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

In the Matter of:)	
)	
Department of)	
Youth Rehabilitation Services,)	
)	
Complainant,)	PERB Case No. 16-A-02
)	
and)	Opinion No. 1638
)	
Fraternal Order of Police/)	
Department of Youth Rehabilitation Services)	
Labor Committee,)	
)	
Respondent.)	

DECISION AND ORDER

I. Introduction

On November 24, 2015, the Department of Youth Rehabilitation Services (“DYRS”) filed this Arbitration Review Request (“Request”) pursuant to section 1-605.02(6) of the Comprehensive Merit Personnel Act of 1979 (“CMPA”), seeking review of an Arbitrator’s Supplemental Opinion and Amendment to Award (“Supplemental Award”) that granted attorneys’ fees to the Fraternal Order of Police/Department of Youth Rehabilitation Services Labor Committee (“Union”). DYRS asserts that the Arbitrator’s award of attorneys’ fees under the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii) is on its face, contrary to law and public policy.¹

In accordance with section 1-605.02(6) of the CMPA, the Board is permitted to modify or set aside an 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

¹ Request at 5.

means.² Having reviewed the Arbitrator's conclusions, the pleadings of the parties, and applicable law, the Board concludes that the Award on its face is not contrary to law and public policy. Therefore, the Board lacks the authority to grant the Request.

II. Arbitrator's Initial Award

In an Arbitration Award issued on August 29, 2015, the Arbitrator sustained the Union's grievance, finding that DYRS violated Article 17, Sections 2 and 3 of the parties' collective bargaining agreement, by failing to notify the Union of DYRS' decision to contract out bargaining unit work, and refusing to provide the Union with an opportunity to bargain over the impact and effects of that decision.³ The Arbitrator ordered DYRS to "invite the Union to engage in Labor/Management meetings to discuss contracting out and alternatives to contracting out and to bargain about the impact and effects of contracting out" security work, as required by Article 17, Sections 2 and 3 of the Parties' collective bargaining agreement.⁴ The Arbitrator also ordered DYRS to reinstate the collective bargaining agreement's provisions for "Light Duty" and "Early Return-to-Work."⁵ Additionally, the Arbitrator ordered DYRS to offer reinstatement to "all bargaining unit employees whom it terminated or who resigned their DYRS employment, due to [DYRS'] termination of its light duty policy. . . and make them whole for any loss of wages they may have suffered, as a result of the [DYRS'] termination of that policy" retroactively to December 9, 2013.⁶ The Arbitrator did not make any findings as to the specific amount of back pay or lost wages owed to the Union. The Arbitrator retained jurisdiction over the matter for the purpose of "resolving any disputes which might arise regarding this portion of the Award."⁷

III. Arbitrator's Supplemental Award

On September 24, 2015, the Union filed a brief in support of its application for attorneys' fees in accordance with the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii), on the grounds that the Arbitrator found that DYRS' termination of its "Light Duty" policy was an unjustified or unwarranted personnel action in violation of the Parties' collective bargaining agreement, which resulted in a loss of pay.⁸ DYRS filed a response in opposition to the Union's application for attorneys' fees.⁹ DYRS contended that the cited provision of the Back Pay Act requires a showing that a bargaining unit employee lost wages as a result of the termination of DYRS'

² D.C. Official Code § 1-605.02(6).

³ Award at 15.

⁴ Award at 15.

⁵ Award at 15.

⁶ Award at 15.

⁷ Award at 15.

⁸ Supplemental Award at 3.

⁹ Supplemental Award at 3.

“Light Duty” policy.¹⁰ DYRS requested the Arbitrator reject the Union’s application on the basis that the Union failed to produce any witnesses to support its claim of loss of pay.¹¹

