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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

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| In the Matter of: |) | |
| |) | |
| DISTRICT OF COLUMBIA |) | |
| DEPARTMENT OF HUMAN SERVICES, |) | PERB Case Nos. 02-A-04 and 02-A-05 |
| |) | (Consolidated) |
| |) | |
| |) | Opinion No. 691 |
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| Petitioner, |) | |
| |) | |
| |) | |
| v. |) | |
| |) | |
| FRATERNAL ORDER OF POLICE/ DEPARTMENT OF HUMAN SERVICES LABOR COMMITTEE, |) | |
| |) | |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

Decision and Order

This matter involves two separate Arbitration Review Requests (PERB Case Nos. 02-A-04 and 02-A-05 ¹) filed by the Department of Human Services (“DHS”, “Petitioner” or “Agency”),

¹The arbitration award which is the subject of PERB Case No. 02-A-04 was issued by Lois Hochhauser. This case, filed on or about June 3, 1999, involved DHS’s alleged failure to promote DS-07 Correctional Officers at Oak Hill to grade 8 positions. (See, Hochhauser’s Award at p.4). After first determining that the grievances were arbitrable, the Arbitrator found in favor of the Agency because the positions were not career-ladder grade 8 positions at the time the grievance was filed.

The arbitration award which is the subject of PERB Case No. 02-A-05 was issued by Barry Shapiro. The case involved grievances filed by three DHS employees (Keye, Shields, and

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through its representative, the Office of Labor Relations and Collective Bargaining (OLRCB). The two Arbitration Review Requests assert that arbitrators Lois Hochhauser and Barry Shapiro were without authority and exceeded their jurisdiction by, *inter alia*, making a determination that the underlying grievances in both cases were arbitrable.² Also, before the Board in this case is the

Johnson). According to the record, these grievances were filed in January 2001 for Group A and in July or August of 2001 for Group B. (See, Shapiro's Award at p.4). Arbitrator Shapiro's role in this matter was only to determine whether the grievances were arbitrable. As background, Arbitrator Shapiro indicated that the Federal Mediation and Conciliation Service notified him by letter on September 10, 2001, that he had been selected by both parties to arbitrate these grievances. Later on October 18, 2001, he was notified by the Agency that it would not arbitrate the grievances because there was no collective bargaining agreement in place which mandated arbitration. After consultation with the parties, it was agreed that the proceedings would be bifurcated. The first proceeding, held on February 19, 2002, was to address the issue of arbitrability. The second proceeding would reach the merits of the grievance. Arbitrator Shapiro did not address the merits of the underlying grievances in the Award that is before the Board.

²In PERB Case No. 02-A-04, the Agency asserts that Arbitrator Lois Hochhauser was without authority and exceeded her jurisdiction in finding that:

- (1) A bargaining representative and an employer are bound by the terms of a predecessor contract executed by different parties;
- (2) A bargaining representative and an employer are required to arbitrate grievances absent an effective contract requiring such;
- (3) The recognition of an "implied-in-fact" contract in the absence of a properly executed and statutorily approved collective bargaining agreement (was proper); and,
- (4) The finding of arbitrability, holding a hearing on the merits and issuance of a decision, all in the absence of a collective bargaining agreement (was proper). (PERB Case No. 02-A-04, Request at p.2).

In PERB Case No. 02-A-05, the Agency asserts that Arbitrator Barry Shapiro was without authority and exceeded his jurisdiction in finding that:

- (1) A bargaining representative and an employer are bound by the terms of a prior contract executed between an Agency and a predecessor union;

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Agency's Motion for Consolidation³ and Expedited Review⁴.

(2) A bargaining representative and an employer are required to arbitrate grievances absent an effective contract requiring such; and

(3) The finding of arbitrability in the absence of a collective bargaining agreement (was proper). (PERB Case No. 02-A-05 Request at p.2).

³DHS seeks to have the two Arbitration Review Requests consolidated because they share similar issues and involve the same parties. After reviewing the Agency's Motion for Consolidation, the Board finds that the arguments in support of its Motion are valid. The parties, DHS and FOP, are the same in both PERB Case Nos. 02-A-04 and 02-A-05. In addition, after reviewing the claims of error made in both Arbitration Review Requests, the Board finds that three of the four total claims made by DHS are almost identical. As noted in Footnote 2, both Arbitration Review Requests share the following common issues:

Whether the Arbitrator was without authority and exceeded his/her jurisdiction by finding that: (1) a bargaining representative and an employer are bound by the terms of a prior contract executed by an Agency and a predecessor union; (2) a bargaining representative and an employer are required to arbitrate grievances absent an effective contract requiring such; and (3) the grievances are arbitrable, in the absence of a collective bargaining agreement. (PERB Case No. 02-A-04, Request at p.2 and PERB Case No. 02-A-05, Request at p.2).

