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

In the Matter of:)	
)	
Fraternal Order of Police/)	
Department of Corrections)	
Labor Committee,)	
)	
Petitioner,)	PERB Case No. 10-A-02
)	
v.)	Opinion No. 1303
)	
District of Columbia)	
Department of Corrections,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

On October 5, 2009, the Fraternal Order of Police/Department of Corrections Labor Committee (“FOP” or “Complainant”) filed an Arbitration Review Request (“Request”) alleging the Arbitrator’s Award is contrary to law and public policy. The District of Columbia Department of Corrections (“Agency”, “DOC” or “Respondent”) filed an opposition to the arbitration review request (“Opposition”) on November 4, 2009. The Complainant filed a document styled “Motion to Strike Opposition” (“Motion”) on November 18, 2009. The Respondent filed a “Response to the Motion to Strike the Agency’s First Response” (“Response to Motion”) on November 25, 2009.

The issue before the Board is whether “the award on its face is contrary to law and public policy.” D.C. Code § 1-605.02(6) (2001 ed.).

II. Background

The arbitration in discussion arose pursuant to a collective bargaining agreement between the District of Columbia Department of Corrections and the FOP, after an employee was discharged. The arbitration was held over a period of two days on August 20 and October 21, 2008.

The issues to be determined, as stated in the arbitration are as follows:

Agency Issues:

1. In the July 13, 2004 letter, did DOC validly designate Mr. Butler as a Term employee? The agency answers Issue 1 as yes.
2. If the designation is correct, can the arbitrator change his status to permanent or grant his request to return to work or back pay? The Agency answers Issue 2 as no.

Union Issues:

Mr. Butler should not have been a Term employee at all. The DOC's decision "not to renew" was specious and the Agency's rationale does not qualify as "cause" as defined in the D.C. Personnel Regulations. Therefore, Mr. Butler's separation from his employment is a wrongful termination.

The remedy Mr. Butler seeks is to be reinstated to his former position with all back pay and benefits to which he is rightfully entitled. He seeks all references to his terminations removed from all of his official and unofficial record and files, and that his future performance ratings and assignments not be adversely impacted in retaliation for the challenge of this action. Finally, Carl Butler seeks to be reimbursed for all costs and attorneys' fees associated with pursuing this action.

(Award at pgs. 2-3).

FOP argues, in its Request, the following:

The Arbitration Award B is contrary to law and public policy because it incorrectly applies the Federal Back Pay Act, 5 U.S.C. § 5596 (2009) ("FBPA"). "The [FBPA], which applies to the District of Columbia government, provides that an employee who has suffered wage loss as the result of 'an unjustified or

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unwarranted personnel action' is entitled to full restitution." *D.C. Metro. Police Dep't v. Stanley*, 942 A.2d 1172, 1179 (D.C. 2008); 5 U.S.C. 5596(a)(5)) ("for the purposes of this section, 'agency' means—the government of the District of Columbia"). The D.C. Court of Appeals has held that the FBPA allows an employee who prevails following an administrative and judicial review of an employment decision to recover reasonable attorney's fees, if the payment of fees is warranted in the interest of justice. *Surgent v. District of Columbia*, 683 A.2d 493 (D.C. 1996). See also Stanley 942 A.2d at 1179 (Citing U.S.C. §5596(b)(1); *Cathedral Ave. Coop., Inc. v. Carter*, 2008 D.C. App. LEXIS 240, *39 (D.C. 2008) (explaining that attorney's fees are recoverable if authorized by statute)). In order to receive compensation under the FBPA, "an employee must show that: (1) he has undergone an unjustified or unwarranted personnel action as determined by an appropriate authority, and (2) the action resulted in a withdrawal or reduction of all or part of the employee's pay, allowances, or differentials." *Mitchell v. District of Columbia*, 736 A.2d 228, 230 (D.C. 1999). In cases specifically involving the unjustified termination of D.C. government employees, attorney's fees incurred in successfully challenging that termination are awarded in the same way in which they may be awarded under the FBPA. *Surgent*, 683 A.2d at 495; see also *District of Columbia M.P.D. v. Broadus*, 560 A.2d 501 (D.C. 1989). Here, in both Arbitration Awards A and B, the arbitrators agreed that Officer Butler was wrongfully terminated resulting in loss of pay and entitling him to the remedies provided by the FBPA. However, Officer Butler was somehow denied those remedies, *contrary to law*. [Emphasis included].

Although the Arbitrator first denied Officer Butler's claim for attorney's fees, he after admitted that this was a mistake of law. In Arbitration Award B, Mr. Kendellen denied Officer Butler's claim because "such would be an extraordinary remedy, justified only by a party's egregious actions." See Ex. B at 27 n. 25. However, on May 13, 2009, in a letter to counsel for the parties, Mr. Kendellen candidly admitted:

I have reviewed the parties' submissions and have concluded that when I denied attorney's fees, I relied upon incorrect considerations in reaching my ruling. ... It is now clear to me that I failed to recognize that as to attorney's fees, very different considerations are applicable in a public sector matter from those in my prior experience in the private sector.

