

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

)	
In the Matter of:)	
)	
District of Columbia Metropolitan Police Department)	
)	
Employer)	PERB Case No. 23-A-05
)	23-A-06 ¹
v.)	
)	Opinion No. 1852
Fraternal Order of Police/Metropolitan Police Department Labor Committee)	
)	
Labor Organization)	
)	

DECISION AND ORDER

I. Statement of the Case

These consolidated arbitration review requests arise out of a class grievance submitted to arbitration over the Metropolitan Police Department’s (MPD) alleged failure to pay bargaining unit members’ owed wages, retention pay and retroactive pay in violation of the parties’ collective bargaining agreement.² The grievance was granted in part and denied in part by the Arbitrator’s award (Award).³

MPD filed an arbitration review request (MPD Request) asserting that the Award is contrary to: (1) the federal and District Anti-Deficiency Acts; and (2) statutory and case law

¹ *FOP/MPD Labor Comm. v. MPD* (2023).

² Award at 5.

³ Award at 46.

regarding the Board's exclusive jurisdiction.⁴ MPD argues, alternatively, that the Award lacks sufficient detail and clarity and, therefore, should be remanded to the Arbitrator.⁵

The Fraternal Order of Police/MPD Labor Committee (FOP) filed an arbitration review request (FOP Request) arguing that the Award is contrary to law and public policy based on the Arbitrator's improper determination that he lacked authority to award liquidated damages under the Fair Labor Standards Act (FLSA).⁶ FOP requested that the Board vacate that portion of the Award and remand the issue of liquidated damages back to the Arbitrator with instructions to consider and rule on the merits of the request.⁷

Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Board concludes that the Award is not contrary to law and public policy.⁸ Therefore, the Board denies MPD and FOP's Requests.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. The parties negotiated a collective bargaining agreement (CBA) effective from October 1, 2020, through September 30, 2023.⁹ The CBA includes new disciplinary policies and wage increases for each year covered by the contract.¹⁰ The CBA further includes base retention differentials—additional wage increases based on reaching a certain number of years of service in MPD.¹¹ The parties negotiated changes in the calculation and system of payment for overtime.¹² While previous CBAs between the parties explicitly required that payment of overtime comply with the requirements of the FLSA, the new CBA's overtime requirements do not reference the FLSA.¹³

⁴ MPD Request at 5. MPD has not asserted that the Award violates any public policy and, therefore, has waived the public policy argument.

⁵ MPD Request at 5. The Board finds that MPD's claim regarding the sufficiency of the Arbitrator's explanations of his findings and orders is wholly without merit and does not relate to any of the permissible grounds for the Board to overturn an arbitration award under the Comprehensive Merit Personnel Act (CMPA). See D.C. Official Code § 1-605.02(6). See also *FOP/MPD Labor Comm. (on behalf of Officer Timothy Harris) v. MPD*, 59 D.C. Reg. 11329, Slip Op. No. 1295 at 6, PERB Case No. 09-A-11 (2012) (holding that an arbitrator is not required to explain the reason for their decision nor is an award unenforceable merely because they fail to explain certain bases for their decision).

⁶ FOP Request at 3, 11.

⁷ FOP Request at 3, 15.

⁸ Although MPD appears to argue that the Arbitrator exceeded his authority by intruding upon the Board's exclusive jurisdiction over claims of unfair labor practice violations, MPD includes this assertion within its argument that the Award is contrary to law. MPD Request at 5. However, the Board finds, *infra*, that the Arbitrator did not exceed his jurisdiction by finding that MPD violated the parties' CBA and the CMPA.

⁹ Award at 3.

¹⁰ Award at 3.

¹¹ Award at 3.

¹² Award at 3.

¹³ Award at 3.

