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

)	
In the Matter of:)	
)	
Metropolitan Police Department)	
)	
Petitioner)	PERB Case No. 18-A-08
)	
v.)	Opinion No. 1660
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee (on behalf of)	
Lawrence Bailey))	
)	
Respondent)	
)	

DECISION AND ORDER

Petitioner Metropolitan Police Department (“the Department”) has filed an arbitration review request appealing from the second of two arbitration awards issued in the arbitration of a an employee’s grievance. For the reasons stated herein, the arbitration review request is granted in part.

I. Statement of the Case

A. The First Award

On April 22, 2011, the Department discharged Officer Lawrence Bailey (“the Grievant”) for disobeying orders. Respondent Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) filed a grievance contesting the Grievant’s dismissal. The Union invoked arbitration. The Union contended that the Grievant was not served with a notice of proposed adverse action and as a result was not able to request an adverse action hearing. The Union requested that the Arbitrator, Homer C. LaRue, dismiss the discipline and reinstate the Grievant or alternatively that the Arbitrator conduct a hearing in the arbitration on the charges against the Grievant.

The parties submitted the following issue to the Arbitrator: “Whether this matter is arbitrable before this Arbitrator in this arbitration based on the alleged procedural irregularity and, if not arbitrable before this Arbitrator, what should the remedy be?” This was an anomalous issue to present because it asked what the remedy should be without asking whether the contract

was violated. Instead the issue's unusual condition for a remedy was that the matter was *not* arbitrable. The Arbitrator answered the question of whether the matter was arbitrable by stating that "[t]his matter is not arbitrable before this Arbitrator in this arbitration based on the found procedural defects."¹ Despite the conventional understanding that an arbitrator exceeds his authority by arbitrating a dispute that is not arbitrable,² the Arbitrator then proceeded to issue the first of a series of awards and orders. The first award was entitled "Decision & Award" ("the First Award") and was issued September 4, 2017.

It appears that the Arbitrator did not mean that the entire case was not arbitrable. One can glean from what he said and did that in his view the termination was not arbitrable in the absence of an adverse action hearing but the procedural defects preceding the termination were arbitrable. He refers to them as "the *found* procedural defects," and indeed he found that the Grievant was denied his right under the parties' collective bargaining agreement ("Agreement") and General Order 120.21 to a notice of proposed adverse action and a hearing.³

The First Award concluded in the following manner:

AWARD

Having heard the evidence and the arguments of the parties, the Arbitrator awards as follows:

1. This matter is not arbitrable before this Arbitrator in this arbitration based on the found procedural defects.

Order of Remedy

2. The Department is ordered to provide Officer Bailey with a hearing before the Adverse Action Panel to determine whether Officer Bailey is to be disciplined and/or discharged.
3. The decision of the Adverse Action Panel shall be subject to review in arbitration by this Arbitrator pursuant to the Collective Bargaining Agreement and General Order 120.21.

Retention of Jurisdiction

4. This Arbitrator's jurisdiction over this matter is continuing until the conclusion of the review of the Panel's decision by this Arbitrator, if demanded, or unless the Panel dismisses the Proposed Adverse Action.

¹ Decision & Order ("First Award") 22.

² *E.g., Town of Johnston v. R.I. Council 94, AFSCME, Local 1491*, 159 A.3d 83, 86 (R.I. 2017); *Trident Technical Coll. v. Lucas & Stubbs, Ltd.*, 333 S.E.2d 781, 786 (S.C. 1985).

³ First Award 19-20.

Allocation of the Arbitrator's Fees and Expenses

5. The parties shall share equally the fees and expenses for the Arbitrator's services in the instant matter[.]⁴

The day after the Arbitrator issued the First Award, the Union asked the Arbitrator to clarify whether the Grievant must be reinstated and must receive back pay and other make-whole remedies. On September 12, 2017, the Arbitrator sent the parties an e-mail responding that the Grievant's discharge is to be rescinded and the Grievant is to be placed in the status he would have been in on February 11, 2011, and made whole for any wages and lost benefits from the date of his discharge to the date of his return to work. The Arbitrator subsequently denominated this order as "Post-Award Order No. 01."

Neither party appealed from the First Award as clarified. It is too late for either party to question the procedure or the substance of the First Award.

