Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
	)	
District of Columbia Water and Sewer Authority,	)	
	)	
Petitioner,	)	PERB Case No. 07-A-05
	)	
and	)	Opinion No. 931
	)	
American Federation of Government Employees, Local 631, *et. al.*,[1]	)	
	)	
Respondents.	)	
	)	
In the Matter of:	)	
	)	
American Federation of Government Employees, Local 631, *et. al.*,	)	
	)	
Petitioners,	)	PERB Case No. 07-A-06
	)	
and	)	Opinion No. 931
	)	
District of Columbia Water and Sewer Authority,	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

[1] The bargaining unit employees in this case are represented by the American Federation of Government Employees, Locals 631, 2553 and 872; the American Federation of State, County and Municipal Employees, Local 2091; and the National Association of Government Employers, Local R3-06 - which together make up Compensation Unit 31. (See Clark Award at p. 3).

I. Statement of the Case:

On May 23, 2007, the District of Columbia Water and Sewer Authority ("Petitioner" or "WASA") filed an Arbitration Review Request ("WASA's Request"). This case was designated as PERB Case No. 07-A-05. WASA seeks reversal of Arbitrator Clark's Award ("Clark Award" or "Award") in which the Arbitrator found that WASA is required to pay a 2004 performance bonus with interest to qualified bargaining unit employees in Compensation Unit 31. (See Clark Award at p. 15).

WASA is seeking review of the Award on the grounds that the Arbitrator "exceeded the jurisdiction granted to him under the agreement and that the Award by its terms is inconsistent with law and public policy". (See WASA's Request at p. 4). The American Federation of Government Employees, Local 631, *et al.*, ("Respondents" or "Unions") oppose WASA's Request.

The issues before the Board in PERB Case No. 07-A-05 are whether "the Arbitrator was without, or exceeded, his or her jurisdiction" and whether "the award on its face is contrary to law and public policy". D.C. Code § 1-605.02 (6) (2001 ed.).

On the same day, the Unions ("Petitioners" or "Unions") also filed an Arbitration Review Request concerning the same award, asking the Board to reverse the Arbitrator's denial of attorney fees. (Clark Award at p. 15). The Unions' Request was assigned PERB Case No. 07-A-06.

The Unions contend that the portion of the Award that denies attorney fees on its face is contrary to law and public policy. (See Unions' Request at pgs. 6 and 16). WASA opposes the Unions' Request.

The issue before the Board in PERB Case No. 07-A-06, is whether the Arbitrator's award denying the Unions' request for attorney fees is "on its face is contrary to law and public policy". D.C. Code § 1-605.02 (6) (2001 ed.).

The two Requests involve the same Award; therefore, we have decided to consolidate the two cases and issue one decision.

II. Discussion

In calendar year 2000, WASA and the five (5) Unions representing its employees - engaged in negotiations for a successor Master Agreement ("Master Agreement" or "CBA"). The parties implemented the successor CBA that was effective October 1, 2001, lasting until September 30, 2003, while continuing to bargain over issues identified in a memorandum of understanding ("MOU"). Pursuant to the MOU, the parties continued to negotiate over a new performance evaluation system for bargaining unit employees. On September 27, 2002, the

parties agreed to initiate for the first time a system of granting "lump sum awards" to employees based on their overall performance rating.[2] Consistent with the parties' agreement, WASA paid bonuses to qualified bargaining unit employees in June 2003. (See Award at p. 4).

On September 30, 2003, the October 2001-September 2003 Master Agreement expired and there was no successor agreement in place. (See WASA's Request at p. 2). In March 2004, after the expiration of the 2001-2003 Master Agreement, WASA notified the Unions of its position that it was under no obligation to pay bargaining unit employees performance bonuses in 2004 and that it would "wait for the formal exchange of compensation proposals at the bargaining table".(Clark's Award at p. 5).

On April 1, 2004, the Unions filed a grievance with WASA claiming that WASA's decision not to pay a merit pay bonus for Fiscal Year 2004 violated the parties' October 2001-September 2003 Master Agreement. (See Award at p. 1; WASA's Request at p. 2). On April 13, 2004, WASA denied the grievance. In the fall of 2004, the Unions filed for arbitration and the Federal Mediation and Conciliation Service ("FMCS") assigned Arbitrator Clark.