The FOP membership ratified the CBA on July 27, 2022.¹⁴ On October 31, 2022, the CBA was submitted to the Council of the District of Columbia and set to be automatically approved on November 27, 2022, if there was no further action by the Council.¹⁵ The CBA was deemed automatically approved on November 27, 2022.¹⁶

MPD implemented the new disciplinary policies covering FOP bargaining unit members at midnight on November 27, 2022, but failed to implement the wage increases at that time.¹⁷ FOP requested information and updates on the implementation of the new wages and retroactivity multiple times to no avail.¹⁸

On January 9, 2023, FOP filed a class grievance alleging that MPD had violated Articles 1, 4, 35, 36 and 46 of the parties' CBA.¹⁹ FOP asserted that MPD had violated the wage provisions of the CBA and failed to pay wages, retention pay and retroactivity owed to FOP bargaining unit members.²⁰ FOP further asserted that MPD's "willful violations"²¹ warranted the award of liquidated damages and four percent (4%) interest per annum on all new wages, retention pay and retroactive pay from November 27, 2022, until the date of payment, as well as attorney fees and reasonable costs.²²

B. Arbitrator's Findings

The parties each submitted a statement of the issues to the Arbitrator. MPD asserted that the grievance was not arbitrable, asserting that, if the arbitrator determined the grievance arbitrable, the issue was whether "the District's implementation of the negotiated wage increase violate[d] Article 35 and 36 [sic] of the parties CBA?"²³ FOP submitted two issues: (1) "Whether the MPD's failure to implement the wage increases owed to the D.C. Police Union members under the parties' CBA violated Articles 1, 4, 35, 36 and 46, as well as applicable laws, rules and regulations;"²⁴ and (2) "Whether the MPD's failure to pay D.C. Police Union members retroactive pay for compensation increases owed to them under the parties' CBA violated Articles 1, 4, 35, 36 and 46, as well as applicable laws, rules and regulations."²⁵

The Arbitrator determined that MPD had not timely raised the issue of arbitrability as required by the parties' CBA, and thereby had waived arbitrability as a defense.²⁶

¹⁴ Award at 42.

¹⁵ Award at 4.

¹⁶ Award at 4.

¹⁷ Award at 4.

¹⁸ Award at 4-.

¹⁹ Award at 5.

²⁰ Award at 5.

²¹ Award at 5.

²² Award at 5.

²³ Award at 2. While the Award reproduces the text of MPD's arbitrability issue statement, the Arbitrator found, *supra*, that MPD first presented this issue at the opening of its case in chief at the arbitration hearing. Award at 42. *See also* Arbitration Hearing Tr. 189:19-191:21, 193:8-13, May 10, 2023.

²⁴ Award at 3.

²⁵ Award at 3.

²⁶ Award at 42 (citing CBA, Art. 19, Sec. E (3) (2020)).

Further, the Arbitrator addressed Articles 1, 4, 35, 36 and 46 of the parties' CBA, as well as FOP's requests for liquidated damages, attorney fees and costs.²⁷ The Arbitrator found that "MPD could have been more pro-active in preparation for the implementation of the new wages, retention pay and retroactivity,"²⁸ and held that MPD acted in bad faith and violated Article 1 of the CBA.²⁹

The Arbitrator further noted that MPD "requests that the Arbitrator ignores [sic] many years of precedent and past practice that the CBA is an enforceable right"³⁰ and that Article 4 of the CBA is modified by the negotiated language in Articles 35 and 36. The Arbitrator found that MPD had violated Articles 4, 35, and 36 of the CBA. The Arbitrator found that November 27, 2022, the date the Council approved the CBA, constituted the date of final determination under Article 46, which required MPD to make the negotiated payments under the new CBA within sixty (60) days of the date of approval.³¹ The Arbitrator granted FOP the requested four percent (4%) interest on all retroactive payments from sixty (60) days after the date of final determination to the date of full payment.³²

The Arbitrator, despite noting that FOP's arguments regarding MPD's bad faith were "numerous and quite compelling,"³³ found that he did not have authority to award liquidated damages under the FLSA.³⁴ However, the Arbitrator found that the award of attorney fees and costs was appropriate in this case.³⁵

In sum, the Arbitrator found that MPD violated Articles 1, 4, 35, 36 and 46 of the parties' CBA and applicable laws, rules and regulations, and therefore sustained FOP's class grievance against MPD.³⁶ The Arbitrator denied FOP's request for liquidated damages but granted FOP's requests for reasonable attorney fees and costs.³⁷

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an 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

²⁷ Award at 42-45.

