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

In the Matter of:)	
)	
District of Columbia)	
Department of Corrections)	
)	
Petitioner,)	PERB Case No. 10-A-14
)	
and)	Opinion No. 1381
)	
Fraternal Order of Police/Department)	
of Corrections Labor Committee,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

On August 23, 2012, the Board issued a Decision and Order in PERB Case No. 10-A-14, affirming an arbitration award, which was reviewed at the request of the District of Columbia Department of Corrections (“DOC”). *District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, 59 D.C. Reg. 12702, Slip Op. No. 1326, PERB Case No. 10-A-14 (2012).

On September 13, 2012, DOC, through its representative Office of Labor Relations and Collective Bargaining (“OLRCB”), filed a Motion for Reconsideration of the Board’s Decision and Order in Slip Opinion Number 1326. On September 20, 2012, the Fraternal Order of Police/Department of Corrections Labor Committee (“FOP”) filed an Opposition to the Motion for Reconsideration.

II. Background

On October 23, 2009, Arbitrator Joyce M. Klein (“Arbitrator”) issued an arbitration

award sustaining in part and denying in part charges against three correctional officers. The Arbitrator reduced the penalty from termination to a ten-day suspension for two officers and a fifteen-day suspension for the third officer. Slip Op. No. 1326, at 2. The Arbitrator retained jurisdiction over the issue of attorney's fees sought by the Union. *Id.* The Union submitted a motion for attorney's fees to the Arbitrator, and the Agency opposed the motion. *Id.* On January 12, 2010, in a Supplemental Award ("Award"), the Arbitrator granted the Union attorney's fees in the amount of \$52,206.00. *Id.*

On February 2, 2010, DOC filed an arbitration review request ("Request") in the above-captioned matter, asserting that the Arbitrator exceeded her authority in granting attorney's fees to the Union. Slip Op No. 1326, at 2 (citing Request at 3). FOP filed an Opposition to the Request. Slip Op. No. 1326, at 1.

On August 23, 2012, the Board denied the DOC's Arbitration Review Request, finding that "the Arbitrator's conclusions are based on a thorough analysis and cannot be said to have exceeded his (sic) authority." Slip Op. No. 1326, at 6.

DOC's Motion for Reconsideration of Opinion No. 1326 is before the Board for disposition.

III. Discussion

DOC argues in its Motion that the Board should reconsider its previous decision because (1) the "Award contradicts the express terms of the contract," and (2) the "Award creates added requirements that are not clearly stated in the contract." (Motion at 3-5). In its Opposition to the Motion for Reconsideration, FOP argues that (1) "DOC's Motion for Reconsideration is frivolous and improper," and (2) "FOP did not waive its Back Pay Act Rights." (Opposition to Motion at 2, 4).

DOC requests in its Motion that the Board "reconsider and reverse its Decision and Order that upheld the Arbitrator's award of attorney fees." (Motion at 2). In support of its argument, DOC quotes D.C. Code § 1-605.02(6), which states:

arbitration awards ... may be modified or set aside or remanded, in whole or in part, only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means.

The basis for DOC's Motion, however, is that "[u]nder District arbitration case law, the Arbitrator's Award conflicts with the express terms of the CBA." (Motion at 3) (citing *District of Columbia Public Schools and the Washington Teachers Union, Local 6, American Federation of Teachers, AFL-CIO, AAA, Case No. 16-390-626-06*). DOC's argument in its current Motion is nearly identical to its argument in its initial Arbitration Review Request. (Motion at 3-5, Request at 4-5). DOC has asserted no new case law or any other basis that contravenes the Board's decision in Opinion No. 1326.

In Opinion No. 1326, the Board considered DOC's argument with regards to *District of Columbia Public Schools and the Washington Teachers Union*. Slip Op. No. 1326, at 3 (citing Request at 4). As the Board stated, "the Board's scope of review is extremely narrow." Slip Op. No. 1326, at 3. See D.C. Code § 1-605.02(6). In addition, the Board stated: "The Board has long recognized the applicability of the Federal Back Pay Act to District of Columbia employees and its application in arbitration awards." Slip Op. No. 1326, at 4 (citing *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 (1995)).

DOC in both its Request and its Motion argues that the Parties have waived the right to attorney's fees. (Request at 4-5, Motion at 3-4). DOC argues that the interpretation of a similar provision by Arbitrator Michael Wolf in *District of Columbia Public Schools and Washington Teachers Union* is dispositive of the present issue, quoting Arbitrator Wolf as stating "[i]f [he] were to look to the Back Pay Act to override this language, [he] would then be violating Article VI(B)(2)(a), Step 4(3), which precludes an Arbitrator from deleting or modifying any of the provisions of the contract." (Motion at 4). Further, DOC argues that *D.C. Public Schools and WTU* "governs and defines the authority of arbitrators in cases in which unions seek attorney fees under the Back Pay Act." (Motion at 5). DOC reasons that the Arbitrator in the present case cannot have been said to have "arguably constru[ed] or appl[ied] the contract," because the "Arbitrator disregarded the plain and ordinary meaning of these express terms [of the contractual provision] and entered an Award that conflicts with those terms' most natural meaning." *Id.* (citing Slip Op. No. 1326). Therefore, DOC argues that "the Award does not draw its essence from the contract." (Motion at 5).

