

review both the Award and Supp. Award deciding a grievance filed by the University of the District of Columbia Faculty Association (UDCFA). The Arbitrator initially sustained the grievance, which alleged a breach of a contractual provision concerning the receipt of within-grade increases by bargaining-unit faculty members for the 1989-90 academic year. The Arbitrator subsequently made a supplemental award of interest (at 9 percent per annum) on "the difference between the amounts actually paid and the amounts which should have been paid in compliance with the Award." On December 27, 1990, UDCFA filed an Opposition to Arbitration Review Request.

UDC contends that (1) the Arbitrator exceeded his jurisdiction and (2) the Award and Supp. Award are contrary to law and public policy and should therefore be set aside.

The case before the Arbitrator concerned the interpretation of a provision in the parties' collective bargaining agreement, Article XVIII C(2) (see Appendix). The issue, as framed by the Arbitrator, was whether the contract provision "creates an obligation of the University to grant within-grade step increases to all faculty members for academic [year] 1989-90, subject to discharge of that obligation with respect to an individual faculty member by that faculty member receiving a rating of 'Competent' or 'Less than Satisfactory' on his or her performance in academic [year] 1988-89, or, [w]hether that language makes evaluation pursuant to Article XV for performance in academic [year] 1988-89 a condition precedent to the University's obligation to grant within-grade step increases for academic [year] 1989-90 to faculty members in any event." (Award at 9) In deciding that issue the Arbitrator also addressed the question whether UDC had waived and removed from consideration defenses for denial of the grievance pursuant to Article IX D(6) and E(3) (see Appendix).

The Arbitrator concluded that Article XVIII, Section C(2) "impose[d] an obligation on the University to grant a within-grade step increase to each faculty member for the academic year 1989-90" except where a faculty member received an evaluation for the academic year 1988-89 of "Competent" or "Less than Satisfactory." (Award at 18) In reaching his conclusion, the Arbitrator sustained UDCFA's objection to his consideration of two UDC defenses which he determined were not stated in UDC's answer to the grievance and were therefore removed from consideration by Article IX Sections D(6) and E(3). Based on these findings and conclusions, and the parties' stipulation that "no faculty member was evaluated on his performance for the academic year 1988-89" or "received a within-grade step increase in salary for the academic year 1989-90", the Arbitrator determined as a remedy that UDC must "award each faculty member a

contract for the academic year 1989-90...reflecting the within-grade step increase for academic [year] 1989-90 required by Article XVIII, Section C(2)..." (Award at 17). The Arbitrator further directed UDC "to pay to each faculty member backpay compensation for the difference in salary and benefits which should have been paid had the University complied with Article XVIII, Section C(2) ..." (Award at 17-18). The Arbitrator did not refer to or rule expressly on UDCFA's request for interest, which request was made in the grievance and repeated at all relevant times thereafter.

However, the matter did not rest there. Upon the request of UDCFA and over the objection of UDC, the Arbitrator subsequently reopened the arbitration hearing to "complete the Award by ruling and deciding the issue of an award of interest on the monetary award to the grievant faculty members in the original award." (Supp. Award at 1.) In his decision to reopen the arbitration hearing the Arbitrator reasoned that "[t]he original submission conferring jurisdiction did specify the issue [of interest]; I did not decide the issue; and the Award, therefore, is incomplete because it failed to decide all the issues submitted." (Supp. Award at 6.) The Arbitrator concluded that an award of interest was appropriate and issued a supplemental award granting interest at the rate of 9 percent per annum.

Under the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Sec. 1-605.2(6), the Board is authorized to, "[c]onsider appeals from arbitration awards pursuant to grievance procedures: Provided, however, that such awards may be reviewed only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy.... Provided further, that the provisions of this paragraph shall be the exclusive method for reviewing the decision of an arbitrator concerning a matter properly subject to the jurisdiction of the Board, notwithstanding any provision of the District of Columbia Uniform Arbitration Act (D.C. Code, Sec. 16-4301 and 16-4319)".

