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THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
District of Columbia Child and Family Services Agency,)	
Petitioner,)	PERB Case No. 08-A-07
and)	Slip Op. No. 1025
American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO,)	
Respondent.)	

DECISION AND ORDER ON REMAND

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 captioned matter. CFSA seeks review of Arbitrator John Truesdale’s award (“Award”) of September 2, 2008, which rescinded the termination of three (3) employees. CFSA contends that: (1) the arbitrator exceeded his authority; and (2) the Award is contrary to law and public policy. (See Request at pgs. 5 and 7). The American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO (“AFSCME” or “Union”) opposes the Request.

The issues before the Board are whether “the award on its face is contrary to law and public policy” and “whether the arbitrator was without or exceeded his or her jurisdiction” in issuing the award. D.C. Code § 1-605.02(6) (2001 ed.). Specifically, CFSA asserts that the Arbitrator did not use the preponderance of the evidence standard in making his decision. (See Request at pgs. 5 and 7). In Slip Op. No. 956, the Board concluded that the Award was not clear as to what standard of proof was used; accordingly, the Board found that it could not make a determination concerning CFSA’s Request without clarification of the Award. In Slip Op. No.

956, the Board remanded this matter to Arbitrator Truesdale for clarification regarding the standard of proof used in the matter. See *CFSA and AFSCME, Local 2401*, Slip Op. No. 956, PERB Case No. 08-A-07 (May 21, 2010).

On June 2, 2010, Arbitrator Truesdale issued a document styled "Arbitrator's Clarification on Remand" ("Clarification on Remand") in which he clarified the standard of proof used. The parties' pleadings and Arbitrator Truesdale's Award and Clarification on Remand now are before the Board for disposition.

II. Background Information

In the initial Award, the Arbitrator stated that "[o]n January 8, 2008, the bodies of four children were discovered at the home of Banita Jacks, a resident of the District of Columbia. (See Award at p. 2). Prior to this time, on July 12, 2006 and April 27, 2007, there had been calls to the CFSA hotline concerning Banita Jacks' family situation. The last call triggered a CFSA investigation that began on April 28, 2007. CFSA Social Workers Nikole Smith, Carl Miller, and Foletia Nguasong were identified as personnel who had contact with the family as part of the investigation. On January 14, 2008, the CFSA gave each of the three (3) employees a 30-day advance notice of proposed removal. (See Award at p. 2). The proposed removal was based upon actions of the employees that: (1) "threatened the integrity of government operations," and (2) were "detrimental to public, health, safety and welfare." (Award at p. 2).

Pursuant to Article 7, Section 7 of the Master Agreement between AFSCME, District Council 20 and the Government of the District of Columbia, the employees were given the opportunity for a hearing regarding the proposed removal. (See Award at pgs. 2 and 4). On February 13, 2008, an agency Hearing Officer, recommended that the removal actions be dismissed. (See Award at pgs. 2-3). Notwithstanding the Hearing Officer's recommendation, the Mayor "prohibited the Agency Deciding Official from considering the Hearing Officer's recommendation.... [and the] CFSA Director, issued notices of final decision terminating the three (3) employees." (Award at p. 3). On March 6, 2008, the Union filed grievances on behalf of the employees. The Agency denied the grievances on March 27, 2008. On April 22, 2008, the Union invoked arbitration over the terminations. (See Award at p. 3).

The issue before Arbitrator Truesdale was: "Did the Agency have cause, as required by Article 7 of the collective bargaining agreement, to terminate Carl Miller, Nikole Smith and Foletia Nguasong and, if not, what shall be the remedy?" (Award at p. 2).

At the arbitration, the Agency argued that the Grievants were lawfully terminated from their positions for cause because they did not follow CFSA policy. (See Award at p. 14). Specifically, the Agency claimed that "[Ms.] Nikole Smith's failure to probe the July 2006 caller exhibited poor professional judgment. [Mr.] Carl Miller failed to report that the caller said that one of the children was being held hostage, and did not ask what the caller meant by her use of the 'hostage' language. [Also,] Mr. Foletia Nguasong failed to make contact with individuals

with close ties, such as paternal grandparents, relatives, and neighbors who could have provided information on the family. When he received additional information, he failed to conduct any follow-up investigation to contact or locate the family. Instead, the case remained closed.” (Award at pgs. 14-15).

