Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Office of Chief Financial Officer	
Petitioner,	PERB Case No. 12-A-06
and	Opinion No. 1386
American Federation of State, County and Municipal Employees, District Council 20, Local 2776 (on behalf of Robert Gonzales)	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On April 4, 2012, the District of Columbia Office of the Chief Financial Officer ("OCFO" or "Agency") filed an Arbitration Review Request ("Request") of an Arbitration Award ("Award") by Arbitrator David Epstein ("Arbitrator"). On April 19, 2012, the American Federation of State, County and Municipal Employees, District Council 20, Local 2776 ("AFSCME" or "Union") filed an Opposition to OCFO's Arbitration Review Request ("Opposition").

OCFO seeks review of the Award, which reduced the termination of Robert Gonzales ("Grievant") to a one-year suspension. In its Request, OCFO challenges the Board's jurisdiction to review OCFO arbitration awards, and asserts that the Award is contrary to law and public policy. (Request at 1-2).

II. The Award

The Union filed a grievance against OCFO, challenging the Grievant's termination for assaulting "a member of the public while engaged in a property tax appeal hearing and for making false and misleading statements during the course of an investigation that followed." (Award at 7). After failing to resolve the grievance through the negotiated grievance procedure,

the Union invoked arbitration. *Id.* Two days of hearing were held before Arbitrator David Epstein. *Id.* The parties each submitted post-hearing briefs. *Id.*

The Parties did not agree on the issue for resolution. *Id.* The issues presented by the Employer were: "(1) Does the evidence establish that Robert Gonzales was terminated for just cause?[; and] (2) Does the evidence establish that the termination of Robert Gonzales was appropriate, reasonable and proportionate to the offense committed?" *Id.* The issue presented to the Arbitrator by the Union was: "Did the Employer violate Article 7 of the parties' collective bargaining agreement when it terminated [Grievant] Robert Gonzales and, if so, what shall be the remedy?" *Id.*

In the Award, the Arbitrator found that "[t]he facts are largely in agreement." (Award at 11). During a recess at a Board of Real Property and Appeals hearing, a member of the public, Mr. McIntosh, who represents private property owners, and who was challenging a valuation of property before the Board, made vulgar statements to the Grievant, which may have included an ethnic slur. (Award at 8, 11). According to the Arbitrator, the two had "a testy and tangled professional relationship." (Award at 8). Mr. McIntosh admitted making the vulgar statements towards the Grievant, but denied the ethnic slur. (Award at 11). After Mr. McIntosh made the statements, the Grievant rose from his chair and went to the other side of the conference table to confront Mr. McIntosh. *Id.* The Grievant stated that "there may have been a physical touching but it was inadvertent, caused when Mr. McIntosh arose and his chair fell back caught in a coat that he says was the back of the chair." (Award at 12). Mr. McIntosh, corroborated by another witness, testified that there was a physical touching. *Id.* Further, the Arbitrator found that "Mr. McIntosh was concerned about his personal safety as he could reasonably assume that he was under a threat of physical harm, whether or not there was a physical touching." *Id.* At some point after the confrontation, the Grievant reported the occurrence to his supervisor. (Award at 13).

In his Award, the Arbitrator found that the Master Agreement's use of the term "cause" was the same as the use of the term "just cause" in other collective bargaining agreements. *Id.* The Arbitrator determined "[b]y a preponderance of the evidence, cause for disciplinary sanction was established on an evaluation of the undisputed evidence." *Id.* The Arbitrator found that the Grievant violated the District Personnel Manual (DPM) under Section 1603.3, regarding several charges. (Award at 13-14). The Arbitrator, however, did not find that the Grievant violated the DPM provision requiring honesty, and dismissed the dishonesty charge against the Grievant. (Award at 14-15).

As for the appropriate sanction for the Grievant's conduct, the Arbitrator reviewed the Master Agreement and the underlying conduct guide, as well as the Agency's Handbook. (Award at 15). The Arbitrator found that the appropriate penalty for the Grievant's conduct was "close to the intersection of a suspension and termination." *Id.* The Arbitrator considered several mitigating factors, including that the Grievant had not cooled down when he approached Mr. McIntosh, and that the Grievant realized the import of his conduct by reporting the occurrence to his supervisor. (Award at 16). In addition, the Arbitrator stated, "An intended forceful blow with physical damage to Mr. McIntosh is not what occurred." *Id.*

In determining the appropriateness of the penalty, the Arbitrator considered OCFO's argument that DPM, 1619.1, Section 5(c) supported termination of the Grievant. *Id.* In addition, the Arbitrator considered Section 7 of DPM, 1619.1, which contained recommended penalties for a variety of activities. *Id.* The Arbitrator found that the Grievant's conduct fell short of removal but was more than the activities described in Section 7. *Id.* Therefore, the Arbitrator determined that the appropriate sanction was a one-year suspension, commencing on the effective date of Grievant's termination, May 27, 2011, and ending with his return to work on May 28, 2012. *Id.*

III. Discussion

OCFO has filed its Request, pursuant to D.C. Code § 1-605.02(6). (2001 ed.). In its Request, OCFO asserts that PERB lacks jurisdiction to review the Award and that the Award violates law and public policy. (Request at 1-2). AFSCME argues that PERB has jurisdiction over the Request, and that OCFO's Request is merely a disagreement with the Arbitrator's conclusions. (Opposition at 1-2, 6).