UDC contends that the Arbitrator exceeded his jurisdiction by (1) basing his Award "on factors beyond and contrary to the terms of the relevant collective bargaining agreement;" (2) "refusing to consider [UDCFA]'s role in obstructing the faculty evaluation process"; (3) "interpreting the collective bargaining agreement so as to infringe upon management's right to assign work under Section 1-618.8(a) of the District of Columbia Code," (4) "reopening and modifying his initial Decision and Award without the mutual consent of the parties" and (5) "awarding interest as part of the Award...[.]" UDC further contends that the Award and Supp. Award are contrary to law and public policy by (1) "awarding merit pay increases where no merit has been

shown and the failure to have evaluations was caused by [UDCFA]" and (2) "ordering [UDC] to pay interest at a rate in excess of four (4) percent per annum" in contravention of D.C. Code Sec. 28-3302. (Arb. Rev. Req. at 3-5)

The Board has reviewed the Arbitrator's findings and conclusions, the pleadings of the parties and applicable law and grants in part and denies in part UDC's Arbitration Review Request. The objections raised by UDC to the initial Award do not establish a statutory basis for review and we therefore deny its request with respect to that Award. However, we conclude that the Arbitrator exceeded his jurisdiction by reopening the initial Award and issuing the Supplemental Award.

I. The Arbitrator Did Not Exceed His Jurisdiction In The Initial Award Nor Is It Contrary To Law and Public Policy.

UDC first contends in its Memorandum of Points and Authorities that the Arbitrator exceeded his jurisdiction by relying in part on his personal experience that "evaluations are ultimately the administrative responsibility of the University." (Award at 15.) However, UDC fails to show how this observation by the Arbitrator determined his resolution of the issues presented so that the Arbitrator can be said to have exceeded his authority by "add[ing] to, subtract[ing] from, or modify[ing] [the parties' collective bargaining] Agreement" in contravention, as UDC argues, of Article IX E(4). Immediately following the quoted observation, the Arbitrator concluded that "... absent express provision, the conduct of the evaluation process is not, either expressly or necessarily by implication, as argued by the University, made a condition precedent to application of Article XVIII C(2) language." His ruling thus turned on the contract.

Next, UDC quarrels with the Arbitrator's refusal to consider certain grounds advanced by UDC for denying the grievance.^{3/} This ruling, as stated earlier, was based on the Arbitrator's conclusion that two contractual provisions, i.e., IX D(6) and E(3), served to waive UDC's right to raise the grounds at arbitration. (Award at 17.) UDC does not contend that the two contractual provisions were not before the Arbitrator for his consideration. UDC merely asserts that the Arbitrator's

^{3/} These grounds included, as stated in the Arb. Rev. Req. at 3-4: (1) "[UDCFA's] role in obstructing the faculty evaluation process" as "a condition precedent to awarding faculty merit pay increases" and (2) the "failure to have evaluations was caused by [UDCFA]."

conclusion is contrary to the plain language of these provisions. But, a party's disagreement with an arbitrator's interpretation of a provision in the parties' collective bargaining agreement does not mean that the arbitrator exceeded his jurisdiction. See, e.g., Department of Public Works and American Federation of State, County and Municipal Employees, Local 2091, 35 DCR 8186, Slip Op. No. 194, Case No. 87-A-08 (1988). We have further stated that this is the case even if the arbitrator misconstrued the contract, for it is the arbitrator's interpretation for which the parties bargained. University of the District of Columbia and UDC Faculty Association, 36 DCR 3639, Slip Op. No. 220, PERB Case No. 88-A-03 (1989).

UDC asserts in its third point that notwithstanding D.C. Code Sec. 1-618.17, which authorizes collective bargaining regarding compensation, what UDC contends is management's "ultimate authority" to determine which employees receive merit increases may not be limited by a bargaining agreement. Such authority, argues UDC, is rooted in management's statutory right to assign work under D.C. Code Sec. 1-618.8(a).^{4/} We find UDC's contention totally at odds with the CMPA where compensation, as UDC must acknowledge, is explicitly made negotiable. The Arbitrator's Award merely interprets duly negotiated provisions contained in the parties' collective bargaining agreement concerning compensation, i.e., within-grade increases. The Arbitrator clearly possessed such authority.

