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

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In the Matter of:	)	
	)	
Metropolitan Police Department	)	
	)	
Complainant,	)	PERB Case No. 16-A-15
	)	
and	)	Opinion No. 1620
	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee,	)	
	)	
Respondent.	)	

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**DECISION AND ORDER**

**I. Introduction**

On July 18, 2016, the Metropolitan Police Department (“MPD”) filed this Arbitration Review Request (“Request”) pursuant to the Comprehensive Merit Personnel Act (“CMPA”), D.C. Official Code § 1-605.02(6), seeking review of an Arbitrator’s Supplemental Opinion and Award (“Supplemental Award”) that granted attorneys’ fees and expenses to Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union” or “FOP”). MPD asserts that the Arbitrator exceeded his jurisdiction by awarding attorneys’ fees.<sup>1</sup>

**II. Arbitrator’s Award**

In an Arbitration Award issued on January 25, 2016, the Arbitrator found in favor of the Union on behalf of a Grievant who challenged his 15-day suspension.<sup>2</sup> The Arbitrator ordered MPD to rescind the disciplinary action against the Grievant and reimburse the Grievant for all

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<sup>1</sup> Request at 2; See D.C. Official Code § 1-605.02(6) (2001 ed.).

<sup>2</sup> Supplemental Award at 1-2.

lost pay and benefits.<sup>3</sup> The Arbitrator retained jurisdiction over the matter for the purpose of “resolving any disputes that may arise in the implementation” of the Award and on February 9, 2016, the Union submitted a Petition for Attorneys’ Fees and Expenses.<sup>4</sup> MPD timely filed an opposition on April 18, 2016.<sup>5</sup>

In the petition and the opposition, the parties asked the Arbitrator to determine if the Union had established by a preponderance of the evidence that it was entitled to an award of reasonable attorneys’ fees and expenses in connection with the matter; and if so, what should be the amount of any such award.<sup>6</sup>

In a Supplemental Award issued on June 20, 2016, the Arbitrator found that the Union established by a preponderance of the evidence that it was entitled to an award of \$18,670.00 in attorney’ fees and \$109.74 in costs.<sup>7</sup> The Arbitrator acknowledged that although the parties’ collective bargaining agreement does not have a provision explicitly providing for an award of attorneys’ fees to a grievant who prevails, arbitrators have granted attorney’s fees to the Union in at least four previous awards dating back to 2011.<sup>8</sup> The Arbitrator also concluded that an award of attorneys’ fees is consistent with the Back Pay Act<sup>9</sup> and is not prohibited by the CMPA.<sup>10</sup> Finally, the Arbitrator determined that the Union’s request for fees was reasonable based on its hourly rates, number of hours billed, and the nature of some of the work performed.<sup>11</sup> Accordingly, the Arbitrator concluded that the Union was entitled to an award of its reasonable attorneys’ fees and expenses in connection with this matter.<sup>12</sup>

### III. Discussion

In accordance with D.C. Official Code § 1-605.02(6), 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 means.<sup>13</sup> Upon review of the Award, the pleadings of the parties, and applicable law, the Board, for the reasons that follow, denies MPD’s Request.

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<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* at 8. See *Arbitration Opinion and Award* in FMCS Case No. 11-59575 at p.53 (Arbitrator Donald A. Wasserman) (February 22, 2014); *Arbitration Opinion and Award* in FMCS Case No. 10-01341 at pp. 44, 51 (Arbitrator David Paul Clark) (September 19, 2011); *Arbitration Opinion and Award* in FMCS Case No. 11-04085 at p. 28 (Arbitrator M. David Vaughn) (October 29, 2015); *Supplemental Opinion and Award of Attorneys’ Fees* in FMCS Case No. 11-04085 (Arbitrator M. David Vaughn) (January 26, 2016).

<sup>9</sup> The Federal Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii) (2014).

<sup>10</sup> *Id.* at 9-10.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Fraternal Order of Police/Metro. Police Dep’t Labor Comm. v. Metro. Police Dep’t*, 62 D.C. Reg. 12587, Slip Op. 1531, PERB Case No. 15-A-10 (2015) (citing D.C. Official Code § 1-605.02(6) (2001 ed.)).

