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

_____)	
In the Matter of:)	
)	
Metropolitan Police Department of the)	
District of Columbia)	
)	PERB Case No. 24-A-09
Petitioner)	
)	Opinion No. 1891
v.)	
)	
Fraternal Order of Police/Metropolitan)	
Police Department Labor Committee)	
)	
Respondent)	
_____)	

DECISION AND ORDER

I. Statement of the Case

On March 29, 2024, the District of Columbia Metropolitan Police Department (MPD) filed an arbitration review request (Request), seeking review of a March 8, 2024, clarification of an arbitration award (Clarification), pursuant to the Comprehensive Merit Personnel Act (CMPA).¹ The arbitration award (Award) reduced a twenty (20) day suspension of an MPD officer (Grievant) to a written reprimand, ordered a make whole remedy for the Grievant, split the payment of arbitration costs equally between the parties and denied the union's request for attorney fees.² The Clarification ordered MPD to split payment of both the arbitration costs and the union's attorney fees with the union.³ MPD requests that the Board reverse the Clarification on the grounds that the Arbitrator exceeded his authority.⁴ The Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) filed an Opposition to MPD's Request.

Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Board concludes that the Arbitrator exceeded his authority in issuing the Clarification. Therefore, the Request is granted, and the Clarification is set aside.

¹ The Arbitrator issued the original arbitration award on November 15, 2023, but issued a corrected arbitration award (Award) on November 16, 2023. Request at 5. *See also* MPD Ex. 6 at 33.

² Award at 18.

³ Clarification.

⁴ Request at 2, 8-11.

II. Arbitration Award

A. Factual and Procedural Background

The Arbitrator made the following factual findings. The Grievant worked as an MPD officer for two years without any disciplinary incidents.⁵ On June 29, 2022, the Grievant received a Notice of Proposed Adverse Action as a result of a February 21, 2022 incident.⁶

The arbitration hearing was held on July 12, 2023.⁷ The parties submitted post-hearing briefs to the Arbitrator.⁸ In its post-hearing brief, FOP requested that the Arbitrator order MPD to pay all of FOP's attorney fees and the full costs of the arbitration "pursuant to Article 19 (E) § 5(7) of the CBA."⁹ The Arbitrator requested both parties' interpretation of Article 19 (E) § 5(7),¹⁰ which provides that "[a] statement of the arbitrator's fee and expenses shall accompany the award. The fee and expense [*sic*] of the arbitrator shall be borne by the losing party, which shall be determined by the Arbitrator."¹¹ FOP asserted that MPD would be the losing party under the CBA if the Arbitrator held either that the Agency lacked just cause to discipline the Grievant or failed to impose a reasonable penalty.¹² MPD asserted that a finding in favor of MPD on disciplining the Grievant for cause combined with a finding in favor of FOP on the unreasonableness of the penalty would constitute a "split decision" where "the parties bear their proportionate share of the arbitrator fees."¹³

The Arbitrator issued the Award on November 15, 2023.¹⁴ The Arbitrator considered the following issues: "whether *just cause* was properly implemented in all phases of the disciplinary procedure that assessed the Grievant's alleged misconduct as well as formulated his penalty? If not, what shall be the remedy?"¹⁵

⁵ Award at 5.

⁶ MPD Ex. 7, *Grievant's Post-Hearing Arbitration Brief* at 5, 2.

⁷ Award at 1.

⁸ Award at 1.

⁹ MPD Ex. 7 at 43.

¹⁰ MPD Ex. 6, *Email Correspondence between Arbitrator and Parties* at 45.

¹¹ MPD Ex. 5, *Collective Bargaining Agreement Between the District of Columbia Government Metropolitan Police Department and the D.C. Police Union (Fraternal Order of Police/Metropolitan Police Department (FOP/MPD) Labor Committee)* at 29.

¹² MPD Ex. 6 at 45.

¹³ MPD Ex. 6 at 41.