UDC's final contention for review of the initial Award is that by awarding merit increases without regard for actual merit, the Arbitrator has acted contrary to the compensation policy stated in D.C. Code Sec. 1-612.3(a)(3) that differences in pay for these employees "be maintained in keeping with differences in level of work and quality of performance." UDC, however, cites to nothing in the Arbitrator's Award or his interpretation of the provision at issue, i.e., Article XVIII C(2), that vitiates UDC's ability to act in conformance with D.C. Code Sec. 1-612.3(a)(3). On the contrary, the Arbitrator's decision leaves intact a means, i.e., performance evaluations, by which UDC may maintain this compensation policy with respect to faculty members.

^{4/} Federal Labor Relations Authority cases which UDC cites, finding the determination of merit increases for federal employees encompassed within management's right to assign work, have no relevance to the CMPA where, in contrast to the federal statute, compensation is negotiable. (See D.C. Code Secs. 1-602.6, 1-618.6 and 1-618.17.)

II. The Arbitrator Exceeded His Jurisdiction by Reopening the Arbitration Proceeding and Issuing a Supplemental Award on Interest.

It is undisputed that the Arbitrator reopened the arbitration following closing of the hearing and issuance of his Award. Nor is there any question about UDC's opposition to the reopening, which was formally reiterated at every opportunity (see footnote 1 of this Decision and Order and the Arbitrator's reiteration of the fact in his Supplemental Award). The Arbitrator had no authority to reopen the proceeding as he did, urged the University, because application of D.C. Code Sec. 16-4309 is "expressly precluded" by D.C. Code Sec. 1-605.2(6) and the parties' collective bargaining agreement forbids such an action without the consent of both parties. ^{5/}

We conclude, for the reasons set forth below, that the Arbitrator exceeded his jurisdiction in reopening the proceeding and issuing his Supplemental Award, so that the Award must be set aside.

Authority for the challenged action could derive only from statute or agreement. The claimed statute is a provision in D.C. Code Title 16, chapter 43, which concerns arbitration. This chapter is the District's adoption of the Uniform Arbitration Act, and preceded enactment of the CMPA. By its terms, the chapter is applicable to collective-bargaining-agreement grievance arbitration, and the limited case law finds it applicable to such agreements between the District and unions representing its employees. See American Fed. of State, County and Municipal Employees v. District of Columbia Bd. of Educ.,

^{5/} D.C. Code Sec. 1-605.2 "Powers of the Board" empowers the Board to:

* * *

(6) Consider appeals from arbitration awards pursuant to a grievance procedure: Provided, however, that such awards may be reviewed 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: Provided, further, that the provisions of this paragraph shall be the exclusive method for reviewing the decision of an arbitrator concerning a matter properly subject to the jurisdiction of the Board, notwithstanding any provisions of the District of Columbia Uniform Arbitration Act. (D.C. Code, Sections 16-4301 to 16-4319);

D.C. Superior Court Misc. Nos. 65-86 and 93-86, decided Aug. 22, 1986, reported at 114 Daily Wash. Law Reporter 2113, Oct. 15, 1986. We think it clear that the CMPA provision set out in footnote 5, supra, supersedes the Uniform Arbitration Act's allocation of arbitration award review authority to the courts. However, we do not agree with UDC that this CMPA provision precludes application of the provisions of chapter 43 that set forth substantive and procedural rules for arbitration proceedings such as the rules embodied in Sec. 16-4309.

D.C. Code Sec. 16-4309 provides that a single party may seek modification or correction of an award in three circumstances. The first two, set forth in the note below, are of no relevance here.^{6/} The third circumstance is a modification or correction of the award "for the purpose of clarifying the award."

The parties' agreement also speaks to "clarification". The agreement provides in Article IX.E. "Arbitration" that (sub-paragraph 2) "The arbitration proceedings shall be conducted in accordance with the rules of the Federal Mediation and Conciliation Service." The FMCS rules, in turn, require arbitrators to conform to the Code of Professional Responsibility for Arbitrators of Labor Management Disputes, 29 CFR Sec. 1404.4(b) (1990), and this latter provides that "[n]o clarification or interpretation of an award is permissible without the consent of both parties."

