

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)	
Office of the Attorney General,)	
)	PERB Case No. 14-A-02
Petitioner,)	
)	Opinion No. 1459
and)	
)	
American Federation of State, County)	
and Municipal Employees,)	
District Council 20)	
(on behalf of Raquel Beaufort),)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

On November 11, 2013, the District of Columbia Office of the Attorney General filed an Arbitration Review Request (“Request”) challenging Arbitrator Andrew M. Strongin’s October 18, 2013 Arbitration Award on the grounds that (1) the Arbitrator exceeded his authority and (2) the Award on its face is contrary to law or public policy. On March 3, 2014, AFSCME filed an Opposition to the Agency’s Arbitration Review Request.

II. The Award

The arbitration involved a grievance filed by AFSCME, District Council 20 (“Union”), on behalf of Raquel Beaufort (“Grievant”), objecting to her November 18, 2010, removal from her position as a Legal Assistant. (Award at 2). During the arbitration proceedings, the parties stipulated that the “issue is whether there is proper cause for grievant’s termination within the meaning to Article 7 of the Agreement.” (Award at 16). The Union argued that Grievant’s termination was “without proper cause in violation of Article 7 of the parties’ Agreement,” asking for Grievant’s reinstatement to her former position and make whole remedy for her

losses. *Id.*

Grievant was hired in 2004 as a Legal Clerk in the Juvenile Section of the OAG. Then in 2008 she was promoted to the position of Legal Assistant. (Award at 2). Beaufort's duties as a Legal Assistant "chiefly consisted of assisting in the Section's clerical work, creating and maintaining paper and electronic files through the use of the Agency's Prolaw database" that consisted "of a variety of data, including case identifiers, filings and correspondence, a Juvenile Evidence Folder, and email from the court confirming or rejecting electronic filings ('e-filings')." *Id.* The Prolaw program was accessed by the OAG Juvenile Section as well as the Family Division of the District of Columbia Superior Court." *Id.* The Arbitrator found that Prolaw was "critical to the Juvenile Section's mission." *Id.*

On April 29, 2009, Grievant was admonished by her supervisor Section Chief Lynette Collins for "failure to consistently report to work on time." *Id.* Thereafter, on November 18, 2009, Grievant received a two-day suspension for tardiness. (Award at 3).

On June 30, 2010, Collins placed Grievant on a 90-day Performance Improvement Plan ("PIP"). *Id.* The PIP identified problem areas and "corresponding desired outcomes, action plans to improve performance, results to measure, and frequency of monitoring." (Award at 4). The Arbitrator found of "special relevance" that the PIP stated, "The employee shall be given a two-part training on the use of Prolaw and on the most efficient method of ensuring that documents are dragged and dropped into the appropriate Prolaw database by July 6, 2010." (Award at 5).

In determining the propriety of the PIP, the Arbitrator stated, "Of special relevance to the PIP, the District Personnel Manual, Title 6-B, Chapter 14, § 1400 *et seq.*, provides that a PIP, 'is a performance management tool designed to offer the employee placed on it an opportunity to demonstrate improvement in his or her performance,' 6-B DCMR § 1410.2." (Award at 16).

The Arbitrator further noted that DPM§ 1410.3 stated:

The purpose of a Performance Improvement Plan is to offer the employee placed on it an opportunity to demonstrate improvement. A Performance Improvement Plan issued to an employee shall last for a period of thirty (30) to ninety (90) days, and shall:

- (a) Identify the specific performance areas in which the employee is deficient; and
- (b) Provide concrete, measurable action steps the employee needs to take to improve to those areas.

(Award at 16-17).

