Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Mental Health,	
Petitioner,	
and	PERB Case No. 11-A-09
Local 1199, National Union of Hospital and Health Care Employees, AFL-CIO, Local 2095,	Opinion No. 1265
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On August 1, 2011, the District of Columbia Department of Mental Health ("Agency," "Petitioner" or "DMH") filed an Arbitration Review Request ("Request"). DMH seeks review of an arbitration award ("Award") that reversed the termination of Derrick Pitt ("Grievant" or "Mr. Pitt"), a Psychiatric Nursing Assistant. The Arbitrator ruled that "Management violated the Collective Bargaining Agreement in terminating the Grievant." (Award at pg. 111). The Agency filed an Arbitration Review Request, alleging that the "Arbitrator's Award is on its face contrary law to and public policy." (Request at pg. 4). Local 1199, National Union of Hospital and Health Care Employees, AFL-CIO, Local 2095 ("Union" or "Respondent") filed a document styled Union's Opposition to Arbitration Review Request ("Opposition").

The DMH's Request and the Union's Opposition are before the Board for disposition.

II. Discussion

This case concerns the termination of the Grievant from his position as a Psychiatric Nursing Assistant with the DMH. The Grievant was discharged for alleged patient abuse "as a result of fighting or assaulting a patient."[1] (Award at pg. 6). The Union filed a grievance on behalf of Mr. Pitt, and arbitration was conducted by Arbitrator Charles E. Donegan on December 7, 8 and 29, 2010. (Award at pg. 6). On June 30, 2011, Arbitrator Donegan issued his decision, finding that:

> Management violated the Collective Bargaining Agreement in terminating the Grievant. However, there was just cause to discipline the Grievant. The proper remedy is a twenty (20) day suspension. The Grievant should also be reassigned to a different ward. Any income earned by the Grievant while he was discharged shall be deducted from his back pay award.

(Award at pg. 111).

DMH filed the instant review of the Award, contending that: "[the] award is contrary to law and public policy." D.C. Code § 1-605.02(6) (2001 ed.).

When a party files an arbitration review request, the Board's scope of review is extremely narrow.[2] 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.).

Concerning DMH's claim that the Award is on its face contrary to law and public policy, we disagree for the reasons discussed below.

As previously stated, the Board's scope of review, particularly concerning the public policy exception, is extremely narrow. Furthermore, the U.S. Court of Appeals, District of Columbia Circuit, observed:

---

[1] For a full recitation of the factual background, see the Arbitrator's Award.

[2] 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 arbitration 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.

> [i]n *W.R. Grace*, the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question "must be well defined and dominant, and is to be ascertained 'by reference to laws and legal precedents and not from general considerations of supposed public interests.'" Obviously, the 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).[3]

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). In addition, 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 pg. 2, PERB Case No. 00-A-04 (2000). *Also see, 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 pg. 6, PERB Case No. 86-A-05 (1987). As 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 Department of Corrections v. Teamsters Union Local 246*, 54 A.2d 319, 325 (D.C. 1989).

In its Arbitration Review Request, DMH challenges the Arbitrator's decision on the ground that the Award violates law and public policy. The Petitioner states:

> [i]n the instant case, the arbitrator exceeded his authority by imposing a clear and convincing standard of proof instead of a preponderance standard. In doing so, he ordered the Grievant's reinstatement, which violated the well-defined and dominant public policy of protecting consumers from abuse, as reflected in District law that specifically states that consumers have the right to be free from abuse; ignored District and common law which make assault a crime; and misapplied the principles of *Douglas v. Veterans Administration*, 5 MSPR 280 (1981), by stating that it "required" progressive discipline, resulting in the reduction of the removal to a 20-day suspension.

(Request at pg. 4). DMH further alleges:

> [t]he standard commonly used in arbitration hearings, which are in the nature of administrative proceedings, is the preponderance of the evidence. By departing from this standard, the arbitrator grafted an additional term onto the collective bargaining agreement that was not bargained for by the parties. Without an

[3] See, *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 103 S.Ct. 2177, 2176, 76 L. Ed. 2d 298 (1983).

> express contractual provision allowing for the use of such a standard- or whether all disciplinary actions will do so- each arbitrator is left to decide what standard will govern, with the inevitable result that a split of opinion will subject only some grievants to the higher standard, and not others. While it has been observed that by submitting their disputes to arbitration, the arbitrator's judgment is precisely what the parties bargained for, such a freewheeling and inconsistent interpretation of just cause is not. This is particularly true where, as here, the award flies in the face of District of Columbia Mental Health Consumers Protection Act, D.C. Official Code § 7-1231.04, which protects consumers from physical abuse.
>
> The arbitrator specifically found that the Grievant had physically assaulted the patient. A well-settled public policy exists that persons receiving mental health services for psychiatric disorders- who are members of a vulnerable population- should be adequately protected from abuse at the hands of those who are obligated to provide and facilitate their care, for patient care, custody, and protection comprise the reasons for healthcare provider's existence. This public policy is not based solely on a presumption involving humanitarian considerations, but carries the imprimatur of positive law- that consumers have the right to be free from abuse when seeking and/or receiving such care. D.C. Official Code § 7-1231.04.

(Request at pg. 4).

