

Official Leave (AWOL) and Insubordination totaling six specifications. (*See Award* at pgs. 1-2). The Grievant elected to challenge her termination through the grievance procedure provided in the parties' collective bargaining agreement ("CBA") and arbitration was invoked in November 2008. (*See Request* at p. 3). A hearing was held on July 30, 2009 before arbitrator Byron Yaffe.

An Award was issued on November 6, 2009. (*See Request* at p. 3). The Arbitrator found the following facts as pertinent to his decision:

On 8/18/08 the Grievant was provided a notice of proposed removal based upon charges of AWOL and insubordination. The AWOL charges alleged:

- 1) that she vacated the premises after her requests for unscheduled leave were denied;
- 2) that she was scheduled to return to duty on 7/27 at 6 a.m., that she did not report until 8, and made no attempt to notify management;
- 3) that on 7/27/08 she was scheduled to return to duty at 12 noon, that she did not do so, and did not notify anyone of her intent in that regard; and
- 4) that she did not return to duty on 8/4 as she was instructed to.

The insubordination charges alleged:

1. that she left the premises on 7/24/08, when her request to do so was denied; and
2. that although she was directed to return to duty after a suspension on 8/4/08, she did not return to duty on that date.

After a hearing, the Grievant was ultimately terminated on 9/30/08.

On July 25, the Grievant received a ten-day suspension for insubordination and for being AWOL on prior occasions in May and early June of 2008. Three of the ten days were to be held in abeyance for sixty days, pending the Grievant's conduct during that period. The first seven days of the suspension began on 7/28/08 and ended on 8/3/08. The Grievant was notified that she was to return to work on 8/4/08 at 6 a.m.

(Award at pgs. 1-2).

The Arbitrator identified the following issues for arbitration:

ISSUE:

Was the Grievant's termination for just cause, and if not, what is the appropriate remedy?

(Award at p. 1).

After considering the positions of the parties, the Arbitrator reasoned that "[the Agency had just cause to formally counsel and suspend the Grievant for the [July 24 and August 8, 2008] incidents under the just cause standard, but did not have the right to base the Grievant's termination on said incidents." (Award at p. 7). The Arbitrator considered factors such as the Grievant's disciplinary history, the use of suspension in most other incidents of employee AWOL, and the reasonableness OUC's decision to base its decision to terminate the grievant on previous AWOL incidents for which the grievant had already been disciplined. Consequently, as to the AWOL incidents occurring on July 25 and 27, 2008, the Arbitrator determined that termination was "too severe a penalty under the just cause standard." (*See* Award at p. 7). Instead, the Arbitrator directed OUC:

to offer the Grievant reinstatement into her former or an equivalent position, without loss of seniority. However, based upon the Grievant's recent work history, she shall not be entitled to a make whole remedy. Furthermore, the Grievant should understand that this award affords her an opportunity to be reinstated on a last chance basis, thereby conditioning her right to continued employment in the future on her ability to work without an AWOL incident for 24 months from the date of her reinstatement. If she is found, under the just cause standard, to be AWOL during said period, the Employer will have the right, without further progressive discipline, to terminate her.

(Award at pgs. 7-8).

On December 1, 2009, the Union submitted its Request asserting the Arbitrator exceeded his jurisdiction "when the Arbitrator failed to treat the Grievant fairly and equitably, as is required by the collective bargaining agreement, by reinstating the Grievant without loss of seniority without awarding the Grievant back pay and placing her in "last chance" status for a period of two years." (Request at p. 4). The Agency opposes the Union's Request.

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:

1. If "the 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) (2001 ed.).¹

In the present case, the Union argues that "the Arbitrator exceeded his jurisdiction as the Award fails to draw its essence from the collective bargaining agreement when he failed to award back pay." (Request at p. 4). Specifically, FOP contends that:

the portion of the award, failing to award back pay because of the Grievant's recent alleged work history for which the Arbitrator determined the Grievant had already been disciplined, is contrary to the express terms of the parties' collective bargaining agreement that requires employees be treated both fairly and equitably. Had the Arbitrator issued an award in compliance with the collective bargaining agreement, having determined the Agency did not have cause to terminate the Grievant, he would have mitigated the penalty treating the Grievant equitably with other employees who had committed similar misconduct and received a lesser penalty.

(Request at p. 5).

In support of this argument, FOP maintains that:

The Collective Bargaining Agreement further provides that the "agency shall take [disciplinary] action in accordance with the progressive disciplinary table of offenses..." Exhibit 2, Article 23, Section A(2). By failing to award back pay for the thirteen month

¹ In addition, Board Rule 538.3 - Basis For Appeal - provides:

In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:

- (a) The arbitrator was without authority or exceeded the jurisdiction granted;
- (b) The award on its face is contrary to law and public policy; or
- (c) The award was procured by fraud, collusion or other similar and unlawful means.

period since the Agency removed the Grievant without the necessary cause - the Arbitrator has constructively suspended the Grievant for a period exponentially longer than allowed for in the District of Columbia Table of Penalties, District Personnel Manual, Section 1619.