The parties commenced negotiations for a successor Master Agreement covering the period October 2003 to September 2007.[3] In March 2005 the Unions submitted their first proposal concerning performance bonuses. The parties reached an impasse on several contractual issues. Pursuant to D.C. Code § 1-617.17, the parties submitted their Last Best Offers ("LBOs") to an Impartial Board of Arbitration on March 10, 2006. Arbitrator M. David Vaughn was the panel chair. The parties' LBOs addressed the issue of compensation, including performance bonuses. (See Vaughn Award at pgs. 1-2). The Impartial Board of Arbitration held a hearing and an Award was issued on May 30, 2006. (See Vaughn Award at p. 22).

After the Impartial Board of Arbitration issued its Award on May 30, 2006, the grievance concerning the 2004 bonuses was scheduled and heard by Arbitrator Clark on November 30, 2006 and December 19, 2006. At the grievance arbitration, the Unions argued that WASA's failure to pay the employee bonuses violated several contractual provisions in the October 1, 2001-September 30, 2003 CBA, specifically: (a) Article I, Part I, *"Wages"*; (b) Article II, Part II, *"Relationship to this Agreement to Authority"*; (c) *Policies and Practices*; (d) Article 4, Part II, Sections B and C *"Management Rights"*; (e) the *September 27, 2002, Performance Evaluation Agreement*; (f) the *Performance Evaluation Settlement Agreement dated December 11, 2003*; and (g) the *August 2000 Letter of Agreement*. Primarily, the Unions relied on the

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[2] For an employee who "continually meets expectations" the parties agreed to an award of two (2%) percent; for an employee who "occasionally does not meet expectations" they agreed to an award of one (1%) percent; and for an employee who "rarely meets expectations" they agreed there would be no bonus. (Clark Award at p. 4).

[3] The duration of the collective bargaining agreement will be referenced interchangeably as "FY 2004 to FY 2007" or "October 1, 2003 to September 30, 2007".

September 27, 2002 Performance Evaluation Agreement ("September 27, 2002 Agreement") reached by the parties. (See Award at p. 7). The Unions claimed that the September 27, 2002 Agreement created an ongoing, "annual evaluation system requiring the payment of bonuses to eligible employees." (Award at p. 7).

The Unions argued that the language in Article I, Part I, Section A *"Wages"* in the parties' 2001 Master Agreement supports their position. Article I, Part I, Section A *"Wages"* provides as follows: "[WASA] is developing a new performance evaluation system in partnership with the Local Unions pursuant to the August 23, 2000 Letter of Understanding the new performance evaluation system shall be implemented beginning with Fiscal Year 2002 (but shall not be used to determine compensation until Fiscal Year 2003) . . ." Based on this language, the Unions asserted that WASA was obligated to pay the performance bonuses in FY 2004. (See Award at p. 8). The Unions further argued that the language cited and the time and effort spent in developing the performance evaluation system are indications that the performance evaluation system was intended to continue from year to year. (See Award at p. 8). Finally, the Unions claimed that Arbitrator Vaughn's Award should have no impact on the grievance that was before Arbitrator Clark because the Unions did not bargain to impasse over WASA's nonpayment of FY 2004 performance bonuses. (See Award at p. 8). According to the Unions, at the impasse arbitration hearing, all the parties involved understood that the Unions had not proposed to bargain over the 2004 evaluations because of the pending grievance that was before Arbitrator Clark. (See Award at p. 8).

WASA countered that the Master Agreement which expired on September 30, 2003, did not require that WASA pay performance bonuses and certain other benefits beyond FY 2003. (See WASA's Request at p. 9). WASA noted that there was no payment of performance bonuses, wages or gainsharing in FY 2005. These benefits were not contained in the October 2001 - September 2003 CBA. WASA asserted that the Unions' failure to also assert that these other benefits should be paid in 2004 and 2005, contradicts the Unions' claim that they believed the performance bonus to be ongoing. WASA also argued that none of the Unions' exhibits contained the year "2004" nor specific language indicating that WASA would pay bonuses beyond 2003. (See Award at p. 10). Finally, WASA claimed that "the Unions' Last Best Offer submitted to Arbitrator Vaughn, stating that performance bonuses shall be paid 'every year', specifies that a bonus be paid every year of the contract - including retroactive payments for Fiscal Years 2004 and 2005." (Award at p. 10).

