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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:

District of Columbia  
Public Schools,

Petitioner,

v.

American Federation of State,  
County and Municipal Employees,  
D.C. Council 20, Local 1959,  
AFL-CIO (On behalf of Eddie  
Lanier, Jr.)

Respondent.

PERB Case No. 94-A-02  
Opinion No. 381

DECISION AND ORDER

On November 10, 1993, the District of Columbia Public Schools (DCPS) filed an Arbitration Review Request with the Public Employee Relations Board (Board) seeking review of a supplementary arbitration award, providing for backpay (Supp. Award), issued on October 25, 1993. The supplementary award provided the remedy for an initial award (Award) sustaining the merits of a grievance filed by the American Federation of State, County and Municipal Employees, District of Columbia Council 20, Local 1959, AFL-CIO (AFSCME) on behalf of the Grievant, a DCPS temporary employee. On December 1, 1993, AFSCME filed an Opposition to the Arbitration Review Request.

The initial Award, issued December 2, 1992, sustained the grievance which alleged a breach of the parties' collective bargaining agreement concerning the discharge of the Grievant. The Award also provided for the "issue concerning the proper remedy, if any, [to be] remanded to the Parties for further development of the record and for a re-opening of the record if the Parties are unable to resolve this matter." (emphasis in original, Award at 26.) The

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parties were unable to resolve the issue of remedy and the Arbitrator convened the parties for an arbitration hearing on the issue of what, if any, backpay should be awarded. Pursuant to this arbitration proceeding on the remedy, the Arbitrator issued the supplemental Award.

DCPS contends that by reopening an arbitration proceeding without the mutual agreement of one of the parties to the proceeding, i.e., DCPS, and reassuming jurisdiction in a "closed" arbitral proceeding "to rule on an issue that was submitted during the arbitral proceeding but omitted in the Award", the Arbitrator exceeded his jurisdictional authority. With respect to the remedy provided in the backpay Award, DCPS contends that the Arbitrator exceeded his jurisdictional authority "when he awarded backpay to a temporary employee beyond the expiration of the employee's temporary appointment or contract." (Req. at 2.)

Under the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-605.2(6), the Board is authorized to "[c]onsider appeals from arbitration awards pursuant to grievance procedures: Provided, however, that such awards may be reviewed only if the Arbitrator was without, or exceeded his jurisdiction; the award on its face is contrary to law and public policy; ...."

The Board has conducted its preliminary review of the Arbitrator's Awards, the pleadings of the parties and applicable law and denies DCPS' arbitration Review Request. DCPS' objections to the Arbitrator's actions and the remedy provided in the backpay Award do not establish a statutory basis for review.

DCPS' contention that the Arbitrator exceeded his jurisdiction "when he reopened an arbitration proceeding over the objection of [DCPS] ... to rule on an issue that was submitted during the arbitral proceeding but omitted in the Award" rests on the premise that the initial arbitration proceeding was indeed "closed". Based on this premise, DCPS cites our Decision and Order in University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1992), for the proposition that an arbitrator, following the closing of an arbitration proceeding, cannot reassert jurisdiction to rule upon a matter submitted to him in the original proceeding but on which he did not rule in his initial award. We based our holding, however, on the Arbitrator taking such action absent mutual agreement by the parties. Id. at 8.

A review of both the Award and supplemental Award reveals, however, that the Arbitrator's conditional closing of the record, was based on the parties' agreement to reopen and complete the record on the issue of back pay if the grievance was sustained and

a further award on remedy became necessary.<sup>1/</sup> In view of this agreement, DCPS' reliance on our Decision and Order is misplaced.<sup>2/</sup> Since the condition set forth in the Award had been met, i.e., the parties were not able to settle the issue of remedy, the initial Award became only a partial Award and, accordingly, the Arbitrator's jurisdiction was maintained to complete the Award as to remedy.<sup>3/</sup> In view of the above, we cannot find that the Arbitrator was without, or exceeded, his jurisdiction by reconvening the arbitration proceeding. The parties apparently agreed to accord him conditional authority to address an outstanding issue that was properly before him; there is no dispute

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<sup>1/</sup> DCPS does not dispute an arbitrator's authority to reopen a closed arbitration proceeding upon a joint request of the parties. (Req. at n. 3.)

