Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Corrections,	
Petitioner,	
and	PERB Case No. 04-A-14
	Opinion No. 825
Fraternal Order of Police/ Department of Corrections Labor Committee (on behalf of Dexter Allen),	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Department of Corrections ("DOC" or "Agency") filed an Arbitration Review Request ("Request") and a document styled "Memorandum in Support of Arbitration Review Request" ("Memorandum"). DOC seeks review of an arbitration award ("Award") which: (1) rescinded the termination of Dexter Allen ("Grievant"), a bargaining unit member; and (2) awarded full back pay with seniority with no offset for interim earnings. The Fraternal Order of Police/Department of Corrections Labor Committee ("FOP" or "Union") opposes the Request.

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.).

II. Discussion:

"On May 17, 2001, a group of male students from Evans Junior High School, in the D.C. Public School system took a tour of the D.C. Jail. On that date the Grievant was on duty as a correctional officer (Corporal) at the D.C. Jail. Other correctional officers also were on duty. During the tour, allegedly at the urging of D.C. Public School employees, the students were subjected to some procedures associated with the intake of prisoners into the facility including strip searches and body cavity searches as well as exposure while naked to inmates who made abusive comments to the students, isolation, and students were forced to wear prison clothing." (Award at pgs. 4-5). In addition "[t]he students were subjected to the foregoing actions by correctional officers on duty at the D.C. Jail on the date of the tour. These officers also forcibly removed clothing from the students and yelled at them." (Award at p. 5).

The incident was reported to the Office of Internal Affairs by a correctional officer who was not involved in the incident. (See Memorandum at p. 3). An investigation was conducted and the Grievant, as well as other officers, was found to have violated several departmental regulations and procedures. (See Request at pgs. 5-7). Subsequently, the Grievant was summarily removed on May 29, 2001. (See Request at p. 8).

The Union filed a grievance, which was denied. As a result, the Union invoked arbitration on behalf of the Grievant. The issue before the Arbitrator was: "Did the Agency have just cause to summarily remove [the] Grievant and then terminate him. If not, what shall be the remedy?" (Award at p. 2).

At arbitration, DOC argued that the Grievant had participated in the incident. In its Notice of Termination to the Grievant, DOC provided the following and based its decision to terminate the Grievant on the following grounds:

> A. Violation of Department Order 4080.1A (September 1992) Inmate Visiting Regulations, Section D. Visitor Searches, Paragraph (2) which states in pertinent part that "all visitors shall be searched by a scanning device and pat search.["] Paragraph (D)(3) provides that "Department of Corrections personnel are strictly prohibited from performing body cavity (anal or genital) searches or [']strip searches['] on visitors to the facility." Paragraph (D)(4) states "If a finish search is insufficient to allay suspicions that a visitor is smuggling contraband, this shall be reported to the supervisory correctional officer on duty."

B. Violation of Department Order 101.5B, Chain of Command due to [the Grievant's] failure to consult with a supervisor before engaging in the egregious conduct with the student visitors to the [D.C.] Jail on May 17, 2001. Specifically, Department Order 1010.5B, Section IX(A) provides that "It is incumbent upon all department employees to understand, recognize and determine when official communications and transactions must be cleared through the chain of command. When in doubt regarding this requirement the appropriate supervisory personnel should be consulted."

C. Violation of Correctional Officer's General [Order], 10. General Order 10 requires "that correctional officers be courteous to all supervisors, fellow employees, residents and members of the general public; act in a gentlemanly and ladylike manner at all times, and commit no acts which. . . . will discredit the Department of Corrections, or the Government of the District of Columbia."

D. Violation of Correctional Officer's General Order Number 11 requires that Correctional Officers "Call the Shift Supervisor immediately in all circumstances not covered by instructions or orders."

(Memorandum at p. 12).

The Union countered that the Grievant had not participated in the May 17th incident; therefore, DOC did not have cause to terminate the Grievant. (See Award at p. 5).

In an Award dated May 13, 2004, Arbitrator Fredenberger found that the record did not establish that the Grievant participated in the actions taken by other correctional officers against the students touring the correctional facility on May 17, 2001. (See Award at p. 5). Specifically, the Arbitrator stated:

> Review of the record substantiates the Union's position that while the Grievant was on duty at the D.C. Jail on the day of the tour while students were present, it does not establish his participation in any of the inappropriate or improper acts perpetrated by correctional officers on the students on the date of the tour . . . . Accordingly, it must be concluded that the Grievant was not summarily removed or terminated for cause. (Award at p. 5).

