

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: |) | |
| |) | |
| Water and Sewer Authority |) | |
| |) | |
| Petitioner |) | PERB Case No. 18-A-15 |
| |) | |
| v. |) | Opinion No. 1699 |
| |) | |
| American Federation of Government Employees, Local 631 |) | |
| |) | |
| Respondent |) | |

DECISION AND ORDER

The Petitioner District of Columbia Water and Sewer Authority (“Authority”) filed an arbitration review request (“Request”) appealing an award issued on July 15, 2018, (“Award”) on a group grievance filed by the Respondent American Federation of Government Employees, Local 631 (“Union”). The Arbitrator upheld the grievance, ordered the Authority to restore the *status quo ante*, and awarded attorneys’ fees and costs. The Authority appeals the Award on the grounds that it is contrary to law and public policy, that it lacks clarity, and that it is devoid of analysis.

The narrow circumstances under which the Comprehensive Merit Personnel Act (“CMPA”) permits the Board to modify, set aside, or remand an award are “if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means.”¹ Having reviewed the Award, the pleadings of the parties, the arbitration record submitted by the parties, and applicable law, the Board finds that the Award violates law and public policy in its award of attorneys’ fees and costs but not in any other respect.

¹ D.C. Official Code § 1-605.02(6).

I. Statement of the Case

A. Grievance

On October 12, 2017, the Union submitted a step 3 group grievance alleging unilateral changes to working conditions, violations of a memorandum of understanding, and violations of the parties' collective bargaining agreement ("CBA").

According to the Union, the Authority made two changes to working conditions without notice or bargaining: the first increased from four hours to eight the time employees must wait at the end of a shift before beginning overtime; the second increased from one to two the number of duty stations employees were assigned to during a tour of duty.

Further, the grievance alleged that the Authority violated a May 15, 2017 memorandum of understanding ("MOU") by requiring waste water treatment operators to perform PCS computer² monitoring without training. The grievance alleged that the Authority violated article 12 of the CBA by operating the Waste Water Treatment Process Department without a full staff and by failing to implement and maintain a fatigue risk management program. The grievance further alleged that the Authority's "failure to provide information on the PCS duties is a violation of the MOU, paragraphs 5 through 7 and Article 18 of the Working Conditions Agreement."³ The grievance did not allege that the Union had requested that information from the Authority.

With regard to remedies, the grievance stated that the Union sought an award instructing the Authority to (1) comply with the MOU by training employees before they work on the PCS computer monitoring and by resuming the practices of assigning employees to only one duty station per shift and of having employees wait only four hours before beginning overtime, (2) comply with the CBA, and (3) provide the information the Union sought. The Union also asked that affected employees be made whole for any lost wages and benefits plus interest. Of significance to this arbitration review request, the Union also requested "reimbursement of attorney fees and costs under the Federal Back Pay Act, 5 U.S.C. sec. 5596 and the CMPA."⁴

The day after filing the grievance, the Union sent the Authority a letter with the heading "Corrected Grievance Information Request Regarding Unilateral Changes to Work Practices and Safety Violations in WWT." The letter stated that the information it requested "is needed to process and present our grievances filed October 12, 2017." The letter requested documents related to the various grievances.⁵

² The record does not disclose what PCS stands for.

³ Request Ex. C-2 at 3.

⁴ *Id.*

⁵ Request Ex. C-5.

The Authority responded to the grievances in a letter dated November 8, 2017. The Authority stated that “the grievance is moot as it pertains to the PCS Monitoring issue and is respectfully denied on the remaining issues.”⁶

B. Arbitration

On November 13, 2017, the Union filed a step 4 grievance invoking arbitration. On July 18, 2018, the Arbitrator, Kenneth E. Moffett, issued the Award, which related at length the testimony of the witnesses and the arguments of the parties before, during, and after the hearing.⁷ Following that recitation, the Award upheld the grievance and stated in pertinent part:

Opinion and Award

After hearing the parties['] arguments in hearing and reading both sides['] Post hearing briefs, I rule in favor of the Union. The Authority had an obligation to give the Union advance written notice and to bargain with the Union over any changes in working conditions. The remedy should return the parties to the status quo that existed prior to Management[']s making the unilateral change.