²⁸ Award at 43.

²⁹ Award at 43. The Arbitrator erroneously stated that MPD violated "Article 2" at the end of the Award's discussion of Article 1 of the CBA, but clearly intended to find a violation of Article 1.

³⁰ Award at 44.

³¹ Award at 45.

³² Award at 46.

³³ Award at 46.

³⁴ Award at 46.

³⁵ Award at 46.

³⁶ Award at 43-46

³⁷ Award at 46.

means.³⁸ The parties request the Board’s review of the Award on the grounds that the Award is contrary to law and public policy.

The two arbitration review requests share similar issues and involve the same parties and are therefore consolidated.³⁹

A. The Award is not contrary to law.

MPD requests review of the Award on the grounds that it violated both federal and District Anti-Deficiency Acts and the Board’s own statutory powers.⁴⁰ FOP requests review of the Award on the grounds that it violated “the well-settled law that arbitrators maintain a wide degree of latitude and flexibility in fashioning remedies for CBA violations.”⁴¹ The Board’s review of an arbitration award on the grounds that it is contrary to law and public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to an arbitrator’s ruling.⁴² The narrow scope limits potentially intrusive judicial reviews under the guise of public policy.⁴³ The petitioning party has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.”⁴⁴ The D.C. Court of Appeals has reasoned that “[a]bsent a clear violation of law[,] one evident on the face of the arbitrator’s award, the [Board] lacks authority to substitute its judgment for the arbitrator’s.”⁴⁵ The Board may not modify or set aside an Award as contrary to law in the absence of a clear violation on the face of the Award.⁴⁶

MPD argues that the Award is contrary to the federal and District Anti-Deficiency Acts and the Board’s authority as defined by precedent and the CMPA.⁴⁷ MPD argues that the Arbitrator erred in finding that MPD acted in bad faith by not pro-actively preparing for the implementation of the CBA’s wage increases, retention pay and retroactivity prior to the Council’s approval of the CBA.⁴⁸ MPD asserts that it could not take any action to implement the CBA prior to the Council’s approval without violating the District Anti-Deficiency Act⁴⁹ or its federal equivalent.⁵⁰

³⁸ D.C. Official Code § 1-605.02(6).

³⁹ See *MPD v. FOP/MPD Labor Comm.*, 59 D.C. Reg. 12663, Slip Op. No. 1317 at 3, PERB Case Nos. 10-A-23 and 10-A-24 (2012).

⁴⁰ MPD Request at 5.

⁴¹ FOP Request at 6.

⁴² *MPD v. FOP/MPD Labor Comm.*, 59 D.C. Reg. 3959, Slip Op. No. 925 at 12, PERB Case No. 08-A-01 (2012).

⁴³ *Id.* at 12.

⁴⁴ *Id.* at 12.

⁴⁵ *Dep’t of Youth Rehabilitation Services and DCHR v. FOP/YRS Labor Comm.*, 68 D.C. Reg. 46, Slip Op. No. 1800 at 8, PERB Case No. 21-A-09 (2021) (citing *FOP/MPD Labor Comm. v. D.C. PERB*, 973 A.2d 174, 177 (D.C. 2009)).

⁴⁶ *MPD v. FOP/MPD Labor Comm.*, 64 D.C. Reg. 13401, Slip Op. No. 1644 at 3, PERB Case No. 17-A-09 (2017).

⁴⁷ MPD Request at 5, 8.

⁴⁸ MPD Request at 7.

⁴⁹ MPD Request at 6. See D.C. Official Code § 47-355.02(2), which prohibits D.C. agencies from “[o]bligat[ing] the District for the payment of money before an appropriation is made or before a certification of the availability of funds is made, unless authorized by law.”

