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**Government of the District of Columbia  
Public Employee Relations Board**

In the Matter of:	)	
	)	
District of Columbia Department of Corrections,	)	
	)	
Petitioner,	)	PERB Case No. 06-A-01
	)	
and	)	Opinion No. 824
	)	
Fraternal Order of Police/ Department of Corrections Labor Committee (On behalf of Carl Butler),	)	
	)	
Respondent.	)	
	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

The Department of Corrections ("DOC") filed an Arbitration Review Request ("Request"). DOC seeks review of an Arbitration Award ("Award") that sustained a grievance filed by the Fraternal Order of Police/Department of Corrections Labor Committee ("FOP" or "Union") on behalf of the Grievant, Carl Butler ("Grievant"). FOP opposes the Request.<sup>1</sup>

The issue before the Board is whether "the arbitrator was without authority or exceeded his or her jurisdiction" or whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02 (6) (2001 ed.).

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<sup>1</sup> See Respondent's Opposition to Petitioner's Arbitration Review Request ("Opposition").

## I. Discussion

On or about December 18, 2004, the Grievant, a correctional officer of the DOC, "brought contraband food into [a] prison cell. . . ." (Award at p. 34). His actions were seen and reported by other correctional officers. An investigation was conducted and the Deputy Warden for Operations recommended that the Grievant be discharged for violation of DOC's contraband policy. On February 28, 2005, the Grievant was sent a notice informing him of the Deputy Warden's recommendation and his right to request a departmental hearing. The Grievant requested such a hearing, and Hearing Officer Delores Thomas reviewed the recommendation and determined that the appropriate penalty was a forty-five (45) day suspension. (Award at pgs. 7-8). Interim Director York remanded the case, presenting exhibits "to show the Hearing Officer that DOC took contraband seriously." (Award at p. 11). After the remand, the Hearing Officer determined that the discharge was appropriate. (See Award at p. 12). Subsequently, on or about May 23, 2005, the Grievant received a discharge letter. The Union filed a grievance on behalf of Mr. Butler, and the grievance was denied. The Union then invoked arbitration on June 21, 2005. On September 27, 2005 an arbitration hearing was held before Arbitrator Guy Raymond.

The issue before the Arbitrator was whether "the discharge of Carl Butler [was] for cause, in accordance with the parties... [Collective Bargaining Agreement ("CBA")]... and Chapter 16 of the District Personnel Manual?" (Award at p. 2).

At arbitration, DOC asserted that there was sufficient evidence to establish cause for the adverse action taken against the Grievant based upon his own admissions to DOC's investigators. (See Award at p. 14). DOC also argued that the Grievant's change in his story regarding the incident in a subsequent interview with investigators undermined his credibility. (See Award at p. 21). DOC claimed that utilizing progressive discipline would be inappropriate because of the Grievant's attitude towards his violation. (See Award at p. 23). Specifically, DOC believed the Grievant did not appreciate the seriousness of his violation of the contraband policy. DOC also argued that the Arbitrator should arrive at the same result as another arbitrator in a similar case involving DOC, and thereby sustain the Grievant's termination. (See Award at p. 23).

FOP argued that the Arbitrator was not confined to determining if there was cause for disciplining a grievant. Specifically, FOP contended that the Arbitrator may also determine what, if any, penalty should be imposed. (See Award at p. 27). FOP claimed in this case that the penalty was excessive. (See Award at p. 28). FOP asserted that the Grievant should have been provided a "remand memo" and "summary of prior discharges", and that in failing to do so, DOC ignored the Grievant's due process rights. (See Award at p. 22).

DOC, countered that: (1) it did not ignore any due process rights; (2) the Grievant waived any due process rights when he confessed to the violation and signed the waiver of union representation; and (3) the CBA contains no provisions granting the Grievant any due process rights.

(See Award at pgs. 22-23).

In an Award dated December 1, 2005, Arbitrator Raymond, found:

Carl Butler had an **impeccable 12 year record** with D.O.C. [Grievant received [n]othing lower than superior [performance evaluations] and two letters of commendation. . . .