A return would permit the Union to bargain and address those issues that concern them. The Overtime wait time should be returned to the status quo.

The Authority is ordered to respond to the Union[']s request for information. The Union[']s request for attorney fees and costs, in accordance with the Federal back pay act is granted. The Union has 30 work days from this issuance in this matter to submit the names of employees who lost wages due to the change in overtime wait time and to submit a petition for attorneys['] fees and costs.⁸

C. Arbitration Review Request

On August 10, 2018, the Authority filed an arbitration review request (“Request”) along with exhibits and a brief in support. On August 30 the Union filed a Response with exhibits. Before addressing the merits of the Request, the Response raised two procedural objections to the Request that it asserted were grounds for dismissal.

First, the Response and a supporting affidavit averred that the Request was served on the Union by electronic mail only and not by any of the means of service permitted by Rule 501.11(b).⁹ The Executive Director responded to this objection by sending the Authority a deficiency letter notifying it of the deficiency and allowing it seven days to cure the deficiency in accordance with Rule 501.5. The Authority cured the deficiency within the allotted time.

⁶ Request Ex. C-3 at 2.

⁷ Opinion & Award 2-18.

⁸ *Id.* at 18-19.

⁹ Response 4 (citing Request 8); Response Ex. 7 (affidavit of Hutchinson).

The Union's second procedural objection was that the Request was untimely. The Union stated that the CBA requires an arbitration review request to be filed within 20 days after service of the award. This period is a day shorter than that found in Rule 538.1, which was revised in 2015 to increase the filing period from 20 days after service of the award to 21 days after service of the award. The Union moved to dismiss the Request on the ground that it was untimely filed 22 days after the Arbitrator mailed the Opinion and Award on July 18, 2018. However, the Union failed to add the five days that Rules 538.1 and 501.4 allow when an award is mailed. As a result, the Executive Director denied the motion to dismiss. The Union did not move for reconsideration of the Executive Director's decision. Consequently, the Executive Director's decision is final.¹⁰

II. Discussion

The Authority asserts in its Request and supporting brief that the Award is contrary to law and public policy, that it lacks clarity, and that it is devoid of analysis.

A. The Authority's Claim that the Award is Contrary to Law and Public Policy

1. Award of Attorneys' Fees under the Back Pay Act

The first aspect of the Award that the Authority challenges as contrary to law and public policy is its award of attorneys' fees. The Authority contends that the award of attorneys' fees under the Back Pay Act ("BPA") is on its face contrary to law and public policy because the BPA is inapplicable to the Authority.

a. The Authority did not waive its objection.

The Union asserts that the Authority did not raise this issue below: "The Union's grievance requested the arbitrator to apply the Federal Back Pay Act and the Authority did not challenge the arbitrator's authority to apply the Federal Back Pay Act. In the Authority's Post-Hearing Brief, the Authority did not raise any objection to the application of the Federal Back Pay Act."¹¹

Although the Union does not say so expressly, it has raised the question of whether the Authority has waived its objection to the application of the BPA. Because arbitrators derive their authority from the consent of the parties,¹² participating in an arbitration without objecting to the arbitrability of an issue generally results in a waiver of an objection to its arbitrability.¹³

¹⁰ See PERB R. 500.4.

¹¹ Response 6 (citing Response Ex. 4 (Authority's Post-Hearing Br.) 3-11).

¹² *Washington Teachers' Union Local No. 6 v. D.C. Pub. Sch.*, 77 A.3d 441, 446 (D.C. 2013).

¹³ *Lopata v. Coyne*, 735 A.2d 931, 937 (D.C. 1999); *D.C. Fire & Emergency Med. Servs. v. AFGE, Local 3721*, Slip Op. No. 756 at 3-4, PERB Case No. 02-A-08 (Aug. 31, 2004). Substantive arbitrability may be challenged by filing a motion to stay arbitration in Superior Court pursuant to the Arbitration Act unless the parties' collective bargaining agreement clearly and unmistakably provides that the issue is to be decided by the arbitrator in the first instance. *Washington Teachers' Union*, 77 A.3d at 453-54. See also *D.C. Pub. Sch. and AFSCME, Dist. Council 20*, Slip Op. No. 1576 at 2-3, PERB Case No. 15-A-08 (Apr. 21, 2016) (quoting *Washington Teachers' Union*). Issues of procedural arbitrability are for arbitrators to decide. *Washington Teachers' Union*, 77 A.3d at 446, 446 n.10; *Brown v. D.C. PERB*, 19 A.3d 351, 358 (D.C. 2011).

