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Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
District of Columbia Public Schools,	PERB Case No. 13-A-09
Petitioner,	
v.	Opinion No. 1525
Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO (on behalf of Deborah H. Williams),	
Respondent.	

DECISION AND ORDER ON REMAND

The above-captioned arbitration review request ("Request") is before the Board on remand from an order of the D.C. Superior Court. The court reversed and vacated the decision and order of the Board in *D.C. Public Schools v. Council of School Officers, Local 4*[1] and remanded the case to the Board for proceedings consistent with its order.[2] In accordance with the order of the court, the Request of Petitioner D.C. Public Schools ("Petitioner" or "DCPS") is granted. For the reasons stated below, the Board finds that the Arbitrator exceeded his authority and that his award is contrary to law and public policy.

I. Statement of the Case

A. Arbitration

The facts as found by the Arbitrator, Joseph Sharnoff, in his Opinion and Award ("Award") are as follows. DCPS hired Deborah H. Williams ("Grievant" or "Williams") as a teacher for the 2005-2006 school year. She became principal of the Sharpe Health School at the start of the 2007-2008 school year. (Award 2.)

The Award details numerous problems that Williams had with one of the teachers at the school, Maurice Asuquo ("Asuquo"). In September 2009 Williams sent Asuquo a letter of reprimand as a result of his hostile response to her attempt to observe his class. At the start of

[1] 60 D.C. Reg. 15978, Slip Op. No. 1422, PERB Case No. 13-A-09 (2013).
[2] *D.C. Pub. Schs. v. D.C. Pub. Emp. Relations Bd.*, No. 13 CA 7322 (D.C. Super. Ct. Jan. 8, 2015).

the 2009-2010 school year, Williams was informed of the need to conduct a reduction in force and told that as part of the reduction in force principals would have an opportunity to remove individuals employed at their schools. Asuquo was laid off in October 2009 as a result of a system-wide reduction in force conducted in October 2009. The Arbitrator found that Williams acted in accordance with the Petitioner's directions with regard to the reduction in force. (Award 11.) Asuquo filed a complaint with the D.C. Office of Human Rights against Williams and Sharpe Health School. (Award 11.)

The Petitioner's EEO officer prepared a report on Asuquo's case. The report concluded that there appeared to be sufficient evidence in the record to substantiate Asuquo's allegations. Specifically, the report stated that "Principal Williams continually issued Mr. Asuquo failing . . . evaluations based upon ineffectively communicated standards." (Award 14.) Michelle A. Rhee, the former Chancellor of DCPS, issued to Williams a letter dated May 21, 2010, stating, "I am writing to you to give you notice of my decision not to reappoint you to the position of Principal with the District of Columbia Public Schools . . . for the 2010-2011 school year. **The action is effective at the close of business on June 25, 2010.**" (Award 14.) On June 18, 2010, DCPS issued Williams a notice of termination, which stated that "this letter serves as official notice that you will be terminated from your position as a Principal effective Monday, July 5, 2010." The letter stated that the grounds for termination were failure of good behavior and harassment. (Award 16.)

Respondent Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO ("Union") filed a grievance stating that "[t]he termination is not supported by just cause as required by the parties' collective bargaining agreement. Therefore, this discipline must be reversed. . . ." (Award 2.) The parties' collective bargaining agreement prohibits disciplinary action against an officer except for just cause. (Award 2.) The Arbitrator found that, with regard to the relationship between Williams and Asuquo and the actions of the two them, Williams' testimony was credible and Asuquo's was not. (Award 16-17.) The Arbitrator concluded that DCPS failed to meet its burden of demonstrating that Williams engaged in misconduct against Asuquo and failed to demonstrate that it had just cause to terminate Williams under the parties' collective bargaining agreement. (Award 25-26.) He further stated:

