GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES,	PERB Case Nos. 02-A-04 and 02-A-05
	Opinion No. 717
Petitioner,	Motion for Reconsideration
and	
FRATERNAL ORDER OF POLICE/ DEPARTMENT OF HUMAN SERVICES LABOR COMMITTEE,	
Respondent.	

Decision and Order

This matter involves a Motion for Reconsideration filed by the Office of Labor Relations and Collective Bargaining (OLRCB) on behalf of the Department of Human Services (DHS). DHS is requesting that the Board vacate its Decision and Order issued on November 21, 2002. (Opinion No. 691). In Opinion No. 691,[1] the Board found, *inter alia*, that Arbitrators Lois Hochhauser and Barry

[1]The facts and issues presented by this case are set forth in the Board's Decision and Order, Slip Op. No. 691. However, a brief summary of the facts and main issue follows:

> DHS filed two Arbitration Review Requests (PERB Case Nos. 02-A-04 and 02-A-05) seeking review of two separate Arbitration Awards (Awards) which found that a valid and enforceable agreement obligated DHS to arbitrate employee grievances. Upon

Shapiro did *not* exceed their authority or violate the law and public policy by finding that: (1) a valid and enforceable *express* agreement existed which obligated DHS to arbitrate disputed grievances; (2) DHS's attempts to cancel the agreement failed; and (3) the underlying grievances which formed the basis of the arbitration cases were arbitrable.[2] In its Decision and Order, the Board observed that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based." See, Department of Human Services and Fraternal Order of Police/Department of Human Services Labor Committee, 50 DCR 5028, Slip Op. No. 691, PERB Case Nos. 02-A-04 and 02-A-05 (2003) and Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). Moreover, the Board noted that it would not substitute its own interpretation or that of the Agency, in place of the duly designated Arbitrator's interpretation. See, Id.

---

the Petitioner's request, both cases were consolidated because they shared similar parties and issues. The common issues were whether the Arbitrators were without authority and exceeded their jurisdiction by finding that: (1) a bargaining representative and an Employer are bound by the terms of a prior contract executed by an Agency and a predecessor union; (2) a bargaining representative and an Employer are required to arbitrate grievances absent an effective contract requiring such; and (3) the grievances are arbitrable, in the absence of a valid collective bargaining agreement. (Request at p. 2). DHS also raised an issue concerning the validity of Arbitrator Hochhauser's finding of an implied-in-fact contract. FOP opposed the Request. Stated more concisely, the issue before the Board was whether "the Arbitrator was without or exceeded his or her jurisdiction... in making the findings noted above." D.C. Code §1-605.02(6) (2001 ed).

[2]By way of background, a dispute existed concerning whether there was a valid and enforceable contract which obligated DHS to arbitrate grievances. The dispute arose because DHS had not negotiated a new agreement with FOP, once it succeeded the American Federation of Government Employees, Local 383 (AFGE, Local 383). Relying on National Labor Relations Board (NLRB) and Supreme Court precedent, Arbitrator Shapiro found that DHS and FOP were bound by the terms of an agreement negotiated by the Agency and AFGE, Local 383 (the predecessor Union). See, American Seating Boston Machine Works, 89 NLRB 59 (1950) and American Seating Co., 106 NLRB 250 (1953). Department of Human Services and Fraternal Order of Police/Department of Human Services Labor Committee, 50 DCR 5028, Slip Op. No. 691, PERB Case Nos. 02-A-04 and 02-A-05 (2003).

In denying DHS's Arbitration Review Request, the Board concluded that the Arbitrators decided the precise issues that were given to them for decision; namely, whether there was a valid contract in place between the parties[3] and whether the underlying grievances were arbitrable. As a result, the Board denied DHS's Arbitration Review Requests and refused to set aside the Arbitration Awards.[4] Department of Human Services and Fraternal Order of Police/Department of Human Services Labor Committee, 50 DCR 5028, Slip Op. No. 691, PERB Case Nos. 02-A-04 and 02-A-05 (2003). On the same day that the Board issued this Decision and Order, DHS, through its representative, OLRCB, faxed a letter to the Board requesting that it be allowed to brief additional issues concerning the duty to arbitrate a claim once a contract expires. Shortly thereafter, DHS filed this Motion for Reconsideration with the Board.