However, the principle that a party can waive the arbitrability of an issue by participating in an arbitration does not mean that an objection that an award is contrary to law is waivable. Quoting the Connecticut Supreme Court in *Board of Trustees for State Technical Colleges v. Federation of Technical College Teachers Local 1942*,¹⁴ the D.C. Court of Appeals said that “a party is not ‘estopped to claim, because of a waiver, that the arbitrator’s award violates the mandates of specific statutory and regulatory provisions.’”¹⁵ In *Board of Trustees*, the court distinguished cases holding that arbitrability was waivable from the case before it where there was no dispute that the question before the arbitrator (the number of sick days employees accrue per year under a contract) was arbitrable but the question before the court was whether the number of sick days the arbitrator found conflicted with state law. The court held that the principle that the issue of arbitrability is waivable “has no place in the context of the present case.”¹⁶

Similarly, the Federal Labor Relations Authority has held that it may consider a statutory bar to an arbitrator’s jurisdiction to rule on a grievance regardless of whether the jurisdictional argument was made to the arbitrator.¹⁷

In the present case, the arbitrability of the grievance is not in dispute. The question is whether one of the remedies ordered by the Arbitrator conflicts with statutory law. Guided by the foregoing authorities, we hold that the Authority is not estopped to claim, because of waiver, that the award of attorneys’ fees under the BPA is contrary to law.

b. The award of attorneys’ fees is contrary to law.

The BPA provides, *inter alia*, that “[a]n employee of an agency who, on the basis of . . . 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 which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee” is entitled to reasonable attorneys’ fees.¹⁸ An arbitrator does not exceed his authority by looking to the BPA when the collective bargaining agreement is silent on the issue of attorneys’ fees.¹⁹

In challenging the Arbitrator’s award of attorneys’ fees under the BPA, the Authority relies upon *White v. D.C. Water and Sewer Authority*.²⁰ In that case the court stated that it had previously held that the CMPA supersedes the BPA.²¹ The CMPA supersedes the BPA in section 1-632.05(a)(5)(G), which provides, “The following provisions of Title 5 of the United States Code are superseded for all employees of the District of Columbia Government: . . . 5

¹⁴ 425 A.2d 1247, 1251 (Conn. 1979).

¹⁵ *Drivers, Chauffeurs, & Helpers Local Union No. 639 v. D.C.*, 631 A.2d 1205, 1211 (D.C. 1993).

¹⁶ 425 A.2d at 1252.

¹⁷ *AFGE Local 1923 v. Soc. Sec. Admin.*, 66 F.L.R.A. 424, 425 (2012); *U.S. Dep’t of the Navy, Naval Air Eng’g Station Lakehurst, N.J.*, 64 F.L.R.A. 1110, 1111 (2010).

¹⁸ 5 U.S.C. § 5596(b)(1)(A)(ii).

¹⁹ *AFSCME, Dist. Council 20, Local 2087 v. Univ. of D.C.*, 166 A.3d 967, 973 (D.C. 2017).

²⁰ 962 A.2d 258 (D.C. 2008).

²¹ *Id.* at 259 (citing *Mitchell v. D.C.*, 736 A.2d 228, 229 n.1 (D.C. 1999)).