⁵⁰ MPD Request at 6. See 31 U.S. Code § 1341(a)(1), which prohibits “officers or employees of the United States Government or of the District of Columbia government” from “mak[ing] or authoriz[ing] an expenditure or obligation

The Arbitrator did not base his finding of bad faith on an expectation that MPD should have taken any action that would have violated the Anti-Deficiency Acts. Rather, the Arbitrator suggested that MPD could have prepared to implement these compensation increases more expediently while waiting for Council approval. Even if MPD has correctly asserted that it could take no action to implement these increases prior to the Council's approval of the CBA, that does not account for the delays and incongruent explanations of the delays after November 28, 2022. MPD's failure to take action to implement the negotiated compensation increases after the CBA's approval belies MPD's suggestion that the delays in implementation of the compensation increases resulted from an attempt to comply with the Anti-Deficiency Acts. The Arbitrator noted that MPD successfully implemented new disciplinary policies at midnight on the day the Council approved the CBA by default.⁵¹ The Arbitrator further noted conflicting testimony in MPD's accounting of the timeline for implementation of the compensation increases—for example, the Office of Labor Relations and Collective Bargaining's January 4, 2023 memorandum stating that the CBA "will be deemed approved by the D.C. Council effective November 28, 2022" and that "in preparation to implement the terms, immediate action is required."⁵² The Arbitrator determined that the January 4, 2023 memorandum directly conflicted with other statements by MPD to FOP regarding the timeline for implementation of these compensation increases.⁵³ The Arbitrator carefully examined the inconsistencies in the record regarding MPD's statements to FOP and explanations for delays in the implementation of the negotiated compensation increases. The Arbitrator clearly specified the evidence he weighed in determining that MPD acted in bad faith and violated the parties' CBA by failing to implement the CBA as negotiated by the parties. The Arbitrator's finding that MPD acted in bad faith by failing to timely implement the negotiated compensation increases does not suggest that MPD should have violated the Anti-Deficiency Acts to implement the compensation increases and is not on its face contrary to law.

MPD further argues that the Award is contrary to "statutory and case law regarding [the Board's] exclusive jurisdiction [over unfair labor practice claims]."⁵⁴ MPD argues that, by stating that the Board "has held that a party's refusal to implement a collective bargaining agreement constitutes a failure to bargain in good faith and an unfair labor practice,"⁵⁵ the Arbitrator has usurped the Board's primary and exclusive jurisdiction to determine unfair labor practices, and therefore the Award violates the Board's enabling legislation.⁵⁶ The Board has upheld arbitration awards sustaining grievances involving unfair labor practices.⁵⁷ The Arbitrator's discussion of MPD's violation of the CMPA does not render the Award contrary to law.

exceeding an amount available in an appropriation or fund for the expenditure or obligation" or "involv[ing] either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

⁵¹ Award at 4.

⁵² Award at 18.

⁵³ Award at 18.

⁵⁴ Award at 8.

⁵⁵ Award at 43-44.

⁵⁶ MPD Request at 10.

⁵⁷ *Government of the District of Columbia v. AFGE, District 14, AFSCME, Council 20, Laborers' International Union of North Am., Local 960, CWA, Local 2336, and Nat'l Assoc. of Gov't Empl./Int'l Brotherhood of Police Officers*, 33 D.C. Reg. 3918, Slip Op. No. 142 at 3, PERB Case No. 86-U-03 (1986).

