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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD

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In the Matter of:	)	
	)	
District of Columbia	)	
Department of Public Works,	)	
	)	
Petitioner,	)	PERB Case No. 95-A-08
	)	Opinion No. 438
and	)	
	)	
American Federation of	)	
Government Employees, Locals	)	
872, 1975 and 2553, AFL-CIO	)	
	)	
Respondent.	)	

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DECISION AND ORDER

On May 1, 1995, the Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of the D.C. Department of Public Works (DPW) filed an Arbitration Review Request in the above-captioned proceeding. OLRCB seeks review of an arbitration award (Award) that sustained a grievance filed by the American Federation of Government Employees, Locals 872, 1975 and 2553 (AFGE) on behalf of bargaining unit employees who were included in a reduction in force (RIF) implemented by DPW in violation of requirements contained in the parties' collective bargaining agreement (CBA). OLRCB contends, on several grounds, that the Arbitrator exceeded his authority and that the Award is contrary to law and public policy and requests that the Award be set aside or remanded to the Arbitrator. AFGE filed an Opposition to the Arbitration Review Request contending that OLRCB presents no statutory basis for review and therefore the Request should be dismissed.

Under the Comprehensive Merit Personnel Act, D.C. Code Sec. 1-605.2(6), the Board is authorized to "[c]onsider appeals from arbitration awards pursuant to grievance procedures: Provided, however, that such awards may be reviewed only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy... ." The Board has reviewed the Arbitrator's Award, the pleadings of the parties and applicable law, and concludes that the Request presents no statutory basis for review of the Award. <sup>1/</sup>

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<sup>1/</sup> OLRCB requested, pursuant to Board Rule 538.2, that the Board permit it to present a comprehensive brief setting forth the  
(continued...)

OLRCB presents six grounds in support of its contention that the Arbitrator "exceeded his authority"<sup>2/</sup> or the Award is contrary to law and public policy. (ARR at 2.) We summarize these grounds below.

OLRCB contends that the arbitrator granted relief based upon the Back Pay Act, 5 U.S.C. 5596, notwithstanding the fact that the CBA does not provide for this form of relief. OLRCB further states that the award of attorney fees "does not remedy th[e] issue for the grievant's (sic) themselves."<sup>3/</sup> (ARR at 2.) As OLRCB acknowledges, an arbitrator possesses broad equitable powers to fashion a remedy. As such, only express provisions of the parties' contract and applicable law can limit the Arbitrator's jurisdictional authority to render remedial relief.<sup>4/</sup> OLRCB does not cite express provisions from either source as the basis for its contentions.

In a related ground for review, OLRCB states that the

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<sup>1/</sup>(...continued)

arguments in support of its arbitration review request. In accordance with Board Rule 538.2, the parties shall be provided an opportunity to file briefs "[i]f the Board finds that there may be grounds to modify or set aside the arbitrator's award... ." Finding no grounds to set aside or remand the Award, this request is denied.

<sup>2/</sup> This basis for review presents none of the statutory criteria for our review. For purposes of our consideration and disposition, we assume that the statutory criteria these grounds are intended to support is that the "arbitrator was without, or exceeded, his or her jurisdiction".

<sup>3/</sup> By providing attorney fees incurred by the grievants' representative, AFGE, to pursue the grievance, the award of attorney fees provided relief for an attending impact, i.e., cost to arbitrate, caused by the contractual violation grieved. This cost is one that the grievants indirectly bear in the form of dues and service fees they pay to their representative, AFGE.

<sup>4/</sup> We have observed that while "the Back Pay Act is the prevailing law with respect to District Government employees..., recognition extended only to those provisions that established a system for determining aspects of back pay where their 'exist[ed] no established system promulgated by the District of Columbia [, e.g., the awarding or calculating of attorney fees.]' " University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 41 DCR 2738, Slip Op. No. 317 at n. 5, PERB Case No. 92-A-02 (1992).

Arbitrator exceeded the terms of the CBA by rescinding the RIF notwithstanding the fact that it was implemented in accordance with applicable law and regulation. Although DPW complied with the applicable law, under the CBA it agreed to adhere to additional prerequisites in the event of a RIF. The Arbitrator's rescission of the RIF was pursuant to his jurisdictional authority to provide a remedy, including restoring the status quo ante, upon his finding that DPW did not implement the RIF in accordance with these contractual requirements. See, D.C. General Hospital and American Federation of Government Employees, Local 631, AFL-CIO, 41 DCR 2734, Slip Op. No. 316 at n. 3, PERB Case No. 92-A-03 (1992).

The parties' CBA provides that in the event of a RIF that the "Employer agrees to minimize the effect on employees, if practicable through such means as reassignment, retaining or restricting recruitment to reduce the impact on employees." OLR CB states that the Arbitrator's application of this provision as requiring a determination "whether every practicable method has been employed to minimize the effect of the RIF", exceeds the terms of the CBA by requiring "the Department to do more than the parties bargained... ." (ARR at 2.) However, under the parties' CBA, the parties' have agreed to resolve such contractual disputes through grievance-arbitration. Therefore, the Arbitrator possessed the jurisdictional authority to determine whether or not DPW has complied with this CBA provision, which necessarily included his interpretation of the meaning of the provision. D.C. Metropolitan Police Department and Fraternal order of Police, MPD Labor Committee, \_\_\_ DCR \_\_\_\_, Slip Op. No. 394 at n. 2, PERB Case No. 94-A-04 (1991). The Arbitrator interpreted the list of "practicable means" specified in the provision as examples not as a delimitation of all practicable means. We do not find that by doing so he exceeded his arbitral jurisdiction.