U.S.C. § . . . 5596(a)(5).” Section 5596(a)(5) defines “agency” for purposes of the BPA to include the government of the District of Columbia. However, the court said that notwithstanding section 1-632.05(a)(5)(G) “the Back Pay Act continues to apply to District employees under the broader CMPA policies of maintaining . . . the pre-CMPA compensation system [including the attorney fees provision of the FBPA] for all employees . . . until a new [compensation system] is enacted to replace it.”²²

The CMPA policy the court referred to is found in section 1-611.04(e), which provides, “Until such time as a new compensation system is approved, the compensation system, including the salary and pay schedules, in effect on December 31, 1979, shall continue in effect. . . .” The court held that the Authority had adopted a new compensation system as provided for in section 34-2202.17(b)²³ and pursuant to that statute it had “exempted itself from the reach of the CMPA’s compensation provisions, including entitlement to attorney fees under the FBPA.”²⁴ The Authority, the court held, “is relieved of application of the CMPA and, thereby, the FBPA.”²⁵

As the Authority correctly notes, in *Housing Authority v. AFGE Local 2725*²⁶ the Board recognized *White*’s holding that the BPA is inapplicable to the Authority. As the BPA is inapplicable to the Authority, compelling the Authority to pay attorneys’ fees under the BPA is contrary to law and public policy, in particular sections 1-632.05(a)(5)(G) and 34-2202.17(b) of the D.C. Official Code as authoritatively interpreted by the court of appeals.

The Union asserts an independent basis for the award of attorneys’ fees. The Union contends that the Arbitrator had equitable powers to fashion a remedy for any violations he found.²⁷

The “equitable powers” of an arbitrator are a matter of contract and are governed by normal principles of contract law.²⁸ Whether the parties’ contract authorizes an award of attorneys’ fees is a matter within the Arbitrator’s purview and not the Board’s. The Arbitrator did not state that the CBA authorized an award of attorneys’ fees or that he was acting under the authority of the CBA in awarding attorneys’ fees. He said only that the “request for attorney fees and costs, in accordance with the Federal [B]ack [P]ay [A]ct is granted.”²⁹ Accordingly, the Board sets aside the award of attorneys’ fees and remands the case to the Arbitrator to reconsider his remedy in the light of this opinion and to issue an award consistent therewith.

²² *Id.* (quoting *AFGE v. D.C. Water & Sewer Auth.*, 942 A.2d 1105, 1112-13 (D.C. 2007)).

²³ “Until the Board [of Directors of the Authority] establishes a personnel system and a procurement system, and until rules and regulations pertaining to the Board’s duties have been promulgated, Chapter 3A of Title 2, and § 1-601.01 et seq., and implementing rules and regulations shall continue to apply to the Authority.”

²⁴ *White*, 962 A.2d at 259.

²⁵ *Id.* at 260. As this sweeping language makes clear, the Union’s claim that the holding of *White* is limited to cases not involving a collective bargaining agreement (Opp’n 6) is baseless.

²⁶ 62 D.C. Reg. 2893, Slip Op. No. 1503 at 4-5, PERB Case No. 14-A-07 (2014) (distinguishing *White* and finding the Back Pay Act applicable to the Housing Authority).

²⁷ Opp’n 7, 8.

²⁸ See *Peterson v. Washington Teachers’ Union*, 192 A.3d 572, 576 (D.C. 2018).

²⁹ Award 19. See also Award 3.

2. Order to Respond to Information Request

The Arbitrator ordered the Authority “to respond to the Union[']s request for information.”³⁰ The Authority claims that it already responded to the Union’s request for information as part of a settlement of an unfair labor practice complaint the Union filed. While that unfair labor practice case is not before us, the Authority seeks review of the Award on the ground that ordering production of the information already produced in connection with that case violates law and public policy.

According to the Authority, the law and public policy at issue is the Board’s policy in favor of voluntary settlement of disputes.³¹ The Authority takes the position that compelling it to “furnish the same documents to the Union . . . violates and undermines the established policy and integrity of PERB proceedings and the parties’ mutual agreement in resolving the matter.”³²

Surely, if the Authority has complied with the information request in question, then the Award imposes no obligation on it in that regard. A party may bring more than one action to seek redress for a single injury, but it is limited to one satisfaction for that injury.³³ Where an agency had failed to produce information requested by a union but later produced it pursuant to a Freedom of Information Act request, the Board held that the agency committed an unfair labor practice and would be required to post a notice but would not be ordered to provide again information that it had already provided.³⁴ We find that in this regard the Award does not violate law and public policy.

