

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:)	
)	
District of Columbia Metropolitan Police Department,)	
)	PERB Case No. 11-A-11
Petitioner,)	
)	Opinion No. 1382
v.)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Petitioner District of Columbia Metropolitan Police Department (“MPD”) filed the above-captioned Arbitration Review Request (“Request”), seeking review of Arbitrator Donald Wasserman’s Arbitration Award (“Award”). MPD asserts that the Arbitrator was without authority or exceeded his jurisdiction in awarding attorneys’ fees to Respondent Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”). (Request at 3). FOP filed an Opposition to the Request (“Opposition”).

The Request and Opposition are now before the Board for disposition.

II. Discussion

A. Award

The Award stems from the termination of Grievant Phillip Thompson on November 10, 2009 (Award at 15). The Arbitrator determined that the Grievant’s termination violated D.C. Code § 5-1031 (the “90-day rule”), placed the Grievant in administrative double-jeopardy, and was not supported by substantial evidence. (Award at 29-30). The Arbitrator ordered MPD to

reinstate the Grievant with back pay, benefits, and seniority. (Award at 30). In its Request, MPD does not dispute this portion of the Award.

In addition to reinstating the Grievant, the Arbitrator granted FOP's request for attorneys' fees, stating "[s]uch fees are in the interest of justice and shall be reasonable and in accord with the U.S. Code Title 5, Chapter 55, Section 5596, Back Pay Act." (Award at 30). It is this portion of the Award that MPD asks the Board to modify or overturn. (Request at 3).

B. Position of MPD before the Board

In its Request, MPD contends that the Arbitrator was without authority to award attorneys' fees to the Grievant's counsel. (Request at 3). MPD states that the Arbitrator's authority arises directly from the terms of the parties' collective bargaining agreement ("CBA"), and that courts are obligated to reverse awards in excess of an arbitrator's lawful authority. (Request at 4-5). MPD contends that the Award does not draw its essence from the CBA, and must be overturned if the Award (1) conflicts with the express terms of the CBA; (2) imposes additional requirements that are not expressly provided in the agreement; or (3) cannot be rationally derived from the terms of the CBA. (Request at 6; citing *D.C. Water and Sewer Authority v. American Federation of Government Employees, Local 872*, 54 D.C. Reg. 2582, PERB Case No. 04-A-10 (2007)).

Next, MPD alleges that although Article 19 E of the parties' CBA provides that the "fee and expense of the *arbitrator* shall be borne by the losing party," it does not require that the losing party "pay the fee and expense of *arbitration*." (Request at 6) (emphasis in original). MPD states that as the CBA does not provide for payment of attorneys' fees, the Arbitrator exceeded his authority in awarding attorneys' fees, and the Award should be overturned. (Request at 7).

C. Position of FOP before the Board

In its Opposition, FOP alleges that the Arbitrator did not exceed his authority in issuing an award of attorneys' fees. (Opposition at 6). FOP contends that the Arbitrator's authority for the Award is derived from Article 19 E of the parties' CBA, which "allows the Arbitrator the freedom to craft his or her own suitable remedy." (Opposition at 8). FOP analogizes the circumstances of this case to cases involving the "55-day rule" of Article 12, § 6 of the parties' CBA. (Opposition at 9). Although the CBA does not provide for a specific remedy for violations of the 55-day rule, arbitrators frequently use their discretion to craft a remedy. *Id.* FOP states that the Arbitrator did not exceed his authority because the CBA does not prevent an award of attorneys' fees, and Article 19 does not limit an arbitrator's remedial options. (Opposition at 10).

Further, FOP alleges that MPD's challenge to the Award is a mere disagreement with the Arbitrator's findings and conclusions. (Opposition at 10). FOP asserts that the facts of the case warranted an award of attorneys' fees, and the Arbitrator did not err in using the Back Pay Act to fashion the Award. (Opposition at 11).

D. Analysis

The 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.).

An arbitrator does not exceed his authority by exercising his equitable power to formulate a remedy unless the CBA expressly restricts his equitable power. *See Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 59 D.C. Reg. 6787, Slip Op. No. 1133 at p. 8, PERB Case No. 09-A-12 (2011); *District of Columbia Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Further, a CBA's prohibition against awards that add to, subtract from, or modify the CBA does not expressly limit the arbitrator's equitable power. *Metropolitan Police Dep't*, Slip Op. No. 1133 at p. 8.

Contrary to MPD's allegations, the Arbitrator did not exceed his authority by formulating a remedy that awarded attorneys' fees to FOP. MPD has not cited any provision in the CBA which expressly limits an arbitrator's equitable power. (Request at 4-7). Therefore, the Arbitrator did not exceed his authority, and the Board will not overturn the Award on this ground.

MPD alleges that Article 19 E, § 5(7) does not provide that a losing party shall pay the fee and expense of arbitration, only the fee and expense of the arbitrator. (Request at 6). Article 19 E, § 5(7) states: "A statement of the arbitrator's fee and expense shall accompany the award. The fee and expense of the arbitrator shall be borne by the losing party, which shall be determined by the Arbitrator." (Request Attachment 2). For the Board to overturn the Award as in excess of the Arbitrator's authority, MPD must show that the CBA expressly limits an arbitrator's equitable power. *Metropolitan Police Dep't*, Slip Op. No. 1133 at p. 8. MPD's attempt to parse the language of Article 19 E does not provide the Board with such a limitation. Instead, MPD asks the Board to accept its interpretation of the CBA over that of the Arbitrator. (Request at 6). The Board will not overturn an arbitration award based simply upon the petitioning party's disagreement with the arbitrator's findings. *Fraternal Order of Police/Dep't of Corrections Labor Committee v. D.C. Dep't of Corrections*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at p. 6, PERB Case No. 10-A-20 (2012). Therefore, the Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Arbitration Review Request is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

Decision and Order
PERB Case No. 11-A-11
Page 4 of 4

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

May 1, 2013

CERTIFICATE OF SERVICE

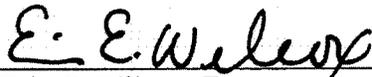
This is to certify that the attached Decision and Order in PERB Case No. 11-A-11 was transmitted via U.S. Mail & e-mail to the following parties on this the 1st day of May, 2013.

Mr. Frank McDougald, Esq.
Assistant Attorney General
441 4th St, NW
Suite 1180 South
Washington, D.C. 20001
frank.mcdougald@dc.gov

U.S. MAIL and E-MAIL

Mr. Marc Wilhite, Esq.
Pressler & Senftle, PC
Three McPherson Square
1432 K St, NW
12th Floor
Washington, DC 20005
mwilhite@presslerpc.com

U.S. MAIL and E-MAIL



Erin E. Wilcox, Esq.
Attorney-Advisor