Therefore, while it is not possible to predict at this point whether or not I would have reached the same determination if I had applied the correct analysis, it is clear that the analysis I conducted did not consider the appropriate factors. [Emphasis included].

Ex. I at 4 (emphasis added). The Arbitration Award must be reversed as to fees, when the arbitrator himself admits that his decision is contrary to law and public policy.

Arbitration Award C is contrary to law also because it incorrectly applies the *functus officio* doctrine. *Functus officio* provides that an arbitrator's jurisdiction ends when a final award is issued. Elkouri & Elkouri, How Arbitration Works, (6th ed. 2003). This doctrine does not apply because the arbitrator still had jurisdiction, and the award was not final. Mr. Kendellen explicitly retained jurisdiction, and even if he had not, "a request for award of attorneys' fees under authority of the Back Pay Act is permissible even if the arbitrator did not reserve jurisdiction over the case after the delivery of the award." *Id.* At 330, n. 179 (citing *Department of the Navy, Naval Weapons Station*, 113 LA 1214 (Lubic 2000); *Vandenberg Air Force Base*, 106 LA 108 (Feldman, 1996)). Moreover, by filing a motion to reconsider the issue of attorney's fees, the Arbitration Award was not final as to the attorney's fees issue, it was being *reconsidered*. Therefore the doctrine of *functus officio* cannot apply. [Emphasis included].

Another reason that the doctrine of *functus officio* does not apply is that this situation falls into one of the exceptions to the doctrine. Those exceptions include when the arbitrator corrects a mistake that is apparent on the fact of the award, and when he clarifies an ambiguity in the award.

(Request at pgs. 7-9).

Respondent states in its opposition that:

[t]he Agency shows that the Union is not entitled to any attorneys' fees. First under the terms of the parties' collective bargaining agreement, each party had the right to legal assistance at its own expenses. The Union's request for attorneys' fees is inconsistent

with the parties' collective bargaining agreement. Second, the Arbitrator has held twice that the Union has no right to attorney fees.

The parties' agreement on this issue is incorporated in the collective bargaining agreement at Article 10, Section 6(B). It provides:

"The hearing shall not be open to the public or persons not immediately involved unless all parties mutually agree to such. All parties shall have the right, at their own expense, to legal and/or stenographic assistance at this hearing." [Emphasis added].

[Emphasis included].

Likewise, Article 10, §6(c) of the CBA states:

"The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision on the issue(s) presented and shall confine his/her decision to the precise issue(s) submitted for arbitration."

Once the Arbitrator issued his decision, the doctrine of *functus officio* attached and he could not go back and reconsider. He closed or terminated his own jurisdiction on the issue of attorney fees. The Arbitrator was conclusive and final about fees. That ended his power to consider attorney fees any more.

In his September 9, 2009 (EX 2) decision, the Arbitrator denied reconsideration and applied the doctrine of *functus officio*, relying on the binding authority DOC cited in its pleadings. The arbitrator's decision is binding authority on PERB. That authority bears repeating herein.

Furthermore, the mechanics of the arbitration process do not comport with the procedure espoused by the appellant. Arbitrators are not and never were intended to be amenable to the "remand" of a case for "retrial" in the same way as a trial judge. In *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, Judge Freedman made the critical distinction:

'It is an equally fundamental common law principle 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. The policy which lies behind this is an unwillingness to permit one who is *not a judicial officer* and *who acts informally and sporadically*, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion. The *continuity* of judicial office and the *tradition* which surround judicial conduct is *lacking* in the isolated activity of an Arbitrator, although even here the vast increase in the arbitration of labor disputes has created the office of the specialized professional Arbitrator.

Washington-Baltimore Newspaper Guild, Local 35 v. the Washington Post, 442 F.2d 1234, 1238-1239 (D.C. 1971) (emphasis and italics in original, internal citations omitted). See also, *AMEC CIVIL LLC v. Mitsubishi International Corp.*, 940 A.2d 131 (D.C. 2007).

The Federal Labor Relations Authority has applied the same doctrine. See, e.g., U.S. Department of Defense Dependents Schools and Overseas Education Association, 49 FLRA 120 (1994); *Navy Public Works Center, Norfolk, Virginia and Tidewater Virginia Federal Employees Metal Trade Council*, 35 FLRA 93 (1990); *General Services Administration and American Federation of Government Employees, Local 2600*, 34 FLRA 1123 (1990). All of these cases apply the *functus officio* doctrine and thus DOC's position that an arbitrator must forbear from involving himself in reconsidering attorney fees after he has specifically relinquished jurisdiction.