C. The Authority’s Claim that the Award Lacks Clarity and Is Devoid of Analysis

The Authority makes several criticisms of the Award. It states that the Award is devoid of structure, lacks clarity, and is ambiguous. While the Award is devoid of the structure often found in Arbitration awards, the decision of the Arbitrator is unambiguous. He states: “I rule in favor of the Union. The Authority had an obligation to give the Union advance written notice and to bargain with the Union over any changes in working conditions. The remedy should return the parties to the status quo that existed prior to Management[']s making the unilateral change.” An arbitrator is not required to explain the grounds for his decision.³⁵ Similarly, ambiguity alone is not grounds for a remand. The Board can remand if clarification of an ambiguity is needed to determine whether the award is contrary to law and public policy or to determine whether the arbitrator exceeded his jurisdiction. In *D.C. Child and Family Services*

³⁰ Award 19.

³¹ The Authority quotes Rule 558.6 in support of its assertion that “PERB has articulated a well-established policy regarding voluntary and mandatory settlement of disputes.” The more pertinent rule is Rule 558.1, which provides, “It is Board policy to encourage voluntary efforts of parties to settle or adjust disputes involving issues of representation, unfair labor practices, standards of conduct, or issues arising during negotiations.”

³² Authority’s Br. in Support of Request 6.

³³ *Sanders v. Hudgens*, 184 A.3d 345, 349-50 (D.C. 2018).

³⁴ *FOP/MPD Labor Comm. v. MPD*, 62 D.C. Reg. 16524, Slip Op. No. 1553 at 3, PERB Case Nos. 12-U-05, 12-U-10, and 13-U-28 (2015) (citing *Walter N. Yoder & Sons, Inc. and Sheet Metal Workers Int’l Ass’n, Local Union 100*, 270 N.L.R.B. 652, 652-53 (1984)).

³⁵ *NAGE, Local R3-07 v. Office of Unified Commc’ns*, 65 D.C. Reg. 10091, Slip Op. No. 1673 at 7, PERB Case No. 18-A-07 (2018).

Agency v. American Federation of State, County, and Municipal Employees, District Council 20, Local 2401,³⁶ the standard of proof the arbitrator used to determine whether there was cause for a termination was unclear. “In the absence of an articulated standard,” the Board said, “we cannot rule on whether there is merit in the [agency’s] assertion that the arbitration award conflicts with law and public policy or whether the arbitrator exceeded his authority.”³⁷ For that reason, the Board remanded the case to the arbitrator for clarification of the standard of proof he used.³⁸

In the present case, there is no claim that any ambiguity in the Award bears on whether the Award is contrary to law and public policy or whether the Arbitrator exceeded his jurisdiction. Resolution of the Award’s ambiguities is a matter between the Arbitrator and the parties and may be in the parties’ common interest.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Award of attorneys’ fees and costs is set aside. The Board remands the case to the Arbitrator to reconsider his remedy in the light of this opinion and to issue an award consistent therewith.
2. In all other respects the Award is affirmed.
3. Pursuant to Board Rule 559.1, this decision and order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Members Ann Hoffman, Barbara Somson, Douglas Warshof, and Mary Anne Gibbons

Washington, D.C.

January 17, 2019

³⁶ Slip Op. No. 956, PERB Case No. 08-A-07 (May 21, 2010).

³⁷ *Id.* at 6-7.

³⁸ *Id.* at 8-9 (citing *U.S. Dep’t of Justice Fed. Bureau of Prisons Fed. Corr. Complex Coleman, Fl. v. AFGE, Council of Prison Locals, Local 506*, 63 F.L.R.A. 351, 354-55 (2009) (remanding case to arbitrator for clarification of the basis of his award in order to determine whether the award was consistent with law)).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-15 is being transmitted by File & ServeXpress to the following parties on this the 23rd day of January 2019.

George Spears
D.C. Water and Sewer Authority
5000 Overlook Ave. SW
Washington, D.C. 20032

Barbara Hutchinson, Esq.
1325 G Street NW, Suite 500
Washington, D.C. 20005

/s/ Sheryl V. Harrington
Sheryl V. Harrington
Administrative Assistant