WASA also argued that the "Wages" and "Duration" Articles in Arbitrator Vaughn's are controlling on the issue of performance bonuses in this case. (See R&R at p. 9). In support of this argument, WASA cited D.C. Code § 1-617.17(f)(3) which states that "the award shall be final and binding upon the parties to the dispute." (WASA's Request at p. 3). WASA noted that the duration clause contained in the Vaughn Award provides that the Agreement is in effect from FY 2004 to FY 2007 (i.e., October 1, 2003 to September 30, 2007). (WASA's Request at pgs. 3-4). Furthermore, the Wages article in the Vaughn Award allows for performance-based bonuses

commencing in Fiscal Year 2006. Thus, WASA argued that there was no obligation to pay performance bonuses in 2004. (See Clark Award at pgs. 5-6).

Arbitrator Clark addressed whether "the Employer [was] obligated to pay a performance evaluation bonus for the Fiscal Year ["FY"] 2004 to the bargaining unit employees, [for] the period constituting April 1, 2003, through March 31, 2004." (Clark Award at p. 1).

Arbitrator Clark distinguished between Arbitrator Vaughn's interest arbitration proceeding and the grievance which was the focus of the proceeding before him. He stated that, in the case before him, his role is "to interpret and enforce the language of the parties' collective bargaining agreement"; while in impasse arbitration "the arbitrator chooses between bargaining proposals after the parties' negotiations over new contract terms have reached impasse. . . . [Specifically,] '[i]nterest arbitration' refers to the arbitration of disputes arising from negotiations for *new* contract terms. In contrast, 'grievance' disputes arise from the interpretation or application of an *existing* agreement. 'Binding' interest arbitration is arbitration that results in a legally binding contract award." . . . . Accordingly, the Vaughn Award is binding with respect to the new contract terms that were awarded by the Arbitration Board as a result of that impasse arbitration." (Clark Award at p. 11).

Having concluded that interest or impasse arbitration is final and binding, Arbitrator Clark determined that "[i]f the parties elected to negotiate over the employer's nonpayment of 2004 performance bonuses, the employer might have had an argument that the Unions waived the grievance [that was before him]. Waiver would have occurred if the parties had bargained over 2004 performance bonuses, and one or the other party had submitted the matter to impasse arbitration . . . . However, . . . the parties did not bargain over this issue." (Clark Award at p. 12). Thus, Arbitrator Clark found that the Vaughn Award did not resolve, cover, or bar the issue submitted to him, i.e., 2004 performance bonuses. (See Clark Award at pgs 11-12). Furthermore, Arbitrator Clark determined that the duration clause in the Vaughn Award does not clearly bar payment of performance bonuses prior to 2006. (See Clark Award at p. 13).

Arbitrator Clark then turned to the October 2001-September 2003 Agreement between the parties. He found that the language in the September 27, 2002 Agreement, ("Fiscal Year 2003 Merit Pay" in Article I, Part I. Section A) "demonstrates that the parties anticipated ongoing negotiations over the payment of performance bonuses, and incorporated those negotiations directly into the CBA". (Clark Award at p. 13). He specifically relied on the following language: "In addition to the general wage increase for Fiscal Year 2003, employees covered by this Agreement shall be eligible to receive a merit based lump sum bonus . . . [t]he Authority is developing a new performance evaluation system in partnership with the Local Unions pursuant to the August 23, 2000 Letter of Understanding. The new performance evaluation system shall be implemented beginning with Fiscal Year 2002 (but shall not be used to determine compensation until Fiscal Year 2003). . . ." (Clark Award at p. 13).

Furthermore, Arbitrator Clark found that the October 2001-September 2003 Agreement contains a rollover provision which states as follows: "This Agreement shall remain in full force and effect during the period of negotiations and *until a new contract takes effect* . . . or in the event of an impasse, pending the completion of mediation and arbitration or both." (Clark Award at p. 13) (emphasis added). Arbitrator Clark determined that the rollover provision meant "that the CBA remained in effect after September 30, 2003, unless or until new contract terms took over." (Clark Award at p. 14). He opined that if the parties wanted to prevent a rollover of general obligations such as the bonuses, they could have inserted a specific year for ending the performance bonuses, but they did not. (See Clark Award at p. 14). Arbitrator Clark concluded that WASA violated the terms of the September 27, 2002 Agreement, as incorporated into the CBA, when it failed to pay 2004 performance bonuses. (See Clark Award at p. 14). On April 30, 2007, he issued his grievance Arbitration Award, awarding payment of the 2004 bonuses with interest. (See Clark Award at p. 15).