> The Arbitrator, based on the above findings and discussion, grants the grievance and finds that, as a remedy, the DCPS is directed: to reinstate the Grievant to her former, or fully equivalent position of Principal in the DCPS system; and to make her whole for all losses. . . . With regard to the reinstatement directive, the Arbitrator finds that the termination letter issued to the Grievant by the DCPS was intended to, and did, have the effect of making null and void the previously issued Notice of Non-Reappointment. Consequently, the only DCPS action protested in this Arbitration proceeding – as improper and without just cause under the CBA – was the Grievant's termination. The issue also included, to the

> extent a violation of the CBA was found, the appropriate remedy for that violation. . . .[3]

B. Arbitration Review by the Board

DCPS petitioned the Board for arbitration review on the ground that the Award's reinstatement of Williams to her former or fully equivalent position as a principal was contrary to law and public policy. (Request 3-4.) At the parties' request, the Board directed the parties to file briefs.[4]

Although the only statutory ground for review Petitioner asserts in its Request is that the Award is contrary to law and public policy, the Petitioner also asserts in its brief as a ground for review that the Arbitrator exceeded his authority.[5] The Petitioner does not dispute in its brief the Arbitrator's finding that the termination was not for cause.

Regarding the issue of the Arbitrator's authority, the Petitioner argues that the Chancellor's decision not to re-appoint Williams was neither rescinded by the Chancellor nor challenged by Williams. As the Arbitrator noted, Williams challenged only her termination and not her non-reappointment. (Br. for Pet'r. 8.) "The Arbitrator's decision and award exceeds his authority by going beyond the resolution of the expressed issue and rendering null and void a valid non-reappointment letter that was issued by the Chancellor and reinstating Ms. Williams to her position as a principal." (Br. for Pet'r. 8.) With regard to its contention that the Award is contrary to law and public policy, the Petitioner argued, "Title 5-E DCMR § 520.2 is clear that reappointment is at the discretion of the Chancellor; thus, the Arbitrator's directive to reinstate Ms. Williams to the position of principal, where there was no challenge to the Chancellor's decision or authority to non-reappoint Ms. Williams is contrary to law and public policy." (Br. for Pet'r 7-8.) The Petitioner also cites sections 519.1 and 520.5 of Title 5-E and Mayor's Order 2007-186 (Aug. 10, 2007) for the authority of the Chancellor. The Petitioner states that the termination letter terminated Williams' right to revert to another position at DCPS. (Br. for Pet'r 10-11.) Because the termination letter was the only action that was brought, and the only action that could have been brought, before the Arbitrator, the sole remedy the Arbitrator could award was reinstatement of Williams' right to revert to her prior DCPS position. (Br. for Pet'r 11.)

The Union, in its brief, does not deny that it did not grieve the non-reappointment and does not dispute the Chancellor's authority regarding appointments. The Union points out that

[3] Award 26. The Award that the Arbitrator then issued is as follows: "The grievance is sustained. The District of Columbia Public Schools is directed to reinstate the Grievant, Deborah Hall Williams to her former, or fully equivalent position as a Principal in the DCPS school system and make her whole for all losses, including back pay and seniority, under the CBA, less any appropriate set offs. The Arbitrator hereby retains jurisdiction for the limited purpose of resolving any disputes concerning the remedy only."

[4] *D.C. Pub. Schs. v. Council of Sch. Officers, Local 4*, 60 D.C. Reg. 12075, Slip Op. No. 1402, PERB Case No. 13-A-09 (2013).

[5] Br. for Pet'r 8-9. The grounds for review of an arbitration award by the Board are set forth in D.C. Official Code § 1-605.02(6), which provides "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. . . ."

the Arbitrator found that the termination letter made the previously issued notice of non-reappointment null and void. The Union asserts that at the arbitration hearing DCPS provided neither evidence nor argument supporting its present position that the non-reappointment somehow survived the subsequent termination and could not lawfully be affected by the Award. "[I]t is the last employer action that controls here," the Union argues, "and not an interim personnel decision made prior to the ultimate termination decision." (Br. for Resp't 15.) The Union contends that DCPS "has waived it[s] ability to now suggest that the non-reappointment decision can be used to avoid the Award issued by the Arbitrator in this case." (Br. for Resp't 14.)