The Arbitrator found "[t]o the extent this case is controlled by principles governing

performance-based actions under the DPM, as contrasted with conduct-based actions, it is plain from the undisputed facts of record that the Agency failed to provide grievant with a meaningful opportunity to improve her performance under the terms of the PIP.” (Award at 17). As stated by the Arbitrator, “[c]entral to grievant’s action plan for success under the PIP is the Agency’s provision that grievant ‘shall be given a two part training on the use of Prolaw and on the most efficient method for ensuring that documents are dragged and dropped into the appropriate Prolaw database by Tuesday July 6, 2010.’” (Award at 18). The Arbitrator’s determination of the importance of the two-part training was based on “the nature of the performance deficiencies identified by the grievant’s supervisors” and “the timing of the action plan—training was to be provided within the first week of the 90-day PIP.” *Id.*

The Arbitrator found that the Grievant did not receive the two-part training, and “what little training she did receive was not provided in the timeframe identified in the PIP.” *Id.* Collins criticized the Grievant during the PIP over Prolaw errors, and Grievant thereafter requested training. (Award at 6). Though Collins arranged for the Assistant Section Chief for Papering and Operations of the Juvenile Section Barbara Chesser to provide training on August 5, 2010, the Arbitrator determined that the training lasted “substantially closer to five minutes based on “the description of the demonstration offered by both Chesser and grievant and the testimony related to the workload of the office generally and Chesser specifically. (Award at 19). The Arbitrator noted that the Section Chief, Grievant’s supervisor admitted that the “training was only part of what she initially envisioned when establishing the PIP.” *Id.* Without more training provided to the Grievant, “the conclusion is unavoidable that the Agency failed to provide grievant with the only meaningful element of the action plan designed to address her principal performance deficiency, that being her ongoing failure properly to file documents in Prolaw.” *Id.*

The Arbitrator found that Collins “chose to dispense with that [training] opportunity without either documenting that decision or taking any steps to modify the PIP, thereby depriving grievant of the opportunity to inquire into and then address the fundamental question as to why Collins decided to provide no training.” (Award at 20). The Arbitrator further found that “Collins’ chosen path deprived grievant of the opportunity to question whether Collins concluded within the first week of the PIP that grievant was a lost cause destined for removal, for whom no amount of additional training would be helpful, which not only would be a fundamentally improper approach to a PIP, but also would have exposed the PIP as an improper attempted end-run around normal disciplinary procedures properly addressed through progressive discipline.” *Id.* The Arbitrator found that Collins provided “candid and surprising testimony regarding the lack of care with which she established the training requirement in the first place.” *Id.* As stated by the Arbitrator, “Collins invited precisely the sort of credibility dispute presented on this record as to whether she ever told grievant of the change in the PIP’s terms, under circumstances where grievant disputes that Collins ever told her that no more training would be provided.” *Id.*

The Arbitrator determined that “Collins apparently devoted considerably more time to documenting and creating an evidentiary record of grievant’s shortcomings during the period of the PIP, than to taking any action to assist grievant in meeting the PIP’s requirement.” (Award at

22).

In addition, the Arbitrator determined that the PIP was improperly implemented because “Collins apparently gave no real consideration to reassigning grievant or reducing her grade, express options short of removal upon an employee’s failure to meet the requirements of a PIP.” (Award at 23). The Arbitrator found that “Collins nominally addressed the relevant *Douglas* factor, but her principal focus clearly was on the conduct-based nature of the removal action.” *Id.* The Arbitrator stated, “As the [Notice of Proposed Removal] document shows, Collins characterized grievant’s shortcomings in terms of her disciplinary history, alleged unresponsiveness to training, and an alleged uncaring attitude, all of which speak to conduct rather than performance.” *Id.*

The Arbitrator concluded that Grievant’s removal based on performance issues “fell far short of the mark of 6-B DCMR § 1410, that the Agency deprived grievant of a meaningful opportunity to meet the requirements of the PIP in multiple substantive respects,” and that the Agency did not have “just cause” within the meaning of Article 7 of the Parties’ Agreement to remove Grievant for failing to meet the requirements of the PIP. *Id.* The Arbitrator emphasized:

[E]ven if grievant’s alleged failure timely to respond to emails and her attendance-related issues noted in the PIP properly are addressed as performance rather than conduct-based, Collins’ administration of the PIP in terms of the Prolaw issues was so deficient as to taint the PIP period and to support the conclusion that grievant was not, in fact, provided a meaningful opportunity to improve.

(Award at 23-24).

