Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Consumer and Regulatory Affairs,	
Petitioner,	PERB Case No. 11-A-06
v.	Opinion No. 1471
American Federation of Government Employees, Local 2725, AFL-CIO,	
Respondent.	

DECISION AND ORDER ON REMAND

I. Statement of the Case

This matter comes before the Board on remand from the Superior Court of the District of Columbia, pursuant to its order reversing and remanding the decision of the Board in *District of Columbia Department of Consumer and Regulatory Affairs v. American Federation of Government Employees, Local 2725*, 59 D.C. Reg. 11357, Slip Op. No. 1298, PERB Case No. 11-A-06 (2012).

The case was brought by the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), who sought review of an arbitration award ("Award") that, in part, reinstated 19 employees who had elected to challenge their terminations through the Office of Employee Appeals ("OEA"), and then lost those appeals. (Award at 45). DCRA claimed that the Award was contrary to law and public policy, and that the Arbitrator exceeded his authority. (Request at 2). The American Federation of Government Employees, Local 2725 ("AFGE") opposed the Request.

The issue before the Board was whether "the award on its face [was] contrary to law and public policy," or whether "the arbitrator was without or exceeded his or her jurisdiction..." D.C. Official Code § 1-605.02(6) (2001 ed.). Upon consideration of the Request, the Board

found that DCRA did not establish a statutory basis for review. (Slip Op. No. 1298 at p. 4-5). Therefore, pursuant to Board Rule 538.4, DCRA's Request was denied.

DCRA appealed a portion of the Board's decision to the District of Columbia Superior Court. Superior Court Judge Anthony Epstein reversed the Board's Decision and Order and remanded the case to the Board for entry of an order reversing the Arbitrator's Award. As a result, this case is before the Board for a decision consistent with Judge Epstein's order.

II. Discussion

The Award at issue in this case resulted from a group grievance filed on behalf of commercial and residential housing inspectors employed by DCRA. (Award at 7). DCRA terminated approximately 30 employees who, after a change in certification requirements, failed to obtain the required certification. (Award at 27). AFGE filed a group grievance on behalf of 59 commercial and residential housing inspectors who had been adversely impacted by the change in certification requirements, including the 30 terminated inspectors. (Award at 24). Of the group of terminated inspectors, 19 employees sought redress through the OEA. *Id.* Their appeals were denied by OEA Administrative Judge Eric Robinson, who dismissed the appeals for lack of jurisdiction. (Award at 27-28).

Meanwhile, in the grievance arbitration proceedings, the Arbitrator found that the adversely-affected inspectors must be made whole, including reinstatement for all of the terminated inspectors. (Award at 47). The 19 employees whose cases were dismissed by the OEA were included in the make-whole remedy, and they were ordered to be reinstated. *Id.*

DCRA appealed the Award to PERB, asserting in part that the Arbitrator exceeded his jurisdiction and violated law and public policy by reinstating the 19 employees who had appealed their terminations through the OEA, notwithstanding the election of remedies language in the parties' collective bargaining agreement ("CBA"). (Request at 7-9). DCRA contended that the election of remedies provision in the parties' CBA is conclusive, holding that "[a]n employee shall elect either of these procedures in writing and the selection once made cannot be changed." (Request at 7). DCRA also argued that the same outcome is provided by the District Personnel Manual, which provides:

> 1601.3 If an employee is authorized to choose between the negotiated grievance process set forth in a collective bargaining agreement and the grievance or appellate process provided in these rules, the employee may elect, at his or her discretion, to do one (1) of the following:
>
> (a) Grieve through the negotiated grievance procedure; or
>
> (b) Appeal to the Office of Employee Appeals or file a disciplinary grievance, each as provided in these rules.

> 1601.4 An employee shall be deemed to have elected his or her remedy pursuant to § 1601.3 when he or she files a disciplinary grievance or an appeal under the provisions of this chapter or files a grievance in writing in accordance with the provisions of the negotiated grievance procedure applicable to the parties, whoever event occurs first. This section shall not be construed to toll any deadlines for filing.

(Request at 7-8). In issuing an Award which included the 19 employees who sought redress through OEA, DCRA alleged that the Arbitrator violated the CBA's provision against adding to, subtracting from, or modifying the provisions of the CBA through an award, effectively attempting to "rescue [the 19 employees] from a poor election of forum." (Request at 9; citing CBA Article 10, Section E 11).