Two months after the issuance of Post-Award Order No. 01, the Union called the Arbitrator's attention to the Department's failure to reinstate the Grievant. On November 22, 2017, the Arbitrator issued "Post-Award Order No. 02," which recited "the clarification of the Order of Remedy issued on September 12, 2017 (Post-Award Order No. 01)" and ordered the parties to make a written submission by November 28, 2017, on the authority of the Arbitrator to issue sanctions against the Department for failing to reinstate the Grievant with back pay. The Arbitrator instructed the Department to include in its submission its authority for not reinstating the Grievant.

The parties made their submissions on that date, whereupon the Arbitrator issued "Post-Award Order No. 03." Post-Award Order No. 03 again recited Post-Award Order No. 01's clarification requiring reinstatement of the Grievant, and it ordered the parties to make another written submission on the sanctions question by December 8, 2017, this time discussing *Reliastar Life Insurance Co. v. EMC National Life Co.*,⁵ which the Arbitrator said was a persuasive case. The parties complied with that briefing order.

On December 12, 2017, the Department filed with the Board an arbitration review request, Case No. 18-A-06, challenging the Arbitrator's authority to issue Post-Award Order Nos. 02 and 03.

B. The Second Award

On December 19, 2017, the Arbitrator issued the second of the two awards in the arbitration, which he entitled "Final Partial Award" ("the Second Award"). The Second Award incorporated Post-Award Order Nos. 01 through 03. The Second Award found that the Department failed to fully implement the First Award, as clarified, and that this failure

⁴ First Award 22.

⁵ 564 F.3d 81 (2d Cir. 2009).

was bad faith conduct that caused the Union to incur expenses to seek compliance and warranted the imposition of three sanctions—attorney’s fees, arbitration fees, and punitive damages. The Arbitrator issued the following award:

AWARD

The Arbitrator, having retained jurisdiction to clarify the Order of Remedy, and the request to clarify the Order of Remedy having been appropriately requested, the Arbitrator makes this Final Partial Award as follows:

Status of Prior Awards and Orders

1. Unless otherwise specifically modified in this Award, the Award dated September 4, 2017, is unchanged and remains in full force and effect, except as clarified or modified in Post-Hearing Order No. 01, in Post-Hearing Order No. 02 or in Post-Hearing Order No. 03.
2. The Award, dated September 4, 2017, the Post-Hearing Order No. 01, the Post-Hearing Order No. 02 and the Post-Hearing Order No. 03 are incorporated, by reference, into this Award, dated December 19, 2017.
3. The actions of the District of Columbia Metropolitan Police Department, in failing fully to implement the Award, dated September 4, 2017, constitutes bad faith conduct as set forth in this Decision and Award.
4. The bad faith conduct of the District of Columbia Metropolitan Police Department warrants the imposition of sanctions.

Sanctions

a. Attorney’s Fees

5. The District of Columbia Metropolitan Police Department (the “MPD”) is responsible for and shall pay all the attorney’s fees for the Fraternal Order of Police/Metropolitan Police Department Labor Committee (the “FOP”) dating from September 12, 2017, the date of Post-Hearing Order No. 01 up to and including the final resolution of the instant dispute.

b. Arbitration Fees

6. The “MPD” is responsible for and shall pay all the arbitration, dating from September 12, 2017, the date of Post-Hearing Order No. 01 up to and including the final resolution of the instant dispute.

- a) The MPD shall reimburse the FOP for any arbitration fees which shall have been paid by the FOP following the issuance of the Award, dated September 4, 2017.
- b) The FOP shall pay one-half of the arbitration fees associated with this Award, dated December 19, 2017.
- c) The MPD shall reimburse the FOP for the arbitration fees paid to the Arbitrator connected with this Award, dated December 19, 2017.
- d) The MPD shall reimburse the FOP for any future arbitration fees paid to the Arbitrator by the FOP up to and including the final resolution of the instant dispute.

c. Punitive Damages

7. The MPD shall pay directly to the FOP the cumulative penalty of one thousand dollars \$1000.00 per day dating from September 12, 2017, the date of Post-Hearing Order No. 01, up to and including the date that MPD fully complies with the Award, dated September 4, 2017 as clarified.

Interest on Back-Pay

8. The MPD shall pay Officer Bailey interest on the back-pay to which he is owed. Such interest shall be at the legal rate of interest permitted by D.C. Code § 28-3302.
 - a) The interest shall be applied to the back-pay owed Officer Bailey beginning September 4, 2017;
 - b) Such interest shall continue to accrue on the principal until the MPD has paid Officer Bailey the total amount of his back-pay, including interest.

