Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Housing Authority,	
Petitioner,	
v.	PERB Case No. 14-A-07
AFGE, Local 2725,	
Respondent.	Opinion No. 1503

DECISION AND ORDER

The Petitioner District of Columbia Housing Authority ("Authority") has brought an arbitration review request that raises the question of whether the Authority is subject to the Federal Back Pay Act, 5 U.S.C. § 5596, pursuant to which the arbitrator awarded attorneys' fees to the Respondent AFGE, Local 2725 ("Union"). We find that the Authority is subject to the Back Pay Act and accordingly sustain the Award. For the reasons explained below, however, we remand the matter to the arbitrator for resolution of attorneys' fees pursuant to D.C. Official Code § 6-215(e).

I. Statement of the Case

On behalf of two employees of DCHA, the Union brought a grievance claiming that the Authority had violated the principle of equal pay for substantially equal work recognized in Article 27E of the parties' collective bargaining agreement. The arbitrator held that the employees were denied equal pay for work substantially equal to that performed by gardeners employed by DCHA. The arbitrator awarded the employees back pay and retained jurisdiction to entertain a petition from the Union for attorneys' fees. Following the filing of the application for attorneys' fees by the Union and the filing of an opposition by the Authority, the arbitrator issued an Opinion and Award ("Award") finding the Authority subject to the fee provisions of the Back Pay Act and on the authority of that act awarding to the Union fees for the work of its counsel in the course of the arbitration in the amount requested by the Union, $76,592.25.

On May 19, 2014, the Authority filed with the Board an arbitration review request ("Request") arguing that the arbitrator "had no contractual, statutory, or regulatory authority to award attorney fees, and the Fee Award is contrary to law and public policy." (Request 2.) The *Union's Opposition to Agency's Arbitration Review Request* ("Opposition") notes that the Authority attached to its Request a fee award from a different case. The Union argues that as the Request did not comply with Board Rule 538.1's requirement that an arbitration review request contain a copy of the award, the Board should not entertain the merits of DCHA's allegations. Concerning the merits, the Union contended that the Back Pay Act authorized the arbitrator to award the Union attorneys' fees and that the Award was fully consistent with that law.

DCHA then filed a reply attaching the correct award and marking it exhibit 7. The Authority argued that it had complied with Rule 538.1 because that rule does not require a copy of the award if the petitioner files a proof of service of the award, as the Authority had done. The Authority contends that "Rule 538.1 expressly permits a Petitioner to file either '[a] copy of the award and affidavit' **or** 'other proof of the date of service of the award' 'not later than twenty (20) days after service of the award.' *See* Rule 538.1(e)." Alternatively, the Authority argues that if its Request was deficient then it is entitled to an opportunity to cure the deficiency through its attachment of the Award, which was already in the record as exhibit A to the Opposition.

II. Analysis

A. Deficiency of the Request

Rule 538.1(e) provides, "A copy of the award and affidavit or other proof of the date of service of the award shall accompany the arbitration review request." Notwithstanding DCHA's creative deconstruction of that sentence, "other proof of the date of service" is clearly an alternative to "affidavit," which can be one type of proof of the date of service. "[O]ther proof" is not an alternative to "[a] copy of the award and affidavit" and does not suffice as a substitute for both. Rather, "[a] copy of the award," a document the Board needs to review, is a stand-alone item in the list of necessary attachments. *See D.C. Metro. Police Dep't v. F.O.P/Metro. Police Dep't Labor Comm.*, 45 D.C. Reg. 4950, Slip Op. No. 548 at 2, PERB Case No. 98-A-04 (1998), *rev'd on other grounds, D.C. Metro. Police Dep't v. D.C. Pub. Employee Relations Bd.*, No. 98-MPA-16 (D.C. Super. Ct. Apr. 13, 1999).