The Arbitrator provided analysis of the conduct-related issues finding that “the Agreement echoes the CMPA in requiring that discipline ‘shall be imposed for cause,’ and ‘will be appropriate to the circumstances, and shall be primarily corrective, rather than punitive in nature.’” (Award at 24) and further noting that “Grievant’s employment and disciplinary history demonstrates that the Agency considers such alleged deficiencies, regardless of their relationship to performance-based factors, to be subject to correction through progressive discipline as opposed to summary removal.” *Id.* Thus, the Arbitrator found that the Grievant had an April 28, 2009, admonition for failure to report to work on time, which was neither a corrective nor adverse action under 6-B DCMR § 1602.1. *Id.* In addition, Grievant received a two-day suspension for “consistent tardiness” November 18, 2009. *Id.* During the PIP, Grievant received a letter of counseling dated September 7, 2010, which related to Prolaw errors, but was neither corrective or an adverse action. *Id.* The Arbitrator found that Grievant did not receive progressive discipline on Prolaw errors to warrant termination. (Award at 25). “While neither the DPM nor the Agreement mandates any particular progression or number of steps from admonition through removal, the types of errors underlying grievant’s removal clearly are fodder for progressive discipline rather than summary termination.” (Award at 25-26).

The Arbitrator stated, “Whatever the basis for the Agency’s decision to withhold serious

discipline for grievant's Prolaw errors until proposing grievant's removal, grievant's accumulation of such errors over time cannot properly be viewed as a sufficient reason to move from a letter of counseling on September 7, 2010, directly to a Notice of Proposed Removal on October 4, 2010, bypassing any formal corrective or less-severe adverse action." (Award at 26).

Grievant requested a hearing for the proposed removal, which was denied by the Hearing Examiner. *Id.* Grievant then requested the Hearing Examiner reconsider the denial of a hearing. (Award at 30). The Hearing Examiner did not grant Grievant's request. *Id.* Consequently, Grievant was not afforded a hearing. *Id.* Based on the language contained in the Notice of Proposed Removal, which was "Upon request, you have the right to a have a hearing," the Arbitrator concluded that the Grievant had a right to a hearing. *Id.* The Arbitrator found that the denial of a hearing deprived grievant of "her rights under the parties' discipline process and grievance procedure as the Agency itself understood those rights." (Award at 31). Further, the Arbitrator found that there was "significant deprivations at the Hearing Officer stage, which was compounded by the actions of the Deciding Official in adopting the Hearing Officer's Report and Recommendation in sustaining the removal." (Award at 30).

The Arbitrator determined, "In light of the findings that the Agency lacked cause to remove grievant, whether viewed through the lens of performance or conduct-based standards, the Agency is directed to offer grievant reinstatement to her former position and to make her whole for her losses." (Award at 32). The Arbitrator ordered: "Grievant shall be reinstated to her former position and made whole for her losses. The Arbitrator retains jurisdiction to resolve any questions that may arise over application or interpretation of the remedial provisions of this Award, including any request by the Union for an award of attorney fees." (Award at 33).

III. Discussion

The CMPA authorizes the Board to modify or set aside an arbitration award in three limited 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 means. D.C. Code § 1-605.02(6) (2001 ed.).

The Agency requests reversal of the Award on the basis that the Award is contrary to law and public policy, and that the Arbitrator exceeded his authority. (Request at 7-8). The Agency contends that the Arbitrator "attempts to void District law," by ignoring D.C. employment regulations. (Request at 5-7). In addition, the Agency asserts that "[t]he Arbitrator erred when he ignored the Union's untimely invocation of arbitration." (Request at 7).

A. Contrary to law argument

The Agency argues that the Award is contrary to law and public policy, because "[t]he Arbitrator has selectively used parts of the District Personnel Manual to create a new obligation on the District thereby imposing his own brand of industrial justice." (Request at 4). The Agency asserts that "the Arbitrator sometimes cited to and depended upon the DPM to support a point or decision he reached." *Id.* The Agency argues that the Arbitrator ignored applicable

rules and regulations for Hearing Officers, and created a new requirement for the District to require testimonial hearings for all removal cases. (Request at 5). The Agency criticizes the Arbitrator for not providing any citation to the DPM for discussing the regulations governing Hearing Officers. *Id.* The Agency asserts that the DPM does not require the Hearing Officer to conduct a testimonial hearing. (Request at 6). The Agency argues that the “Arbitrator fails to cite, treat or distinguish the applicable regulations or the Instruction [governing hearings].” *Id.*

The Agency argues that “the Court of Appeals for the District of Columbia considers regulations to have the force of law.” (Request at 6). The Agency argues that that “[t]he Arbitrator dispenses his own brand of industrial justice by ignoring the applicable regulations.” (Request at 6). The Union argues that the Arbitrator relied on the record and that the Arbitrator’s interpretation of the law was what the parties “bargained for.” (Opposition at 5-6).