“The Union [countered] that the Agency failed to meet its burden of proof to establish, by a preponderance of the evidence, that it had cause to terminate the Grievants. The Union [stated] that the Agency’s only witness, Audry Sutton, Deputy Director of Program Operation, testified that she was neither the deciding [n]or the proposing official; that a better investigation could have been conducted; [that] all three employees were valuable and outstanding and that the Mayor ordered that they be terminated without an investigation; that the Mayor prohibited CFSA from considering mitigating evidence; that the system failed and was later improved; and that the termination of the employees had been ‘devastating’ to Agency morale.” (Award at p. 15). Finally, the Union asserted that “[t]he documents given to the Grievants, after the decision to terminate them had been made, did not specify the evidence, if any, against them, in violation of due process.” (Award at p. 16).

In an award issued on September 2, 2008, Arbitrator John Truesdale found that “[CFSA] did not have cause to terminate [the Grievants]” and sustained the Union’s grievances. (Award at pgs. 18-19). In support of his decision that there was no cause to terminate the Grievants, the arbitrator found that the termination decisions: (a) failed to meet basic standards of fairness and due process¹ (see Award at p. 16); (b) violated Article 7 of the collective bargaining agreement (see Award at pgs. 16-17); and (c) merited reversal under *United Paperworkers International Union, AFL-CIO v. Misco*, 484 U.S. 29 (1987) (see Award at p. 18). Arbitrator Truesdale reinstated the Grievants without loss of seniority and ordered that they be made whole for loss of pay and benefits, with interest, and expunged the Grievants’ records. He also ordered that CFSA place a letter reiterating the Agency’s Hotline Policy and the Intake and Investigations Policy in the Grievants’ personnel folders for three (3) years. (See Award at pgs. 18-19).

CFSA filed a Request challenging Arbitrator Truesdale’s Award. CFSA asserts that the arbitrator exceeded his authority by “implicitly applying a higher level of proof and imposing a standard which is outside of [the] District’s regulatory provisions that are applicable to District government employees in disciplinary proceedings.” (Request at p. 6). Also, CFSA contends that the Award on its face is contrary to law and public policy because Arbitrator Truesdale “improperly applied a higher level of proof whereas the District Personnel Regulations mandate that the standard of proof for the Agency is preponderance of the evidence [pursuant to] DCMR § 6-1603.9[.]”² (Request at pgs. 7-8).

¹ The arbitrator found that the Grievants were only told that they had contact with the Jacks family and were not given any other reason for the proposed removal action. (See Award at p. 17).

² 6 DCMR §1603.9 provides in pertinent part as follows: “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....”

In support of its Request, CFSA argues that the preponderance of the evidence standard found in the DCMR is applicable in the three (3) terminations because Article 7, Section 8 of the parties' collective bargaining agreement provides that "discipline shall be...consistent with...D.C. Office Of Personnel regulations"; that "the arbitrator could not impose a standard that was heavier and outside of the regulatory authority; and that] [n]either the collective bargaining agreement, nor the personnel regulations gave the arbitrator this authority." (Request at pgs. 6-7).

The Union disputes CFSA's assertion that the arbitrator must apply the standard of proof found in District regulations. Relying on D.C. Code § 1-617.52(d), the Union maintains that the parties' collective bargaining agreement takes precedence over District regulations.³ (See Opposition at pgs. 4-5). Furthermore, the Union asserts that "the section of the personnel regulations upon which the Agency relies is part of the statutory grievance procedure under D.C. Code § 1-616.53, and not [a grievance procedure found in] a collective bargaining agreement." (Opposition at p. 4).

In, *CFSA and AFSCME, Local 2401*, the Board considered CFSA's argument that Arbitrator Truesdale exceeded his authority by not using the preponderance of the evidence standard and found that we could not make a determination based on the record presented. We noted that "[t]he arbitrator mentioned three (3) standards of proof and under what conditions each is sometimes used by the arbitrators, but did not indicate which one he applied." (*Id.* at p. 7). Specifically, we stated as follows:

[W]hen an arbitration award is ambiguous, reviewing bodies may remand the award for clarification. "[A]n award is ambiguous if it is susceptible to more than one interpretation."... [citations omitted]. Here, the only ambiguity is in the standard of proof used by the arbitrator, rather than the award. Remand for clarification permits the reviewing body to avoid "judicial guessing" and instead gives the parties the decision for which they bargained. [citations omitted].