Therefore, omitting the Award was a deficiency, but "[i]n view of the fact that the Board did not notify Petitioner of the deficiency in its initial filing in accordance with Board Rule 510.15, the Board accepts" DCHA's subsequent filing of exhibit 7 "as a timely cure of its deficient [May 19, 2014] Request." *Univ. of D.C. v. Univ. of D.C. Faculty Ass'n/NEA*, 41 D.C. Reg. 3830, Slip Op. No. 321 at 2 n.2, PERB Case No. 92-A-05 (1992).

B. Applicability of the Back Pay Act to Employees of DCHA

DCHA's challenge to the arbitration award in this case centers on whether the attorneys' fees provisions of the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii), apply to DCHA employees.

The arbitrator engaged in an extensive analysis of the applicability of the Back Pay Act to DCHA employees and concluded, based on his interpretation of the statutory scheme, that the Back Pay Act does apply to DCHA employees. Under the CMPA, D.C. Official Code § 1.605.02(6),[1] PERB may only disturb the arbitrator's award if it is "on its face contrary to law and public policy." The Board holds that DCHA has not shown the Award is contrary to law and public policy, and, indeed, finds that the arbitrator's legal conclusion is sound.

The CMPA places specific, narrow, limits on PERB's review of arbitration awards. D.C. Official Code § 1-605.02(6); *FOP/Dep't of Corrs. Labor Comm. v. D.C. Pub. Employee Relations Bd.*, 973 A.2d 174, 176 (2009); *Metro. Police Dep't. v. D.C. Pub. Employee Relations Bd.*, 901 A.2d 784, 789 (2006). When an arbitrator is called upon to apply external laws like the Back Pay Act and the myriad statutes governing the application of the Back Pay Act to District and DCHA employees, the Board examines the award to determine if it is contrary to those provisions "on their face." *FOP/Dep't of Corr. Labor Comm.*, 973 A.2d at 176; *Metro. Police Dep't.*, 901 A.2d at 788. If a party must engage in "a comprehensive analysis" to interpret a statute, an arbitrator's differing interpretation of the statute is not "contrary 'on its face' to any law. *Metro. Police Dep't.*, 901 A.2d at 788.

DCHA's burden, therefore, is to demonstrate that there is a law and public policy that prohibited the arbitrator from applying the Back Pay Act to DCHA employees and from awarding attorney's fees. This it has not done. Instead, the Authority challenges the arbitrator's legal reasoning with respect to the application of the Back Pay Act in this case but has not identified any law and public policy preventing the arbitrator from awarding fees.

The Federal Back Pay Act provides that an "employee of an agency" who has been found "to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay . . . of the employee" is entitled, among other things, to "reasonable attorney fees related to the personnel action. . . ." 5 U.S.C. § 5596(b)(1)(A)(ii). Section 5596(a)(5) defines "agency" to include "the government of the District of Columbia."

In the Home Rule Act of 1973, the Council of the District of Columbia purportedly superseded application of the Back Pay Act for all employees of the District of Columbia Government. D.C. Official Code § 1-632.02(a)(5)(G). The CMPA also states, however, that "Until such time as a new compensation system is approved, the compensation system . . . in effect on December 31, 1979, shall continue in effect." D.C. Official Code § 1-611.04(e). The Court of Appeals has wrestled with the issue of whether and how the Federal Back Pay Act applies to District employees and independent District authorities no less than eight times. *See District of Columbia v. Hunt*, 520 A.2d 300 (D.C. 1987); *Zenian v. District of Columbia Office of Employee Appeals*, 598 A.2d 1161 (D.C. 1991); *Kennedy v. District of Columbia*, 654 A.2d 847,

[1] D.C. Official Code § 1.605.02(6) applies to DCHA employees under D.C. Official Code § 6–215(a)(1), which explicitly states that "[s]ubchapters V and XVII [of the CMPA] shall apply to the labor-management relationship between the Authority and its employees."