In a Supplemental Award issued on November 3, 2015, the Arbitrator found “ample judicial authority” to support the Union’s contention that the Back Pay Act sustains its application for attorneys’ fees in this case.¹² The Arbitrator found “it is well settled that the Back Pay Act applies to bargaining unit employees in the District of Columbia.”¹³ The Arbitrator determined that the Union satisfied the three requirements set out in *U.S. Department of Defense Dependent Schools v. Federal Education Association*¹⁴: (1) the grievant must be the prevailing party; (2) the award must be warranted in the interest of justice; and (3) the amount of the fees must be reasonable and incurred by the grievant.¹⁵ First, the Arbitrator found that the Union was the prevailing party.¹⁶ Second, the Arbitrator found that DYRS’ violation of the collective bargaining agreement resulted in the termination of its “Light Duty” policy and a loss of wages by bargaining unit employees.¹⁷ Third, noting that DYRS did not challenge the Union’s Verified Statement of Hours Billed, the Arbitrator determined that the amount requested by the Union was consistent with current law.¹⁸ In contrast, the Arbitrator concluded that there was “no authority” to support DYRS’ position that the Back Pay Act requires the prevailing party to show the amount of wages lost by employees due to the agency’s contract violations.¹⁹ The Arbitrator found that the Union’s claim to attorneys’ fees need only satisfy the three elements in *U.S. Department of Defense Dependent Schools*.²⁰ Accordingly, the Arbitrator sustained the Union’s application and awarded \$22,920.00 in attorneys’ fees to the Union.²¹

On November 24, 2015, DYRS filed the present Request, seeking review of the Arbitrator’s Supplemental Award as well as “the opportunity to brief this matter fully for the Board’s further consideration.”²² In Slip Opinion 1579, the Board granted DYRS’ request.²³ On August 24, 2016, DYRS submitted its Agency Brief in Support of the Arbitration Review Request (“Brief”) and on August 25, 2016, the Union submitted a Supplemental Brief of the Fraternal Order of Police Department of Youth Rehabilitative Services Labor Committee.

¹⁰ Supplemental Award at 3.

¹¹ Supplemental Award at 3.

¹² Supplemental Award at 4.

¹³ Supplemental Award at 4.

¹⁴ 54 F.L.R.A. 777, 773 (1998)

¹⁵ Supplemental Award at 4.

¹⁶ Supplemental Award at 4.

¹⁷ Supplemental Award at 4.

¹⁸ Supplemental Award at 5.

¹⁹ Supplemental Award at 4.

²⁰ Supplemental Award at 4.

²¹ Supplemental Award at 5.

²² Request at 7.

²³ *DYRS v. Fraternal Order of Police/DYRS Labor Comm.*, 63 D.C. Reg. 11708, Slip Op. 1579, PERB Case No. 16-A-02 (2016).

IV. Discussion

The CMPA, D.C. Official Code § 1-617.01 *et seq.*, regulates public employee labor-management relations in the District of Columbia. As previously noted, under section 1-605.02(6) of the CMPA, the Board is permitted to modify or set aside an arbitration award if the award on its face is contrary to law and public policy.²⁴ The Court of Appeals has stated, “the statutory reference to an award that ‘on its face is contrary to law and public policy’ may include an award that was premised on ‘a misinterpretation of law by the arbitrator that was apparent ‘on its face.’”²⁵ Absent a clear violation of law evident on the face of the arbitrator’s award, the Board lacks authority to substitute its judgment for that of the arbitrator.²⁶ Moreover, to overturn an arbitration award on the grounds that the award is contrary to law and public policy, the petitioning party has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.”²⁷ In this case, DYRS seeks review from the Board on the grounds that the Arbitrator’s award of attorneys’ fees under the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii), without having determined whether there are any valid claims for back pay, is on its face, contrary to law and public policy.²⁸

In reviewing the record, the Board finds that the essence of DYRS’ Request is merely an attempt to re-litigate the Arbitrator’s original Award. DYRS did not file an arbitration review request to the original Award. In that Award, the Arbitrator determined that by eliminating its “Light Duty” policy, DYRS caused some employees to leave their employment at DYRS, while others received administrative leave without pay.²⁹ Therefore, the Arbitrator ordered DYRS to make whole any bargaining unit employees who were terminated or who resigned as a result of DYRS’ policy change.³⁰ Although DYRS now challenges only the Supplemental Award of attorneys’ fees, its argument that none of the listed employees have a valid claim for back pay actually challenges the Arbitrator’s conclusion in the original Award.

