THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
District of Columbia Child and Family Services Agency,	
Petitioner,	PERB Case No. 09-A-15
and	
	Opinion No. 1272
American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO (for Carlita Jackson),	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

The District of Columbia Child and Family Services Agency ("CFSA" or "Agency") filed an Arbitration Review Request ("Request") in the above captioned matter. CFSA seeks review of Arbitrator David Clark's award ("Award") of September 8, 2009, which rescinded the termination of Grievant Carlita Jackson ("Grievant"). CFSA contends that the Award on its face is contrary to law and public policy and that the arbitrator exceeded his authority. The American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO ("AFSCME" or "Union") filed an Opposition to the Request ("Opposition") stating that the arbitrator's Award was not contrary to law and public policy, nor did the Arbitrator exceed his authority. In addition, the Union offered to brief the issue of attorney fees should the Board deem it necessary. The Agency filed a Response to the Union's Opposition countering the Union's arguments pertaining to the Back Pay Act ("Response").

The issues before the Board are whether: (1) Arbitrator Clark's Award is contrary to law and public policy; and (2) the Arbitrator exceeded his authority.

II. Discussion

A. Background

The arbitrator found the following facts: Until her termination, Grievant was employed by the Agency as a Clerical Assistant. On June 25, 2007, Grievant pled guilty to one count of Bank Fraud, as defined by 18 U.S.C. Sec. 1344[1]. As a result, the Grievant was sentenced to a term of six months imprisonment, with five years' probation. Grievant resigned from her job on July 30, 2007, in order to begin serving her six-month period of incarceration. Grievant was released from incarceration on January 24, 2008. Sometime in February 2008, Grievant filled out an online employment application for a Clerical Assistant position with the Agency. The position involved the same duties as Grievant's previous position but was in a different department.

Question 10(a) of the Agency's employment application asks, "[d]uring the past 10 years have you been: 1) convicted or forfeited collateral for any felony; or 2) convicted by a court-martial?" The question defines "felony" as "any violation of law punishable by imprisonment of longer than one year, except for a violation called a misdemeanor under state, county, or local law, which is punishable by imprisonment of two years or less." In response to this question, Grievant answered "No."

On May 6, 2008, the Agency notified Grievant of her reinstatement to the position of Clerical Assistant, and that a condition of her employment was satisfactory completion of a criminal background check. On June 9, 2008, the D.C. Metropolitan Police Department ("MPD") reported the results of its criminal background check. MPD found that Grievant was arrested in the District of Columbia in 1999 for Forgery, for which she was placed on probation for two years, and was arrested in 2007 for Bank Fraud, for which she was sentenced to six months' confinement and five years' probation. In Virginia, MPD found that Grievant was arrested in 1999 and 2000 on unspecified charges. With regard to the Virginia arrests, the Agency discovered that the Grievant was convicted on June 1, 2000, for the crime of Credit Card Theft, with two years suspended incarceration and two years' probation; and was also convicted on June 1, 2000, for the crime of Credit Card Forgery, with two years suspended sentence and two years' probation.

On August 8, 2008, the Agency issued Grievant a 30-day advance notice of a proposal to remove her from employment "in accordance with the provisions of the D.C. Official Code § 1-

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[1] Whoever knowingly executes, or attempts to execute, a scheme or artifice –
(1) to defraud a financial institution; or
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
(3) shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

616.51 (2000 ed.) and Article 7, [charging her with] willful and deliberate misrepresentation or omission of any facts on the employment application." (Award at 8). Grievant was given the opportunity to be heard by an Agency hearing officer. On October 22, 2008, Hearing Officer Parris concluded that the Agency did not prove by a preponderance of evidence that Grievant willfully and deliberately misrepresented or omitted any facts on the employment application. Nonetheless, on December 19, 2008, the Agency's Deputy Director issued a "Notice of Final Decision," in which the Agency sustained its decision to remove Grievant from employment. The Grievant's removal was effective immediately. (Award at 9-10).

On January 12, 2009, the Union filed a grievance on behalf of the Grievant alleging violation of Article 7, sections 1 and 3 of the parties' collective bargaining agreement ("Agreement"). The Agency denied the grievance, indicating that there was sufficient cause for termination. The Union then invoked arbitration.

B. The Award

The Arbitrator found that "the source of authority for the charge brought against the Grievant is located at DPM § 1603.3(c), which states that "cause" for disciplinary action is "[a]ny knowing or negligent material misrepresentation on an employment application." (Award at 14). The Arbitrator went on to find that:

> [s]ignificantly...the Agency in this case chose to omit an important term from the available charge, specifically, the word 'negligent.' Rather than duplicating the language set forth in DPM § 1603.3(c), the Agency instead charged the Grievant, in its notice of proposal to remove, with 'willful and deliberate misrepresentation or omission of any facts on the employment application.' The effect of this omission...is to require that the Agency prove that the Grievant 'knowingly' misrepresented her criminal record when she completed her application for employment, rather than more simply proving that she filled out the employment application in a manner that a reasonable person would not do, as proving 'negligence' would arguably require.