³ D.C. Code § 1-616.52(d) provides as follows: "Any system for the review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by a labor organization...."

A parallel provision found in the District Personnel Manual (DPM), Section 1601.2, states as follows: "Any procedural system for the review of adverse actions negotiated between the District of Columbia and a labor organization shall take precedence over the provisions of this chapter for employees in a bargaining unit represented by a labor organization, to the extent that there is a difference.... A contract, memorandum of understanding or collective bargaining agreement cannot modify the standard for cause as defined in § 1603."

CFSA and AFSCME, Local 2401, Slip Op. No. 956 at p. 7, PERB Case No. 956 (May 21, 2010).

In light of the above, on May 21, 2010, we remanded this matter to Arbitrator Truesdale to “seek[] clarification with respect to one question only: What standard of proof was used to determine whether there was ‘just cause’ to terminate the three (3) Grievants?” (*Id.* at p. 5, n. 4).

On June 2, 2010, Arbitrator Truesdale issued “Arbitrator’s Clarification on Remand” (“Clarification on Remand”) clarifying that, “[i]n response to the Order of the District of Columbia Public Employee Relations Board,” he applied the preponderance of the evidence standard of proof’ in reaching his decision in the September 2, 2008 Award. (Clarification on Remand at p. 3).

In his “Clarification on Remand” Arbitrator Truesdale noted the following:

[In its brief] the Employer did not raise any question concerning standard of proof as such, referring only to D.C. Official Code § 1-616.51(1)-(3) which it said “provides that the District government may take disciplinary action only for cause and that prior written notice of the grounds on which the action is proposed to be taken must be provided.” The Employer’s brief said that “Chapter 16 of the D.C. Personnel Regulations defines ‘cause’ to include any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operation.” The Employer’s brief further cited Article 7, Sections 1-3 of the collective bargaining agreement which it said “provides that discipline, including adverse actions such as removals, shall be imposed for cause, consistent with D.C. Official Code § 1-616.51 and the D.C. Personnel Regulations.”

In its post-hearing brief, the Union also cited D.C. Official Code § 1-616.51. In addition, the Union cited the following language of the D.C. Office of Personnel Regulations which it said was incorporated by reference into the collective bargaining agreement:

§ 1-603.10 In any disciplinary action, the government shall bear the burden of proving by a preponderance of the evidence that the corrective or adverse action may be taken or, in the case of a summary action, was taken, for cause as that term is defined in this section.

The Union argued in its post-hearing brief that the Employer had failed to meet its burden of proof, by a preponderance of the evidence, that it had cause to terminate the Grievants.

In the Discussion section of my Opinion and Award, I included what, it now appears with hindsight, was an unnecessary academic discussion of burden of proof. In finding that the Agency introduced no evidence of any investigation at all, that any consideration of the Hearing Officer's recommendation was prohibited, that basic notions of fairness and due process had not been met, and that the Employer had not met its burden of establishing the reasonableness of its decision to terminate [the] Grievants, I was applying the only standard of proof cited to me by the Parties - the Union's reference to "preponderance of the evidence." (Clarification on Remand at pgs. 2-3).

III. Decision

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances where:

1. "the arbitrator was without, or exceeded, his or her jurisdiction";
2. "the award on its face is contrary to law and public policy";
or
3. the award "was procured by fraud, collusion or other similar and unlawful means."

D.C. Code § 1-605.02(6) (2001 ed.).

CFSA alleges that the arbitrator was without authority or exceeded his jurisdiction because he did not use the preponderance of the evidence standard of proof and because he "attempt[ed] to stand in the place of the Agency to determine whether it could terminate the employees." (See Request at pgs. 5-7). CFSA further argues that the CBA requires that the arbitrator use the standard of proof found in District regulations. The Union argues that the CBA prevails over District regulations and does not contain any specific standard of proof.

We found that the arbitrator's Award was ambiguous regarding the standard of proof used and remanded the matter for the sole purpose of determining which standard of proof the arbitrator used when rendering his decision. On remand, Arbitrator Truesdale issued the second

award in which he made clear that he relied on the preponderance of the evidence standard of proof.