The Board agreed with the Union that DCPS was impermissibly raising an argument for the first time in its Request, and for that reason the Board denied the Request.[6]

C. Order of the D.C. Superior Court

On judicial review, the D.C. Superior Court reversed the Board's finding that DCPS waived the issue of non-reappointment. The court stated that the Arbitrator's finding that the termination letter nullified the notice of non-reappointment made clear that DCPS had contested Williams' right to be re-appointed and had not raised the issue for the first time before the Board.[7]

The court interpreted the termination letter differently than the Arbitrator did. The termination letter and the notice of non-reappointment have different effective dates. Despite the Chancellor's previous notice that her decision not to reappoint Williams would be effective June 25, 2010, the termination letter notified Williams that she would be terminated from her position as principal effective July 5, 2010. In view of the discrepancy between the dates, the Arbitrator determined that the letter of termination nullified the earlier notice, and the Board deferred to this finding.[8] However, the court did not defer to this finding but instead interpreted the termination letter to extend "the termination of Grievant's principal position" to July 5, 2010. The court found no evidence that the termination letter rescinded the non-reappointment letter. The court further stated,

> It is clear that the appointment and retention of a DCPS principal is at the sole discretion of the Chancellor. 5 DCM[R] 520.2. Therefore, PERB failed to consider whether the Arbitrator exceeded his authority when he adjudicated a grievance involving the non-reappointment of a principal and he reinstated Grievant to a DCPS principal position.[9]

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[6] *D.C. Pub. Schs. v. Council of Sch. Officers, Local 4*, 60 D.C. Reg. 15978, Slip Op. No. 1422 at pp. 3-4, PERB Case No. 13-A-09 (2013).
[7] *D.C. Pub. Schs. v. D.C. Pub. Emp. Relations Bd.*, No. 13 CA 7322, slip op. at 7 (D.C. Super. Ct. Jan. 8, 2015).
[8] *D.C. Pub. Schs. v. Council of Sch. Officers, Local 4*, 60 D.C. Reg. 15978, Slip Op. No. 1422 at 4, PERB Case No. 13-A-09 (2013); *D.C. Pub. Schs. v. Council of Sch. Officers, Local 4*, 60 D.C. Reg. 12075, Slip Op. No. 1402 at 3, PERB Case No. 13-A-09 (2013).
[9] *D.C. Pub. Schs. v. D.C. Pub. Emp. Relations Bd.*, No. 13 CA 7322 slip op. at 8 (D.C. Super. Ct. Jan. 8, 2015).

The court concluded that by sustaining the Award, PERB usurped the authority of the Chancellor. The court reversed and vacated the Board's decision and order and remanded the case to the Board for proceedings consistent with the court's order.

II. Analysis

The proceedings discussed above establish as the law of the case that (1) appointment and retention of a DCPS principal is at the sole discretion of the Chancellor; (2) the Chancellor did not re-appoint Williams to the position of principal, and the Chancellor's decision not to re-appoint her was not rescinded; (3) at the arbitration DCPS contested Williams' right to be re-appointed as a principal and did not raise that issue for the first time before PERB; and (4) Williams' employment with DCPS was terminated, and this termination was not for just cause. (DCPS has not suggested any statutory ground for reversing this determination of the Arbitrator, and the Superior Court did not question it.)

In light of the foregoing law of the case and the Superior Court's remand for proceedings consistent with its order, we consider again the Petitioner's contentions that (1) the Arbitrator exceeded his authority "by going beyond the resolution of the expressed issue and rendering null and void a valid non-reappointment letter that was issued by the Chancellor" (Br. for Pet'r 8) and (2) the directive to reinstate Williams to the position of principal, despite the Chancellor's decision not to re-appoint her, is contrary to law and public policy.