¹⁴ MPD Ex. 6 at 34. The Arbitrator emailed the Award to the parties on November 15, 2023. MPD Ex. 6 at 34. On November 16, 2023, MPD notified the Arbitrator of a typographical error in the remedy section of the Award. MPD Ex. 6 at 33. The sentence at issue read, "The Grievant shall be made fees, there is no provision in the CBA permitting such a payment to be made." MPD Ex. 6 at 33. The Arbitrator transmitted a revised Award to the parties on November 16. Request at 5 (fn 3).

¹⁵ Award at 2 (emphasis in original). The parties both submitted statements of the issues. FOP stated the issues as:

(1) whether the Metropolitan Police Department's suspension of the Grievant was for cause and permissible and appropriate under the parties' Collective Bargaining Agreement, General Orders, and D.C. Law?

The Arbitrator reviewed the parties' CBA, including Article 19.¹⁶ The Arbitrator stated that, while the CBA directs arbitrators to determine "the losing party," that directive "is ambiguous because there are no criteria identified to justify such a decision."¹⁷ The Arbitrator noted that neither party demonstrated "bad faith, egregious conduct, or flagrant violations of the CBA that would warrant a 'loser' label."¹⁸ He concluded that the dispute had "neither a true prevailing party nor a true losing party."¹⁹ The Arbitrator further noted his post-hearing request for the parties' interpretation of their CBA and stated that MPD's interpretation "will be given preference."²⁰

The Arbitrator analyzed the appropriateness of the discipline the Grievant received.²¹ The Arbitrator found that MPD had not properly applied several mitigating factors that justified a reduced penalty.²² The Arbitrator concluded that MPD had "the right to make a judgment call for disciplining the Grievant. However, the processing of that disciplinary action failed to consider appropriate *just cause* standards which resulted in an exceedingly more severe corrective action than was warranted."²³

The Award directed MPD to expunge the Grievant's suspension from his personnel file and replace it with a written reprimand addressing the relevant issues.²⁴ The Award further directed MPD to make the Grievant whole for all wages and benefits lost during his suspension.²⁵ The Award stated that, "[a]lthough the Union asks for attorney fees, there is no provision in the CBA permitting such a payment to be made. Given that the Arbitrator decides the meaning of

(2) whether the Metropolitan Police Department's suspension of the Grievant was fair, appropriate, consistent with penalties for similar conduct, and permissible and appropriate under the parties' Collective Bargaining Agreement and *Douglas v. Veterans Admin.*, 5 MSPR 280 (1981)?

Award at 2. MPD stated the issues as:

- (1) Did the Department have just cause to discipline Grievant for his misconduct on February 21, 2022?
- (2) Assuming the Department had just cause to discipline Grievant for the misconduct, was the Department's penalty imposed upon the Grievant reasonable.

Award at 2.

¹⁶ Award at 2.

¹⁷ Award at 14.

¹⁸ Award at 14.

¹⁹ Award at 14.

²⁰ Award at 14. The Arbitrator quoted a portion of MPD's statement regarding interpretation of the CBA, stating, "if the Department prevails on the *cause issue* and the Union prevails on the *penalty issue*, then this is a 'split decision' where the parties bear their proportionate share of the arbitrator fees" (emphasis in original). Award at 14.

²¹ Award at 15-18.

²² Award at 18.

²³ Award at 18.

²⁴ Award at 18.

²⁵ Award at 18.

‘loser pays,’ the award shall be considered a split decision with the expenses being evenly divided between the parties.”²⁶

After the Arbitrator transmitted the Award, the parties and the Arbitrator engaged in an email exchange, including substantive arguments and briefs, between November 2023 and March 2024.²⁷ On November 16, 2023, FOP stated, “Now that the merits of the grievance have been resolved, the D.C. Police Union will present a Petition for Attorneys’ Fees and Costs to you for your consideration.”²⁸ FOP asserted that it was routine in disciplinary arbitrations for attorney fees to be granted to FOP when an arbitrator rescinded a grievant’s discipline and that “because an award of attorneys [*sic*] fees cannot be considered until a determination on the merits has been made, arbitrators often issue supplemental awards for attorneys’ fees after issuing an initial award on the merits.”²⁹ MPD responded, arguing that the Arbitrator had already denied FOP’s request for attorney fees and no longer had jurisdiction over the matter.³⁰ On November 17, FOP reasserted that determinations on attorney fees can only be made after a decision on the merits has been made and further asserted that the parties had not briefed the issue yet because doing so “prior to a ruling on the merits is never done.”³¹ MPD responded by maintaining its objection to FOP’s request for attorney fees and reasserting that the Arbitrator no longer had jurisdiction over the matter.³² MPD further asserted that:

- (1) FOP had already availed itself of the opportunity to request attorney fees in its post-hearing brief;
- (2) MPD was the prevailing party regarding the cause issue and, therefore, the Award was a split decision;
- (3) because the parties had not agreed to bifurcate the Arbitrator’s decision, they had therefore made their arguments regarding remedies during the hearing and in post-

²⁶ Award at 18. The typographical error that necessitated the Arbitrator’s reissuance of the Award occurred within the quoted portion, which originally stated “The Grievant shall be made fees, there is no provision in the CBA permitting such a payment to be made.” MPD Ex. 6 at 33.

²⁷ See, generally, MPD Ex. 6.

²⁸ MPD Ex. 6 at 38.

²⁹ MPD Ex. 6 at 38.

³⁰ MPD Ex. 6 at 37.

³¹ MPD Ex. 6 at 36. FOP further stated that:

[b]ecause the DC [*sic*] Police Union prevailed on the merits and the 20 day [*sic*] suspension was rescinded, it is now entitled to attorneys’ fees and costs and a determination of the amount of the attorneys’ fees and costs to be awarded is appropriately made through a Petition for Fees to the arbitrator. As in all other forms of litigation, a Petition for Fees cannot be submitted to any arbitrator, tribunal, Court, or agency, until after a decision on the merits is first made. The MPD knows this full well and the award of our attorneys’ fees has become so uniform in these cases that the MPD has stopped even filing an opposing brief to our Petition for Fees because our fees are indisputably reasonable.

MPD Ex. 6 at 37.

³² MPD Ex. 6 at 35.

hearing briefs, and the Award included determinations on both merits and remedies, including the denial of FOP's request for attorney fees; and

- (4) the Award held that the parties' CBA "does not allow for...a remedy [of attorney fees], rendering the issue of attorney's fees and costs moot."³³ FOP countered that the CBA's silence on the issue of attorney fees did not preclude an arbitrator from awarding such a remedy.³⁴

On November 20 MPD reasserted its arguments, including that the Arbitrator lacked jurisdiction to consider FOP's request for attorney fees.³⁵

On November 30, 2023, FOP submitted a petition requesting attorney fees and costs (Petition).³⁶ On December 4, 2023, the Arbitrator stated that "[FOP's Petition] persuasively addresses the wide degree of latitude and flexibility given to arbitrators in fashioning remedies for CBA violations ... [i]f a Supplemental Opinion and Award becomes necessary, how is that to be handled and who is to be billed for the additional work ... ?"³⁷ FOP responded that "when arbitrators issue Supplemental Awards for attorneys' fees they also issue supplemental invoices"³⁸ and noted that if FOP prevailed on the issue of attorney fees, MPD would be responsible for the costs associated with the supplemental award.³⁹ The Arbitrator, in an email granting MPD an extension for a response, stated, "Regarding the Union's petition, there are several unanswered questions that I hope will be addressed in the MPD's response. I'm particularly interested in knowing why the parties do not address all relevant issues in the initial hearing to eliminate the need for supplemental awards."⁴⁰ On January 19, 2024, MPD submitted its response to FOP's Petition (Response) to the Arbitrator.⁴¹ On January 22, 2024, the Arbitrator stated:

It is surprising that this case requires two additional legal briefs to give clarity to the ambiguous "loser pays" language in the CBA. To settle this dispute, are there any jointly proposed solutions that would prevent further litigation given that the Union's Petition will likely be denied under *functus officio*?⁴²

³³ MPD Ex. 6 at 35-36.

³⁴ MPD Ex. 6 at 26.

³⁵ MPD Ex. 6 at 25.