The Board has long held that by agreeing to submit the settlement of a grievance to arbitration, it is the arbitrator’s interpretation, not the Board’s, for which the parties have bargained. *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). The Board has found that 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.” *District of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metro. Police Dep’t and Fraternal of Police, Metro. Police Dep’t Labor Comm. (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).

The Arbitrator stated,

While there is no necessarily irremediable harm caused in and of itself by the hearing Officer’s obvious deprivation of grievant’s right not simply to request a hearing, but to have a hearing as the Notice itself expressly states – ‘you have the right to a hearing’ – harm nevertheless flows from the Deciding Official’s adoption of the Hearing Officer’s Report and Recommendation, insofar as the Deciding Official offers no comment as to the deprivation of grievant’s right to a hearing before the Hearing Officer. Harm also flows from the lack of indication in the record that either the Hearing Officer or Deciding Official understood from the record before them that grievant was denied both her rights under the PIP and under the parties’ system of progressive discipline. The Deciding Official’s final decision is tainted by errors below.

(Award at 31).

The Agency argues that the Arbitrator created his own brand of industrial justice by creating an obligation by the Agency to conduct a hearing. However, the Arbitrator based his ruling on the express language of the Notice of Proposed Removal. *Id.* Furthermore, he did not rest his decision on just cause solely on the lack of a hearing. The Arbitrator found that the PIP was invalid according to the DPM's requirement that an employee be given a "meaningful opportunity to improve" and that the Agency failed to follow progressive discipline as required by the parties' contract. The Arbitrator went on to state, "to the extent the Agency intends grievant's removal to be conduct-based, the Arbitrator concludes that the Agency failed to honor its commitment to progressive discipline, allowing grievant to accumulate a series of relatively minor offenses to such a degree as to cause it to propose her removal without sufficient intervening disciplinary measures." (Award at 31). The Arbitrator applied these findings to the Parties' Agreement, which required "proper cause" for the Grievant's termination. The Arbitrator determined that the Agency did not reach "proper cause."

The Agency's argument that the Award is contrary to District law based on DPM § 1612, governing Hearing Officers, is without merit. The Arbitrator's findings related to the denial of a hearing only emphasized the deprivation of the Grievant's rights during the PIP and the lack of progressive discipline for conduct-related charges that occurred prior to the Grievant's proposed removal. The Agency does not assert any express contract provision that limited the Arbitrator's decision regarding the matter. The Agency's Request constitutes only a disagreement with the Arbitrator's evidentiary findings and application of relevant law. "The Board will not second guess credibility determinations, nor will it overturn an arbitrator's findings on the basis of a disagreement with the arbitrator's determination." *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, 59 D.C. Reg. 9798, Slip Op. No. 1271, PERB Case No. 10-A-20 (2012). See also *Metro. Police Dep't and Fraternal Order of Police/Metro, Police Dep't Labor Comm.*, 31 D.C. Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984); *FOP/DOC Labor Comm. v. Dep't of Corrections*, 52 D.C. Reg. 2496, Slip Op. No. 722, PERB Case Nos. 01-U-21, 01-U-28, 01-U-32 (2005).

The Arbitrator's penalty reduction does not contravene any District law. The Board has held that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement. *District of Columbia Metropolitan and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). See also *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (upholding an arbitrator's award when the arbitrator concluded that MPD had just cause to discipline grievant, but mitigating the penalty, because it was excessive). Furthermore, the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, that arbitrators bring their "informed judgment" to bear on the interpretation of collective bargaining agreements, and that is "especially true when it comes to formulating remedies." 363 U.S. 593, 597 (1960). The Agency does not contend that there was a contractual prohibition on the Arbitrator's assertion of his equitable powers.