On the merits, the Board finds that the Arbitrator’s award of attorneys’ fees under the Back Pay Act is not contrary to law and public policy. First, as it argued before the Arbitrator, DYRS contends that in order for a claim for attorneys’ fees to succeed under the Back Pay Act, the Union must show that an employee suffered a pecuniary loss as a result of DYRS’ actions.³¹ However, the Arbitrator previously considered and rejected this argument in the Supplemental Decision. The Arbitrator determined that there was “no authority” to support DYRS’ position that the Back Pay Act requires the prevailing party to show the amount of wages lost by

²⁴ D.C. Official Code § 1-605.02(6).

²⁵ *F.O.P./Dep’t of Corrections Labor Comm. v. Pub. Emp. Relations Bd.*, 973 A.2d 174, 178 (D.C. 2009)(quoting *D.C. Metropolitan Police Dep’t v. D.C. Pub. Employee Relations Bd.*, 901 A.2d 784, 787-88 (D.C. 2006)).

²⁶ *DC Metro. Police. Dep’t*, Slip Op. 1561 at 6.

²⁷ *MPD and FOP/MPD Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, *D.C. Pub. Sch. v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case 86-A-05 (1987).

²⁸ Request at 5; See D.C. Official Code § 1-605.02(6) (2001 ed.).

²⁹ Award at 10.

³⁰ Award at 15.

³¹ Brief at 7, 9.

employees due to the agency's contract violations.³² The Arbitrator also was not persuaded by DYRS' arguments that the Supreme Court case, *United States v. Testan*, 424 U.S. 392, 405-07 (1976) and D.C. Circuit Case, *Gray v. Office of Personnel Management*, supported DYRS' position that the Union must prove pecuniary loss.³³ The Arbitrator noted that in *Testan*, the Supreme Court simply found that the Back Pay Act did not apply to the wrongful-classification claim which it was reviewing.³⁴ In *Gray*, the Arbitrator noted that the D.C. Circuit found that the issue of back pay under the Back Pay Act was "premature."³⁵ Alternatively, the Arbitrator found that the Union's claim to attorneys' fees need only satisfy the three elements in *U.S. Department of Defense Dependent Schools*.³⁶

In addition, the Board notes that *U.S. Department of Defense Dependent Schools* is persuasive in the current matter as the Federal Labor Relations Authority concluded in that case that attorney fees may be awarded even though the arbitrator did not specifically state that back pay was granted to the grievants.³⁷ The Authority stated:

...the requirement that a party show a "withdrawal or reduction of pay, allowances or differentials" is satisfied by Arbitrator Bloch's finding that the Agency's action resulted in the grievant's "suffer[ing] delays, sometimes excessive, in payment of monies that were unquestionably owed to them."³⁸

In the current matter, the Arbitrator's finding that DYRS' termination of its "Light Duty" policy caused some employees to lose wages³⁹, not merely suffer a delay in payment of monies owed them, clearly satisfied the Back Pay Act's requirement that the agency's action "...resulted in the withdrawal or reduction of all or part of the pay...of the employee."⁴⁰ The Arbitrator, relying on the testimony of then-Union Chairperson Takisha Brown, concluded that DYRS denied "Light Duty" assignments to at least six listed employees and ordered back pay to "any other bargaining unit employees who may have been terminated or forced to resign, and make them whole for any loss of wages they may have suffered."⁴¹ Accordingly, the requirements of an award of attorneys' fees under the Back Pay Act has been met even though the Arbitrator did not determine the exact amount of back pay granted to the individual grievants. Although DYRS objects to the conclusion of the Arbitrator, the Board finds that the Arbitrator's conclusion is not based on a misinterpretation of law that is apparent on its face.

³² Supplemental Award at 4.

³³ Supplemental Award at 3-4.

³⁴ Supplemental Award at 3.

³⁵ Supplemental Award at 4.

³⁶ Supplemental Award at 4.

³⁷ *U.S. Department of Defense Dependent Schools*, 54 F.L.R.A. 773 (1998).

³⁸ *Id.* at 10.

³⁹ Supplemental Award at 4.

⁴⁰ 5 U.S.C. § 5596(b)(1).

⁴¹ Award at 11.