In its separate request, FOP argues that the Arbitrator erroneously found that “granting any such award of [liquidated] damages was outside of his authority,”⁵⁸ and that this finding is contrary to established Board precedent that “arbitrators have broad discretion and authority in fashioning appropriate relief and remedies.”⁵⁹ FOP relies on a Board decision upholding an arbitration award granting liquidated damages calculated under the FLSA and ruling that “the FLSA ‘was not specifically excluded from the CBA,’ and, therefore, liquidated damages were appropriate and within the arbitrator’s authority to award.”⁶⁰ FOP further cites D.C. Court of Appeals and Supreme Court precedent supporting the same discretion and authority for arbitrators.⁶¹

FOP correctly asserts that arbitrators have broad discretion and authority to fashion appropriate remedies. However, that discretion applies equally to an arbitrator’s determination of the limit of their authority in a particular case or to an arbitrator’s decision to decline to award a requested remedy. The Board avoids intervention in arbitration awards even where an arbitrator arguably has made “serious, improvident, or silly errors”⁶² regarding authority or jurisdiction if the arbitrator has confined themselves to resolving the dispute committed to arbitration and has arguably construed or applied the contract in resolving legal and factual disputes.⁶³

Here, the Arbitrator based his finding that he did not have jurisdiction to award liquidated damages on his interpretation of the parties CBA. The Arbitrator noted the parties’ express removal of any reference to the FLSA or compliance with the FLSA in the new CBA⁶⁴ and emphasized MPD’s argument that the CBA did not explicitly grant authority to consider liquidated damages under the FLSA as a remedy.⁶⁵ Even if the Arbitrator erred in determining he lacked authority to consider liquidated damages under the FLSA in this case, the Award here still “draws its essence” from the parties’ collective bargaining agreement.⁶⁶ Furthermore, the Board has previously held that arbitrators do not exceed their authority by exercising their equitable power, unless it is expressly *restricted* by the parties’ CBA, determining that an agency’s violation of a CBA “did not mandate an exercise of [their] equitable power to formulate a remedy,”⁶⁷ or by “neglect[ing] to address the issue of [a requested] remedy.”⁶⁸ An arbitrator’s broad discretion to fashion appropriate remedies applies equally to a decision to decline an award of a particular remedy. Nothing in the parties’ CBA expressly restricts the Arbitrator’s exercise of his equitable

⁵⁸ FOP Request at 5.

⁵⁹ FOP Request at 5.

⁶⁰ FOP Request at 8-9.

⁶¹ FOP Request at 6-7.

⁶² See *DPW v. AFG, AFL-CIO, Local 631*, 69 D.C. Reg. 12569, Slip Op. No. 1819 at 3, PERB Case No. 22-A-04 (2022)(citing *DYRS and DCHR v. FOP/DYRS Labor Comm.*, 68 D.C. Reg. 46, Slip Op. No. 1800 at 6, PERB Case No. 21-A-09 (2021)(holding that arbitrator did not exceed jurisdiction in deciding an issue stipulated by the parties where the language of the CBA did not expressly limit the arbitrator’s equitable power)).

⁶³ *Id.* at 2 (citing *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. No. 1480 at 5, PERB Case No. 14-A-01 (2014)).

⁶⁴ Award at 3.

⁶⁵ Award at 45.

⁶⁶ *DPW v. AFG, AFL-CIO, Local 631* at 2 (citing *DYRS and DCHR v. FOP/DYRS Labor Comm.*).

⁶⁷ *FOP/MPD Labor Comm. (on behalf of Officer Timothy Harris) v. MPD* at 5-6.

⁶⁸ *Id.* at 6.

power to decline, nor requires that he address, the issue of liquidated damages or adopt FOP's requested remedy, even while finding in FOP's favor.⁶⁹

FOP has not met its burden to present an applicable law that the Award violates on its face.⁷⁰ Furthermore, the Arbitrator confined the Award to his construal of the contract in order to resolve the dispute committed to arbitration and reasonably relied on his interpretation of the removal of reference to the FLSA or FLSA compliance in order to determine whether or not he had authority to consider a liquidated damages remedy.

For the reasons stated above, the Board finds that the Award is not on its face contrary to law.