(Award at 14).

The Arbitrator determined that "the Agency is required to prove, by preponderance of the evidence, that the Grievant intended to misrepresent her record when she filled out her employment application." (Award at 15). The Arbitrator concluded that it is plausible that the Grievant did not believe that the definition of "felony," as set forth in the Agency's employment application, applied to her prior convictions because her record does not include a period of incarceration for one year, but for six months only. *Id.* The Arbitrator determined that "the Agency did not prove the requisite element of intent with respect to the alleged offense, which means that the Agency's charge against the Grievant is not supported by the record." (Award at 16). Therefore, the Arbitrator concluded that the Agency did not establish cause for terminating Grievant and the termination was in violation of Article 7, Section 1 of the Agreement. *Id.*

As a remedy, the Arbitrator ordered the Agency to pay Grievant back pay and lost benefits, less interim earnings, calculated from the date of the hearing officer's recommendation to the date of the Award. (Award at 17). The Agency was ordered to restore Grievant's seniority and purge her personnel file of all documents relating to or referencing the underlying discipline. *Id.* The Award also granted the Union attorneys' fees under the Federal Back Pay Act. *Id.* Finally, the Arbitrator rejected the Agency' argument alleging that reinstating Grievant would be a security risk, stating that no such allegation was made in the proposal to remove Grievant. *Id.*

C. Analysis

The Agency raises two arguments in support of its Request: that the award on its face is contrary to law and public policy, and that the Arbitrator has no statutory or regulatory authority to award attorneys' fees. (Request at 11).

The Board's scope of review, particularly concerning the public policy exception, is extremely narrow. A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Committee*, 47 DC Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000); *see also District of Columbia Public Schools and American Fed'n of State, County and Municipal Employees, District Council 20*, 34 DC Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). Absent a clear violation of law evident on the face of the arbitrator's award, PERB lacks authority to substitute its judgment for the arbitrator's. *FOP/DOC Labor Committee v. PERB*, 973 A.2d 174, 177 (D.C. 2009).

By submitting the grievance 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 DC 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 DC Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004). Disagreement with the arbitrator's findings is not a sufficient basis for concluding that an award is contrary to law or public policy. *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 31 DC Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984).

The Agency states that "the arbitrator improperly negated [the Agency's] proof of intent which showed that the employee knew she was convicted of a felony yet she failed to record this information on her employment application. The District Personnel Regulations mandate that

the standard of proof for the Agency is preponderance of the evidence. D.C.M.R. § 6-1603.9[2]." (Request at 7). The Agency goes on to argue that "[i]nstead of crediting the Agency's proof, it appears that the arbitrator rested his decision on plausibilities and assumptions while ignoring the evidence before him. The arbitrator implicitly and improperly applied a higher level of proof whereas the mandated standard of proof for the Agency is preponderance of the evidence, under the District Personnel Regulations." (Request at 10).

The Union contends that the Agency merely disagrees with the Arbitrator's findings and fails to show that the Award is contrary to law and public policy on its face. (Opposition at 3). Additionally, the Union disputes that the Arbitrator failed to apply the appropriate standard of proof, citing to the portion of the Award where the Arbitrator notes the standard of review is "preponderance of the evidence" in accordance with District Personnel Manual § 1603.9. (Opposition at 4; Award at 15).

The Board is not persuaded that the Arbitrator "implicitly and improperly applied a higher level of proof" than the mandated preponderance of the evidence standard. The Agency chose to omit the term "negligent" from the language set forth in DPM § 1603.3(c) when it issued its notice of proposal to remove Grievant. The Arbitrator did not implicitly elevate the Agency's burden of proof when he held the Agency to the language it chose. Therefore, the Arbitrator's determination that the Agency failed to show the grievant "knowingly" misrepresented her criminal record when she completed her application for employment is not in violation of law and public policy.

What is more, the Board rejects the Agency's policy arguments that the Award jeopardizes the District's ability to hire suitable employees and keep the citizenry safe. (Request at 10-11). As the petitioning party, the Agency bears the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Committee*, 47 DC Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). The Agency's suitability and safety arguments do not meet this burden of specificity, and must be dismissed.

In the second portion of the Request, the Agency alleges that the Arbitrator has no statutory or regulatory authority to award attorneys' fees. (Request at 11). The Agency contends that the Back Pay Act no longer applies to District of Columbia employees because it was negated in 2005 when the District implemented a new compensation system. [3] (Request at 12). The statutory and regulatory provisions currently in place do not allow the award of attorneys' fees. *Id.* In support of this argument the Agency cites to *White v. D.C. Water and Sewer Authority*, 962 A.2d 258 (D.C. 2008). In *White*, the Court of Appeals found that the Water and Sewer Authority exempted itself from the reach of the CMPA's compensation provisions,

[2] "In any disciplinary action, the District government will bear the burden of proving by a preponderance of the evidence that the action may be taken or, in the case of summary action, that the disciplinary action was taken for cause, as that term is defined in this section. A criminal conviction will estop the convicted party from denying the facts underlying the conviction." District Personnel Manual § 1603.9.