A. Authority of the Arbitrator

Arbitrators are required to rule on all the issues, but no more than the issues, the parties submit.[10] DCPS argues that while the grievance challenged Williams' termination, it did not challenge the decision not to re-appoint her. (Br. for Pet'r 2, 5, 7.) Williams' non-re-appointment, DCPS asserts, "was not at issue in arbitration." (Br. for Pet'r 8.)

The Award states that "[t]he union filed a grievance on behalf of Williams in protest of her termination. . . ." (Award 16.) Although the Union grieved only the termination, it did seek "as a remedy, to have the Grievant reinstated to her former position as a Principal." (Award 2.) The Arbitrator formulated the issue before him thus: "Was the decision of the District of Columbia Public Schools to terminate the Grievant, Deborah H. Williams[,] from her position of Principal at the Sharpe Health School for just cause under the Party's Agreement, at Article X.A.3 and, if not, what is the appropriate remedy?" (Award 2.) The issue stated by the Arbitrator does not include the non-reappointment, but it does describe the DCPS decision in question as a decision to terminate the Grievant "from her position of Principal." That wording was not of the Arbitrator's invention. DCPS chose the wording of the letter of termination, and DCPS worded it to notify Grievant "that you will be terminated from your position as a Principal."

The Arbitrator's resolution of the issue, however, was beyond his authority. Although "[t]he Board has held on numerous occasions that an arbitrator has the full range of equitable

[10] *Cathedral Ave. Coop., Inc. v. Carter*, 947 A.2d 1143, 1152 (D.C. 2008).

powers to fashion an appropriate remedy where the parties' contract does not specifically limit his authority,"[11] the maxim that "equity follows the law"[12] places a limit on the full range of equitable powers. Equity is ancillary and not antagonistic to the law, and where a law precludes a remedy, such as the remedy issued by the Arbitrator in this case, equity will not aid the circumvention of the law.[13]

Title 5-E of the D.C. Municipal Regulations ("DCMR") empowers the superintendent of schools to appoint principals.[14] Section 520.2 provides that retention and reappointment of a principal shall be at the discretion of the superintendent.[15] An appointment to the position of principal expires on completion of the principal's term unless the appointment has been renewed.[16]

Citing section 520.2, the Superior Court held that "the appointment and retention of a DCPS principal is at the sole discretion of the Chancellor."[17] If by law the Chancellor has the *sole* discretion to appoint a DCPS principal, then an arbitrator does not have lawful discretion to appoint a DCPS principal. As a result, appointing Williams to the position of principal was not within the equitable powers of the Arbitrator. Therefore, the Board finds that the Arbitrator exceeded his authority.

B. Law and Public Policy

The provisions of the DCMR discussed above "constitute 'applicable law and definite public policy that mandate[] that the Arbitrator arrive at a different result.'"[18] The Arbitrator's directive that DCPS "reinstate the Grievant to her former, or fully equivalent position of Principal in the DCPS system" is not permitted by the DCMR and consequently is, on its face, contrary to law and public policy.

For the foregoing reasons the Petitioner's arbitration review request is granted.

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[11] *Univ. of D.C. v. D.C. Faculty Ass'n/NEA*, 38 D.C. Reg. 1580, Slip Op. No. 262 at p. 6, PERB Case No. 90-A-08 (1990).
[12] *Jas. Stewart & Co. v. Liberty Trust Co.*, 60 App. D.C. 243, 244, 50 F.2d 1008, 1009 (1931).
[13] *Eichelberger v. Symons*, 53 App. D.C. 116, 118, 288 F. 654, 656 (1923).
[14] D.C. Mun. Regs. tit. 5-E §§ 515.1(a), 519.1.
[15] The Public Education Reform Amendment Act of 2007, D.C. Law 17-9, converted the position of superintendent to chancellor. National Resource Council of the National Academies, *A Plan for Evaluating the District of Columbia's Schools* 43 (2011). Where a provision of the DCMR refers to the superintendent, the D.C. Court of Appeals has read the provision to refer to the chancellor. *See Thompson v. District of Columbia*, 978 A.2d 1240, 1242-44 (D.C. 2009).
[16] D.C. Mun. Regs. tit. 5-E § §520.5.
[17] *D.C. Pub. Schs. v. D.C. Pub. Emp. Relations Bd.*, No. 13 CA 7322 slip op. at 8 (D.C. Super. Ct. Jan. 8, 2015).
[18] *D.C. Water & Sewer Auth. and AFGE Local 631*, 59 D.C. Reg. 4536, Slip Op. No. 931 at p. 9, PERB Case No. 07-A-05 (2008) (quoting *Metro. Police Dep't v. FOP/Metro. Police Dep't Labor Comm. (on behalf of Sims)*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