Second, DYRS argues that it has shown that there were no affected employees that have a valid claim for back pay in the Arbitrator's original Award.⁴² Without any supporting evidence, DYRS argues that of the six employees listed by the Arbitrator, four remained employed by DYRS, one was terminated before the "Light Duty" policy was ended, and there is no record of the remaining employee.⁴³ However, this argument only involves a disagreement with the Arbitrator's findings. As previously stated, the Arbitrator found that by eliminating its "Light Duty" policy, DYRS caused some employees to leave their employment at DYRS and others received administrative leave without pay.⁴⁴ It is well settled that disputes over the weight and the significance to be afforded the evidence is within the domain of the arbitrator and does not state a statutory basis for review.⁴⁵ The Board lacks jurisdiction to review an arbitrator's findings of fact based on credibility determinations.⁴⁶ Disagreement with the arbitrator's findings is not a sufficient basis for concluding that an award is contrary to law or public policy.⁴⁷ Accordingly, DYRS has not presented grounds to support a statutory basis or setting aside the Supplemental Award.

Third, DYRS contends that the Arbitrator's Supplemental Award lacks support and analysis. Specifically, DYRS argues that the Arbitrator: (1) "[B]arely addresses the Federal Back Pay's requirements that a grievant suffer some sort of pecuniary loss due to an unjustified and unwarranted personnel action;⁴⁸ (2) "[F]ails to address, or even take into account, that the Union has failed to produce a scintilla of evidence of affected employees that may have a claim under his original award;"⁴⁹ (3) "[D]oesn't even take into account that the Union has refused the Agency's request for more information regarding the affected employees;"⁵⁰ and (4) "[D]oesn't even factor in the Union's refusal of his own suggestion to have a supplemental hearing."⁵¹ The Board finds that DYRS' contentions here are merely disagreements with the Arbitrator's findings. The Board has repeatedly held that "[a]n Arbitrator need not explain the reason for his or her decision."⁵² Furthermore, an Arbitrator's decision is not unenforceable merely because he or she fails to explain a certain basis for his or her decision.⁵³ In the present case, the Arbitrator made ample factual conclusions and discussed the Parties' arguments in supporting his decision.

⁴² Brief at 6.

⁴³ Request at 3.

⁴⁴ Award at 10.

⁴⁵ See, e.g., *Am. Fed'n of State, Cnty and Mun. Emp., Local 872 v. D.C. Water and Sewer Auth.*, 63 D.C. Reg. 11725, Slip Op. No. 1588 at 4, PERB Case No. 16-A-10 (2016).

⁴⁶ See, *Univ. of the D.C. and Univ. D.C. Faculty Ass'n/NEA*, 38 D.C. Reg. 1580, Slip Op. No. 262, PERB Case No. 90-A-08 (1990).

⁴⁷ *D.C. Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 31 D.C. Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984).

⁴⁸ Brief at 8.

⁴⁹ Brief at 8.

⁵⁰ Brief at 8.

⁵¹ Brief at 8.

⁵² *FOP/Dep't of Corr. Labor Comm. v. D.C. Dep't of Corr.*, 61 D.C. Reg. 11301, Slip Op. 955 at 8, PERB Case No. 08-A-06 (2010) (citing *Lopata v. Coyne*, 735 A.2d 931, 940 (D.C. 1999)); *FOP/MPD Labor Comm. v. D.C. MPD*, 59 D.C. Reg. 3543, Slip Op 882 at n.7, PERB Case No. 07-A-13 (2008); *FOP/MPD Labor Comm. v. D.C. MPD*, 59 D.C. Reg. 3875, Slip Op. 911 at n.8, PERB Case No. 06-A-12 (2007).

⁵³ *Id.* (citing *Chicago Typographical Union 16 v. Chicago Sun Times Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991)).

Moreover, the Board has held that an arbitrator need not address and consider all the arguments made at arbitration.⁵⁴ Therefore, the Board finds that this DYRS argument also lacks merit.

V. Conclusion

Based on the foregoing, the Board finds that the Arbitrator's Supplemental Award is not contrary to law and public policy. Accordingly, DYRS' Request is denied and the matter is dismissed in its entirety with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
2. Pursuant to Board Rule 559, this Decision and Order shall become final thirty (30) days after issuance unless a party files a motion for reconsideration or the Board reopens the case within fourteen (14) days after issuance of the Decision and Order.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By the unanimous vote of Board Members Mary Anne Gibbons, Barbara Somson, and Douglas Warshof.

August 17, 2017

Washington, D.C.

⁵⁴ *Id.*

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-A-02, Op. No. 1638 was sent by File and ServeXpress to the following parties on this the 25th day of August, 2017.

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