In addition, DMH contends that:

> D.C. Official Code § 7-1231.04, which prescribes conditions of mental health service delivery, states that consumers "*shall* be free from physical, emotional, sexual, or financial abuse...when seeking or receiving mental health services and mental health supports. (emphasis supplied) The arbitrator found that the Grievant assaulted the patient, which constitutes abuse, but reduced the removal to a 20-day suspension. Reinstating the Grievant would contravene District law by characterizing his conduct as an "aberration," allowing him to return to serving a population that I legally protected from the conduct in which he illegally engaged. While all consumers are protected by the District law prohibiting abuse, here, the Grievant assaulted a patient who was committed to the Hospital, and therefore dependent on the Grievant to discharge his responsibilities in accordance with District law. In addition, the Employer could be exposed to civil and criminal liability if the assault caused serious physical injury. (internal citations omitted)

(Request at pgs. 4-5).

Moreover, the Agency asserts that the Award violates the policy established by *Douglas v. Veterans Administration*, 5 MSPR 280 (1981):

> The reinstatement also runs afoul of the policy established in *Douglas*, *supra*, requiring employers to weigh certain factors in deciding on discipline. The arbitrator erroneously stated that *Douglas* **required** progressive discipline. Instead, *Douglas* lists a number of factors that employers should consider in assessing a penalty for disciplinary infractions, including mitigating ones, and notes that not all factors will be relevant in a particular case. Specifically, however, *Douglas* does not proscribe termination for a first offense after the employer has engaged in the kind of reasoned analysis *Douglas* set forth. In a cursory statement in favor of mitigation, the AA states that the Grievant was "provoked" by the patient, but this ignored the conditions of employment that the Grievant voluntarily assumed. The position description clearly notes that the needs of the population served are "unpredictable" and that the employee may expect aggressive behavior from patients as a consequence of his tenure. The Employer has instituted mandatory training to equip employees with the tools to effectively respond to such "provocation," in which the arbitrator found the Grievant had participated. The arbitrator also found that the Grievant's potential for rehabilitation was "very good," even though the Grievant failed to acknowledge wrongdoing, and if he returned to work, his only concern was that he be placed on another ward. The mitigating factors were given undue weight in light of District law and the strong public policy in favor of protecting consumers from abuse.

(Request at pg. 6).

In response to the Agency's Review Request, Respondent filed its Opposition contending that the Award is not contrary to law or public policy and the Arbitrator did not exceed his authority. (Opposition at pg. 1). The Union states:

> [t]he Arbitrator, the Agency, the parties, and PERB are aware that absent a specific standard in the CBA, arbitrators may not all apply the same standard in all types of cases in determining whether there was just cause to discipline. That possibility is exactly what the parties here bargained for. Grievant here was charged with "Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of laws: assault or fighting on duty (patient abuse)[.]" Under DC Law and Agency policy, "patient abuse requires "knowing, reckless, or intentional abuse of patients." Before PERB, the Agency characterizes "assault" as a crime; the Arbitrator characterized this charge as involving social stigma. That an arbitrator might (or might not) apply a clear and convincing standard in a termination case involving a charge of assault (patient abuse) is exactly what the parties knew might happen when they bargained to subject disputes to arbitration without specifying the standard(s) the arbitrator should apply. (internal citations omitted)

(Opposition at pgs. 8-9). In addition, the Union asserts that the Arbitrator's award violates neither "the District of Columbia Mental Health Consumers Protection Act, D.C. Code Sec. 7-1231.04" nor "the policy established in *Douglas* requiring employers to weigh certain factors in deciding on discipline." (Opposition at pg. 9). The Union concludes by stating:

> [i]n the present case, the parties submitted their dispute to an Arbitrator. DMH has not cited any specific law or public policy that mandates that the Board reverse the Arbitrator's Award. DMH had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result"- but DMH did not. DMH's arguments are merely disagreements with the Arbitrator's findings and interpretation of the language in the CBA, the D.C. Code and the *Douglas* case. DMH asks the Board to adopt its findings and interpretation of the provisions of the D.C. Code and case law. This PERB cannot do given its "extremely narrow" grounds for review of an arbitration award. DMH's disagreement with the Arbitrator's interpretation is not grounds for reversing the Arbitrator's Award.

(Opposition at pgs. 15-16).

The Board has held that a disagreement with the Arbitrator's interpretation does not render an award contrary to law. See *DCPS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 49 DCR 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. DMH's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. See, *University of the District of Columbia and UDC Faculty Association*, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991). We have held 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 his evidentiary findings and conclusions upon 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). Moreover, "[i]n bargaining for an arbitrator to make findings of fact and to interpret the Agreement, the parties chose a forum that is not bound by precedent. Arbitration decisions do not create binding precedent even when based on the same collective bargaining agreement. *See, Hotel Ass'n of Washington D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25*, 295 U.S. App. D.C. 285, 963 F.2d 388 (D.C. Cir. 1992)." *Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 901 A.2d at 784 (D.C. 2006).

The Board finds that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to contrary to law or public policy.

THEREFORE, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Mental Health'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.

March 27, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice in PERB Case No. 11-A-09, Slip Opinion No. 1265 is being transmitted electronically and *via* U.S. Mail to the following parties on this the 9th day of May, 2012.

Wendy L Kahn
ZWERDLING, PAUL, KAHN & WOLLY, P.C.
1025 Connecticut Avenue, N.W.
Suite 712
Washington, D.C. 20036

wlkahn@zwerdling.com

EMAIL & U.S. MAIL

Anndreeze Williams, Esq.
Department of Mental Health
64 New York Avenue, NE
5th Floor
Washington, DC 20002

Williams, Anndreeze (DMH) anndreeze.williams@dc.gov

EMAIL & U.S. MAIL

Sheryl V. Harrington
Secretary