A. Jurisdiction of PERB

The Comprehensive Merit Personnel Act ("CMPA") is the statutory authority for the Board. Consequently, the Board is only empowered to hear and decide legal matters that are covered by the CMPA. Furthermore, the courts defer to the Board's interpretation of the CMPA, unless the interpretation is "unreasonable in light of the prevailing law or inconsistent with the statute" or is "plainly erroneous." *Doctors Council of the Dist. of Columbia Gen. Hosp. v. District of Columbia Pub. Employee Relations Bd.*, 914 A.2d 682, 695 (D.C.2007) (citation omitted); *Public Employee Relations Bd. v. Washington Teachers Union Local 6, AFT*, 556 A.2d 206, 207 (D.C.1989). Unless "rationally indefensible," a PERB decision must stand. *Drivers, Chauffeurs, & Helpers Local Union No. 639 v. District of Columbia, 631 A.2d 1205, 1216* (D.C.1993).

The CMPA prescribes the Board's subject-matter jurisdiction for review of arbitration awards. The Board may:

> Consider appeals from arbitration awards pursuant to a grievance procedure; provided, however, that such 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....

D.C. Code § 1-605.02(6).

OCFO argues that the Board does not have jurisdiction over OCFO, because "OCFO is expressly exempt from the Comprehensive Merit Personnel Act." (Request at 4). In its Request, OCFO quotes D.C. Code § 1-204.25(a) as stating "employees of the Office of the Chief Financial Officer of the District of Columbia shall be considered at-will employees not covered

by the District of Columbia Comprehensive Merit Personnel Act of 1978." (Request at 4). OCFO construes the statute to exempt OCFO from the CMPA and from PERB's jurisdiction to review OCFO arbitration awards.

OCFO's Request misquotes the statute. In actuality, the statute states:

> (a) *In general* – Notwithstanding any provision of law or regulation (including any law or regulation providing for collective bargaining or the enforcement of any collective bargaining agreement), employees of the Office of the Chief Financial Officer of the District of Columbia, including personnel described in subsection (b) of this section, shall be appointed by, shall serve at the pleasure of, and shall act under the direction and control of the Chief Financial Officer of the District of Columbia, and shall be considered at-will employees not covered by Chapter 6 of this title, *except that nothing in this section may be construed to prohibit the Chief Financial Officer from entering into a collective bargaining agreement governing such employees and personnel or to prohibit the enforcement of such an agreement as entered into by the Chief Financial Officer.*

D.C. Code § 1-204.25(a) (emphasis added). The above legislative language was an amendment to Section 424 of the District of Columbia Home Rule Act, D.C. Code § 1-204.24a, et seq., by the 2005 District of Columbia Omnibus Authorization Act, PL 109-356, 120 Stat. 2019 (2006) (West 2012). The plain language of the statute clearly creates an exception that permits the Chief Financial Officer to enter into a collective bargaining agreement.

It is undisputed that OCFO and AFSCME have entered into a collective bargaining agreement, and that the present arbitration award arises from the Parties' grievance procedure, pursuant to their collective bargaining agreement. Moreover, no jurisdictional issue, concerning the Arbitrator's jurisdiction over the arbitration proceedings, was presented by OCFO to the Arbitrator for determination.

The CMPA on its face states that the Board has the power to "[c]onsider appeals from arbitration awards pursuant to a grievance procedure." *Id.* The CMPA does not provide an exception to PERB's jurisdiction to consider the present Request.

OCFO argues that case law supports its interpretation of D.C. Code § 1-204.25(a). (Request at 4-5). In *Bartee v. District of Columbia Office of Tax and Revenue*, the D.C. Office of Employee Appeals ("OEA") determined that it lacked jurisdiction over employees in the Office of Tax and Revenue ("OTR"), based on D.C. Code § 1-204.25(a). Case No. 2009 CA 8105 (D.C. Sup. Ct. 2010). OEA's determination was upheld by the D.C. Superior Court and affirmed by the D.C. Court of Appeals. *Id., aff'd*, Case No. 11-CV-19 (D.C. 2011). The Superior Court reviewed OEA's determination in light of OEA's interpretation of D.C. Code § 1-204.25(a) and OEA's statutory authority under the CMPA. *Bartee*, Case No. 2009 CA 8105 at 4. The Superior Court emphasized the language of "shall be considered at-will employees not covered by Chapter 6 of this title," as applicable in determination of OEA's appellate jurisdiction

over adverse actions for OTR employees. *Id.* The Superior Court further stated that the employees were at-will employees and not covered by Chapter 6, Title 1. *Id.* at 7. OCFO argues that this interpretation bars the Board's jurisdiction over the current Award before it for disposition.