Discharge is **too harsh** a punishment for the **circumstances disclosed** at this arbitration **hearing** with his excellent service record to D.O.C. . . . In all justice he is deserving of a progressive discipline penalty namely 45 days of suspension with no pay. . . .  
(Award at p. 36)(Emphasis in the original).

The Arbitrator, in reducing the penalty referred to Union Exhibit 2, the initial memorandum from the Hearing Examiner to the Interim Director recommending a suspension of 45 days. (See Award at pgs. 11, 36).

In their Arbitration Review Request, DOC claims that "the Arbitrator exceeded his authority and, in so doing, issued an award that, on its face, violates both law and public policy." (Request at p. 4). FOP countered that DOC's Request has not presented a statutory basis for review, and that the Award is not contrary to law and public policy. (See Opposition at pgs. 2,4).

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; that:

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.).

In the present case, DOC asserts that the Arbitrator reduced the penalty based on a "misapprehension" and a failure to "apply the correct evidentiary standard." (Request at pgs. 5-6). In support of this assertion, DOC disagrees with the criteria the Arbitrator expounded upon in rendering his decision; specifically the psychological impact of discipline. Furthermore, DOC argues that the evidentiary standard for proving there was "cause" for disciplinary action did not permit the Arbitrator to reduce the penalty. DOC claims that a "cause" standard would only allow the Arbitrator to determine if DOC's decision to discipline the Grievant was "rational and fair". (Request at p. 6).

FOP counters that an arbitrator is given broad equitable power to fashion a remedy unless the contract expressly limits that authority and that no such contractual limitation exists in this case. (Opposition at pgs. 2-3). FOP concludes that DOC's position amounts to a mere disagreement with the Arbitrator's findings and conclusions, and does not present a statutory basis for review. (Opposition at p. 3). We agree.

Although DOC initially asserted that the Arbitrator was without authority and exceeded his jurisdiction in rendering his Award, no supporting argument was made in the body of its Request. Moreover, we believe that the argument DOC does present is merely a disagreement with the Arbitrator's findings and conclusions. We have explained 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 and conclusions on which the decision is based.

*District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police/Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

We have found that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." *D.C. Department of Public Works and AFSCME, Local 2091*, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). An arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' CBA.<sup>2</sup> See, *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Also, the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960), that "part of what the parties bargain for when they include an arbitration provision in a labor agreement is the 'informed judgment' that the arbitrator can bring to bear on a grievance, especially as to the formulation of remedies." See also, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6 (May 13, 2005).

In the present case, DOC merely disagrees with the Arbitrator's conclusion that discharge is too harsh a penalty in this case. Also, DOC has not established that the CBA limited the Arbitrator's authority to fashion a remedy. Whereas DOC has failed to present a statutory basis for review, we cannot grant its Request on this ground.

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<sup>2</sup>We note that if the parties' CBA limited the arbitrator's power, that limitation would be enforced.

As a second basis for review, DOC claims that the Arbitrator's Award on its face violates law or public policy, in that it "conflicts with well respected Supreme Court precedent." (Request at p. 6). DOC cites a number of cases which provide that an arbitration decision may be overturned where the decision is contrary to law or public policy. (See Request at pgs. 6-11). DOC asserts that since the Grievant committed a felony<sup>3</sup>, the Arbitrator erred in reducing the penalty. (See Request at pgs. 11-12).

FOP countered that "[t]here is no evidence that [the Grievant] committed a felony or that he was terminated for committing a felony." (Opposition at p. 4). Specifically, FOP claims that the fish the Grievant brought to the facility was not contraband because he was permitted to bring it to work for his "own use" and that the only reason he gave it to the inmates was due to his reassignment where he could not consume the fish. (See Opposition at p. 5). FOP argued that the Grievant "did not bring any contraband into the Jail . . . [and] [t]herefore, he is not guilty of a felony under D.C. Code § 22-2603." (Opposition at p. 5).