The only exception is the one claim made in PERB Case 02-A-04, where the Agency asserts that the Arbitrator exceeded her authority by recognizing an "implied-in-fact" contract in the absence of a properly executed and statutorily approved collective bargaining agreement. The Board finds that the three common claims of error and the one claim of error that is not included in both requests can be decided in one consolidated case. Therefore, the Board grants the Agency's Motion for Consolidation.

⁴ DHS seeks expedited review of this matter because the central issue in both arbitration cases concerns whether the Agency has a duty to arbitrate grievances pursuant to either: (1) a negotiated, but unapproved, contract between the Fraternal Order of Police ("FOP" or "Union") and DHS or (2) an existing contract between DHS and FOP's predecessor Union, American Federation of Government Employees, Local 383 (AFGE). DHS seeks to have this issue resolved so that it will know with certainty what its obligation is, as it relates to processing

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Having determined that it is proper to consolidate PERB Case Nos. 02-A-04 and 02-A-05, the Board will now address the issues raised in the consolidated Arbitration Review Requests on the merits. In both Arbitration Review Requests, the Agency and the Union disagree on the issue of whether the grievances are arbitrable. Specifically, the Agency and the Union disagree on whether there is a valid contract in place between the parties that imposes a *duty* on the Agency to arbitrate employee grievances.

The Agency asserts that the grievances are not arbitrable because there is no valid collective bargaining agreement in effect between FOP and DHS which requires arbitration of those grievances. DHS bases this argument on its assertion that the negotiated agreement between the parties had not been approved by the appropriate authorities prior to the filing of these grievances.⁵ In addition, the Agency, through its representative, OLRCB, argues that the former agreement between AFGE, Local 383 and DHS was no longer applicable to the parties since it had expired.⁶ DHS contends that

grievances and arbitrating cases in the future. After reviewing the Agency's Motion, the Board finds that the Agency's request for expedited review of this issue is reasonable because this important issue involves employee rights and should be resolved sooner than later. Specifically, the Board finds that the Agency needs to know, as soon as possible, what its duty is as it relates to processing grievances. In addition, the represented employees need to know what mechanism is in place to resolve their disputes, should any arise. If the issue remains unresolved, the Board recognizes the Agency may choose not make any efforts to resolve issues raised by aggrieved employees. Furthermore, aggrieved employees may feel helpless when it comes to having their disputes resolved. Neither of these results will foster good labor-management relations between management officials and employees at DHS. D.C. Code §1-617.01 (a) (2001 ed.) provides that: "an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public." Presenting grievances and having them resolved is an important employee right and is a vital part of the collective bargaining process. *See*, D.C. Code §1-617.06(3)(b) (2001 ed.). As a result, the Board finds that this issue merits expedited review. For the reasons noted above and the ones outlined in its Motion, the Board grants the Agency's Motion for Expedited Review.

⁵Arbitrator Barry Shapiro found that despite considerable fanfare, the negotiated agreement between FOP and DHS had never received written approval of the Mayor or the written approval of the District of Columbia Financial Responsibility Management Assistance Authority ("Control Board"). D.C. Code §1-617.15 (2001 ed.) requires, *inter alia*, that a negotiated collective bargaining agreement be approved by the Mayor, City Council and other designated officials before it becomes valid.

⁶Correctional Officers who work for DHS were formerly represented by AFGE, Local 383 and a contract was in place between the officers and DHS when FOP assumed its role as their new representative. FOP replaced AFGE in December 1996. The agreement covering the

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while it may have continued to use “past practices” and processed grievances, the arbitration provision is based on contract and did not survive the expiration of the contract. Finally, the Agency argues that, although the agreement between DHS and AFGE contained an automatic renewal clause, the agreement was not renewed for the year in question because Mary Leary, OLR CB’s Director, sent timely notice of the Agency’s intent to discontinue adhering to the agreement⁷. In effect, DHS argues that by giving this notice, the Agency successfully disavowed the arbitration clause contained in the older agreement. DHS supports its argument by relying on McNealy v. Caterpillar, Inc. (Caterpillar), a Seventh Circuit case which held that once a contract expires, a party may disavow an arbitration clause. 139 F.3d 1113 (7th Cir. 1998). As a result, DHS concludes that it was under *no obligation* to arbitrate, reasoning that there was no valid arbitration clause in effect. In view of the above, DHS claims that the Arbitrator erred in finding that the grievances were arbitrable.