In Opinion No. 1326, the Board considered whether the Award drew its essence from the Parties' collective bargaining agreement ("CBA"). Slip Op. No. 1326, at 4-5. The Board found that there was no dispute that "the collective bargaining agreement committed this grievance to arbitration." Slip Op. No. 1326, at 5. Further, the Board found that the Arbitrator interpreted the contractual provision at issue in the Parties' CBA, and that the Arbitrator ascertained that the CBA did not provide a clear waiver of rights under the Back Pay Act. *Id.* The Board found that the Arbitrator's decision was a reasonable interpretation of the contract. *Id.* As stated in Opinion No. 1326, "[i]t is not for [this Board] or a reviewing court ... to substitute their view for the proper interpretation of the terms used in the [CBA]." Slip Op. No. 1326, at 5-6 (quoting *District of Columbia General Hospital v. Public Employee Relations Board*, No. 992 (D.C. Super. Ct. May 24, 1993)). Consequently, based on case law and the record, the Board found that the Award draws its essence from the Parties' CBA. *Id.* Thus, the Board found that "the Arbitrator's conclusions are based on a thorough analysis and cannot be said to have exceeded his (sic) authority." Slip Op. No. 1326, at 6.

DOC additionally argues in its Motion that the "Award imposes additional requirements that are not expressly provided in the CBA." (Motion at 5). DOC argues that the Union asserted that the contested CBA provision "is an embodiment of the American Rule which (sic) provides that parties ordinarily bear the cost of their own representation at a hearing." *Id.* (citing Opposition to Arbitration Request). In sum, DOC argues that an award of attorney's fees needed to be expressly written in the contract, in order for the Arbitrator to award attorney's fees.

(Motion at 5). DOC asserts that, in the absence of an express contractual provision for attorney's fees, the Award cannot draw its essence from the CBA. *Id.*

This assertion is incorrect. The Board found that the Arbitrator based her Award on her interpretation of the Parties' contract. Slip Op. No. 1326, at 5. The Board previously concluded that the Arbitrator reasonably interpreted the Parties' CBA; the Arbitrator's grant of authority; and the relevant laws, regulations, and case law. *Id.* Furthermore, the Board found that there was no provision of the Parties' CBA specifically limiting the equitable powers of the Arbitrator to grant attorney's fees under the Back Pay Act. *Id.* In addition, as stated in Opinion No. 1326, the Board has held that "an arbitrator does not exceed his authority by exercising his equitable powers, unless these powers are expressly restricted by the parties' collective bargaining agreement. *Id.* (citing *District of Columbia Metropolitan Police Department and fraternal Order of Police/Metropolitan Police Department Labor Committee*, __D.C. Reg.__, Slip Op. No. 933, PERB Case No. 07-A-08 (2008)). In its Motion, DOC has not provided any new evidence or legal precedent that requires the Board to overturn the Arbitrator's Award. Therefore, the Board finds that the Agency merely disagrees with the Arbitrator's interpretation.

The Board has long held that by agreeing to submit the resolution of a grievance to arbitration, it is the arbitrator's interpretation, not the Board's, for which the parties have bargained. See *University of the District of Columbia and University of the District of Columbia Faculty Association*, 39 D.C. Reg. 9628, Slip Op. No. 320, PERB Case No. 92-A-04 (1992). 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 on which the decision is based." *D.C. Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D.C. Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004). The "Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." *District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union 246*, 34 D.C. Reg. 3616, Slip Op. No. 157, PERB Case No. 87-A-02 (1987).

In light of the Board's thorough analysis in Slip Op. No. 1326, it is clear that the arguments raised by DOC in its Motion for Reconsideration were made, considered, and rejected. Moreover, the precedent relied on by the Board has not been reversed by the courts. Thus, DOC's Motion for Reconsideration is merely a disagreement with the Board's determination in this case. The Board has repeatedly held that a motion for reconsideration cannot be based upon mere disagreement with its initial decision. See *AFGE Local 2725 v. D.C. Department of Consumer and Regulatory Affairs & Office of Labor Relations and Collective Bargaining*, 59 D.C. Reg. 5041, Slip Op. No. 969, PERB Case No. 06-U-43 (2012); *D.C. Department of Human Services and Fraternal Order of Police/Department of Human Services Labor Committee*, 52 D.C. Reg. 1623, Slip Op. No. 717, PERB Case Nos. 02-A-04 and 02-A-05 (2003); *D.C. Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (Shepherd)*, 49 D.C. Reg. 8960, Slip Op. No. 680, PERB Case No. 01-A-02 (2002); *AFSCME Local 2095 and AFSCME NUHHCE and D.C. Commission*

on Mental Health Services, 48 D.C. Reg. 10978, Slip Op. No. 658, PERB Case No. 01-AC-01 (2001).

Therefore, for the reasons discussed above, the Board must deny DOC's Motion for Reconsideration.

ORDER

IT IS HEREBY ORDERED THAT:

1. DOC's Motion for Reconsideration is denied.
2. Pursuant to Board Rule 559.3, this Decision and Order is final upon issuance.

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

April 30, 2013

CERTIFICATE OF SERVICE

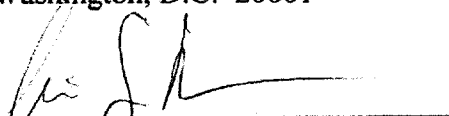
This is to certify that the attached Decision and Order in PERB Case No. 10-A-14 was transmitted via LexisNexis File & Serve to the following parties on the 1st of May, 2013.

J. Michael Hannon, Esq.
1901 18th Street, N.W.
Washington, D.C. 20009

E-Service

Jonathon O'Neill, Esq.
Kevin M. Stokes
D.C. Office of Labor Relations and Collective Bargaining
441 4th Street, N.W., Suite 820 North
Washington, D.C. 20001

E-Service



Erica J. Balkum, Esq.
Attorney-Advisor
Public Employee Relations Board
1100 4th Street, S.W.
Suite E630
Washington, DC 20024
Telephone: (202) 727-1822
Facsimile: (202) 727-9116