.C. Water and Sewer Authority v. AFGE Local 631*, 59 D.C. Reg. 4536, Slip Op. Nos. 931 at p. 5, PERB Case Nos. 07-A-05 and 07-A-06 (2008). Therefore, the Board must determine whether the BPA creates an independent basis for jurisdiction over the Union's supplemental fee petition, and if so, whether the LaRue Award is contrary to that law and public policy.

The question of whether the BPA confers jurisdiction upon an arbitrator to consider a second or supplemental petition for attorneys' fees after an initial petition for attorneys' fees has been granted is an issue of first impression before the Board. Where the Board has no precedent on an issue, it looks to precedent set by other labor relations authorities, such as the National Labor Relations Board and the Federal Labor Relations Authority. *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, Slip Op. No. 1119 at p. 5, PERB Case No. 08-U-38 (Oct. 7, 2011); *citing Forbes v. Int'l Brotherhood of Teamsters, Local 1714*, 36 D.C. Reg. 7107, Slip Op. No. 229, PERB Case No. 88-U-20 (1989) and *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, 48 D.C. Reg. 8530, Slip Op. No. 649, PERB Case No. 99-U-27 (2001).

The FLRA has definitively found that the BPA "confers jurisdiction on an arbitrator to consider a request for attorney fees filed within a reasonable time after an arbitrator's award becomes final and binding," and that where the BPA confers statutory jurisdiction, the *functus officio* doctrine does not preclude an arbitrator from considering the request. *Philadelphia Naval Shipyard*, 32 FLRA at 417-21; *see also U.S. Dep't of the Army Red River Army Depot*,

Texarkana, Texas and Nat'l Association of Government Employees, 39 FLRA 1215, 1221 (1991) (arbitrator erred in concluding that he must be specifically authorized by the parties' CBA to award attorney fees because such authority is conferred upon him by the BPA); *Nat'l Association of Government Employees, Local R4-106 and Dep't of the Air Force Langley Air Force Base Virginia*, 32 FLRA 1159, 1164 (1988) (arbitrator erred in concluding that the doctrine of *functus officio* prevented him from considering union's request for attorneys' fees). The Board cited this precedent with approval in Slip Op. 992, the Board's decision on the Agency's appeal of Arbitrator Truesdale's attorneys' fees award, where it noted that "[i]t is well settled that an Arbitrator may retain jurisdiction after issuing a final and binding award on the merits for the purpose of resolving question relating to attorney fees," and cited to *Dep't of the Treasury, Customs Service, Nogales and National Treasury Employees Union Chapter 116*, 48 FLRA 938, 940-42 (1993). Slip Op. 992 at p. 4 n. 6.

In *American Federation of Government Employees, Local 1148 and U.S. Dep't of Defense Supply Center, Columbus, Ohio*, the FLRA rejected an arbitrator's determination that he lacked authority to consider a union's attorneys' fee request because the parties' CBA limited him to answering only questions put before him by the parties. 65 FLRA 402, 403 (2010). Instead, the FLRA determined that the BPA confers jurisdiction on an arbitrator to consider a request for attorney fees at any time during the arbitration or within a reasonable period of time after the backpay award becomes final and binding, unless the parties' CBA "clearly and unmistakably" waives the statutory right to such fees. *Id.* Further, the FLRA has determined that even in instances where an arbitrator does not specifically retain jurisdiction to consider attorneys' fees, a party may file a request for fees within a reasonable time, "consistent with the [a]rbitrator's statutory jurisdiction" over a case. *Alabama ACT and Alabama Nat'l Guard*, 51 FLRA 1262, 1264 (1996); *see also American Federation of Government Employees, Local 2054 and VA Central Arkansas Healthcare System*, 58 FLRA 163, 164 (2002) (a union may file a fee petition with an arbitrator once an award has become final, regardless of whether the arbitrator retained jurisdiction to hear fee petitions).

In his Award, Arbitrator LaRue states:

The specific language of [Section 5596(b)(1) of the BPA] requires that an employee be "...found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement..." to have been adversely affected by a wrongful personnel action. That then entitles the employee to seek attorney's fees. This means, however, that the arbitrator must look to the CBA and the law pertaining to arbitration under a collective bargaining agreement for his source of authority to entertain the petition at dispute here. If the arbitrator determines that the CBA grants the arbitrator authority to act then the Back Pay Act sets the basis for that action.

(LaRue Award at 17). In the instant case, the grievants were found by an arbitrator – an appropriate authority under the parties' CBA – to have been adversely affected by a wrongful

personnel action, and were awarded back pay. (Request at 2; Opposition at 2). Notwithstanding, as shown by the FLRA precedent above, the BPA provides an independent basis to seek attorneys' fees, *separate* and apart from any authority granted by a party's CBA.