One of the tests the Board uses in determining whether an arbitrator has exceeded his jurisdiction and was without authority to render an award is “whether the Award draws its essence from the collective bargaining agreement.” *D.C. Public Schools v. AFSCME, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). See also, *Dobbs, Inc. v. Local No. 1614, Int’l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987). In *Michigan Family Resources, Inc. v. Service Employees Int’l Union Local 517M*,⁴ the U. S. Court of Appeals for the Sixth Circuit utilized the following standard in determining if an award “draw[s] its essence” from a collective bargaining agreement:

[(1)] Did the arbitrator act “outside his authority” by resolving a dispute not committed to arbitration?; [(2)] Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award?; “[a]nd [(3)] [I]n resolving any legal or factual disputes in the case, was the arbitrator arguably construing or applying the contract”? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made “serious,” “improvident” or “silly” errors in resolving the merits of the dispute.

475 F.3d 746, 753 6th Cir. (2007), (overruling *Cement Division, Nat’l Gypsum Co. v. United Steelworkers for America, AFL-CIO, Local 135*).

In the present case, “[n]othing in the record ... suggests that fraud, a conflict of interest or dishonesty infected the arbitrator’s decision or the arbitral process. [In addition,] no one disputes that the collective bargaining agreement committed this grievance to arbitration [n]or ... that this

⁴ In *MPD and FOP/MPD Labor Committee*, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001), the Board expounded on what is meant by “deriving its essence from the terms and conditions of the collective bargaining agreement” by adopting the U.S. Court of Appeals’ Sixth Circuit decision in *Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135*, which explained the standard by stating the following:

An arbitration award fails to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement; and (4) award is based on general consideration of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765 (6th Cir. 1986).

However, the *Cement Division* standard has been overruled in *Michigan Family Resources*.

arbitrator was ... selected by the parties to be eligible to resolve this dispute. The arbitrator, in short, was acting within the scope of his authority. *Id.* at 754.

This leaves the question of whether the arbitrator was engaged in interpretation: Was he "arguably construing" the collective bargaining agreement? "This view of the 'arguably construing' inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the finality clause in most arbitration agreements, ... stating that 'the arbitrator shall have full authority to render a decision which shall be final and binding upon both parties' and a view whose imperfections can be remedied by selecting [different] arbitrators." *Id.* at 753-754.

In the present case, the arbitrator's opinion has all the hallmarks of interpretation. He refers to, and analyzes the parties' positions, and at no point does he say anything indicating that he was doing anything other than trying to reach a good-faith interpretation of the contract. "Neither can it be said that the arbitrator's decision on the merits was so untethered from the agreement that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his 'own brand of industrial justice.' *Id.* at 754. "An interpretation of a contract thus could be 'so untethered to' the terms of the agreement ... that it would cast doubt on whether the arbitrator indeed was engaged in interpretation. Such an exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that." *Id.* at 753. For the reasons cited above, we find that Arbitrator Truesdale's Award draws its essence from the collective bargaining agreement.

There is no evidence in the record that the arbitrator exceeded his authority in this case. The arbitrator discussed the three standards of proof that may be used by arbitrators in his initial award. However, in his Clarification on Remand, he made it clear that he used only the preponderance of the evidence standard in making his decision.

CFSA also argues that the arbitrator: (1) attempted to stand in the place of the Agency to determine whether it could terminate the employees; (2) had no basis for finding that the Agency failed to follow contractual procedure; and (3) should have found that there was cause to terminate the Grievants.⁵ CFSA's argument that the arbitrator should have found that there was

⁵ Furthermore, CFSA disputes the arbitrator's finding that the Mayor ordered the dismissal of the three (3) employees. CFSA asserts that "due to the immediacy of the circumstances and after an internal investigation and identifying the Agency's contact with the Jacks family and staff involvement, the Agency expeditiously disciplined the employees and orally informed them that they were being terminated. Shortly thereafter, in accordance with the collective bargaining agreement, the Agency formally notified the employees in writing, of the charges for conduct that threatened the integrity of government operations and actions detrimental to public health and welfare. . . . The employees were also given an opportunity to be heard by a hearing officer. . . . [T]here was no evidence adduced at the arbitration that showed that any of the witnesses had conversations with the Mayor or anyone else in government outside of the Agency. The evidence clearly shows that all decisions for termination were signed by a deciding official within the Agency. . . . Even if the Mayor were to make such a decision, as the Chief Executive Officer, the Mayor has authority to and is not precluded from making decisions about subordinate District government agencies

cause to terminate the Grievants, is a repetition of the position it presented to Arbitrator Truesdale. (See Award at p. 4).