MPD seeks review of the Supplemental Award on the grounds that the Arbitrator exceeded his jurisdiction in “finding that attorney’s fees were authorized under the parties’ labor agreement.”<sup>14</sup> As it argued before the Arbitrator, MPD asserts that Article 19, Part E, § 5(3) of the parties’ collective bargaining agreement expressly provides that the legal costs are to be borne by the parties at their own expense.<sup>15</sup> MPD also notes that the language of Article 19, Part E, § 5(3) stands in contrast to Article 19, Part E, § 5(7) of the collective bargaining agreement, which states that the arbitrator’s fee and expense “shall be borne by the losing party.”<sup>16</sup> MPD argues that the contrast in these two sections shows that the language chosen by the parties in § 5(3) was “express and deliberate,” and demonstrates that the parties intended for the each side to bear their own legal expenses at arbitration.<sup>17</sup> MPD contends that since there is no authority for the Arbitrator to award attorneys’ fees, the Supplemental Award conflicts with Article 19, Part E § 5(4), which prohibits an arbitrator from issuing an award that would modify, subtract from, or add to the collective bargaining agreement.<sup>18</sup>

The Board has repeatedly held that an arbitrator does not exceed his or her authority by exercising his equitable power to formulate a remedy unless the collective bargaining agreement expressly restricts his or her equitable power.<sup>19</sup> A collective bargaining agreement’s prohibition against awards that add to, subtract from, or modify the collective bargaining agreement does not expressly limit the arbitrator’s equitable power.<sup>20</sup> Further, the Board has held that Article 19, Part E, § 5(7) of the parties’ collective bargaining agreement does not prevent the Arbitrator from awarding attorney’s fees and that MPD must show that the collective bargaining agreement expressly limits an arbitrator’s equitable powers.<sup>21</sup>

Contrary to MPD’s allegations, the Board finds that the Arbitrator did not exceed his authority by issuing a remedy that awarded attorneys’ fees to the Union.<sup>22</sup> The language of

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<sup>14</sup> Request at 2.

<sup>15</sup> Request at 4. Article 19, Part E, § 5(3) states, in pertinent part: “All parties shall have the right at their own expense to legal and/or stenographic assistance at this hearing.”

<sup>16</sup> Request at 4. Article 19, Part E, § 5(7) states, in pertinent part: “The fee and expense of the arbitrator shall be borne by the losing party, which shall be determined by the Arbitrator.”

<sup>17</sup> *Id.* at 4-5.

<sup>18</sup> Request at 4. Article 19, Part E, § 5(4) states, in pertinent part: “The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision...”

<sup>19</sup> See *Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 59 D.C. Reg. 6787, Slip Op. No. 1133 at p. 8, PERB Case No. 09-A-12 (2011); *Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

<sup>20</sup> *Id.*

<sup>21</sup> *Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t*, 60 D.C. Reg. 7193, Slip Op. 1382 at 3, PERB Case No 11-A-11 (2013).

<sup>22</sup> In PERB Case Nos. 16-A-06 and 16-A-17 the Board likewise determined that the language of Article 19, Part E, §5 (3) does not provide an express limitation to an arbitrator’s equitable power. Accordingly, the Board found the arbitrators did not exceed their authority in awarding attorneys’ fees.

Article 19, Part E, §5(3) does not provide an express limitation to an arbitrator's equitable power. Accordingly, the Arbitrator did not exceed his authority and the Board will not overturn the Award on this ground. For the Board to overturn an arbitrator's award as in excess of the arbitrator's authority, MPD must show that the collective bargaining agreement expressly limits the arbitrator's equitable power.<sup>23</sup> MPD's attempt to parse the language of Article 19, Part E does not provide the Board with such a limitation.<sup>24</sup> Instead, MPD asks the Board to accept its interpretation of the collective bargaining agreement over that of the Arbitrator.<sup>25</sup>

The Board has long held that will not overturn an arbitration award based simply upon the petitioning party's disagreement with the arbitrator's findings.<sup>26</sup> It is well settled that "[b]y agreeing to submit a matter to arbitration, the parties also agree to be bound by the Arbitrator's decision, which necessarily includes the ... evidentiary findings and conclusions upon which his decision is based."<sup>27</sup> Therefore, MPD's disagreement with the Arbitrator's award of attorneys' fees does not present a statutory ground for review.

#### **IV. Conclusion**

Based on the foregoing, the Board finds that the Arbitrator did not exceed his authority. Accordingly, MPD's Arbitration Review 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. 1, this Decision and Order is final upon issuance.

#### **BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

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<sup>23</sup> *Id.* (citing *Metro. Police Dep't, supra*, Slip Op. 1133 at p. 8).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Fraternal Order of Police/Dep't of Corrections Labor Comm. v. Dep't of Corrections*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at p. 6, PERB Case No. 10-A-20 (2012).

<sup>27</sup> *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633 at 3, PERB Case No. 00-A-04 (2000); *Metro. Police Dep't and Fraternal Order of Police, Metro. Police Dep't Labor Comm. (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. 738, PERB Case No. 02-A-07 (2004); *Univ. D.C. Faculty Ass'n/NEA and Univ. D.C.*, 39 D.C. Reg. 9628 at 9629, Slip Op. 320 at 2, PERB Case No. 92-A-04 (1992).

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By the unanimous vote of Board Chairperson Charles Murphy and Members Ann Hoffman and Douglas Warshof.

March 23, 2017

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 16-A-15, Op. No. 1620 was sent by File and ServeXpress to the following parties on this the 10<sup>th</sup> day of April, 2017.

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PERB