OCFO's assertion is without merit. The *Bartee* decision concerned OEA's interpretation of OEA's jurisdiction. OEA is a separate and independent agency from PERB with different statutory authority. The court above reviewed OEA's determination of its jurisdictional authority, not PERB's jurisdiction. In addition, the language of D.C. Code § 1-204.25(a) that the court above relied upon in its decision differs from the language that is applicable to the present Request. D.C. Code § 1-204.25(a) creates a specific exemption for collective bargaining agreements, which states, "*except that nothing in this section may be construed to prohibit the Chief Financial Officer from entering into a collective bargaining agreement governing such employees and personnel or to prohibit the enforcement of such an agreement as entered into by the Chief Financial Officer.*" (emphasis added). No case law prevents PERB from having subject-matter jurisdiction over the Request at bar.

In addition, OCFO filed an appeal to the Superior Court, regarding the Arbitration Award. *District of Columbia v. American Federation of State, County, and Municipal Employees, District Council 20, Local 2776*, Case No. 2012 CA 004715 B (D.C. Super. Ct. October 15, 2012). The Superior Court concluded that PERB had jurisdiction over the Arbitration Award, because the exemption in D.C. Code § 1-204.25(a) for the OCFO to enter into a collective bargaining agreement permitted "the OCFO to subject itself to the CMPA under the aegis of a collective bargaining agreement." *Id* at 4.

After reviewing the relevant statutes, case law, and OCFO's arguments, the Board determines that it has subject-matter jurisdiction to review the present arbitration award, pursuant to the CMPA.

B. Contrary to Law and Public Policy Exception

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).

OCFO argues that "the arbitration award is on its face contrary to law and public policy." (Request at 5). 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). 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). 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*, 59 D.C. Reg. 6124, Slip Op. No. 1015, PERB Case No. 09-A-06 (2012) (denying Exceptions that an arbitrator's interpretation of the DPM and MPD's General Orders were contrary to law and public policy).

OCFO argues that the Arbitrator "disregarded policies provided in the Table of Appropriate Penalties (DPM § 1619)," which "explicitly provides and ... compels that following the first offence of assault or fighting on duty, an employee is to be removed or terminated." (Request at 5). OCFO asserts that D.C. Code §§ 1-606.04 and 1-616.51 is the regulatory authority for the DPM, and that Section 5(c) of the DPM compels termination after a first offence of assault or fighting on duty. *Id.* Therefore, OCFO argues that the Award "violates dominant and explicit public policy," because "the Award conflicts with clear personnel policies as set forth in the District Personnel Manual." *Id.*

OCFO's reliance on D.C. Code § 1-606.04 is misguided, as the statute sets forth the hearing procedures for OEA. As stated above, PERB is a different Agency than OEA, and does not share the same statutory authority. Further, OCFO's argument that the Award compels a different outcome pursuant to the DPM read in conjunction with D.C. Code § 1-616.51 is incorrect. D.C. Code § 1-616.51 discusses in general discipline and grievances. Nothing in the plain reading of the statute compels removal, as is OCFO's assertion.

Furthermore, OCFO submitted to the Arbitrator the issue of penalty determination. (Award at 7). The Arbitrator found: "The Master Agreement and the underlying conduct guide promote the use of progressive discipline. The Handbook does much the same." (Award at 15). The Arbitrator considered the Agency's argument that removal was required under the DPM (Table of Appropriate Penalties) at Section 5(c). (Award at 16). The Arbitrator found that Section 5(c) only "recommends" removal. *Id.* Moreover, the Arbitrator found that the DPM (Table of Appropriate Penalties) at Section 7 "provides for a reprimand of suspension up to 15 days for "arguing," "use of abusive or offensive language," and "rude or boisterous playing. *Id.* The Arbitrator found that the Grievant's conduct fell "short of 'removal' or termination, but [was] more than the 'catchall' activities described in Section 7." *Id.* Based on the Arbitrator's interpretation of the Parties' collective bargaining agreement and the record before him, the Arbitrator determined that the appropriate penalty was a one-year suspension. (Award at 16).

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. *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). 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).

OCFO has not provided a particular law or legal precedent that would compel the Arbitrator to have arrived at a different conclusion. The Board finds that OCFO merely disagrees with the Arbitrator's conclusion. This disagreement does not meet any one of the three narrow bases, on which the Board can overturn an arbitrator's decision.

IV. Conclusion

The Board finds that it has jurisdiction over OCFO's Arbitration Review Request. After reviewing the Parties' pleadings and the submitted record, the Board finds that the Award is not contrary to law and public policy, and therefore it lacks the authority to grant the requested review.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Office of the Chief Financial Officer'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 30, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case 12-A-06 was transmitted via U.S. Mail to the following parties on this the 2nd day of May, 2013.

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