Final Partial Award

9. The Arbitrator declares the Award, dated December 19, 2017, to be a *Final Partial Award*.
10. That portion of this Award, answering affirmatively the question as to the Arbitrator's authority to impose sanctions for the bad faith conduct of the MPD, is final.

11. That portion of this Award, imposing sanctions (i.e., attorney's fees, arbitration fees and punitive damages, for the bad faith conduct of the MPD, is final.
12. The determination of the amount to be paid because of the sanctions imposed on the MPD is incomplete.

Retention of Jurisdiction of the Incomplete Portion of the Award

13. The Arbitrator retains jurisdiction over that portion of this Award that is incomplete, that is, the determination of the amount owed because of the imposition of sanctions.
14. This Arbitrator's jurisdiction over this matter is continuing until the conclusion of the review of the Panel's decision by this Arbitrator, if demanded, or unless the Panel dismisses the Proposed Adverse Action.⁶

In response to the Second Award, the Department filed the instant arbitration review request ("Request"), Case No. 18-A-08, along with a motion to consolidate the case with Case No. 18-A-06 and a motion for an immediate stay of the sanctions imposed by the Second Award. The Union filed an opposition to the motion to stay and an opposition to the Request.

On February 21, 2018, the Board dismissed Case No. 18-A-06 on grounds of prematurity⁷ and denied the Department's motion to consolidate and motion for a stay.⁸ The Department's Request is before the Board for disposition.

II. Discussion

A. Positions of the Parties

The Department contends that the Arbitrator had no authority to issue the Second Award or to impose sanctions on the Department. The Department asserts that nowhere in the Agreement is the arbitrator authorized to enforce his own award, sanction noncompliance with an award, or take any action on an issue not presented to him. Article 19(E)(5) of the Agreement provides that an arbitrator "shall confine his decision solely to the precise issue submitted to the arbitrator." The Arbitrator decided and then clarified his decision on the precise issue submitted to him.⁹ Having done so, he cannot enforce his own decision. Only the Board has authority to enforce an arbitration award.¹⁰

⁶ Second Award 21-23.

⁷ *MPD v. FOP/Metro. Police Dep't Labor Comm. (on behalf of Bailey)*, Slip Op. No. 1653, PERB Case No. 18-A-06 (Feb. 21, 2018).

⁸ *MPD v. FOP/Metro. Police Dep't Labor Comm. (on behalf of Bailey)*, Slip Op. No. 1654, PERB Case No. 18-A-08 (Feb. 21, 2018).

⁹ Request 9.

¹⁰ Request 11 (citing *MPD v. FOP/MPD Labor Comm.*, 997 A.2d 65, 79-80 (D.C. 2010)).

The Department further contends that the punitive damages component of the sanctions is contrary to law and public policy. The Department recounts that grossly excessive punitive damages have been held to violate due process.¹¹ The punitive damages imposed by the Arbitrator, the Department contends, are unlimited and are excessive in comparison to the actual pecuniary harm to the Grievant.

Regarding jurisdiction, the Union argues in response that arbitrators have broad discretion to remedy contract violations as long as the contract does not expressly limit this discretion.¹² The Agreement does not expressly bar the Arbitrator from enforcing his award. Further, he expressly retained jurisdiction over the matter until the case was resolved.¹³

Regarding law and public policy, the Union contends that the amount of punitive damages is not excessive in view of the Department's refusal to rectify its illegal personnel action that cost the Grievant his career, his livelihood, and his pension.¹⁴ The Union argues that the Board may not modify or set aside the Second Award simply because the Department disagrees with the Arbitrator's "bargained-for interpretation of the statute."¹⁵ The Union does not say what statute it is talking about, nor does it say where in the Agreement the Department bargained for the Arbitrator's interpretation of it.¹⁶

B. General Principles

The Board's authority to review an arbitration award is narrow. The Board is permitted to modify or set aside an arbitration award "only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means."¹⁷ The test the Board employs in determining whether the arbitrator was without or exceeded his jurisdiction is whether the award draws its essence from the collective bargaining agreement.¹⁸ The award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice."¹⁹

¹¹ Request 11-12 (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 560-62 (1996)).

¹² Opp'n 5-6.