³⁶ MPD Ex. 6 at 12-13.

³⁷ MPD Ex. 6 at 12.

³⁸ MPD Ex. 6 at 12.

³⁹ MPD Ex. 6 at 12.

⁴⁰ MPD Ex. 6 at 16.

⁴¹ MPD Ex. 4, *Department's Response to Union's Petition for Attorneys' Fees and Costs* at 7.

⁴² *Functus officio* is defined as "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." *AFGE, Local 2725 v. DCRA*, 61 D.C. Reg. 7565, Slip Op. No. 1444 at 3, PERB Case 13-A-13 (2014) (citing *Black's Law Dictionary* (9th ed. 2009)).

Would a *clarification* of the Remedy be of any value to the parties? The wording of the Remedy suggesting that the expenses be “evenly divided” may have been confusing. If a trial-run clarification of the Remedy is considered appropriate, please let me know ...⁴³

On January 22, MPD stated that it rested on its brief and reasserted that the Arbitrator no longer had jurisdiction over the matter.”⁴⁴ On January 24, FOP stated that “[i]t appears that clarification of the Remedy would be helpful. Based on your email, it appears that the Remedy stating that the expenses would be ‘evenly divided’ was intended to mean that the Union’s attorneys’ fees would be evenly divided by the parties.”⁴⁵ On January 25, MPD objected to “any additional ‘clarification’ or reconsideration of the Remedy or the overall Opinion and Award,”⁴⁶ and argued that the Award was clear on its face in denying FOP’s request for attorney fees; the Arbitrator did not retain jurisdiction over the matter regarding attorney fees and costs or any other issue; the Arbitrator was *functus officio*; the “loser pays” provision of the CBA—Article 19 (E) § 5(7)—applied solely to an arbitrator’s fees and expenses; and that the Award clearly indicated that the “loser pays” provision referred only to the arbitrator’s fees and expenses.⁴⁷ On March 8, 2024, the Arbitrator submitted the Clarification.⁴⁸

B. Arbitrator’s Findings

In the Clarification, the Arbitrator stated, “MPD asserted that the arbitrator no longer had jurisdiction over this matter because his status was *functus officio*. However, if an issue remains open as advocated by the Union’s petition, the arbitrator’s job is not finished until an answer is given.”⁴⁹ The Arbitrator further stated:

Although the ruling was a split decision with an equal division of the costs, the remedy did not go far enough in identifying what cost items were to be split. Therefore, to clarify the issue, all costs (fees plus expenses) required for the Grievant’s arbitration shall be shared

⁴³ MPD Ex. 6 at 11 (emphasis in original).

⁴⁴ MPD Ex. 6 at 10.

⁴⁵ MPD Ex. 6 at 1, 6.

⁴⁶ MPD Ex. 6 at 3.

⁴⁷ MPD Ex. 6 at 3-5 (emphasis in original). MPD further argued that in the email exchange between the Arbitrator and the parties, the Arbitrator’s statement regarding the “ambiguous ‘loser pays’ language in the CBA” was inaccurate and conflated the issues of arbitration expenses and parties’ attorney fees; the Arbitrator’s conflation of those issues misstated the procedural history of the case, the positions of the parties, and “actually *prejudice[d]* the position of the Department in this matter;” at no point during the post-Award email exchange had the parties “questioned, commented, or considered the CBA’s ‘loser pays’ provision;” the CBA clearly addressed parties’ attorney fees in a different section, which required the parties to bear the costs of their own legal expenses; and that because the Award had denied FOP’s request for attorney fees, the Arbitrator was “precluded from participating in or providing any additional rulings on the matter.” MPD Ex. 6 at 4-6.

⁴⁸ The Board notes that MPD refers to this document as a “Supplemental Award” in the Request and accompanying exhibits.

⁴⁹ Clarification at 1 (citing Elkouri & Elkouri, *How Arbitration Works*, Ch. 7.5E.i.b., p. 7-45 (Kenneth May ed., BNA 8th Ed., 2016)).

equally. The award shall be considered a split decision with all costs of the arbitrator and the Police Union attorneys being evenly divided between the MPD and the Police Union.⁵⁰

MPD seeks review of the Clarification.