III. PERB Case No. 07-A-05: WASA's Grievance Arbitration Review Request

WASA's Request is based on the two following allegations: (1) the Award is contrary to law or public policy and (2) the Arbitrator exceeded his authority. **(See WASA's Request at p. –).** First, WASA alleges that the Clark "Award is inconsistent with the Comprehensive Merit Personnel Act ("CMPA")." (WASA's Request at p. 5). Specifically, WASA cites the CMPA at D.C. Code § 1-617.17(f)(3) which "provides that interest arbitration awards are 'final and binding upon the parties in dispute'." (WASA's Request at p. 6). WASA claims that the Clark grievance Award "clearly overruled Arbitrator Vaughn's binding Interest Arbitration decision. . . [In his decision, Vaughn] found that [WASA] was not required to pay a Performance Bonus to Union employees in Fiscal Year 2004 . . . [Thus,] at the time of the [grievance] arbitration . . . the parties did have an interest arbitration award for Fiscal Years 2004-2007. . . ." (WASA's Request at pgs. 5-6). Second, WASA also alleges that the Arbitrator exceeded his jurisdiction under the CBA by requiring WASA to pay performance bonuses for FY 2004.

WASA claims that the Award on its face is contrary to law and public policy. When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the CMPA authorizes the Board to modify or set aside an arbitration award in only 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).

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's

interpretation of the contract. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy.'" *Id.* A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well-defined, public policy grounded in law or legal precedent. See *United Paperworkers International Union, AFL-CIO v. Misco, Inc.* 484 U.S. 29, 43; *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234, 1239 (D.C. Cir. 1971). The petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000)(citing *AFGE, Local 631 and Dep't of Public Works*, 45 DCR 6617, Slip Op. 365 at p. 4, PERB Case No. 93-A-03 (1998); *see District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." *Department of Corrections v. Teamsters Local 246*, 554 A.2d 319, 325 (D.C. 1989).

Here, after the October 1, 2001-September 30, 2003 Master Agreement expired, the parties began negotiating a successor agreement. The parties did not reach an agreement within 180 days after beginning negotiations on the compensation issues. Therefore, pursuant to D.C. Code § 1-617.17, the parties engaged in mediation and moved to binding interest arbitration. The issues before the Impartial Board of Arbitration concerned compensation. The parties submitted LBOs on compensation to the Impartial Board of Arbitration, where Arbitrator Vaughn served as Chairman.

Before the Impartial Board of Arbitration, the Unions proposed that "employees covered by this Agreement shall be eligible to receive a performance-based lump sum bonus, <u>every year</u>" based on employees' base rate of pay. . . . WASA proposed lump sum bonuses based on an employee's base rate of compensation "for the first full pay period in Fiscal Year 2006". (Clark Award at p. 6).

In its analysis of the parties' proposals concerning "Article I - Wages", the Impartial Board of Arbitration states that it "considers each Party's Wage proposals as a package, even though presented by the Unions as three Articles, because they constitute a common issue - wages - and because the monetary costs of the different proposals are direct, tangible and fungible. . . . [T]he same result would follow, whether wages are considered as a single proposal or three." (Vaughn Award at p. 9). The Impartial Board of Arbitration awarded WASA's LBO on performance bonuses. (See Vaughn Award at pgs. 9 and 22).

D.C. Code § 1-617.17 (f) (2) provides in pertinent part as follows: ". . . The [interest arbitration] award *shall be final and binding upon the parties to the dispute*." (emphasis added). Therefore, once the Impartial Board of Arbitration issued their Award, the parties were bound by

the decision of the Impartial Board of Arbitration. As stated above the 2001-2003 Master Agreement contained the following provision: "This Agreement shall remain in full force and effect during the period of negotiations and *until a new contract takes effect . . . or in* the event of an impasse, pending the completion of mediation and arbitration or both." (Clark Award at p. 13) (emphasis added). Arbitrator Clark correctly interpreted the rollover provision in the 2001-2003 Master Agreement to mean "that the CBA remained in effect after September 30, 2003, unless or until new contract terms took over." (Clark Award at p. 14; also, see above at p. 6). The Board finds that on May 30, 2006, when the Vaughn Award issued, new contract terms on compensation issues took effect and the parties and Arbitrator Clark were bound by these terms.[4]