(Opposition at pgs. 1, 2, 4, 5, 6).

The Complainant's Motion to Strike the Agency's First Response contends that the Respondent's Opposition was submitted to the Board in an untimely manner. (Motion at p. 2). The Union states that it filed its Request on October 5, 2009, and that, pursuant to Board Rule 538.2, the response was due in 15 days. Respondent, however, did not file its Opposition until October 30, 2009, ten days beyond the due date of October 20, 2009. (Motion at pg. 2). Therefore, the Union requests that the Board strike the Agency's Opposition to its Request.

The Respondent states in its Response to Motion:

No prejudice occurs to FOP when PERB considers the prior pleading of October 30, 2009. No trial or hearing is upcoming that would put FOP at any disadvantage.

The arguments in the opposition are not new and cannot be a surprise to FOP.

In addition, because the ARR is merely a restatement of the Union's argument before the Arbitrator, DOC's response is a simple restatement of its response in the arbitration. FOP is fully aware of these arguments and has in no way suffered because of the filing of the opposition.

(Response to Motion at pgs. 2-3).

III. Discussion

In reviewing FOP's Arbitration Review Request, the Board first considers Complainant's motion to strike respondent's first response. Admittedly, the response is untimely. Nonetheless, the Board reserves the right to extend or reduce such time periods to effectuate the purposes of the CMPA.¹ In this instance, the Board has determined that striking an opposition that is ten days late, with no hearing date scheduled, would be overly detrimental to Respondent, and that allowing the opposition to be filed does not prejudice Complainant unfairly. Moreover, "[w]e have held that "[our] Rules exist to establish and provide notice of a uniform and consistent process for proceeding in matters properly within our jurisdiction. In this regard, we do not interpret our rules in such a manner as to allow form to be elevated over the substantive objective for which the rule was intended.'" *D.C. General Hospital and Doctors Council of the District of Columbia General*, 46 D.C. Reg. 8345, Slip Op. No. 493 at p. 3, PERB Case No. 96-A-08 (1996). Thus, the motion to strike is denied.

Secondly the Board must consider Complainant's allegation that *functus officio* does not apply. As the Respondent correctly states, through citation: "once an Arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing

¹ PERB Rule 501: The rules of the Board shall be construed broadly to effectuate the purposes and provisions of the CMPA. When an act is required or allowed to be done within a specified time by these rules, the Board, Chair or the Executive Director shall have the discretion, upon timely request therefore, to order the time period extended or reduced to effectuate the purposes of the CMPA, except that no extension shall be granted for the filing of initial pleadings.

more in regard to the subject matter of the arbitration." *Washington-Baltimore Newspaper Guild, Local 35 v. the Washington Post*, 442 F.2d 1234, 1238-1239 (D.C. 1971). In this instance, the arbitrator not only once, but twice made determinations as to attorneys' fees. His letter to the parties does not demonstrate a binding decision, and furthermore do not dispositively state that his decision itself was wrong, only that the way in which he reached his decision was incorrect. This is in no way a reversal of any decision, and such a reversal would be improper in any case through the doctrine of *functus officio*. As a result, the Complainant's allegations concerning the application of the *functus officio* doctrine is rejected.

Notwithstanding the fact that *functus officio* is applicable, when a party files an arbitration review request, the Board's scope of review is extremely narrow.² Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. If "the 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." D.C. Code § 1-605.02(6) (2001 ed.).

In the instant matter, the Complainant contends that the Arbitrator's Award is contrary to law and public policy because it incorrectly applies the provisions of the Federal Back Pay Act; specifically because the Arbitrator did not grant the Union's request for attorney fees. (Request at p. 7).

When determining whether an award is contrary to law and public policy, the Board has looked to the Court of Appeals decision in *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 901 A. 2d 784, where the Court stated that:

[N]o one disputes the importance of this governmental interest; the question remains whether it suffices to invoke the "extremely narrow" public policy exception to enforcement of arbitrator awards. *Am. Postal Workers*, 252 U.S. App. D.C. at 176, 789 F.2d at 8 (emphasis in original). Construing the similar exception in federal arbitration law, the Supreme Court has emphasized that a public policy alleged to be contravened "must be well defined and

² Board Rule 538.3 - Basis For Appeal - provides:

In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:

- (a) The arbitrator was without authority or exceeded the jurisdiction granted;
- (b) The award on its face is contrary to law and public policy; or
- (c) The award was procured by fraud, collusion or other similar and unlawful means.

dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L.Ed.2d 298 (1983) (citation and internal quotation marks omitted); see *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 63, 121 S. Ct. 462, 148 L.Ed.2d 354 (2000) (for exception to apply, the arbitrator's interpretation of the agreement must "run contrary to an explicit, well-defined, and dominant public policy"). Even where, in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L.Ed.2d 286 (1987), an employer invoked a "policy against the operation of dangerous machinery [by employees] while under the influence of drugs" a policy judgment "firmly rooted in common sense" the Supreme Court reiterated "that a formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award ... entered in accordance with a valid collective-bargaining agreement." *Id.* at 44, 108 S. Ct. 364.