By contrast, the Union asserts that the grievances contained in the consolidated Arbitration Review Requests are arbitrable. In addition, the Union argues that the Agency’s Arbitration Review Requests should be denied because they present no viable claim that would justify overturning the arbitrator’s finding of arbitrability. The Union contends that the older agreement between AFGE, Local 383 and DHS is still valid and enforceable against the parties.⁸ Therefore, in the Union’s view, the arbitration clause contained therein imposes an affirmative duty upon the Agency to arbitrate the grievances.

Additionally, the Union asserts that the Petitioner’s request “is plainly driven by a simple disagreement as to the Arbitrator’s resolution of the issue of arbitrability.” (Opposition at p. 1). Furthermore, the Union states that “grievance arbitration review before the Public Employee Relations Board (PERB) was not intended to address such disagreements, but only to afford a narrow

officers would have expired on September 30, 1997. However, due to its automatic renewal clause, it was renewed in 1997, 1998 and 1999, without evidence of an attempt to cancel it. There was an attempt to cancel the agreement by a letter dated June 30, 2000; however, both arbitrators found that DHS’s attempt to cancel was unsuccessful.

⁷Article 34, §2 of the AFGE Local 383 agreement provides that the agreement automatically renews for one year from the date on which it would otherwise expire, unless either party gives to the other party written notice of intention to terminate or modify the agreement 150 days and no later than 90 days prior to its anniversary date. (Shapiro’s Award at p. 2).

⁸FOP asserts that it did not receive notice of the Agency’s attempt to cancel the agreement within the time frame set forth by the parties’ collective bargaining agreement. Thus, in its view, the Agency’s attempt to cancel the agreement was ineffective.

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appeal in limited circumstances.”⁹ Because the Union contends that those limited circumstances are not at issue here, the Union requests that the Board deny DHS’s consolidated Arbitration Review Requests (Opposition at p. 2).

As stated earlier, both arbitrators in the underlying grievances determined that the AFGE, Local 383 contract and its arbitration clause was still in effect. Therefore, the underlying grievances were arbitrable. However, the arbitrators used different analysis in reaching their conclusions. The analysis that each arbitrator used in reaching their conclusion is discussed in detail in the following paragraphs.

In deciding that the grievances in PERB Case No. 02-A-04 were arbitrable, Arbitrator Hochhauser first concluded that the negotiated agreement between FOP and DHS was not finalized or effective during the pertinent time period (when the grievances were filed)¹⁰. She also concluded that the AFGE, Local 383 contract, including its arbitration clause, was still valid. (Award at p. 4). Arbitrator Hochhauser looked at the conduct between the parties and determined that there was, in fact, an agreement in place that obligated the Agency to process grievances to arbitration. This finding is contrary to the Agency’s argument that there was no contract in place which required the Agency to arbitrate. Arbitrator Hochhauser also noted that, even though Mary Leary sent a letter on June 30, 2000, which was intended to provide the required notice of termination (of the AFGE, Local 383 agreement), “the Agency itself did not adhere to the notification.” (Award at p.4). Instead, the Agency continued to refer to its adherence to the AFGE, Local 383 agreement. (Award at p. 4). In fact, as recently as October 15, 2001, well after the June 30, 2000 notice to discontinue the agreement, Arbitrator Hochhauser noted that the Agency continued to utilize the AFGE, Local 383 agreement to process grievances. (Award at p. 4). In addition, as recently as November 1, 2001, Barbera Bailey, the Agency’s Chief of the Office of Labor Relations, testified that it was her understanding that the parties were “currently operating” under the AFGE, Local 383 contract. (Award at p. 4). On this basis, Arbitrator Hochhauser concluded that the AFGE, Local 383 contract, including its arbitration clause, was still valid and that the parties were bound by the terms of the

⁹D.C. Code §1-605.02 provides, in pertinent part: “that the Board may consider appeals from arbitration awards pursuant to a grievance procedure... only if: (1) the arbitrator was without, or exceeded, his or her jurisdiction; (2) the award on its face is contrary to law and public policy; or (3) was procured by fraud, collusion, or other similar and unlawful means.” The Union contends that none of these narrow circumstances exist for maintaining an appeal of the awards in PERB Case Nos. 02-A-04 and 02-A-05. As a result, the Union asserts that the Agency’s mere disagreement with the Arbitrator’s Award does not state a viable reason to modify or set aside either of the Arbitrators’ Awards in this case.