The Board finds that the Agency's argument is merely a disagreement with the

Arbitrator's findings and conclusions. Therefore, the Agency's Request that the Award is contrary to law is denied.

B. Contrary to public policy argument

The Board's review of an arbitration award on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy." *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (quoting *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F. 2d 1, 8 (D.C. Cir. 1986)). A petitioner must demonstrate that an arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See *United Paperworks Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Moreover, the violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result." *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 47 D.C. Reg. 717, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). Further, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *Id. See, e.g., D.C. Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 1015, PERB Case No. 09-A-06 (2010).

The Agency has not asserted any public policy that the Award contravenes. The Board finds that the Agency's Request is merely a disagreement with the Arbitrator's findings and conclusions. Therefore, the Agency's Request on the basis the Award is contrary to public policy is denied.

C. Arbitrability

Agency seeks reversal of the Award on the grounds that the Arbitrator exceeded his authority because he did not have jurisdiction over the underlying grievance, and that jurisdiction can be raised at any point in a matter. (Request at 4-8). The Union opposes the Agency's Request, arguing that the Agency consented to the arbitration by failing to timely object to the arbitrator's jurisdiction. (Opposition at 4).

This Board has held that subject matter jurisdiction may be raised at any time prior to the finality of a Decision and Order. *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, Slip Op. No. 1372, PERB Case No. 11-U-52 (2013). As construed by the Board, the Agency argues that the Arbitrator's decision concerning the procedural arbitrability of the underlying grievance raises an issue of jurisdiction, which can be raised at any time. The Board declines to adopt the Agency's interpretation. The D.C. Court of Appeals has stated, "issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Washington Teachers' Union, Local*

No. 6, AFT v. D.C. Public Schools, 77 A.3d 441, 446, fn. 10 (2013).

The Arbitrator found “that the Agency never contested the arbitrability of the instant grievance until it raised such issue in its post-hearing brief.” (Award at 13). The Arbitrator determined that the issue of arbitrability “fall[s] within the ambit of procedural arbitrability subject to waiver, not one of substantive arbitrability that may be raised at any time.” *Id.* The Arbitrator determined:

Throughout the creation of the voluminous record in support of its discipline of grievant, which came at great expense to both the Agency and the Union in terms of both time and money and related resources, the Agency made no mention, at any time, of any concern over the propriety of the Union’s invocation of arbitration in light of Article 22. In the Arbitrator’s judgment, the Agency’s failure to timely challenge the arbitrability of the grievance constitutes a waiver of the contractual time limit for invoking arbitration.

(Award at 14).

The Board finds that the Arbitrator had jurisdictional authority to determine whether the underlying grievance was procedurally arbitrable. *See Washington Teachers’ Union*, 77 A.3d at 446. Therefore, the Award is not contrary to law.

The Agency has not stated a public policy exception to the Arbitrator’s decision in favor of arbitrability. On the contrary, the D.C. Court of Appeals has recognized the public policy in favor of arbitrability. *District of Columbia Public Employee Relations Bd. v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 987 A.2d 1205 (D.C. 2010). Therefore, the Board finds no grounds for overturning the Award on the basis of arbitrability.

IV. Conclusion

The Board finds that the Agency’s Arbitration Review Request is based merely on the Agency’s mere disagreement with the Arbitrator’s findings and conclusions. The Board has previously stated that a “disagreement with the Arbitrator’s interpretation . . . does not make the award contrary to law and public policy.” *District of Columbia Metropolitan and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008) (quoting *AFGE, Local 1975 and Dept. of Public Works*, 48 D.C. Reg. 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995)). The Board denies OAG’s Arbitration Review Request.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Office of Attorney General's Arbitration Review Request is denied.
2. 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.

April 1, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-A-02 was transmitted to the following Parties on this the 7th of April, 2014:

Donald M. Temple, Esq.
Donald Temple, P.C.
1101 15th Street, NW
Suite 910
Washington, DC 20005

via File&ServeXpress

James T. Langford, Esq.
Attorney-Advisor
D.C. Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W., Suite 820 North
Washington, D.C. 20001

via File&ServeXpress



Erica J. Balkum
Attorney-Advisor
Public Employee Relations Board
1100 4th Street, S.W.
Suite E630
Washington, D.C. 20024