As a remedy, the Arbitrator directed that the Grievant should be "restor[ed] to his position with full back pay and seniority." (Award at p. 6). In addition, the Arbitrator indicated that "there [should] be no deduction from the back pay for outside earnings by [the] Grievant during the period he has been out of service." (Award at p. 6).

In its Request, DOC asserts that the Arbitrator exceeded his jurisdiction and was without authority by: (1) rendering an award that allows for payment of back pay without deductions for interim earnings; (2) making the remedy unnecessarily punitive to the agency; (3) not addressing or making determinations regarding all of DOC's grounds for termination; and (4) having questionable competence.

Also, DOC claims that the Arbitrator's Award is contrary to law and public policy because: (a) it provides for an award of back pay without deductions for interim earnings; (b) the Arbitrator's competence is questionable; (c) it violates the Fourth Amendment of the United States Constitution; and (d) the Award is unnecessarily punitive. (See Memorandum pgs. 8-17).

FOP counters that "[t]he award of full back pay with no offset for interim earnings does not exceed the jurisdiction of the Arbitrator, nor is it contrary to law or public policy." (Opposition at p. 5). In addition, FOP argues that "the Arbitrator did not exceed his authority, as he confined his decision to the issue submitted for arbitration, and [the Petitioner's] mere disagreement with the Arbitrator's decision on the issue presented raises no statutory ground for review." (Opposition at p. 9). Also, FOP contends that "[t]he Arbitrator's evidentiary findings and conclusions that [Petitioner] failed to establish the Grievant's participation in any inappropriate or improper conduct is not contrary to public policy." (Opposition at p. 11). FOP also claims that the "[Petitioner's] assertion that the Arbitrator is mentally incompetent to render a decision is without merit and does not form a statutory basis for review." (Opposition at p. 12). Lastly, FOP argues that "[Petitioner] waived any objection with regard to its claim that the Award was not made within the time required by the parties' agreement."[1] (Opposition at p. 13). In light of the above, FOP asserts that the Board should deny DOC'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

[1]We note that in DOC's Request, it contends that the Arbitrator was in contravention of his authority by failing to timely issue the Award within thirty days. However, DOC did not provide an argument concerning the timeliness of the Award in either its Memorandum or in the Request. Therefore, we believe that is not necessary for the Board to consider this statement.

3. If the award "was procured by fraud, collusion or other similar and unlawful means."

D.C. Code § 1-605.02(6) (2001 ed.).

A. Whether the arbitrator was without, or exceeded, his jurisdiction.

In the present case, DOC claims that the Arbitrator exceeded his jurisdiction and was without authority by: (1) rendering an award that allows for payment of back pay without deductions for interim earnings; (2) making the remedy unnecessarily punitive; (3) not addressing or making determinations regarding all of DOC's grounds for termination; and (4) having questionable competence. We will address each of these four arguments separately.

First, DOC contends that the Arbitrator exceeded his jurisdiction by allowing for payment of back pay without deductions for interim earnings in violation of the parties' Compensation Agreement. (See Memorandum at pgs. 8-9). In support of its argument, DOC asserts that, in Article 10 of the compensation agreement between Compensation Units 1 and 2 and the District of Columbia, the parties have agreed, *inter alia*:

> Arbitration awards or settlement agreements in cases involving an individual employee shall be paid within sixty (60) days of receipt from the employee of relevant documentation, including documentation of interim earnings and other potential offsets.

(Memorandum at p. 9).

DOC contends that Article 10 "clearly contemplates that the parties expect that interim earnings will be deducted from any arbitration award." (Memorandum at p. 9). Also, DOC asserts that Arbitrator Fredenberger ignored the plain reading of Article 10 of the compensation agreement.

FOP counters that Article 10 is inapplicable, because it was never entered into evidence. (See Opposition at p. 6). Furthermore, FOP argues that neither Article 10 of the compensation agreement, nor the provisions of the District Personnel Manual ("DPM") cited by DOC, "expressly and specifically limit the authority of the Arbitrator." (Opposition at p. 6).