Id. at pgs. 789-790.

In the present case, the Arbitrator determined that a remedy allowing for reimbursement of the Union's attorney fees:

would be an extraordinary remedy, justified only by a party's egregious actions. Such are not present in this long-running and complicated matter involving numerous difficult issues, amply demonstrated by the complexity and length of the [the Arbitrator's] decision herein. Moreover, nothing in either the party's conduct in this matter has indicated a flaunting or abuse of the arbitration process. Rather, both parties have presented positions that involved reasonable arguments made in good faith. Accordingly, the [Arbitrator] denies the costs and fees aspect of a remedy sought by the Union.

(Award dated 2/17/2009 at p. 27, n. 25).

The Board finds that the Arbitrator did not base his decision to deny attorney's fees based upon an application of the Federal Back Pay Act. Instead, the Arbitrator fashioned his remedy based upon his equitable authority. The Board also notes that neither the parties' CBA, nor the Federal Back Pay Act mandates its application in the formulation of an arbitrator's remedy. In *District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, 59 D.C. Reg. 3337, Slip Op. No. 820, PERB Case No. 05-A-02 (2006), the Board considered whether an arbitrator's award that did not offset interim earnings

from an award of back pay was contrary to law. In that case, the Arbitrator specifically determined his remedy of back pay utilizing the Federal Back Pay Act. The Board found that the Federal Back Act mandated an offset for interim earnings and granted the agency's arbitration review request on that issue. The Board held:

Also, we want to make it clear that by our holding in this case, we are not saying that an arbitrator cannot use his/her equitable power to deny a deduction for an offset of earnings; however, where an arbitrator expressly states (as he has in the present case) that he relied on a specific statute for awarding back pay and that statute expressly requires offset of earnings, the arbitrator must follow the statutory mandate.

Id. at p. 12.

In the instant matter, the Board finds that the Arbitrator did not expressly rely on the Federal Back Pay Act in deciding to deny the Union's request for attorney's fees. Instead, the record indicates that the Arbitrator relied on his equitable authority in making his determination. The Board has long recognized the applicability of the Federal Back Pay Act to District of Columbia employees and its application in arbitration awards. *International Brotherhood of Police Officers, Local 445 (On behalf of Officer Cecyl A. Nelson) and District of Columbia Office of Administrative Services*, 41 D.C. Reg. 1597, Slip Op. No. 300, PERB Case No. 91-A-05 (1992). We find, however, that there is no provision in the FBPA which mandates that an arbitrator grant attorney's fees. Instead, the provisions of the FBPA only indicate that a District of Columbia employee may be entitled to attorney fees under certain conditions.

We find that FOP has not cited any specific law or public policy that was violated by the Arbitrator's Award, or that mandated a different result. Here, the Arbitrator declined to award attorney's fees, not due to a misapplication of the FBPA, but based upon the equitable authority granted under the terms and conditions of the parties' CBA. We, therefore, decline FOP's request that we substitute the Board's judgment for the arbitrator's decision for which the parties bargained. FOP had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Instead, FOP merely disagrees with the Arbitrator's exercise of his equitable authority and cites no provision of the parties' CBA limiting that authority or mandating the application of the FBPA.

We have held that a disagreement with the Arbitrator's interpretation of the parties' collective bargaining agreement does not render an award contrary to law. See DCPS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 49 DCR 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. FOP's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. See University of the District of Columbia and UDC Faculty Association, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991).

Therefore, the Board finds that the basis for FOP's arguments only involves a statement made when the Arbitrator did not have jurisdiction in the case.³ The Board finds that the Complainant has not established cause for reversal of the Arbitrator's Award. Therefore, the Union's Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. This Arbitration Review Request is dismissed pursuant to Board Rule 538.1.
2. Fraternal Order of Police/Department of Corrections Labor Committee's Motion to Strike 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.

Jan. 31, 2011

³ See the Arbitrator's May 13, 2009 letter, quoted *supra* at pgs. 3-4.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-02 , Slip Opinion No. 1303 was transmitted *via* U.S. Mail and e-mail to the following parties on this the 3rd day of August, 2012.

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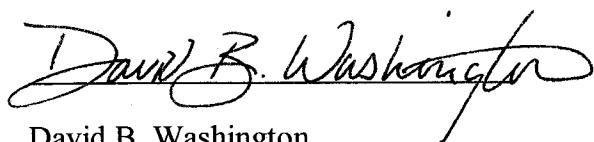
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