¹⁰Specifically, Arbitrator Hochhauser found that the steps needed to finalize the agreement, namely approval from the Mayor and the Control Board pursuant to the Financial Responsibility Management Assistance Act, never took place. (Hochhauser’s Award at p. 3).

contract.

Arbitrator Hochhauser went further and recognized an “implied-in-fact” contract based on the parties’ actions. In Capital Husting Co. v. NLRB, the Seventh Circuit accepted the concept of an “implied-in-fact” collective bargaining agreement where the parties are in accord, even though the agreement “might fall short of the technical requirements of an accepted contract.” 671 F2d 237, 243 (7th Cir. 1982). On the facts presently before the Board, the Arbitrator found that the Agency’s conduct was consistent with a contract being in place because they processed and handled many other grievances and arbitration cases that were filed pursuant to the AFGE, Local 383 agreement. Therefore, Arbitrator Hochhauser was not persuaded by the Agency’s argument that they are now, *not* bound by a predecessor agreement that they routinely used to process grievances and arbitration cases with.

Arbitrator Hochhauser made this finding despite the Union’s argument that no post-expiration duty to arbitrate exists.¹¹ Arbitrator Hochhauser responded to the Agency’s argument by

¹¹ The Agency relied on Litton Financial Printing Division v. NLRB, in support of its argument that there was no post-expiration duty to arbitrate an issue after the expiration of the collective bargaining agreement. (See Hochhauser’s Award at p.5; 501 U.S. 190 (1991)). In Litton, the Supreme Court reviewed the issue of whether an Employer had a duty to arbitrate grievances concerning layoffs where the layoffs occurred almost one year after the contract had expired. Id. at 193. The Supreme Court held that there was no post-expiration duty to arbitrate a dispute unless the dispute arose under the expired contract. Id. In holding that the layoff dispute did not arise under the expired contract in Litton, the Supreme Court explained that a post-expiration grievance is said to arise under contract only where: (1) it involves facts and occurrences that arose before the contract’s expiration; (2) where an action taken after expiration infringes on a right that accrued or vested under the agreement; or (3) where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the agreement. Id. at 206.

In Litton, the Supreme Court also interpreted its holding in the Nolde Brothers, Inc. v. Bakery Workers case. See, Id. at pp. 203-204 and Nolde Brothers, Inc. v. Bakery Workers, 430 U.S. 243 (1977). In Nolde Brothers, unless “negated expressly or by clear implication” ,the Court found a “presumption in favor of post-expiration arbitration of matters” where the expired agreement between the parties contained a broad arbitration clause. Id. In interpreting Nolde Brothers, the Court observed that it “does not announce a broad rule that post-expiration grievances concerning terms and conditions of employment remain arbitrable.” Id. at 204-205. Rather, the Nolde Brothers presumption is limited to disputes arising under the contract. Id. Moreover, the Court noted that the “arbitrability presumption” was “limited by the vital qualification that arbitration was of matters and disputes arising out of the relation governed by contract.” Id.

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stating that “the Supreme Court has also found a post-expiration duty to arbitrate an issue that arose after expiration of the collective bargaining agreement, where the agreement included an arbitration clause.” (Award at p. 4). She pointed to the Supreme Court’s holding that the duty to arbitrate was “a creature of the collective bargaining agreement, rather than the compulsion of law.” Nolde Brothers, Inc. v. Bakery Workers¹², 430 U.S. 243, at pp. 250-251 (1977). Also, Arbitrator Hochhauser stated that the fact that the parties continued to process arbitrations led to the conclusion that they did not intend for their “arbitration duties to terminate automatically with the contract.” (Award at p. 5 and Id. at p. 253).