¹³ Opp'n 6-7.

¹⁴ Opp'n 9-10.

¹⁵ Opp'n 10.

¹⁶ See *MPD v. FOP/MPD Labor Comm. (on behalf of Fowler)*, 64 D.C. Reg. 10115, Slip Op. No. 1635 at 6-9, PERB Case No. 17-A-06 (2017) (holding that parties bargain for an arbitrator's interpretation of external law only where interpretation of their contract requires interpretation of the law or the law is otherwise incorporated into the contract).

¹⁷ D.C. Official Code § 1-605.02(6).

¹⁸ *MPD v. FOP/MPD Labor Comm. (on behalf of Allen and Taylor)*, 64 D.C. Reg. 10138, Slip Op. No. 1637 at 3, PERB Case No. 17-A-04 (2017).

¹⁹ *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 38 (1987) (quoted in *MPD v. FOP/MPD Labor Comm. (on behalf of Bell)*, 63 D.C. Reg. 12581, Slip Op. No. 1591 at 5, PERB Case No. 15-A-16 (2017); *D.C. Sewer & Water Auth. v. AFSCME Local 2091*, 59 D.C. Reg. 10742, Slip Op. No. 1276 at 3, PERB Case No. 04-A-24 (2012)) *Accord United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

The Arbitrator could derive authority to reopen the case and issue a supplemental award only from a statute or from the Agreement.²⁰ The Board will first consider whether the provisions of the Second Award are authorized by statute and then whether they are authorized by contract.

C. Statutory Authority

1. The Back Pay Act

The first item of sanctions is found in paragraph 5 of the Second Award. It orders the Department to pay the Union's attorney's fees from September 12, 2017 (the date of Post-Award No. 01) up to and including final resolution of the instant dispute. The Arbitrator cited the federal Back Pay Act²¹ as authority for awarding attorney's fees.²²

In *AFGE, Local 2725 v. Department of Consumer and Regulatory Affairs*²³ the Board considered a petition to an arbitrator for supplemental attorney's fees that was filed after the parties had litigated an arbitrator's award and order of attorney's fees. The Board adopted the Federal Labor Relations Authority's holding that the Back Pay Act independently confers jurisdiction on arbitrators to consider requests for attorney's 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.²⁴ In one of the cases the Board cited with approval, the Federal Labor Relations Authority stated,

Parties may agree to establish a time period governing when an attorney fees request may be filed with an arbitrator. In the absence of such an agreement, a request for attorney fees must be filed within a reasonable time after an award, which includes a backpay remedy, becomes final and binding.²⁵

The record submitted to the Board by the parties does not contain a request for attorney's fees filed by the Union after the award of back pay. The Second Award does not refer to such a request. Rather, it presents attorney's fees as one of the sanctions the Arbitrator devised to enforce his First Award.²⁶ As the record does not reflect that a request for attorney's fees was filed within a reasonable time after the First Award, the Board cannot find that the Back Pay Act authorized the Arbitrator to award attorney's fees in the Second Award.

²⁰ *Univ. of D.C. and Univ. of D.C. Faculty Ass'n/NEA*, 38 D.C. Reg. 5024, Slip Op. No. 276 at 6, PERB Case No. 91-A-02 (1991).

²¹ 5 U.S.C. § 5596.

²² Second Award 17.

²³ 61 D.C. Reg. 7565, Slip Op. No. 1444, PERB Case No. 13-A-13 (2013).

²⁴ *Id.* 11-14.

²⁵ *Phila. Naval Shipyard Activity and Phila. Metal Trades Council*, 32 F.L.R.A. 417, 421 (1988)

²⁶ Second Award 17, 21.

Paragraph 8 of the Second Award orders the payment of interest on the back pay that Post-Award Order No. 01 had ordered. The Back Pay Act not only authorizes but requires interest on back pay.²⁷ For that reason we find that paragraph 8 of the Second Award is authorized by the Back Pay Act. The Arbitrator's retention of jurisdiction in paragraph 13 to determine the amount owed is also authorized by the Back Pay Act insofar as the paragraph retains jurisdiction to determine the amount of interest on back pay.