^{6/} These are "the grounds stated in" a subsequent provision of the Uniform Arbitration Act, namely, Sec. 16-4312(a)(1) and (3), which provide as follows:

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the Court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

* * *

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

* * *

It is apparent that if the action of the Arbitrator in the reopened proceeding was a "clarification", we are faced with the question whether the parties may, and in fact did, limit the right to unilateral action provided in D.C. Code Sec. 16-4309 by adopting the rules specified in their agreement.

We need not make that determination, however, because the Arbitrator expressly asserted that his action was not a clarification: "the question presented for decision at this point in the proceedings is so presented because the arbitrator failed to complete the arbitration by ruling on all issues submitted in the original submission. It is not a question of modification, interpretation or clarification of what was said or ruled in the award." (Suppl. Award at 8-9, see also the Arbitrator's background discussion at 4-7.)

We are left, therefore, with a Supplemental Award which the Arbitrator was without authority to issue, whether that authority be sought in D.C. Code Sec. 16-4309 or in the parties' collective bargaining agreement. The Arbitrator's reopening and his determination on the issue of interest over the objection of one party was beyond his jurisdiction.^{7/} That the result leaves one party with the legitimate complaint that an issue put to the Arbitrator has not been explicitly resolved by him is unfortunate, but it is not different in nature from the dissatisfaction of a party when an arbitrator gives a "wrong" reading of a contract provision. The possibility of arbitral error is within the outcomes that the parties accept when they agree that otherwise unresolved grievances under their collective bargaining contract shall be determined by arbitration.

ORDER

IT IS HEREBY ORDERED THAT:

The Request for Review of the initial Arbitration Award is denied.

The Request for Review of the Supplemental Arbitration Award is granted, and

^{7/} The question whether an authorized reopening of an arbitral proceeding is permissible after timely filing of a Request for Review of the award with the Board must be left for a proceeding requiring its answer. We think that this is not inconsistent with our ruling of October 18, 1990, see note 2 above. A ruling on the question would have been premature at that time. ✓

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The Supplemental Arbitration Award is vacated.

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

July 10, 1991

APPENDIX

ARTICLE XVIII - COMPENSATION

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C. MERIT COMPENSATION

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2. Step Increments

Each faculty member who was not evaluated "Less than Satisfactory" for the prior year has received a within grade increase for the 1987-88 and 1988-89 academic years, unless he or she was already at the top step within grade. Beginning in AY 1989-90, each faculty member shall receive a within grade step increase, provided the faculty member has not been rated "Competent" or "Less than Satisfactory".

ARTICLE IX - GRIEVANCE PROCEDURE AND ARBITRATION

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D. PROCEDURE

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5. If the grievance is not resolved satisfactorily at the initial level, the grievant or the Association shall present it in writing to the person at the first appellate level within ten (10) days of response or non-response. That person or designee(s) shall have ten (10) days following receipt of the appeal to investigate the matter as deemed appropriate, discuss the matter with the grievant and/or the Association President or designee(s) and to submit a written decision, including reasons for said decision, to the grievant and the Association. Any claim not alleged at this level is waived, and may not be raised by the grievant.

6. The same process will continue to next appellate levels and will stop at the President's level, provided, however, that any ground for denial of the grievance that is not stated in the initial written response to the grievance is waived, and may not be raised by the University at any later step of the grievance and arbitration procedure, unless such ground was not known to and should not reasonably have been known by the person preparing the initial written response. In such case, the University may add the ground for denial at the first step in the proceedings at which such ground is or should have been known to the responsible University official, provided the grievant or the Association will be afforded such adjournment or extension of time, not to exceed twenty (20) days, as it may require to respond to the additional ground or grounds for denial.

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E. ARBITRATION

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3. The arbitrator may not consider any claim, or any ground for denying the grievance, that has been waived by operation of Section D.5 or Section D.6 of this Article.