Finally, the Arbitrator distinguished the present case from the McNealy v. Caterpillar case relied on by the Agency. 139 F3d 1113 (7th Cir. 1998). Arbitrator Hochhauser distinguished the two cases on the facts, by noting that the parties in Caterpillar were unable to negotiate a collective bargaining agreement for an extensive period of time, and the employer had expressly stated that it would *not* submit cases to an arbitrator. 139 F.3d 1113 (7th Cir. 1998). The present case differs from Caterpillar because by DHS’s own admission, there was a contract in place which contained a valid arbitration clause under which the parties operated. Also, unlike the facts in Caterpillar, DHS continued to process grievances and *never* expressly stated that it would not submit cases to an arbitrator, as was done in Caterpillar. Based on the above noted facts, the Arbitrator found that the underlying grievance in PERB Case No. 02-A-04 was arbitrable.

Similarly, Arbitrator Shapiro found that the underlying grievances which formed the basis of

¹²In the copy of the Opinion and Award submitted to the Board with the Agency’s Request, the last case mentioned before the “Id., pp. 250-251” cite reference, on the second line of page 5, is the Litton case. 501 U.S. 190 (1991). Since the Litton case *does not* contain pages 250 and 251, as indicated by the Arbitrator’s cite reference, the Board’s staff contacted Arbitrator Hochhauser about the cite discrepancy and learned that the case she was actually citing was the Nolde Brothers, Inc. v. Bakery Workers case, which *does* contain pages 250 and 251 and that particular quote. 430 U.S. 243 (1977). Arbitrator Hochhauser also notified the Board’s staff that she would contact the parties regarding the discrepancy. Arbitrator Hochhauser later sent the Board a copy of the Award which contains the correct cite and which she contends is the copy that the parties should have received. Also, she forwarded to the Board a copy of a letter dated November 15, 2002, in which she notifies the parties of the discrepancy in the two copies of the Award. Additionally, she indicated to the Board’s staff that she sent the parties the copy of the Opinion and Award which contains the Nolde Brothers cite. The Board notes that this case cite discrepancy makes no substantive difference in the Board’s analysis of the case presently before it, as the Board only considered the Award originally submitted to it, when making its decision. Furthermore, the Board did not release this decision until the parties had been notified of the discrepancy.

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PERB Case No. 02-A-05 were arbitrable. Specifically, Arbitrator Shapiro found, *inter alia*, that: (1) the parties were bound by the terms of a prior contract executed between DHS and AFGE; (2) the arbitration clause contained in the AFGE Local 383 agreement was valid; and (3) the grievances were arbitrable.¹³ In asserting that the AFGE, Local 383 agreement was no longer valid, the Agency repeated its argument that once a contract expires, a party may disavow an arbitration clause.¹⁴ McNealy v. Caterpillar, Inc., 139 F.3rd 1113 (7th Cir. 1998). Additionally, the Agency relied on Litton v. NLRB, in support of its argument that there was no duty to arbitrate an issue after the expiration of the collective bargaining agreement. 501 U.S. 190 (1991). However, the Arbitrator was *not* persuaded by the authority relied on by the Agency.

Instead, the Arbitrator found that the contract had *not* expired, but had been renewed automatically pursuant to its automatic renewal clause. (See, Footnote 6). Arbitrator Shapiro made this finding primarily based on the facts of present case.¹⁵ As noted earlier in Footnote 6, FOP replaced AFGE in December 1996. The agreement covering the officers would have expired on

¹³ In making his first finding, Arbitrator Shapiro relied on NLRB cases when stating that nothing in the Board's case law supports a conclusion that an unexpired collective bargaining (here the AFGE, Local 383) agreement becomes void when a new union is certified as the exclusive representative of the affected employees. (Shapiro's Award at p. 8).

¹⁵ Arbitrator Shapiro also relied on NLRB and Supreme Court precedent which he interpreted as saying that a new union may, if it wishes, continue to be bound by and administer the existing agreement. (See, Award at p. 8), American Seating Boston Machine Works, 89 NLRB 59 (1950) and American Seating Co., 106 NLRB 250 (1953), (where the NLRB adopted the general principle that if an existing collective bargaining agreement was not a bar to an election, it was also not a bar to full collective bargaining by the new exclusive representative.) Arbitrator Shapiro also noted that "the Supreme Court endorsed the principle established in American Seating in NLRB v. Burns International Security Service, by stating the following:

When the Union which has signed a collective bargaining contract is decertified, the succeeding union certified by the Board is not bound by the prior contract, need not administer it and may demand negotiation for a new contract, even if the terms of the old contract have not yet expired. 406 U.S. 272, 284 n.8."