OLRCB states that at the outset AFGE defined its grievance as a contractual violation that was continuing in nature after the RIF. It asserts that the CBA requires this definition to be the sole and exclusive basis for subsequent steps. OLR CB contends that the Arbitrator changed the scope of the grievance during the arbitration hearing by "rul[ing] that no evidence could be presented detailing the Department's efforts to further minimize the effects of the RIF on its employees after the effective date of the RIF." (ARR at 3.)<sup>5/</sup> This ruling, OLR CB asserts, contravenes

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<sup>5/</sup> We note that the Arbitrator awarded back pay and benefits lost by effected employees "pursuant to the Back Pay Act, 5 U.S.C. 5596." (Award at 32.) The Back Pay Act, in pertinent part, provides that an employee is entitled to back pay only in "an amount equal to all or any part of the pay, allowances, or (continued...)"

Article 38, Grievance Procedure, Section C, Arbitration, 2, requiring the arbitrator to confine his award solely to the grounds set forth in Step 2 of the grievance procedure.

Article 38, Sec. C, 8, provides in pertinent part, that "[t]he arbitrator shall confine his/her award solely to the grounds set forth in Step 2 of the Grievance Procedure." The instant grievance was filed directly at Step 4 level, not Step 2. (OLRCB's Post-Hrg Br. at 1.) Assuming, however, that this CBA provision was applicable to Step 4, OLRCB does not state how Article 38, Sec. C of the CBA restricts the Arbitrator's authority to make the disputed evidentiary ruling<sup>6/</sup> or how the Award provided relief that exceeded the grounds stated at Step 4, i.e., that DPW violated the disputed CBA provisions, whether continuing or not.

Next, OLRCB claims that the Award rescinding the RIF is contrary to law and public policy because it contravenes management's right, pursuant to D.C. Code § 1-618.8(a)(3), to "relieve employees of duties because of lack of work or other legitimate reasons". Since the RIF was pursuant to law, i.e., emergency legislation passed by the D.C. Council, OLRCB contends that the Arbitrator "did not have the requisite authority to overturn [the] RIF". (ARR at 4.) However, the Arbitrator's Award did not decide whether DPW possessed the requisite authority to implement the RIF pursuant to its statutory management rights, but only whether, prior to implementing the RIF, DPW met its contractual obligations. Upon finding that DPW had not done so, the Arbitrator had the authority to award a status-quo-ante remedy to redress the contractual violation. See, D.C. General Hospital and American Federation of Government Employees, Local 631, AFL-

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<sup>5</sup>(...continued)

differentials, as applicable, which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period..." (Emphasis added.) In view of this requirement, it appears that "the Department's efforts to further minimize the effects of the RIF on its employees after the effective date of the RIF" must be considered to determine the back pay award that each employee is entitled.

<sup>6/</sup> The arbitrator has jurisdiction to determine the admissibility of evidence. Absent grounds establishing a statutory criteria for limiting an arbitrator's jurisdictional authority to make evidentiary rulings, the Board lacks jurisdiction to review an arbitrator's exclusion of evidence. See, University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 38 DCR 1580, Slip Op. No. 262, PERB Case No. 90-A-08 (1990).

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CIO, 41 DCR 2734, Slip Op. No. 316 at n. 3, PERB Case No. 92-A-03 (1992). Moreover, the emergency legislation relied upon by OLRCB did not require that the RIF be effected by November 12, 1993, i.e., the date the RIF was implemented. See, D.C. Metropolitan Police Department and Fraternal Order of Police, MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 87-A-04 (1991).

OLRCB's final point alleges a factual inconsistency in the findings of the Arbitrator that raises no statutory ground for review. OLRCB states that in reaching his conclusion that DPW failed to consult with AFGE prior to implementing the RIF, the Arbitrator ignored an important piece of evidence concerning certain information that was provided to AFGE 2 months prior to the RIF. OLRCB's claim merely disputes the weight and probative value, or lack thereof, attributed to the evidence by the Arbitrator. We have held that such determinations are clearly within the domain of the Arbitrator. See, e.g., American Federation of Government Employees, Local 872 and D.C. Dep't of Public Works, 39 DCR 5989, Slip Op. No. 290, PERB Case No. 91-A-01 (1992) and University of the District of Columbia Faculty Association/NEA and University of the District of Columbia, 37 DCR 5666, Slip Op. No. 248, PERB Case No. 90-A-02 (1990). Moreover, our review of the Arbitrator's Opinion reveals that his conclusion did not turn merely upon the existence or absence of the information in question.

Accordingly, OLRCB has not presented a statutory basis for its request that the Award be set aside; its request for review is therefore denied.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Review Request is denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD  
Washington, D.C.

July 20, 1995