The possibility of overturning an arbitration decision on the basis of law and public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of the contract . . . . "[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." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). We have held that to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the arbitrator arrive at a different result. *AFGE, Local 631 and Dept. Of Public Works*, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law or legal precedent. See *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 43 (1987). As the District of Columbia Court of Appeals has stated, a reviewing Board or Court must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." *Department of Corrections v. Local No. 246*, 554 A. 2d 319, 325 (D.C. 1989).

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<sup>3</sup>See D.C. Code § 22-2603, which provides:

Any person, not authorized by law, or by the Mayor of the District of Columbia, or by the Director of the Department of Corrections of the District of Columbia, who introduces or attempts to introduce into or upon the grounds of any penal institution of the District of Columbia, whether located within the District of Columbia or elsewhere, any narcotic drug, weapon, or any other contraband article or thing, or any contraband letter or message intended to be received by an inmate thereof, shall be guilty of a felony, and, upon conviction thereof in the Superior Court of the District of Columbia or in any court of the United States, shall be punished by imprisonment for not more than 10 years.

District of Columbia Official Code § 22-2603 (2001 ed.) makes it a felony for any person to give contraband to inmates. The issue of whether or not the Grievant violated the statute was not before the Arbitrator, and he made no finding on that issue.<sup>4</sup> The issue in this case was whether the discharge of the Grievant was for cause, in accordance with the parties' CBA and Chapter 16 of the District Personnel Manual. Furthermore, D.C. Code § 22-2603 contains no provisions that mandates that an arbitrator sustain the discharge of an employee for its violation. The petitioning party in an arbitration review request has the burden to specify applicable law and definite public policy that mandates that the Arbitrator reach a different result. See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633, PERB CASE No. 00-A-04 (2000); 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). Neither the DC Personnel Manual nor the contraband law mandates that an arbitrator sustain a discharge under the circumstances presented in this case.

In addition, DOC contends that the Award is contrary to the public policy which requires DOC to maintain order in a correctional facility. However, DOC cited no specific law or public policy that mandates that an arbitrator sustain the dismissal of an employee for any infraction that DOC contends interferes with its duty to maintain order. It was DOC's burden to establish the existence of a specific law or public policy mandating that the Arbitrator reach a different result. DOC has not alleged, let alone proved, the existence of any such specific law or public policy.

The Board finds that DOC has failed to present a statutory basis for review of the Arbitrator's Award in this case.

For the reasons discussed above DOC's Request is denied.

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<sup>4</sup>It should be noted that DOC presented no evidence that the Grievant was either charged, prosecuted or convicted under this statute.

Decision and Order  
PERB Case No. 06-A-01  
Page 7

**ORDER**

**IT IS HEREBY ORDERED THAT:**

- (1) The District of Columbia Department of Correction'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.**

**September 11, 2006**

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 06-A-01 was transmitted via Fax and U.S. Mail to the following parties on this the 11<sup>th</sup> day of September 2006.

James T. Langford, Esq.  
Labor Relations Specialist  
Office of Labor Relations and  
Collective Bargaining  
441 4<sup>th</sup> Street, N.W.  
820 North  
Washington, D.C. 20001

**FAX & U.S. MAIL**

Joshua McInerney, Esq.  
Baptiste & Wilder  
1150 Connecticut Avenue, N.W.  
Suite 500  
Washington, D.C. 20036

**FAX & U.S. MAIL**

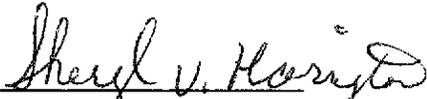
**Courtesy Copy:**

Jonathan K. O'Neill, Esq.  
Office of Labor Relations  
and Collective Bargaining  
441 4<sup>th</sup> Street, N.W.  
Suite 820 North  
Washington, D.C. 20001

**U.S. MAIL**

Nila Ritenour, Vice Chairperson  
FOP/DOC Labor Committee  
FOP/DOC Labor Committee  
711 4<sup>th</sup> Street, N.W.  
Washington, D.C. 20001

**U.S. MAIL**

  
Sheryl Harrington  
Secretary