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an 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.⁵¹

MPD requests review on the grounds that the Arbitrator exceeded his authority by issuing the Clarification after fully deliberating on and deciding all material issues presented by the parties in the Award, including denying FOP's request for attorney fees.⁵² FOP argues that the Arbitrator had jurisdiction to issue the Clarification because: (1) the Clarification did not reopen or alter the Award, but rather further explain the scope of the remedy;⁵³ and (2) the Federal Back Pay Act (BPA) provides independent jurisdiction for arbitrators to award attorney fees.⁵⁴

When determining whether an arbitrator exceeded his authority in rendering an award, the Board analyzes whether the award "draws its essence from the parties['] collective bargaining agreement."⁵⁵ The relevant questions in this analysis are whether the arbitrator acted outside his authority by resolving a dispute not committed to arbitration and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.⁵⁶ Once an Arbitrator has made and published a final award, his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration.⁵⁷ The *functus officio* doctrine's intended purpose is to prevent "one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion."⁵⁸ The *functus officio* doctrine has three exceptions: (1) arbitrators can correct a mistake which is apparent on the face of the award; (2) "where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function

⁵⁰ Clarification at 1.

⁵¹ D.C. Official Code § 1-605.02(6).

⁵² Request at 2, 8-11.

⁵³ Opposition at 4-8.

⁵⁴ Opposition at 8-11.

⁵⁵ *AFGE Local 2725 v. D.C. Housing Auth.*, 61 D.C. Reg. 9062, Slip Op. 1480 at 5, PERB Case No. 14-A-01 (2014).

⁵⁶ *Mich. Family Resources, Inc. v. Serv. Emp' Int'l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. 1258 at 4, PERB Case No. 10-A-09 (2012).

⁵⁷ *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 10804, Slip Op. No. 1303 at 7-8, PERB Case No. 10-A-02 (2012) (quoting *Washington-Baltimore Newspaper Guild, Local 35 v. the Washington Post*, 442 F.2d 1234, 1238-1239 (D.C. 1971)).

⁵⁸ *Washington-Baltimore Newspaper Guild, Local 35* at 1238.

and it remains open to him for subsequent determination;”⁵⁹ and (3) “[w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.”⁶⁰ The Board has held that seeking clarification of an arbitrator’s award is appropriate when the award is ambiguous and the proceedings are not reopened.⁶¹

MPD does not dispute the Award itself or the Arbitrator’s construal of the parties’ CBA, but rather the Arbitrator’s Clarification ordering that the parties equally split payment of FOP’s attorney fees.⁶² Thus, the issue is whether the Arbitrator was acting *functus officio* in considering and granting FOP’s post-Award Petition requesting the payment of its attorney fees. MPD asserts that the Arbitrator exceeded his jurisdiction by entertaining the petition after the Award “clearly and sufficiently denied the Union’s pre-award request for attorney’s fees.”⁶³

FOP argues that the Clarification does not violate the *functus officio* doctrine⁶⁴ and that the Arbitrator had independent authority to award attorney fees under the BPA regardless of whether he would otherwise be acting *functus officio*.⁶⁵ FOP argues that the Clarification falls under a recognized exception to the *functus officio* doctrine permitting “clarification or completion, as distinct from alteration, of the arbitral award.”⁶⁶

The Award in the instant case is not ambiguous.⁶⁷ The Arbitrator notably had to clarify the sentence in the Award at issue because of a typographical error. When originally transmitted, the remedies section of the Award stated, “The Grievant shall be made fees, there is no provision in the CBA permitting such a payment to be made.”⁶⁸ In correcting this error, the Arbitrator

⁵⁹ *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 332 (3rd Cir. 1991) (quoting *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 572 (3rd Cir. 1967)).