According to Arbitrator Shapiro, "implicit in this line of reasoning (expressed in the above noted quote) is the notion that an existing agreement does not become void simply because a new union has been certified. The new union, may, if it wishes, continue to be bound and administer the existing contract." (Award at p. 9).

September 30, 1997. However, due to its automatic renewal clause, it was renewed in 1997, 1998, and 1999 without evidence of an attempt to cancel it. There was an attempt to cancel it in 2000 by a letter sent on June 30, 2000; however, Arbitrator Shapiro found that there was *no* proof that the Union received notice of the Agency's attempt to cancel the agreement in a timely manner. Therefore, he found that OLRCB's attempt to cancel the AFGE Local 383 agreement was not successful.¹⁶(Award at p.9).

Arbitrator Shapiro also found that the new agreement, which had been negotiated between DHS and FOP, was *not* valid because it had not received the necessary approvals signatures as required by D.C. Code §1-617.15(2001 ed.). (See, Footnote 5). In addition, Arbitrator Shapiro reviewed both agreements and highlighted the fact that the "Grievance/Arbitration" clauses contained in both the old and new contract were the same, since there were no substantive changes in the parties' agreement. (See, Shapiro's Award at p.3). Therefore, whether the parties were operating under the old contract or the new one, the Agency's obligation to process grievances and arbitrate cases would be the same. Therefore, Arbitrator Shapiro was unpersuaded by the Agency's claim that there was no valid contract in place and no obligation to process and arbitrate grievances.

The issue before the Board is whether the Arbitrator exceeded his/her authority by finding that : (1) the collective bargaining agreement between AFGE, Local 383 and DHS was valid and enforceable; (2) DHS had a duty to process and arbitrate grievances pursuant to the AFGE, Local 383 agreement; and (3) the grievances in each case were arbitrable.

The Board has authority to review arbitration awards only where an arbitrator exceeds authority or the award is contrary to law and public policy. Washington Teachers Union v. D.C. Public Schools, 45 DCR 4019, Slip Op. No. 543, PERB Case No. 98-A-02(1998). Concerning DHS's claims that the Arbitrator exceeded his authority and jurisdiction by finding that: (1) the AFGE, Local 383 agreement was valid and enforceable against the parties; (2) the arbitration clause was valid; and (3) the grievances were arbitrable¹⁷, we find no merit to these claims.

¹⁶In concluding that the agreement had not been canceled, Arbitrator Shapiro credited the testimony of two Union witnesses who stated that they did not become aware of the Agency's letter which attempted to cancel the agreement until a year later. (Shapiro's Award at p.10). He also noted that the Agency's claim that it canceled the AFGE Local 383 contract by its June 30, 2000 letter, is inconsistent with the District's assertion that there was no valid agreement in place that needed to be terminated. (Shapiro's Award at p. 9).

¹⁷After reviewing the Litton and Nolde cases, the Board notes that, in those cases, there was *no* dispute as to whether the collective bargaining agreement had expired. 501 U.S. 190 (1991); 430 U.S. 243 (1991). Id. This fact alone distinguishes Litton and Nolde from the cases presently before the Board. Both arbitrators in the present case found that the AFGE Local 383 collective bargaining agreement was applicable to the parties and had *not* expired. Therefore, we

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The Board has held that by submitting a matter to arbitration, “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based.” Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). Moreover, the Board will not substitute its own interpretation or that of the Agency, in place of the duly designated Arbitrator’s interpretation. Id. Here, the Arbitrators decided the precise issues¹⁸ that were given to them for decision; namely whether there was a valid contract in place between the parties¹⁹ and whether the underlying grievances in the arbitration cases were arbitrable. After reviewing the evidence in the arbitration cases which form the basis of PERB Case Nos. 02-A-04 and 02-A-05, both Arbitrators determined that there was a valid and enforceable agreement under which the parties were required to arbitrate

conclude that it is not necessary for us to review the Arbitrators’ finding concerning whether there was a post-expiration duty to arbitrate the grievances.