The BPA provides for recovery of attorneys' fees if the request for fees is "related to the personnel action" giving rise to the dispute. 5 U.S.C. § 5596(b)(1)(A)(ii). Additionally, the purpose of the BPA is to "facilitate[] the retention of counsel by government employees who are victims of wrongful personnel actions. When such actions are successfully overcome, the government is required to pay lost income to the employee and to reimburse the costs of litigation." *Naekel v. Dep't of Transportation, Federal Aviation Administration*, 845 F.2d 976, 980 (Fed. Cir. 1988). The FLRA has held that if an arbitrator determines that attorneys' fees are warranted, that determination "applies to all subsequent phases of litigation involving the case if the grievant prevails in the subsequent litigation." *U.S. Dep't of Health and Human Services, Social Security Administration and American Federation of Government Employees, Local 1923*, 48 FLRA 1040, 1050 (1993); *see also U.S. Dep't of Justice, Bureau of Prisons, Washington, D.C. and Bureau of Prisons Federal Correctional Institution, Ray Brook, N.Y.*, 32 FLRA 20, 27 (1998), reversed in part and remanded as to other matters, *American Federation of Government Employees, Local 3882 v. FLRA*, 944 F.2d 922 (D.C. Cir. 1991) (agency's duty to comply with an arbitrator's final award extends to subsequent litigation to enforce compliance where the employee prevails). Further, attorneys' fees are "routinely awarded for time spent litigating entitlement to attorney fees." *American Federation of Government Employees, Local 3882 v. FLRA*, 994 F.2d 20, 22 (D.C. Cir. 1993) ("*AFGE Local 3882*"); *see also U.S. Dep't of Defense, Dependents Schools and Federal Education Association*, 54 FLRA 514, 520 (1998) ("*FEA*"). In *AFGE Local 3882*, the D.C. Circuit determined that although the legislative history is silent as to the exact purposes of the BPA's attorneys' fees provision, "it is undoubtedly intended to facilitate suits to enforce federal labor policy," and that without the ability to collect "fees for fees" under the BPA, there would be a chilling effect on both victims of unjustified personnel actions and the attorneys willing to represent them. *Id.* at 23. In *FEA*, the FLRA determined that under the BPA, time spent collecting attorneys' fees is related to the underlying personnel action and is recoverable. 54 FLRA at 520.

As acknowledged by Arbitrator LaRue in his Award, there is no dispute that the BPA applies to agencies of the District of Columbia government. (LaRue Award at 16); *see also Zenian v. D.C. Office of Employee Appeals*, 598 A.2d 1161 (D.C. 1991); *D.C. v. Hunt*, 520 A.2d 300 (D.C. 1987). Further, the D.C. Court of Appeals determined that the attorneys' fees provision of 5 U.S.C. § 5596 "is not an administrative process or mechanism but is instead a concrete personnel entitlement or benefit," and a "restitutionary form of compensation for employees who are forced to litigate District personnel actions later determined to be improper." *District of Columbia v. Hunt*, 520 A.2d 300, 304 (1987). The Court held that attorneys' fees are a benefit that "merely returns these employees to the position they would have occupied if such improper action never took place." *Id.* Therefore, although this is a case of first impression for the Board, the Board has determined that the same precedents applied to federal employees in the FLRA's BPA decisions, should also apply to D.C. employees in cases involving the BPA brought before the Board.

The parties' CBA is silent as to attorneys' fees resulting from arbitration. The BPA provided independent authority for the original award of attorneys' fees, and there is no reason why that authority does not extend to the supplemental petition. The Union's request for supplemental attorneys' fees is related to the underlying personnel action giving rise to the instant case. Permitting the Union to collect attorneys' fees in this instance furthers the purpose of the BPA to "facilitate the retention of counsel by government employees who are victims of wrongful personnel actions." *Naekel*, 845 F.2d at 980. Arbitrator Truesdale determined that attorneys' fees were appropriate in this case, and that determination "applies to all subsequent phases of litigation involving the case if the grievant prevails in the subsequent litigation." *U.S. Dep't of Health and Human Services*, 48 FLRA at 1050.

The parties' CBA does not "clearly and unmistakably" waive the statutory right to attorneys' fees granted by the BPA and recognized by the Board. There is no precedent cited by the parties, and the Board can find none, limiting the BPA's grant of statutory authority to one attorneys' fee petition. With no limitation on the BPA's grant of jurisdiction over subsequent fee petitions, and no clear and unmistakable waiver on the statutory right to attorneys' fees in the parties' CBA, the Board finds that the BPA provides independent statutory jurisdiction for an arbitrator to consider the supplemental fee petition in this case. The LaRue Award is thus on its face contrary to law and public policy, and the matter will be remanded to the Arbitrator for consideration of the Union's supplemental fee petition.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 2725's Arbitration Review Request is granted.
2. The matter is remanded to Arbitrator Homer LaRue, with instructions to consider the American Federation of Government Employees, Local 2725's supplemental fee petition.
3. 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.

November 26, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-A-13 was transmitted to the following parties on this the 26th day of November, 2013.

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