2. The Uniform Arbitration Act

In section 16-4420(a) of the D.C. Official Code, the Uniform Arbitration Act provides for modification or clarification of awards in certain narrow circumstances. The D.C. Court of Appeals has not ruled on whether section 16-4420(a) applies to arbitrations subject to the Comprehensive Merit Personnel Act ("CMPA"). But even if section 16-4420(a) applies to arbitrations subject to the CMPA, it does not apply to the Second Award because the Second Award was not issued upon a timely motion for modification or clarification made in accordance with section 16-4420(b).

The Arbitrator stated that the Uniform Arbitration Act, in particular section 16-4421, sets forth the policy of the District of Columbia on the authority of arbitrators to impose punitive damages. The Arbitrator said he looked to the D.C. Code for guidance on the extent of arbitral authority permitted by the Agreement.²⁸

Section 16-4421(a) provides that "[a]n arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." Section 16-4421 does not state that an arbitrator may impose punitive damages to enforce a prior award. If it did, it would be inapplicable to this case. The D.C. Court of Appeals in *Metropolitan Police Department v. Fraternal Order of Police Department/Metropolitan Police Department Labor Committee*²⁹ held that the CMPA preempts the Uniform Arbitration Act on the subject of enforcement.³⁰ The exclusive avenues for enforcement of an award in a CMPA-sanctioned arbitration are provided by the CMPA.³¹ The court specified two methods under the CMPA for enforcing an award that were available to the FOP, the appellee in the case: "First, FOP could have petitioned the Board to enforce its order affirming the award. D.C. Code § 1-605.02(16); 6-B DCMR § 560.1. Second, FOP could have challenged MPD's alleged resistance by filing an unfair labor practice complaint. D.C. Code § 1-605.02(3); 6-B DCMR §§ 520.1, et seq."³² That second option is available now to the Union as well. Citing this case, the Department rightly asserts that "[p]er the D.C. Comprehensive Merit

²⁷ 5 U.S.C. § 5596(b)(2)(A).

²⁸ Second Award 18.

²⁹ 997 A.2d 65 (D.C. 2010).

³⁰ *Id.* at 68, 76.

³¹ *Id.* at 76-80.

³² *Id.* at 80.

Personnel Act, the Public Employee Relations Board is the proper authority to enforce an arbitration award.”³³

Enforcement of an award by the arbitrator who issued it is not one of the enforcement methods to be found in the CMPA. Since the CMPA’s methods of enforcing an award subject to the CMPA are the exclusive methods for doing so, no District of Columbia statute authorized the Arbitrator to enforce the First Award.

D. Contractual Authority

The Department contends that no provision of the Agreement authorizes an arbitrator to enforce his own award. The Department’s contention is unrebutted. Neither the Arbitrator nor the Union cites any provision of the Agreement authorizing an arbitrator to enforce a prior award that he had issued. Instead they rely on the remedial authority that an arbitrator necessarily has in order to adjudicate a grievance. The Arbitrator examined *Reliastar Life Insurance Co. v. EMC National Life Co.*,³⁴ and *Synergy Gas Co. v. Sasso*,³⁵ and drew from those cases the conclusion that when a contract confers comprehensive arbitral authority, arbitrators have the discretion to order such remedies as they deem appropriate, including the equitable authority to sanction a party’s bad faith participation in the arbitration.³⁶ The Arbitrator stated that Article 19 of the Agreement, entitled “Grievance Procedure,” and the parties’ stipulated submission “bestowed on the Arbitrator the authority to determine the appropriate remedy for the Department’s contract violation.”³⁷

The Arbitrator equivocated, however, on what contract violation he was remedying. On the one hand, he implied that it was the Department’s dismissal of the Grievant: “It cannot be gainsaid that when the parties agreed to arbitrate the issue of Officer Bailey’s dismissal, they agreed also that the Arbitrator had the authority to determine the remedy if one was appropriate.”³⁸ But on the other hand, he implied that it was the Department’s noncompliance with the First Award: “The contractual agreement between the Union and the Department carries with it the presumption of good faith and fair dealing. In agreeing to arbitrate, both parties covenant that each will fully abide by the ruling of the arbitrator.”³⁹ The Second Award’s findings address only the latter violation.⁴⁰ The Union does not specify either one. Its Opposition merely discusses remedial authority in general.

We shall next analyze separately the Arbitrator’s authority to remedy each of the violations to which the Arbitrator alluded.

³³ Request 10.

³⁴ 564 F.3d 81 (2d Cir. 2009).

³⁵ 853 F.2d 59 (2d Cir. 1998).