[3] District Personnel Manual § 1149.

including any entitlement to attorneys' fees under the Back Pay Act, by establishing its own personnel system for its employees. (Request at 14).

The Union contends that the Back Pay Act does apply to District of Columbia employees, and that the Board and D.C. Court of Appeals have both recently affirmed awards based on the Back Pay Act. (Opposition at 5-6). As examples, the Union points to *Dep't of Consumer and Regulatory Affairs v. AFGE Local 2725*, __ D.C. Reg. __, Slip Op. No. 992, PERB Case No. 09-A-03 (2009), and *FOP/DOC Labor Comm. v. Public Employee Relations Board*, 973 A.2d 174 (D.C. 2009).

The Agency counters this argument by stating that the events in *FOP/DOC Labor Comm. v. Public Employee Relations Board* occurred in 2000 and the arbitrator's award was issued in 2004, well before the 2005 District compensation regulations were implemented. (Response at 2). Additionally, the agency alleges that the Board has held that the back pay provision of the District Personnel Manual is applicable to arbitration awards as of February 4, 2005, thereby superseding the Back Pay Act. *Id; citing Dep't. of Corrections v. FOP/DOC Labor Comm.*, 54 D.C. Reg. 2706, Slip Op. No. 825 at pp. 11-12, PERB Case No. 04-A-14 (2006).

The Federal Back Pay Act ("Act") is "a vestige of the patchwork system in effect prior to the passage of Home Rule in 1973 that awkwardly meshed federal substantive law with the District's own personnel system." *AFGE v. Water and Sewer Authority*, 942 A.2d 1108, 1112 (D.C. 2007). Prior to 1980, the Back Pay Act unquestionably applied to District employees. *Id.* Effective January 1, 1980, the D.C. City Council "explicitly attempted to supersede the Back Pay Act as it applied to District employees with the Comprehensive Merit Protection Act ("CMPA")." *AFGE*, 942 A.2d at 1112 (*citing* D.C. Code § 1-362.2 (1973 & Supp. VII 1980); D.C. Code § 1-632.02 (2001)). Nonetheless, in decisions prior to 2005, the Court of Appeals found that "the Back Pay Act continues to apply to District employees under the broader CMPA policies of maintaining all 'concrete personnel entitlements or benefits' or their equivalents for employees hired before the CMPA, *see District of Columbia v. Hunt*, 520 A.2d 300 (D.C. 1987), and maintaining the pre-CMPA 'compensation system' for all employees whenever hired until a new one is enacted to replace it." *Id*; (*citing Zenian v. D.C. Office of Employment Appeals*, 598 A.2d 1161 (D.C. 1991)).

While the District is required by D.C. Code § 1-242(3) to retain the federal personnel procedure, mechanisms, and processes only until it develops its own – as it did with the CMPA – the Court of Appeals held in another pre-2005 decision that the District must still retain personnel benefits and entitlements at least equal to those previously available under the federal system. *Hunt*, 520 A.2d at 303 (*citing AFGE v. Barry*, 459 A.2d 1045, 1052 (D.C. 1983). The CMPA does not explicitly mention attorneys' fees, but D.C. Code § 1-612.4(e) incorporates by reference the "compensation system…in effect on December 31, 1979," which includes the Back Pay Act. *Zenian*, 598 A.2d at 1165.

On February 4, 2005, the District promulgated new compensation regulations, including the back pay provision of District Personnel Manual § 1149. *See* 52 D.C. Reg. 934. Section 1149 does not provide for attorneys' fees as a part of a back pay award.

Zenian, Hunt, and *FOP/DOC Labor Comm.* address incidents that occurred prior to the implementation of the 2005 compensation regulations. The parties in *Dep't of Consumer and Regulatory Affairs* did not dispute that the Back Pay Act applied, so the Board did not rule on that issue. Slip Op. No. 992 at p. 5 n. 11. The Board and the D.C. Court of Appeals have not yet considered the issue of whether the 2005 regulations supersede the Back Pay Act for District employees. For this reason, the Board asks the parties to brief the issue of whether the Back Pay Act applies to District employees where an arbitrator has awarded attorneys' fees in a case arising after February 4, 2005.

THEREFORE, we find that the Arbitrator's decision to reinstate Grievant is not clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' CBA. No statutory basis exists for setting aside the reinstatement portion of the Award, so that portion of the Award is affirmed. As the portion of the Award concerning the award of attorneys' fees under the Back Pay Act raises an issue of first impression, we order the parties to brief the question of whether the Back Pay Act applies to District employees where an arbitrator has awarded attorneys' fees in a case arising after February 4, 2005. Briefs from each party are due on or before July 2, 2012.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Child and Family Services Agency's Arbitration Review Request is denied with respect to the portion of the award reinstating the Grievant.
2. Grievant will be reinstated in accordance with the arbitrator's Award.
3. The parties will brief the issue of attorneys' fees under the federal Back Pay Act on or before July 2, 2012.
4. 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.

May 30, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-A-15 was transmitted via U.S. Mail and e-mail to the following parties on this the 31st day of May, 2012.

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