In its Opposition to the Request ("Opposition"), AFGE alleged that DCRA's Request was based upon a mischaracterization of the nature of the grievance, and essentially attempted to "retroactively convert a contractual grievance about the employer's failure to negotiate with the Union over changes affecting the terms and conditions of employment of bargaining unit members into a group grievance challenging 19 terminations." (Opposition at 3). AFGE noted that the Arbitrator concluded that DCRA failed to satisfy its contractual duty to bargain with the Union, and did not address the question of whether DCRA had just cause to terminate any individual employee, nor did DCRA present such a case. (Opposition at 6). Further, AFGE contended that DCRA specifically agreed to submit the question of remedy to the Arbitrator, and that nothing in the parties' CBA specifically restricts an arbitrator's authority to craft an equitable remedy if the parties request him to do so. *Id.* Pursuant to Board law, an arbitrator does not exceed his or her jurisdiction by exercising equitable powers if the parties' CBA does not specifically limit the use of such powers. *Id*; citing *Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, Slip Op. No. 933 at p. 8, PERB Case No. 07-A-08 (March 12, 2008). AFGE asserted that the Arbitrator ordered a "restoration of the status quo pending DCRA's compliance with the contract," and that the overlap between the remedies requested in the withdrawn termination grievances and the grievance alleging a failure to bargain in good faith "is not complete and does not equate to a violation of the provisions requiring an election of remedies." (Opposition at 6-7).

After reviewing the pleadings, the Board found that no statutory basis existed for setting aside the Award. (Slip Op. No. 1298 at p. 4-5). Acknowledging its precedent that by submitting the matter to arbitration, the parties agreed to be bound by the arbitrator's interpretation of the CBA, as well as that the Board will not substitute its own interpretation for that of the Arbitrator, the Board concluded that "[n]either the Agency's disagreement with the Arbitrator's interpretation of Article 10, Section E 11 of the CBA, nor the Agency's disagreement with the Arbitrator's findings and conclusions, are grounds for reversing the Award." (Slip Op. No. 1298 at p. 5). As a result, DCRA's Request was denied.

DCRA appealed the portion of the Board's decision pertaining to the reinstatement of the 19 employees to the District of Columbia Superior Court. Superior Court Judge Anthony

Epstein reversed the Board's Decision and Order and remanded the case to the Board for entry of an order reversing the Award as to the 19 employees who had appealed their terminations through the OEA. In reaching his decision, Judge Epstein concluded that "the Arbitrator's approach allowed the 19 employees to have it both ways," conflicting with the CBA's election of remedies provision. *Government of the District of Columbia v. District of Columbia Public Employee Relations Board*, No. 2012 CA 006983P MPA, Slip Op. at p. 7-8 (Super. Ct. Feb. 27, 2013). Judge Epstein stated that the election of remedies provision "requires employees to make an election, and it denies employees the option to pursue relief from an adverse action from an arbitrator after it has elected in writing to seek relief from the same adverse action through an OEA appeal." *Id.* at 11. Further, when the 19 employees filed the OEA appeal challenging their terminations, "they lost the option to seek through the group grievance the remedy that they now sought from OEA: reinstatement undoing their terminations." *Id.* at 12. In rejecting the theory that an employee may pursue some claims that would lead to reinstatement before an arbitrator, and pursue other claims that would lead to reinstatement before OEA, Judge Epstein concluded that Article 9 § B of the CBA "would not require a true election of remedies if it allowed employees to pursue in one forum arguments that that forum has jurisdiction to consider, and to pursue in the other forum arguments that that forum has jurisdiction to consider." *Id.* at 11. Thus, the Arbitrator exceeded express limits on his authority imposed by the parties' CBA when he awarded reinstatement to the 19 employees who sought relief through an OEA appeal. *Id.* at 12.

The Board believes the Court erroneously construed the Union's pursuit of a grievance for the Agency's refusal to bargain regarding the change in qualifications for certain positions as a challenge to their terminations by the 19 employees. The Board continues to believe that the two actions are separate. However, the Board concedes that the Arbitrator's reinstatement of the 19 employees who appealed their terminations through the OEA exceeded the express limits imposed upon the Arbitrator's authority by the parties' collective bargaining agreement. Therefore, this portion of the Award is reversed, and the reinstatement of the 19 employees is rescinded. D.C. Official Code § 1-605.02(6).

ORDER

IT IS HEREBY ORDERED THAT:

1. The portion of the D.C. Department of Consumer and Regulatory Affairs' Arbitration Review Request challenging the reinstatement of the 19 former residential and commercial building inspectors who appealed their terminations through the Office of Employee Appeals is granted.

2. The portion of Slip Op. No. 1298 denying the corresponding portion of the D.C. Department of Consumer and Regulatory Affairs' Arbitration Review Request challenging the reinstatement of the 19 former residential and commercial building inspectors is vacated.

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.

June 4, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-A-06 was transmitted via U.S. Mail and e-mail to the following parties on this the 5th day of June, 2014.

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