IV. The Award is not contrary to public policy.

FOP also requests review on the grounds that the Award is contrary to public policy "favoring resolution of disputes submitted to arbitration."⁷¹ The Board's scope of review is "particularly narrow concerning the public policy exception."⁷² The petitioning party must first "identify a public policy that 'must be [well-defined] and dominant, and ascertained from reference to the laws and legal precedents and not from general considerations of supposed public interests.'"⁷³ Once a well-defined public policy is identified, the petitioner must demonstrate that the arbitration award "compels" the violation of this explicit, well-defined public policy.⁷⁴ The D.C. Court of Appeals has noted that "the issue is...whether enforcing the arbitral award would [violate public policy]."⁷⁵

⁶⁹ *Id.* at 5-6.

⁷⁰ Rather, FOP has presented Board precedent on which the Arbitrator arguably could have relied if he chose to grant FOP's request for liquidated damages. However, the Board has held that "each arbitration stands on its own, and an arbitrator's decision does not bind another arbitrator to that decision. In bargaining for an arbitrator to make findings of fact and to interpret the Agreement, the parties chose a forum that is not bound by precedent." See *MPD v. FOP/MPD Labor Comm.*, 59 D.C. Reg. 6881, Slip Op. No. 1210 at 3, PERB Case No. 10-A-11 (2012).

⁷¹ FOP Request at 11. FOP also includes arguments that the Arbitrator's refusal to reach the merits of FOP's request for liquidated damages violates public policies in favor of "enforcing arbitration agreements," FOP Request at 13, and the timely compensation of "employees." FOP Request at 14. Considering the case here does not concern the enforcement of an arbitration award, but rather requests to overturn one, the former policy is irrelevant. And considering that the Arbitrator here has ordered payment of MPD employees' bargained for wage increases, retention pay and retroactive pay, despite declining to award further liquidated damages, the latter policy is also irrelevant.

⁷² *FOP/MPD Labor Comm. v. MPD*, 70 D.C. Reg. 9645, Slip Op. No. 1843 at 11, PERB Case No. 23-A-01 (2023).

⁷³ *Id.* at 11 (citing *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at 2, PERB Case No. 10-A-20 (2012) (internal quotations omitted)).

⁷⁴ *Id.* at 11.

⁷⁵ *Id.* at 11 (citing *MPD v. PERB*, 282 A.3d 598, 606 (D.C. 2022)).

FOP argues that the Award violates general public policy favoring arbitration.⁷⁶ FOP cites a D.C. Court of Appeals case remanding the denial of an arbitration review request back to the Board with instructions to further remand the request back to the arbitrator.⁷⁷ In *D.C. PERB v. FOP/MPD Labor Comm.*, the D.C. Court of Appeals held:

We do not read the arbitrator's refusal to reach the merits of FOP's claim as an interpretation of the CBA. Instead, his refusal to reach the merits because of a hyper technical defect that did not disguise the actual grievance and misled no one as to its nature, far from promoting the parties' bargain, erects an artificial barrier to resolution of the dispute in the manner they have chosen.⁷⁸

To the contrary, here the Arbitrator has not relied on errors in the parties' citations of their own CBA, but on his interpretation of his authority under the parties' CBA. The Award in this case does not violate any general public policy favoring the resolution of disputes in arbitration, as the Award has resolved the dispute largely in FOP's favor. Therefore, the Board finds that the Award is not on its face contrary to public policy.

V. Conclusion

For the reasons stated, the Board rejects both parties' arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, the requests are denied, and the matter is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review requests in PERB Case Nos. 23-A-05 and 23-A-06 are consolidated;
2. The arbitration review requests are denied; and
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons and Peter Winkler.

November 29, 2023

Washington, D.C.

⁷⁶ FOP Request at 12.

⁷⁷ FOP Request at 11-12 (citing *D.C. PERB v. FOP/MPD Labor Comm.*, 987 A.2d 1205, 1209 (D.C. 2010).

⁷⁸ *D.C. PERB v. FOP/MPD Labor Comm.* (2010) at 1209.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration within fourteen (14) days, requesting the Board to reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provide thirty (30) days after a Board decision is issued to file an appeal.