⁶⁰ *Id.*

⁶¹ *DCPS v. WTU, Local 6*, 69 D.C. Reg. 5567, Slip Op. No. 1809 at 5, PERB Case No. 22-A-02 (2022); *see also Williams v. Richey*, 948 A.2d 564, 567 (D.C. 2008) (citing *American Postal Workers Union v. United States Postal Service*, 254 F.Supp.2d 12, 15 (D.D.C. 2003), which states, “Because of a remand’s limited purpose, remand to clarify an ambiguity does not run afoul of the common-law doctrine of *functus officio*.”).

⁶² Award at 2.

⁶³ Request at 8.

⁶⁴ Opposition at 4-8.

⁶⁵ Opposition at 8-11. FOP notes that the Board has held that the BPA’s independent jurisdiction does not apply if the parties’ CBA contains a “‘clear and unmistakable’ waiver of BPA entitlements.” Opposition at 11 (citing *AFGE, Local 2725 v. DCRA*, Slip Op. No. 1444 at 13. FOP asserts that the relevant CBA in the instant case does not contain such a waiver and that “[t]o the contrary, it is well-settled that the parties’ CBA is silent as to the issue of attorneys’ fees and, therefore, does not preclude an award of attorneys’ fees.” Opposition at 11.

⁶⁶ Opposition at 5 (citing *Hill v. Wackenhut Servs. Int’l*, 971 F.Supp.2d 5, 13 (D.D.C. 2013); *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 991 (3rd Cir. 1997)).

⁶⁷ *But see D.C. Child and Family Services Agency v. AFSCME, District Council 20, Local 2401, AFL-CIO*, Slip Op. No. 956 at 7, PERB Case No. 08-A-07 (2010) (holding that an award was ambiguous because it referenced three differing evidentiary standards without clarifying upon which standard the arbitrator relied); *see also Green v. Ameritech Corp.*, 200 F.3d 967, (6th Cir. 2000) (stating that courts usually remand to the original arbitrator for clarification of an ambiguous award when the award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation).

⁶⁸ MPD Ex. 6 at 33.

modified the Award to read, “The Grievant shall be made whole for all wages and benefits lost during his suspension. Although the Union asks for attorney fees, there is no provision in the CBA permitting such a payment to be made.”⁶⁹ The context of the correction only further emphasizes what is clear on the face of the Award alone—that the Arbitrator considered FOP’s request for attorney fees and declined to award that remedy to FOP.

Further, the Award is clear on its face that the reference to “expenses” in the remedy refers to arbitration expenses, not attorney fees. Directly after declining to award attorney fees to FOP, the Arbitrator states, “Given that the Arbitrator decides the meaning of ‘loser pays,’ the award shall be considered a split decision with the expenses being evenly divided between the parties.”⁷⁰ The Arbitrator refers to the CBA’s directive that arbitrators determine “the losing party” and to the “‘loser’ label” earlier in the Award when stating that he will adopt MPD’s interpretation of Article 19 (E) § 5(7) of the parties’ CBA.⁷¹ The Arbitrator directly quotes Article 19 (E) § 5(7) and references its application to arbitration expenses throughout the Award.⁷² There is no ambiguity to the meaning or application of Article 19 (E) § 5(7) to the expenses and fees of the Arbitrator alone.⁷³ While the statement on expenses in the remedy section of the Award does not explicitly specify “arbitration expenses,” the inclusion of “loser pays” earlier in the sentence makes it clear that the sentence refers to Article 19 (E) § 5(7) expenses. The Arbitrator’s post-hearing request for briefing on that section of the parties’ CBA and the Award’s inclusion of relevant portions of the parties’ interpretations of the section—as well as explicit adoption of MPD’s interpretation—further contribute to the clarity of the expenses statement in the remedy.

The Board has previously rejected an arbitrator’s “*pro forma* attempt to bring [a second award in a matter] within the exception for clarification of an ambiguity.”⁷⁴ There, the Board found that “[t]he record does not reflect that the Arbitrator retained jurisdiction to clarify the remedy or that the requests the Union made to the arbitrator...were for clarification”⁷⁵ and struck the paragraphs of the second award that it did not consider clarifications, including the arbitrator’s award of attorney fees.⁷⁶ In the instant case, the Arbitrator, in addressing FOP’s post-Award Petition, both altered an unambiguous portion of the Award’s remedy and conflated separate issues that he had already addressed in the Award with the issue of his authority to consider the Petition.⁷⁷ The Arbitrator himself noted the likelihood of denying FOP’s Petition in compliance with the *functus officio* doctrine before proposing to address attorney fees in a “clarification” instead.⁷⁸ The remedies in the Award did not require clarification; thus, there was no applicable exception to the *functus officio* doctrine. Therefore, the Arbitrator was without jurisdiction to modify the remedy.