³⁶ Second Award 12-16.

³⁷ Second Award 13.

³⁸ Second Award 12.

³⁹ Second Award 15.

⁴⁰ Second Award 21, paragraphs 3 and 4; *supra* p. 4.

1. The Arbitrator's Authority to Remedy the Grievant's Dismissal

If the contract violation the Arbitrator sought to remedy in the Second Award was the Grievant's dismissal, he was without authority to do so because he was *functus officio*.

The Latin phrase *functus officio* refers to an officer or official body "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." BLACK'S LAW DICTIONARY 696 (8th ed. 2004). In this context, the *functus officio* doctrine holds that "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."⁴¹

The First Award was final with respect to the issues that were decided therein.⁴² The Arbitrator and the Union acknowledged the finality of the First Award by commenting that the Department did not appeal from it.⁴³ The Arbitrator's retention of jurisdiction does not affect the finality of the First Award with respect to the issues it decided. In the First Award the Arbitrator ordered that an adverse action panel determine whether the Grievant should be discharged and that the panel's decision would be subject to his review. The First Award further stated, "This Arbitrator's jurisdiction over this matter is continuing until the conclusion of the review of the Panel's decision by this Arbitrator, if demanded, or unless the Panel dismisses the Proposed Adverse Action."⁴⁴ When an arbitrator retains jurisdiction to decide an issue not previously arbitrated—here the forthcoming decision of an adverse action panel—the arbitrator remains without authority to make determinations on issues that have already been determined in the prior arbitral proceeding.⁴⁵

The First Award did not include attorney's fees, arbitrator's fees, or a daily penalty until the Grievant's reinstatement among its remedies for the Grievant's dismissal. The Arbitrator had no authority to add those remedies to those he had already awarded for the dismissal in his First Award. The arbitrators in the cases that the Second Award relies upon did not attempt to do something like that. In *Reliastar Life Insurance Co. v. EMC National Life Co.*,⁴⁶ the case the Arbitrator ordered the parties to brief, and *Synergy Gas Co. v. Sasso*,⁴⁷ the arbitrators awarded

⁴¹ *Williams v. Richey*, 948 A.2d 564, 567 n.1 (D.C. 2008) (quoting *Washington-Balt. Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234, 1238 (D.C. 1971) (quoted in *FOP/Dep't of Corr. Labor Comm. v. Dep't of Corr.*, 59 D.C. Reg. 10804, Slip Op. No. 1303 at 7-8, PERB Case No. 10-A-02 (2011)).

⁴² See *Univ. of D.C. and AFSCME, Local 287*, 46 D.C. Reg. 4833 Slip Op. No. 473 at 4, PERB Case No. 95-A-06 (1996).

⁴³ Second Award 11; Opp'n 5.

⁴⁴ First Award 22.

⁴⁵ *Univ. of D.C. v. AFSCME, Local 2087*, 46 D.C. Reg. 4833, Slip Op. No. 473 at 3, PERB Case No. 96-A-06 (1996).

⁴⁶ 564 F.3d 81 (2d Cir. 2009).

⁴⁷ 853 F.2d 59 (2d Cir. 1998).

penalties in their initial awards.⁴⁸ Those cases lend no support to a supplemental award that the Arbitrator issued when he was *functus officio*.

The D.C. Court of Appeals and the Board have recognized as exceptions to the *functus officio* doctrine an arbitrator's ability to resolve questions related to attorney's fees⁴⁹ and to clarify an ambiguity in an award.⁵⁰ As discussed, the record does not reflect that the parties raised any questions related to attorney's fees.

The Arbitrator made a *pro forma* attempt to bring the Second Award within the exception for clarification of an ambiguity by stating, "The Arbitrator, having retained jurisdiction to clarify the Order of Remedy, and the request to clarify the Order of Remedy having been appropriately requested, the Arbitrator makes this Final Partial Award as follows . . ." ⁵¹ The record does not reflect that the Arbitrator retained jurisdiction to clarify the remedy or that the requests the Union made to the Arbitrator after the issuance of Post-Award No. 01 were for clarification.⁵² While the Second Award is not entirely a clarification, paragraphs 1 and 2 of the Second Award can be seen as clarifications of the First Award except for their incorporation of Post-Award Nos. 02 and 03, which are not clarifications of the First Award. Paragraph 8 clarifies Post-Award No. 01's order that the Grievant be made whole for any wages and benefits lost during the period of discharge. Paragraph 14 of the Second Award is a repetition of paragraph 4 of the First Award. However, paragraphs 3, 4, 5, 6, and 7 do not clarify any ambiguity or correct any error to be found in the First Award.⁵³ They address circumstances that developed after the First Award. Those circumstances, as we explain below, cannot serve as the justification for the Second Award either.