In reviewing Arbitrator Clark's Award, we are also guided by D.C. Code § 1-617.17 (g) which addresses compensation agreements and provides as follows: "Multi-year compensation agreements are encouraged. *No compensation agreement shall be for a period of less than 3 years."* (emphasis added). Thus, the CMPA requires that compensation agreements be for a duration of at least three (3) years. Therefore, the LBOs of the parties at Impasse Arbitration and the final terms of the Vaughn Award must cover a period of at least three (3) years.

In addition, and consistent with the CMPA, the duration clause specifically identifies which years are covered. The Impartial Board of Arbitration established that the duration of the agreement is FY 2004-FY2007, consistent with the provision of D.C. Code § 1-617.17(g) of the CMPA. The Vaughn Award granted WASA's LBO, which provides bonuses for bargaining unit employees commencing in 2006. Thus, no performance bonuses were awarded in 2004 or 2005.

Arbitrator Clark indicated in his award that "[i]f the parties elected to negotiate over the employer's nonpayment of 2004 performance bonuses, the employer might have had an argument that the Unions waived the present grievance. Waiver would have occurred if the parties had bargained over 2004 performance bonuses, and one or the other party had submitted the matter to impasse arbitration." (Clark Award at p. 12). The Vaughn Award clearly recites offers by both parties with respect to bonuses.

The timing of the Clark Award is significant to the outcome of this case. The Unions did not seek to schedule the grievance arbitration hearing until after April 30, 2007. The pending grievance arbitration was then scheduled and heard by Arbitrator Clark on November 30 and December 19, 2006, approximately five (5) months after the Vaughn Award. Thus, when Arbitrator Clark addressed the issue of 2004 performance bonuses (November and December 2006), and rendered his decision (May 1, 2007), there already existed a final and binding Impasse Arbitration Award that issued on April 30, 2007 and covered FY 2004-FY 2007.

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[4] I.e., October 1, 2003 through September 30, 2007. (See Vaughn Award at pgs. 20-22; see also, Master Agreement, cover page, stating: "Effective Date: May 30, 2006 OCTOBER 1, 2003 THRU SEPTEMBER 30, 2007)".

As stated above, pursuant to the CMPA, "the [Impasse Arbitration] award [was] final and binding upon the parties to the dispute." D.C. Code § 1-617.17 (f) (2). We conclude that Arbitrator Clark's granting of 2004 bonuses in his May 1, 2007 Award, is contrary to the May 30, *2006* Vaughn Award, thus violating D.C. Code § 1-617.17 (f).

We find that D.C. Code § 1-617.17 (f) and (g) constitute "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result". (See *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Therefore, Arbitrator Clark's Award must be set aside as contrary to law and public policy. The outcome of this case might have been different if Arbitrator Clark's Award had been rendered in the absence of an interest arbitration award.

As a second basis for review, WASA asserts that the Arbitrator exceeded his authority by requiring, as a remedy, that WASA pay performance bonuses for FY 2004. We have determined that the Arbitrator's Award is contrary to law and public policy and granted WASA's arbitration review request. Therefore, it is not necessary to consider this second argument.

III. PERB Case No. 07-A-06: The Unions' Grievance Arbitration Review Request

The Unions assert that Arbitrator Clark's Award is contrary to law and public policy because he did not award attorney fees.

Whether or not there are any circumstances under which the Unions could receive an award of attorney fees, a minimum requirement for such an award would be that the party prevail in its claim. Pursuant to D.C. Code § 1-605.02(6) we have granted WASA's request for review and set aside the award that was in the Unions' favor. Therefore, we need not consider the Unions' request for attorney fees.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Water and Sewer Authority's Arbitration Review Request is granted.

2. Arbitrator Clark's Arbitration Award is set aside.

3. The American Federation of Government Employees, Local 631, *et al.'s* Arbitration Review Request is denied.

4. 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.

February 13, 2008

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 07-A-05 and 07-A-06 was transmitted via Fax and U.S. Mail to the following parties on this the 13th day of February 2008.

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