C. Modification of the Award

DCPS requested the Board "to set aside or modify the Arbitrator's award reinstating Ms. Williams to her former or fully equivalent position as principal within DCPS." (Br. for Pet'r 12.) DCPS indicates the appropriate modification by stating that "the only viable remedy that can be awarded by the Arbitrator is reinstatement of Ms. Williams' right to revert to her prior position." (Br. for Pet'r 11.) The right to revert was the only employment right that the termination notice rescinded, DCPS argues, because Williams' term as principal was ending and was not renewed. "As such," DCPS states, "upon the Arbitrator's finding of no just cause for termination, the only appropriate remedy available to Ms. Williams is reinstatement of her right to revert to a prior DCPS position." (Br. for Pet'r 11.)

The Union sought to have Williams' termination reversed on the ground that it was not supported by just cause as required by the parties' collective bargaining agreement. (Award 2.) The Arbitrator found no just cause for the termination. (Award 25-26.) Reversing the termination, as DCPS points out, reinstates Williams' right to revert to her highest prior permanent level of employment at DCPS. This right is governed by Title 5-E, section 520.3 of the DCMR, which provides:

> A person who is not retained in the position of Principal or Assistant Principal and who holds permanent status in another position in the D.C. Public Schools shall revert to the highest prior permanent level of employment upon his or her removal from the position of Principal or Assistant Principal; provided, that this right shall not include the right to any particular position or office previously held.

The Union stated that upon receiving her notice of non-reappointment from an instructional superintendent, Williams informed him as well as Mia Blankenship, a DCPS employee, that she intended to exercise her retreat rights. (Br. for Resp't 12) (citing Tr. 555-56, 562-66.) Whether Grievant notified DCPS of her intention in the manner specified in the notice of re-appointment[19] is not our concern because section 520.3 of the DCMR is mandatory. A person who is not retained as principal and who holds permanent status in another position in DCPS "shall revert to the highest prior permanent level of employment."

The record reflects that both elements prescribed by section 520.3 are present. Williams was not retained in her position as principal. (Award 14-15.) DCPS acknowledges that Williams had a "prior permanent position as a teacher." (Br. for Pet'r 11; *see also* Award 2.)

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[19] Award p. 15.

Therefore, pursuant to the Board's authority under D.C. Official Code section 1-605.02(6) to modify an award where the award on its face is contrary to law and public policy or the arbitrator exceeds his or her jurisdiction, the Award is modified to order the Petitioner to reinstate Williams to her highest prior permanent level of employment rather than to her former, or fully equivalent, position as a principal.

ORDER

It is hereby ordered that:

1. The Order in Opinion No. 1422 is vacated.

2. The arbitration review request of the District of Columbia Public Schools is granted.

3. The Award is modified to read as follows:

   The grievance is sustained. The District of Columbia Public Schools is directed to reinstate the Grievant, Deborah Hall Williams, to her highest prior permanent level of employment in the DCPS school system and make her whole for all losses, including back pay and seniority, under the collective bargaining agreement, less any appropriate set-offs. The Arbitrator retains jurisdiction for the limited purpose of resolving any disputes concerning the remedy only.

4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairman Charles Murphy and Members Keith Washington, Ann Hoffman, and Yvonne Dixon

Washington, D.C.

June 25, 2015

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-A-09 was transmitted via File & ServeXpress to the following parties on this the 26th day of June 2015.

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