DHS's Motion for Reconsideration (Motion) asserts several reasons in support of its contention that the Board erred when it denied DHS's Arbitration Review Request. In the present motion, DHS reiterates many of the arguments raised in its initial filing. In addition, DHS includes several new arguments, which it previously had an opportunity to raise, but did not. Specifically, DHS makes a procedural argument and contends that the Board's Decision and Order (Slip Op. No. 691) should be reconsidered and is not final because the Agency's Motion for Reconsideration was timely filed.[5] (Motion at p. 1). In addition, the Motion disagrees with the Board's specific findings

---

[3]Arbitrator Hochhauser found that the *express agreement* (AFGE, Local 383 contract), under which the parties operated and processed grievances, was still valid and had not expired. Department of Human Services and Fraternal Order of Police/Department of Human Services Labor Committee, 50 DCR 5028, Slip Op. No. 691, PERB Case Nos. 02-A-04 and 02-A-05 (2003). As a result, the Board did not have to consider the issue of whether Arbitrator Hochhauser exceeded her authority by finding an implied-in-fact contract in the absence of a properly executed and statutorily approved collective bargaining agreement.

[4]The Board also noted that if DHS intended to make a "contrary to law" argument when it asserted that the Arbitrator's findings were in contravention of the *RCA del Caribe* line of cases, the Board failed to find relevance in the *RCA del Caribe* lines of cases when those facts that were applied to the ones presently before the Board. 262 NLRB 963 (1982). Therefore, the Board declined to reverse the Arbitrators' decisions based on any violation of law or public policy. Department of Human Services v. Fraternal Order of Police/Department of Human Services Labor Committee, 50 DCR 5028, Slip Op. No. 691, PERB Case Nos. 02-A-04 and 02-A-05 (2003).

[5]DHS relies on Board Rule 559.2 and Ellowese Bargainier and Ellsworth Alexander v. Fraternal Order of Police/Department of Corrections Labor Committee in support of this argument. 46 DCR 7224, Slip Op. No. 484 , PERB Case No. 95-S-02 (1999).

in Opinion No. 691. However, the bulk of DHS's arguments center around its assertion that Arbitrator Hochhauser and the Board misread the Supreme Court precedent in the Litton Financial Printing Division v. NLRB (Litton) and Nolde Brothers, Inc. v. Bakery Workers (Nolde Brothers) cases. 501 U.S. 190 (1991) and 430 U.S. 243 (1977).[6] Specifically, DHS asserts that the cases were misread as a result of an omission that Arbitrator Hochhauser made when citing the Nolde Brothers case. The Litton and Nolde Brothers cases address the parties' duty to arbitrate once the collective bargaining agreement under which the parties have operated expires.[7] We will summarize

---

[6]Text and Cite from Arbitrator Hochhauser's Original Opinion and Award:

> However, the Supreme Court has also found a post expiration duty to arbitrate a creature of the collective bargaining agreement, rather than [the] compulsion of law." Id at p. 250-251. (Hochhauser's Award a pgs. 4 and 5 We note that the last case cited before the Id. in this instance was the *Litton* case. This statement is contained in the Litton case.

Text and Cite from Arbitrator Hocchauser's Reissued Opinion and Award:

> However, the Supreme Court has also found a post-expiration duty to arbitrate **a dispute which arises from the express or implied terms of an expired contract. Nolde Brothers, Inc. v. Bakery Workers, 430 U.S. 243(1977). The Court stated that the duty to arbitrate was "** a creature of the collective bargaining agreement rather than [the] compulsion of law." Id. at pp.250-251. (See Page 5 of Nolde and page 8 of Litton). **[Hochhauser's reissued Award at pgs. 4 and 5]. Bold text indicates text that was different from the original issuance.**

[7] In Litton, the Supreme Court reviewed the issue of whether an Employer had a duty to arbitrate grievances concerning layoffs where the layoffs occurred almost one year after the contract had expired. 501 U.S. 190, 193 (1991). The Supreme Court held that there was no post-expiration duty to arbitrate a dispute unless the dispute arose under the expired contract. Id.

In Litton, the Supreme Court also interpreted its holding in the Nolde Brothers, Inc. v. Bakery Workers case. See, Id. at pp. 203-204 and Nolde Brothers, Inc. v. Bakery Workers, 430 U.S. 243 (1977). In Nolde Brothers, the Supreme Court held that the employees' claim for severance pay arose under the collective bargaining contract and was subject to the contract's arbitration terms even though it arose after the contract was terminated. In Nolde Brothers , the Court also stated that, unless "negated expressly or by clear implication", there is a "presumption in favor of post-expiration arbitration of matters" where the expired agreement between the parties contained a broad arbitration clause. Id. In interpreting Nolde Brothers, the Court observed that it "does not announce a broad rule that post-expiration grievances concerning terms

many of the arguments raised by DHS in the following footnote[8]. In its Response to DHS's Motion

---

and conditions of employment remain arbitrable." Id. at 204-205. Rather, the Nolde Brothers presumption is limited to disputes arising under the contract. Id. Moreover, the Court noted that the "arbitrability presumption" was "limited by the vital qualification that arbitration was of matters and disputes arising out of the relation governed by contract." Id.