<sup>2/</sup> In the first Award, the Arbitrator's finding with respect to what the parties agreed was ambiguous. Specifically the Arbitrator made the following finding:

The Arbitrator agrees that, given this state of the record with regard to the question of remedy, it is appropriate to re-open the record for the limited purpose of affording the Parties the opportunity to present evidence and argument concerning the remedial issues only. (Award at 25.)

No reference was made in the first part of the Award to what or with whom the Arbitrator agreed. This uncertainty is removed in the supplemental Award as follows:

Additionally, at the hearing on November 5, 1992, the Parties agreed that, rather than adjourn at that time and continue the proceeding on another day for evidence and argument concerning the remedy (i.e., complete the record before the Arbitrator issued a decision on the merits), the Arbitrator, instead, would address in the Decision the merits of the discharge only. Only if the decision on the merits was in the Grievant's favor, would the record be re-opened for evidence and argument concerning the appropriate remedy, if any. This is what was done in this case. (Supp. Award at 4.)

<sup>3/</sup> If the Arbitrator had denied the grievance or the parties were successful in their own efforts to resolve the issue of remedy, the need to reopen the arbitration proceeding would have been obviated.

that the condition was met.<sup>4/</sup>

Finally, DCPS contends that the supplemental Award is contrary to law and public policy and the Arbitrator exceeded his authority by awarding backpay to a temporary employee beyond the expiration of the employee's temporary appointment, i.e., duration of his temporary employment contract. DCPS bases its appeal, under both of these statutory standards for review, on its contention that the backpay Award violates management's prerogatives under the CMPA, D.C. Code Sec. 1-618.8(a)(2) and (3), to "retain employees in positions within the agency" and "relieve employees of duties because of lack of work", respectively.

By agreeing to arbitrate matters pursuant to a negotiated procedure, as the parties have with respect to this issue, the parties have also bargained for an arbitrator's decision on the matter. Thus, the supplemental Award does not usurp DCPS' management rights under the CMPA. The Award on remedy was a proper exercise of the Arbitrator's authority over an issue properly retained within his jurisdiction since he sustained the grievance and, as set forth in the initial Award, the parties were unable to resolve the issue on their own. That the Arbitrator's Award may relate to and, in effect, limit a management right, does not constitute a basis for our review when, as here, the Award is based on an interpretation of the parties' collective bargaining agreement.<sup>5/</sup> In our consideration of whether a statutory basis

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<sup>4/</sup> If, as DCPS asserts, it believed the arbitration proceeding to be closed upon the conclusion of the initial hearing on November 5, 1992, its appeal of the Arbitrator's authority to reopen the record to consider an issue left unresolved by the parties --which was made a part of that Award-- would have been due to be filed with this agency "not later than twenty (20) days after service of [that] [A]ward" as required by Board Rule 538.1. If we accept DCPS' contention concerning the arbitration proceeding, the instant appeal would be untimely. In University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 38 DCR 1580, Slip Op. No. 260, PERB Case No. 90-A-05 (1990), the Board declined to consider an arbitration review request of an award we determined was not final when the appeal was filed during the time the arbitrator --with the consent of only one of the parties-- had reopened the proceeding to make a further award. That award, unlike the instant Award, did not provide as a part of the award, the conditional bifurcated continuation of the arbitration proceedings which DCPS is now appealing.

<sup>5/</sup> In making the BP Award, the Arbitrator interpreted Article VIII of the parties' collective bargaining agreement which,  
(continued...)

exists for disturbing an arbitrator's award based on an asserted infringement of a management right, we have held that "contractual provisions shall take precedence over provisions of the CMPA". American Federation of State, County and Municipal Employees, D.C. Council 20, AFL-CIO and District of Columbia Public Schools, 28 DCR 3947, 3950, Slip Op. No. 15 at 4, PERB Case No. 80-U-05 and 80-A-01 (1981). See also, University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 33 DCR 1707, Slip Op. No. 132, PERB Case No. 85-A-07 (1986) and 36 DCR 3635, Slip Op. No. 220, PERB Case No. 88-A-03 (1989).

For the foregoing reasons, the Board concludes that there is no basis for our review, authorized by the CMPA, that has been established by this Request. Accordingly, the request for review of the Arbitration Awards is denied.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Review Request is denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD  
Washington, D.C.

February 18, 1994

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<sup>5</sup>(...continued)  
the Arbitrator concluded, gave DCPS limited "discretion as to whether to continue the employment of a particular employee". (Supp. Award at 9.) He found that this provision applied to the Grievant, notwithstanding his status as a temporary employee.