⁶⁹ Award at 18.

⁷⁰ Award at 18.

⁷¹ Award at 14.

⁷² Award at 2, 4, 14.

⁷³ MPD Ex. 5 at 29.

⁷⁴ *MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1660 at 12.

⁷⁵ *MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1660 at 12.

⁷⁶ *MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1660 at 12-13.

⁷⁷ MPD Ex. 6 at 4.

⁷⁸ MPD Ex. 6 at 11.

FOP further argues that the BPA provides independent jurisdiction to arbitrators to award attorney fees after an award becomes final and binding even if an arbitrator did not retain jurisdiction for that purpose.⁷⁹ However, the cases cited by FOP are clearly distinguishable. In each of the cases cited by FOP, the arbitrator had not addressed attorney fees in the original award.⁸⁰ FOP's assertion that an arbitrator need not have retained jurisdiction is immaterial as here, the Arbitrator considered and denied FOP's request for attorney fees in the Award.⁸¹ FOP's Post-Hearing Brief included an explicit request for attorney fees and costs, without any indication of an expectation to bifurcate the Award to address only that specific request for relief.⁸² The Arbitrator then declined to award attorney fees in the remedy, determining that no provision in the parties' CBA permitted a payment of attorney fees as requested by FOP.⁸³ The Board has held that the BPA "provides an independent basis to seek attorneys' fees, *separate* and apart from any authority granted by a party's CBA."⁸⁴ However, the Board has established that where an appropriate authority finds that a grievant was adversely affected by a wrongful personnel action, and awards the grievant back pay,⁸⁵ an arbitrator may not reopen issues which were sufficiently

⁷⁹ Opposition at 9. FOP cites both Board and Federal Labor Relations Authority precedent. Opposition at 9. FOP cites to *MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1660, where the Board held that "[the BPA] independently confers jurisdiction on arbitrators to consider requests for attorneys' fees made within a reasonable period of time after the award of back pay becomes final **even if the arbitrator did not retain jurisdiction for that purpose**" (emphasis in original). Opposition at 9 (citing *MPD v. FOP/MPD Labor Comm.*, 65 D.C. Reg. 6416, Slip Op. No. 1660 at 8, PERB Case No. 18-A-08 (2018)). FOP also cites *AFGE, Local 2725 v. D.C. Dep't of Consumer & Regulator Affairs*, where the Board held that

[T]he BPA "confers jurisdiction on an arbitrator to consider a request for attorneys' 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.

AFGE, Local 2725 v. DCRA, Slip Op. No. 1444 at 11 (quoting *Philadelphia Naval Shipyard v. Philadelphia Metal Trades Council*, 32 F.L.R.A. 417, 417-21 (1988)).

⁸⁰ See *MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1660 at 2-4; *MPD v. FOP/MPD Labor Comm.*, 67 D.C. Reg. 11476, Slip Op. No. 1759 at 2, PERB Case No. 20-A-08 (2020) (denying arbitration review request where arbitrator retained jurisdiction for the purpose of determining whether additional remedies of interest on back pay and attorney fees were warranted; *But see AFGE, Local 2725 v. DCRA*, Slip Op. No. 1444 at 2 (granting arbitration review request regarding second arbitrator's denial of supplemental attorney fees after union prevailed in agency's appeal to the D.C. Superior Court where original arbitrator had retained jurisdiction for the purpose of addressing requests for attorney fees); *Philadelphia Naval Shipyard* at 2 (overturning award denying attorney fees for lack of jurisdiction because the issue of attorney fees was not raised prior to the close of the record).