After reviewing the Litton and Nolde Brothers cases, the Board noted that, in those cases, there was *no* dispute as to whether the collective bargaining agreement had expired. 501 U.S. 190 (1991); 430 U.S. 243 (1991). Id. This fact, alone, distinguishes Litton and Nolde Brothers from the case presently before the Board. Both arbitrators in the present case found that the AFGE, Local 383 collective bargaining agreement was applicable to the parties and had *not* expired. Therefore, the Board finds that it is not necessary for us to review the Arbitrators' finding concerning whether there was a post-expiration duty to arbitrate the grievances.

[8] In the following paragraphs, we will summarize DHS' major arguments and include the Board's response, where relevant:

1. DHS claims that the Board properly recognized the Petitioner's argument concerning the Arbitrator's finding of an implied-in-fact contract. *We note that the Board did not indicate that the argument was properly made. Instead, we merely summarized the Petitioner's argument on this issue.*

2. DHS contends that the Board violated its own rules (Board Rule 538.2) by failing to request a full briefing on the issue once the discrepancy was found and the request to brief was made. *The Board's Rules, as correctly noted in the Executive Director's January 9th written response to this issue, provide that briefing is only required where the Board finds that there may be grounds to modify or set aside an Arbitrator's award. No such finding was made in this case.*

3. DHS asserts that the Board had an obligation to review briefs prior to reaching a decision on the issues raised. *As indicated in the Executive Director's January 9th Response, the Board does not have an obligation to review or consider briefs where the Board does not order the parties to submit briefs.*

4. DHS asserts that Fundamental Due Process requires that the Board order briefing on an issue as complex as the termination of a collective bargaining agreement and the residual obligation of the parties. *We believe that DHS had an opportunity to explain its position on this and any other complex issue in its: (1) brief to the Arbitrator*; (2) *original Arbitration Review Request,* and (3) *Motion for Reconsideration. As a result, the Board is not persuaded by this due process argument.*

5. DHS asserts that Arbitrator Hochhauser's decision to uphold arbitrability is a significant misreading of the Supreme Court's limitation of the Nolde Brothers case, which is cited in Litton. In addition, DHS asserts that there was no post-expiration duty to arbitrate in

for Reconsideration (Response), FOP asserts that the Petitioner's motion should be summarily denied because the Board's Opinion in this matter is well reasoned and correct as a matter of law. In addition, DHS argues that pursuant to Board Rule 559.2,[9] the Board does not contemplate or permit a Motion for Reconsideration under circumstances where, as here, the Board's decision was made final upon issuance.

After reviewing the current motion, we find that DHS's arguments amount to nothing more than a disagreement with the Board's determination in Opinion No. 691. Furthermore, we find that DHS's motion does *not* state adequate grounds for reversing Opinion No. 691.

In view of the above, the Board finds that DHS has not presented evidence which supports a reversal of Opinion No. 691. Therefore, we deny DHS' Motion for Reconsideration.

PERB Case No 02-A-04, because the dispute arose after the contract expired. DHS argues that the post-expiration duty to arbitrate is limited to cases where the dispute arose under contract. DHS says it needs an opportunity to brief the issue and explain the proper application of the Litton and Nolde Brothers cases . Furthermore, DHS asserts that it needs an opportunity to the present its case and explain why the application of those holdings to these facts require a reversal of Opinion No. 691. *The Board believes that DHS did attempt to explain the applicability of Litton and Nolde to the Arbitrator. The Board summarized and noted DHS's reliance on those cases in Footnote 11 of its Opinion in this case. DHS acknowledged in its Motion that the Board noted their reliance on these cases. Nevertheless, the Board is not persuaded that DHS's explanation necessitates a finding of error or the reversal of Opinion No. 691.*

6. DHS claims that it was prejudiced by its failure to know the full extent of the Arbitrator's Award. *We find no merit in this argument, nor do we find that our actions prejudiced DHS in any way.*

[9]Board Rule 559.2 provides, in relevant part, that:

> the Board's Decision and Order shall not become final if any party files a motion for reconsideration within ten (10) days after issuance of the decision, or if the Board reopens the case on its own motion within 10 days after issuance of the decision, unless the order specifies otherwise.

Even though the Decision and Order contained the language "final upon issuance", this fact does not foreclose DHS from filing a Motion for Reconsideration if it is done in a timely manner. DHS's Motion was timely. As a result, FOP's argument on this issue lacks merit.

ORDER

IT IS HEREBY ORDERED THAT:

1. DHS' Motion for Reconsideration is denied.

3. 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.

July 17, 2003