(Request at pgs. 5-6).

Also, FOP claims that “[t]he Arbitrator exceeded his jurisdiction as the Award fails to draw its essence from the collective bargaining agreement when he placed the Grievant in a last chance status.” (Request at p. 6). FOP argues that:

By placing the Grievant in a “last chance” status for a period of two years from the date of reinstatement, the arbitrator places additional requirements on the parties, restricts future conduct, and potentially restricts the right of the Grievant to the progressive discipline provided for in the collective bargaining agreement.

As stated above, the Union contends that the Arbitrator was limited to the type of remedy which results from a decision to rescind an agency’s termination of a grievant. We have held and the District of Columbia Superior Court has affirmed that, “[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the [CBA].” *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int’l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator’s decision must be affirmed by a reviewing body “as long as the arbitrator is even arguably construing or applying the contract.” *Misco, Inc.*, 484 U.S. at 38. 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).

In the present case, the Board finds that the Union’s disagreement with the Arbitrator’s Award is that the remedy that did not include back pay and also placed the Grievant in a “last chance” status. The Board finds that the Union merely requests that we adopt its interpretation of the parties’ CBA and its proposed remedy under the above-referenced provision of the parties’ CBA. This we will not do.

Under the Board's precedent, we have found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.² See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). However, the Union does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, where the Arbitrator was empowered to determine if OUC had cause to discipline the Grievant, pursuant to Article 24, Section H (12) of the parties' CBA, he also had the authority to determine the appropriate penalty. Contrary to the Union's contention, the Arbitrator did not add to, or subtract from, the parties' CBA but merely used his equitable power to formulate the remedy, which in this case involved rescinding the Grievant's termination, but not providing back pay and directing that the Grievant be placed in a last chance status. Thus, the Arbitrator acted within his authority.

The Board finds that the Union's argument asks that this Board adopt its findings and interpretation of the CBA, and merely represents a disagreement with the Arbitrator's findings and interpretation regarding the remedy. As stated above, the Board will not substitute its, or the Union's, interpretation of the CBA for that of the Arbitrator. Thus, the Union has not presented a ground establishing a statutory basis for review.

The Union also alleges that the Arbitrator's remedy was not drawn from the essence of the agreement. The Board has held, as has the Court of Appeals for the Sixth Circuit, that:

we will consider the questions of 'procedural aberration'.... [and ask]: [D]id the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in 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.

* * *

The Court's repeated insistence that the federal courts must tolerate "serious" arbitral errors suggests that judicial consideration of the merits of a dispute is the rare exception not the rule. At the same time we cannot ignore the specter that an arbitration decision could be so "ignor[ant]" of the contract's "plain language," [citation omitted] ... as to make implausible any contention that

² We note that if the Union had cited a provision of the parties' CBA that limits the Arbitrator's equitable power, that limitation would be enforced.

the arbitrator was construing the contract.... Such 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.... [Citation omitted.]

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 parties’ decision to hire their own judge to resolve their disputes....

Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M, 475 F.3d 746, 753 (2007) (overruling *Cement Divisions, Nat. Gypsum Co. (Huron) v. United Steelworkers of America, AFL-CIO-CLC, Local 135*, 793 F.2d 759).

The Board finds nothing in the record that suggests that fraud, a conflict of interest or dishonesty infected the Arbitrator’s decision or the arbitral process. No one disputes that the collective bargaining agreement committed this grievance to arbitration and the Arbitrator was mutually selected by the parties to resolve the dispute. (*See Michigan*, at p. 754). Therefore, the Board rejects the argument that the Arbitrator exceeded his authority. In light of the above, the Board finds that there is no claim that the arbitrator acted outside his authority by resolving a dispute not committed to arbitration, whether the arbitrator committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award, and whether the arbitrator, in resolving any legal or factual disputes in the case, was arguably construing or applying the contract. Therefore, the Board rejects this argument.

In view of the above, we find no merit to the Union’s argument. We find that the Arbitrator’s conclusions are based on a thorough analysis and cannot be said to be clearly erroneous or in excess of his authority under the parties’ CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The National Association of Government Employees, SEIU, Local R3-07’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.

October 7, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-08 was transmitted via Fax and U.S. Mail to the following parties on this the 7th day of October 2011.

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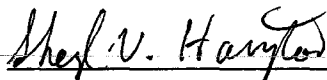
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