We have held that “[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the [a]rbitrator’s interpretation, not the Board’s that the parties have bargained for.” *University of the District of Columbia and University of the District of Columbia Faculty Ass’n*, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 02-A-04 (1992). See *Fraternal Order of Police v. District of Columbia Public Employee Relations Board*, 973 A.2d 174, 177 n. 2 (arbitrator’s interpretation merits deference “because it is the interpretation that the parties ‘bargained for.’”) In addition, we have found that by submitting a matter to arbitration, “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ collective bargaining agreement ... as well as his evidentiary findings and conclusions....” *Id.* Moreover, “[this] 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 Int’l Brotherhood of Teamsters, Local Union 246*, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).

In the present case, the parties submitted their dispute to [Arbitrator Truesdale] and CFSA’s claim that [Arbitrator Truesdale] exceeded his authority only involves a disagreement with the Arbitrator’s: (1) interpretation of Article 7 of the parties’ CBA; and (2) findings and conclusions. This does not present a statutory basis for reversing the arbitrator’s Award. See *District of Columbia Department of Mental Health and Psychologists Union, Local 3758 of the D.C. Department of Mental Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State, County and Municipal Employees, AFL-CIO* (on behalf of John Bruce), Slip OP. No. 850, PERB Case No. 06-A-17 (2006). CFSA essentially is requesting that the Board adopt its arguments and conclusions. We decline to do so.

As a second basis for review, CFSA alleges that the Award is contrary to law and public policy. In support of this contention, CFSA states that “the arbitrator improperly applied a higher level of proof whereas the District Personnel Regulations mandate that the standard of proof for the Agency is preponderance of the evidence” [citing DCMR § 6-1603.9]. (Request at p. 8).

In reviewing whether an award is contrary to law and public policy, we have stated the following:

[T]he possibility of overturning an arbitration decision 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

or their employees, and would have been within his full rights and exercise of authority to do so. (Citing D.C. Code §§ 1-204.22, 1.603.01(17) (XX) (2006 repl.). Nonetheless, it was the Agency that looked into the matter and made the decision to terminate. It was the Agency that issued the employees their notices of proposed removal and the final decision to terminate which resulted in their removal.” (Request at pgs. 9-10).

exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy. *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 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). The petitioning party has the burden to specify applicable law and definite public policy that mandates that the Arbitrator arrive at a different result. *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).⁶

Furthermore, the Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." *District of Columbia Dep't of Corrections v. Teamsters Union Local 246*, 54 A.2d 319, 325 (D.C. 1989).

In the present case, Arbitrator Truesdale has declared that he applied the preponderance of the evidence standard. Therefore, CFSA has failed to specify, "applicable law and public policy that mandates that the Arbitrator arrive at a different result".⁷ Again, CFSA merely disagrees with the arbitrator's findings that the termination decisions: (1) failed to meet basic standards of fairness and due process (*see* Award at pgs. 16-17); (2) violated Article 7 of the collective bargaining agreement (*see* Award at p. 16); and (3) warranted reversals. (*see* Award at p. 18). The Agency has failed to provide a statutory basis for vacating the award.

In light of the above, the Board finds that CFSA's disagreement with Arbitrator Truesdale's findings is not an appropriate ground for review. Moreover, we find no merit to CFSA's arguments. The arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy or in excess of his authority. Therefore, no statutory basis exists for setting aside the Award.

⁶ *See also, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987).

⁷ *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

ORDER

IT HEREBY ORDERED THAT:

- (1) The District of Columbia Child and Family Services Agency'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.

July 8, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order on Remand in PERB Case No. 08-A-07 was transmitted via Fax and U.S. Mail to the following parties on this the 8th day of July 2010.

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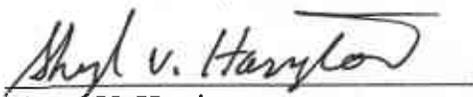
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