862 (D.C. 1994); *Surgent v. District of Columbia*, 683 A.2d 493 (D.C. 1996); *Mitchell v. District of Columbia*, 736 A.2d 228 (D.C. 1999); *District of Columbia v. Brown*, 739 A.2d 832 (D.C. 1999); *AFGE v. District of Columbia Water & Sewer Auth.*, 942 A.2d 1108 (D.C. 2007); *White v. D.C. Water & Sewer Auth.*, 962 A.2d 258, 259 n.2 (D.C. 2008). Broadly speaking, the Court has found that the Back Pay Act, in the form that it existed in 1979, does apply to District employees and that the 1979 Back Pay Act provided for attorneys' fees. *Hunt*, 520 A.2d 304.

The general determination of the Court that the Back Pay Act ordinarily applies to District employees does not resolve the issue of whether DCHA employees in particular are covered by the Act. DCHA is now an independent Authority. D.C. Official Code section 6-215(a) provides that "[n]o provision of Chapter 6 of Title 1 [the CMPA] shall apply to employees of the Authority." D.C. Official Code § 6-215(a). Most parts of the CMPA, therefore, simply do not apply to DCHA employees. By the terms of D.C. Official Code § 6-215(a), neither § 1-632.02 (purporting to supersede the Back Pay Act) nor § 1-611.04(e) (providing the grounds to apply the Back Pay Act to District employees despite that supersession) applies to DCHA employees.

Whether or not the Back Pay Act applies to DCHA employees then turns on whether it is a general law "applicable to public employers in the District of Columbia." D.C. Official Code § 6-215(d) provides that "Except as specifically provided in this chapter, the Authority shall be subject to all general laws applicable to public employers in the District of Columbia, including laws concerning human rights, wages and hours, and occupational safety and health."

By the terms of the Back Pay Act, the Act applies to the government of the District of Columbia. 5 U.S.C. § 5596(a)(5). Although the Act was purportedly superseded and reestablished as law applicable to the government of the District of Columbia by the CMPA, neither the supersession nor re-implementation applies because those provisions of the CMPA do not apply to DCHA employees. After those considerations are removed, the Back Pay Act's own provisions state that it applies to District government employees. The Back Pay Act is, thus, a general law applicable to public employers in the District of Columbia. As the Back Pay Act also specifically concerns employees' wages and hours, it is among the laws that apply to DCHA employees by virtue of D.C. Official Code § 6-215(d). Although D.C. Official Code § 6-215(a) provides, "[a]ll employees hired by the Authority after May 9, 2000, shall be employees of the Authority and not of the District," suggesting that the Back Pay Act would not apply directly to DCHA employees, D.C. Official Code § 6-215(d) nevertheless provides firm grounds for the application of the Back Pay Act to the Authority and its employees.

Under a different statutory scheme, the Court of Appeals, in *White v. D.C. Water & Sewer Auth.*, 962 A.2d 258 (D.C. 2008), found that the Back Pay Act did not apply to D.C. Water & Sewer Authority (WASA) employees. Similar to DCHA, WASA employees were statutorily exempted from the merit personnel system. Due to that exemption from the statutory scheme, the Court held that "the CMPA-and with it, the counsel fees provision included in its compensation system-no longer applies to WASA employees." *Id.* at 259 (citing D.C .Code § 34-2202.17(b); § 34-2202.15). This exemption from the CMPA was predicated on WASA's

implementation of its own personnel system as provided for in D.C. Official Code § 34-2202.17(b), which it had accomplished. *White*, 962 A.2d at 259-60.

Relying on *White*, the Authority notes that it too has established a personnel system, and thus should also be free from the counsel-fee provision in the compensation system under the District of Columbia. The fact that the Authority has also implemented a personnel system has no bearing on whether the Back Pay Act applies to its employees. That issue was important in *White* only because the statute governing WASA's transition to an independent authority stated that the CMPA—and the attorney's fees provisions that apply to District employees under the Back Pay Act by virtue of D.C. Official Code § 1-611.04(e)—would continue to apply until WASA had established its own personnel regulations. *White*, 962 A.2d at 259-60. Under D.C. Official Code § 6-215, there is no similar trigger for the exemption of DCHA from the general provisions of the CMPA and therefore the Authority's implementation of its own regulations is of little consequence.