⁸¹ The Board notes that in all of the Board cases cited, regardless of any need, or lack thereof, to retain jurisdiction, the arbitrators had still explicitly retained jurisdiction over requests for attorney fees. See *MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1660 at 8; *but see AFGE, Local 2725 v. DCRA*, Slip Op. No. 1444 at 2; *MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1759 at 2.

⁸² FOP Post-Hearing Brief at 42-43.

⁸³ Award at 18. The Board notes that while Board precedent supports FOP's arguments that the Arbitrator *could* have awarded attorney fees even without explicit authorization in the parties CBA, *MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1660 at 13, that does not then mean the Arbitrator has free rein to misuse the clarification exception to the *functus officio* doctrine in order to change a remedy he appears to regret.

⁸⁴ *AFGE, Local 2725 v. DCRA*, Slip Op. No. 1444 at 13 (emphasis in original).

⁸⁵ *AFGE, Local 2725 v. DCRA*, Slip Op. No. 1444 at 12-13.

addressed in the previous award.⁸⁶ Further, the Board has previously rejected a challenge to a denial of attorney fees where the arbitrator relied on his equitable authority to deny a union's request for attorney fees, as opposed to expressly relying on the BPA.⁸⁷ Here, the record indicates that the Arbitrator similarly relied on his equitable authority, as he did not apply the BPA in his analysis in either the Award or the Clarification.⁸⁸

For the reasons stated, the Board finds that the Arbitrator exceeded his authority.

IV. Conclusion

The Board finds that the Arbitrator exceeded his authority in submitting the Clarification. Accordingly, MPD's Request is granted, and the Clarification is hereby set aside.

⁸⁶ *C.f. UDC v. UDC Faculty Assoc./NEA*, 38 D.C. Reg. 5024, Slip Op. No. 276 at 8 (1991) (holding that arbitrator exceeded jurisdiction by reopening his award and making a determination on the issue of interest over the objection of one party, even though that left the opposing party with the legitimate complaint that an issue put to the arbitrator has not been explicitly resolved by him). The Board notes that it previously registered the petitioner's consistent objections to the arbitrator reopening the award in overturning an arbitrator's clarification made without jurisdiction. *UDC v. UDC Faculty Assoc./NEA*, Slip Op. No. 276 at 8. However, in that case, the parties' CBA required arbitrators to conduct proceedings in accordance with the rules of the Federal Mediation and Conciliation Service, which, in turn, require arbitrators to conform to the Code of Professional Responsibility for Arbitrators of Labor Management Disputes. *UDC v. UDC Faculty Assoc./NEA*, Slip Op. No. 276 at 7. That code provides that "[n]o clarification or interpretation of an award is permissible without the consent of both parties." *UDC v. UDC Faculty Assoc./NEA*, Slip Op. No. 276 at 7 (citing the Code of Professional Responsibility for Arbitrators of Labor Management Disputes, 29 CFR Sec. 1404.4(b) (1990)). More recent Board and FLRA precedent has held that an arbitrator's violation of the Code by issuing a genuine clarification of an ambiguous award is not grounds for overturning an award. *MPD v. FOP/MPD Labor Comm. (on behalf of Robert Wigton)*, 64 D.C. Reg. 13394, Slip Op. No. 1643 at 4, PERB Case No. 17-A-07 (2017); see also *U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Tucson, Arizona and AFGE, Local 3955, AFL-CIO*, 2015 WL 7273223 at 20 (2015). However, the Board in Opinion No. 1643 found that *functus officio* did not apply because the initial award had not addressed the issue of remedies at all, and therefore was not a final and binding award. *MPD v. FOP/MPD Labor Comm.* at 5. The Board need not reach the issue of MPD's objections in the instant case as the Arbitrator here acted *functus officio* in altering his final and binding Award in the Clarification.

⁸⁷ *FOP/DOC Labor Comm. v. DOC*, Slip Op. No. 1303 at 9.

⁸⁸ See, generally, MPD Exs. 1 and 2.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is granted;
2. The clarification of the November 15, 2024 arbitration award is set aside; and
3. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons and Peter Winkler.

November 21, 2024
Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.