¹⁸ In the grievance arbitration case which forms the basis for PERB Case No. 02-A-04, the Arbitrator identified the following issues for resolution:

1. Was there a collective bargaining agreement in effect during the pertinent time, and if so, was it the agreement negotiated between the parties?
2. Is the matter arbitrable?
3. Did the Agency violate the collective bargaining agreement by failing to promote DS-07 correctional officers at Oak Hill beyond grade 7 during the applicable time period?
(Hochhauser’s Award at p.2).

In the grievance arbitration which forms the basis for PERB Case No. 02-A-05, the Arbitrator identified the following issue for resolution:

1. Are the grievances of the employees in Groups A and B arbitrable? (Shapiro’s Award at p. 5).

¹⁹The Board believes that it does not need to decide the issue of whether Arbitrator Hochhauser exceeded her authority by finding an implied-in-fact contract in the absence of a properly executed and statutorily approved collective bargaining agreement. This is the case because Arbitrator Hochhauser also found that the *express agreement* (AFGE Local 383 contract), under which the parties operated and processed grievances, was still valid and had not expired.

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and that the grievances were arbitrable²⁰. The Agency failed to cite any language in the parties' collective bargaining agreement or any other authority which limits the Arbitrator power to decide the precise issues that were placed before him to decide. We conclude that the Arbitrators' conclusion that the grievances were arbitrable is based on a thorough analysis and cannot be said to be clearly erroneous. Therefore, we conclude that neither Arbitrator exceeded his/her authority or jurisdiction in making the findings noted above. As a result, we cannot reverse the Arbitrator's award on this ground.

The Board has also held that "to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). In its Arbitration Review Request, DHS did not make a clear argument that the Arbitrators' decisions were contrary to law²¹ and public policy, nor did DHS

²¹ While it is not clear to the Board whether the Agency was making a "contrary to law" argument when it asserted that the Arbitrator's findings were in contravention of the RCA del Caribe line of cases, 262 NLRB 963, we note that DHS did assert the following in its Arbitration Review Request in PERB Case No. 02-A-05:

In clear contravention of the NLRB's well established RCA del Caribe, 262 NLRB 963 (1982), line of cases, Arbitrator Shapiro was without authority and exceeded his jurisdiction in finding that, where there is no collective bargaining agreement between the parties to this dispute: (1) the parties were bound by the terms of a prior contract executed by an Agency and a predecessor Union; (2) the parties are required to arbitrate grievances absent an effective contract requiring such ; and, (3) the grievances were arbitrable, in the absence of a collective bargaining agreement. (See, Request for 02-A-05 at p. 2, paragraph 6).

Although DHS cited the above noted case, it did not provide any further explanation for why it believed Arbitrator Shapiro exceeded his authority, pursuant to the RCA del Caribe line of cases, by making the findings that he did.

Upon review of the RCA del Caribe case cited by the Agency, the Board fails to see the relevance of this case as it relates to the facts presently before us. 262 NLRB 963 (1982). In RCA del Caribe , the issue was whether the Employer, RCA del Caribe, committed a unfair labor practice by negotiating with an incumbent Union after a recognition petition had been filed by another union seeking to represent RCA del Caribe's employees. Id. In the case presently before

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present any applicable law or public policy which mandated that the arbitrator arrive at a different conclusion. Therefore, we cannot reverse the Arbitrators' decision on based on any violation of law or public policy.

After reviewing both Arbitration Review Requests, the Board finds that they amount to a mere disagreement with the Arbitrators' factual findings and interpretation of the relevant contract provisions. As noted earlier, disagreement with an Arbitrator's decision does not provide a basis for reversing the arbitrator's decision. See, MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000).

Because we find that the Petitioner has not demonstrated how either Arbitrator exceeded his/her authority, nor has it cited any definite applicable law that mandates that either Arbitrator reach a different conclusion, we find that the consolidated Arbitration Review Request lacks merit. Therefore, the Agency's consolidated Arbitration Review Request is denied.

us, the issue is whether the Agency had a duty to arbitrate grievances where there is a dispute concerning whether an effective collective bargaining agreement mandating such exists. Without further explanation from the Agency on how RCA del Caribe applies, the Board can only conclude that the case is not applicable and; therefore, does not present a viable basis for overturning the Arbitrator's decision in this case.

ORDER

IT IS HEREBY ORDERED THAT:

1. DHS's Motion for Consolidation and Expedited Review is Granted.
- 2.. DHS's Consolidated Arbitration Review Request in PERB Case Nos. 02-A-04 and 02-A-05 is Denied.
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 21, 2002