2. The Arbitrator's Authority to Remedy the Department's Noncompliance with the First Award

If a failure to "fully abide by the ruling of the arbitrator" violates the Agreement's "presumption of good faith and fair dealing," as the Arbitrator implies,⁵⁴ the Board is unable to find authority for the Arbitrator to remedy such a violation. The submission that the Arbitrator claimed empowered him does not refer to this subsequent violation. No grievance regarding that violation has been presented to the Arbitrator.

No one denies that arbitration comes at the end of the grievance procedure. Article 19(A) of the Agreement provides that a grievance is "an allegation that there has been a violation,

⁴⁸ *Reliastar*, 564 F.3d at 84-85; *Synergy*, 853 F.2d at 61.

⁴⁹ *D.C. Dep't of Consumer & Regulatory Affairs v. AFGE, Local 2725*, 59 D.C. Reg. 5502, Slip Op. No. 992 at 4, PERB Case No. 09-A-03 (2009).

⁵⁰ *Williams v. Richey*, 948 A.2d 564, 567 (D.C. 2008); *D.C. Child & Family Servs. Agency v. AFSCME, Dist. Council 20, Local 2401*, Slip Op. No. 956 at 7-8, PERB Case No. 08-A-07 (May 21, 2010).

⁵¹ Second Award 20.

⁵² First Award 22; Attachments B and D to Post-Award Order No. 02.

⁵³ *Cf. In re Rollins, Inc.*, 552 F. Supp. 2d 1318, 1325 (M.D. Fla. 2004) (holding that critical changes made by a supplemental award were neither corrections nor clarifications), *rev'd in part on other grounds*, 167 F. App'x 798 (11th Cir. 2006).

⁵⁴ Second Award 15.

misapplication, or misinterpretation of the terms of this Agreement.” After a grievance is filed in accordance with Article 19(B) of the Agreement, a grievance procedure then ensues. That procedure entails an informal step and two formal steps, which are set forth in Article 19(C) and (D). Article 19(E)(2) provides that “arbitration is the method of resolving grievances which have not been satisfactorily resolved pursuant to the Grievance Procedure.” As there is no suggestion that an unresolved grievance about noncompliance with the First Award was before the Arbitrator, there was nothing in that regard for the Arbitrator to remedy.⁵⁵

III. Conclusion

The Arbitrator had statutory authority to award interest on back pay in paragraph 8 of the Second Award and to retain jurisdiction in paragraph 13 to determine the amount of interest. He had contractual authority to make certain clarifications in paragraphs 1, 2, and 8 and to repeat in paragraph 14 language from the First Award. The Arbitrator was without jurisdiction to issue paragraphs 3, 4, 5, 6, and 7 of the Second Award.

Because we have determined that the Arbitrator had no authority to impose the punitive damages in paragraph 7, it is unnecessary to consider the Department’s claim that the punitive damages were contrary to law and public policy.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department’s Request is granted in part.
2. The Second Award is modified in the following respects:
 - (a) Paragraphs 3, 4, 5, 6, and 7 are stricken from the Second Award;
 - (b) References to Post-Award Nos. 02 and 03 are stricken from paragraphs 1 and 2;
 - (c) The Arbitrator shall retain jurisdiction under paragraph 13 to determine only the amount of interest on back pay.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Members Ann Hoffman, Barbara Somson, Douglas Warshof, and Mary Anne Gibbons

Washington, D.C.
March 27, 2018

⁵⁵ See *U.S. Dep’t of the Army, Fort Eustis, Va. and Nat’l Ass’n of Gov’t Employees*, 39 F.L.R.A. 768 (1991) (denying exceptions to an award in which the arbitrator “stated that no grievances had been filed as to the new job description and determined that he lacked authority to consider either an oral grievance or one that had not proceeded through the normal steps of the parties’ negotiated grievance procedure.”).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-08 is being transmitted via File & ServeXpress to the following parties on this the 5th day of April 2018.

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