What is important is that the WASA statute, unlike the DCHA statute, does not include a provision incorporating "all general laws applicable to public employers in the District of Columbia, including laws concerning human rights, wages and hours, and occupational safety and health" as are applicable to DCHA employees. D.C. Official Code § 6-215(d). The absence of a parallel provision in the WASA statute makes *White* of limited guidance.

While the Back Pay Act continues to apply generally to District employees by virtue of the CMPA, it itself is not a provision in the CMPA. The exemption of DCHA from the application of most provisions of the CMPA under D.C. Official Code § 6-215(a) does not preclude the application of the Back Pay Act under D.C. Official Code § 6-215(d). As the Back Pay Act itself states, it applies to District employees. *See* 5 U.S.C. § 5596(a)(5). Otherwise the Back Pay Act is a general law applicable to District public employers. *See* 5 U.S.C. § 5596(a)(5).

Consistent with the arbitrator's conclusions, the Back Pay Act applies to DCHA employees. This collection of statutes does not clearly prohibit the result ordered by the Award. Indeed, the parties have bargained for the arbitrator's interpretation of the Back Pay Act and underlying statutory scheme and are bound by that interpretation. The arbitrator's interpretation of the law thereby became part of the parties' agreement and thereby is part of the private law governing the parties. *Metro. Police Dep't*, 901 A.2d at 789 (quoting *Am. Postal Workers*, 789 F.2d at 6). As the resolution of the issue requires an arbitrator to apply an external law, the Board may not engage in a *de novo* review under the CMPA. *Metro. Police Dep't*, 901 A.2d at 789 (courts do not employ "the normal tools of statutory construction to decide objectively what the legislature or rule-making body intended" when a "case involves the decidedly different setting of a collective bargaining agreement between parties".) While the Authority's position with regards to whether the Back Pay Act applies is not without some merit, some merit is not sufficient to modify or set aside an arbitration award under the CMPA as no law specifically precludes the result found by the arbitrator. To the contrary, the applicable statutes support the arbitrator's decision that the Back Pay Act applies.

Having found that the Award is not "on its face contrary to law and public policy," by virtue of its application of the Back Pay Act, the Board also finds that the Back Pay Act provides independent authority for an arbitrator's award of attorneys' fees. *AFGE, Local 2725 v. D.C. Dep't of Consumer & Regulatory Affairs*, 61 D.C. Reg. 7565, Slip Op. 1444 at pp. 12-14, PERB Case No. 13-A-13 (2013). Therefore, in ordering the Authority to pay the Union's attorneys' fees pursuant to the Back Pay Act, the arbitrator neither exceeded his authority nor issued an award contrary to law and public policy.

C. Arguments Waived by DCHA

DCHA notes that the Back Pay Act requires payment of attorneys' fees where an individual is "affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowance or differentials of the employee." 5 U.S.C. § 5596(b)(1). The Authority argues that the grievance in question did not involve that type of personnel action and, as a result, the Back Pay Act is inapplicable. (Request 5) (citing *United States v. Testan*, 424 U.S. 392 (1976); *Woolf v. Bowles*, 57 F.3d 407 (4th Cir. 1995)). In addition, the Authority argues that the arbitrator erred in relying upon 5 U.S.C. § 7701(g) and the standards governing appeals to the Merits Systems Protection Board. (Request 5.)

The Union replies to these arguments substantively but also asserts that the Board should not consider the arguments because they were not presented to the arbitrator in the *District of Columbia Housing Authority's Opposition to Union Attorney's Petition for Attorney Fees*. The Union attached that document to its Opposition as exhibit E, and the Authority attached it to its Request as exhibit 5.

A review of the document reveals that it contains neither of the arguments that the Union asserts the Authority waived. An argument may not be raised for the first time in an arbitration review request. *AFGE Local 3721 (on behalf of Chasin) v. D.C. Fire & Emergency Med. Servs. Dep't*, 59 D.C. Reg. 7288, Slip Op. No. 1251 at p. 8, PERB Case No. 10-A-13 (2012). While the Board has exclusive jurisdiction to consider appeals from grievance-arbitration awards, it does not have original jurisdiction over such matters. *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 14896, Slip Op. No. 1332 at p. 3, PERB Case No. 08-U-35 (2012). Accordingly, the Authority waived its arguments that (1) the Back Pay Act does not apply to the type of grievance in question and (2) that the arbitrator should not have relied upon 5 U.S.C. § 7701(g) or standards of the Merit Systems Protection Board.

In conclusion, the Authority has not demonstrated that a statutory basis exists for its Request that the Award be set aside. Therefore, DCHA's arbitration review request is denied.

D. Attorneys' Fees for Proceedings before the Board

In its Opposition, the Union makes a new request for attorneys' fees for proceedings before the Board. The Union requested that the Board award attorneys' fees in accordance with § 6-215(e) of the D.C. Official Code in the event that the Board were to deny DCHA's arbitration review request. (Opposition 22 n.2.) The Board will remand the appellate fees issue to the arbitrator for his resolution.

D.C. Official Code § 6-215(e) provides, "If the Authority applies to the PERB for review of an arbitration award in accordance with § 1-605.02 and the PERB denies review, the PERB shall enter an order requiring the Authority to comply with the award and the Authority shall be liable to the labor organization for its litigation expenses, including attorneys' fees, in connection with the arbitration proceedings and the proceedings before the PERB." As the Board has denied the Authority's petition for review, D.C. Official Code § 6-215(e) provides the explicit statutory basis for an award of all litigation expenses for both the arbitration proceedings and the proceedings before the Board.

The Back Pay Act, like D.C. Official Code § 6-215(e), provides an entitlement for litigation expenses for a prevailing party. The Federal Labor Relations Authority ("FLRA") has found that attorneys' fees are available under the Back Pay Act for work done defending an award against an appellate challenge. *See U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 57 F.L.R.A. 32 (2001) (arbitrator awarded fees for work done opposing exceptions to award); *FAA, Wash. Flight Serv. Station*, 27 F.L.R.A. 901, 902 (1987) (arbitrator's failure to award fees for work defending position on exceptions contrary to law). The FLRA, however, declines to determine attorneys' fees itself. *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 57 F.L.R.A. 32. In the FLRA's view, "a motion for attorney fees related to an unjustified or unwarranted personnel action must be determined by the 'appropriate authority,'" and "that when an arbitrator has resolved a grievance over an unjustified or unwarranted personnel action, the arbitrator, not the Authority, is the 'appropriate authority' for resolving the request for an award of attorney fees." *Id.*

D.C. Official Code § 6-215(e) likewise requires the Authority to pay litigation expenses if the Board denies its petition for review. Section 6-215(e), however, does not state explicitly that the Board itself is to award appellate fees, rather it states only that the Authority shall be liable for such fees. The Board is unaware of any decisions applying § 6-215(e) and thus, this is a matter of first impression. Although the statutory schemes are not precisely parallel, the Board is persuaded that it should follow the lead of the FLRA and remand the appellate attorneys' fees matter to the arbitrator for his resolution.[2]

[2] Because the Award that the Board has sustained in this opinion had already ordered attorneys' fees "in connection with the arbitration proceedings," that part of the Union's request is moot. An order to comply with that Award, which section 6-215(e) requires the Board to issue, is an order to pay attorneys' fees in connection with the arbitration proceedings.

Accordingly, the Union's request for an award of attorneys' fees pursuant to § 6-215(e) from PERB is remanded to the arbitrator for his determination.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Review Request is denied.

2. DCHA shall comply with the Award.

3. The issue of attorneys' fees for proceedings before the Board is remanded to the arbitrator for a determination.

4. 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 Chairman Charles Murphy and Members Donald Wasserman, Keith Washington, Ann Hoffman, and Yvonne Dixon

Washington, D.C.

December 22, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-A-07 was transmitted to the following parties on this the 29th day of December 2014.

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/s/ Sheryl V. Harrington
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