In DOC's Memorandum, it refers to the parties' compensation agreement as Exhibit "Jt-1". (Memorandum at pgs. 8-9). However, after reviewing the parties' pleadings and exhibits, we find that the compensation agreement DOC refers to as Exhibit "Jt-1" was not entered into evidence during the Arbitration hearing as an exhibit. Instead, the exhibit designated as "Jt-1" is actually the

parties' *working conditions agreement* or collective bargaining agreement ("CBA").[2] Thus, the compensation agreement between the District of Columbia and Compensation Units 1 and 2, as cited by DOC, was not before the Arbitrator. (See Transcript at p. 6). Consequently, the Board finds that Article 10 was not presented to the Arbitrator for his interpretation. As a result, we conclude that DOC has raised this issue for the first time in its Request. This Board has held that "[i]ssues not presented to the arbitrator cannot subsequently be raised before the Board as a basis for vacating an award." *District of Columbia Police/Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip Op. No. 282 at p. 4 n. 5, PERB Case No. 87-A-04 (1992). Moreover, a Petitioner cannot base an arbitration review request on issues not first presented to an arbitrator. See *District of Columbia Fire and Emergency Services and AFGE, Local 3721*, _DCR_, Slip Op. No. 756, PERB Case No. 02-A-08 (2004). In light of the above, we conclude that DOC's claim regarding Article 10 of the compensation agreement cannot be considered as a basis for review because DOC's argument regarding Article 10 was raised for the first time in its Request.

As a second basis for review, DOC asserts that the Arbitrator was without authority and exceeded his jurisdiction because the Award is "unnecessarily punitive" against DOC and "exceptionally unusual". (Memorandum at p. 10). In support of this claim, DOC argues that the purpose of a remedy "is to make an employee whole, but should not be unnecessarily punitive in nature". (Memorandum at p. 10). FOP contends that DOC's argument amounts to a disagreement with the Arbitrator's remedy and does not present a statutory basis for review. (See Opposition at p. 8).

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 at p. 2, PERB Case No. 87-A-08 (1988). Also, we have held that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement ("CBA").[3] 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). Moreover, 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

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[2]As previously discussed in this Opinion, we have determined that the compensation agreement was not before the Arbitrator. Therefore, whenever the term "collective bargaining agreement" or "CBA" is used in this Opinion, it refers to the parties' working conditions agreement.

[3]We note that if the parties' CBA limits the arbitrator's power, that limitation would be enforced.

MPA 0008, at p. 6 (May 13, 2005).

Furthermore, this Board has held that an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract." *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, at 38 (1987). Also, 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.[4]

In the present case, DOC does not cite any provision of the parties' CBA which limits the Arbitrator's equitable power. Therefore, once Arbitrator Fredenberger determined that DOC did not have cause to remove the Grievant, he had the authority to determine what he deemed to be the appropriate remedy. In light of the above, we find that DOC's assertion that the Award was unnecessarily punitive and that he exceeded his jurisdiction by requiring DOC to pay the Grievant "full back pay . . . [with] no deduction from the back pay for outside earnings . . . during the period he has been out of service"[5], involves only a disagreement with the Arbitrator's findings, conclusions and remedy. We have held that where a party "merely disagrees with the Arbitrator's findings and the relief granted. . . . [it] is not a sufficient basis for concluding that the Arbitrator exceeded [his or] her authority . . .". *District of Columbia Department of Corrections and Doctors Council of the District of Columbia*, __DCR__, Slip Op. No. 718 at p. 3, PERB Case No. 02-A-03 (2003). Thus we cannot reverse the Award on this ground.

As a third basis for review, DOC contends that the Arbitrator exceeded his authority by not addressing all of its arguments in support of the Grievant's termination.[6] DOC asserts that the evidence presented at the Arbitration hearing clearly supported the Agency's decision to summarily remove the Grievant. (See Memorandum at p. 10). Furthermore, DOC claims that since the Award

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[4]*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); See also, *D. C. Metropolitan Police Department and Fraternal of Police/Metropolitan Police Department Labor Committee (On behalf of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

[5](Award at p. 6)

[6]As stated above, DOC's grounds for terminating the Grievant included violations of departmental regulations concerning the search of visitors, chain of command, courtesy, and failing to contact a supervisor. (See Request at p. 2; See also, Memorandum at p. 14).

fails to address all the "issues"[7] presented at arbitration, the case should be remanded or the Award reversed. (See Memorandum at p. 11). In support of this contention, DOC cites *University of the District of Columbia Faculty Association/NEA and the University of the District of Columbia*, 35 DCR 549, Slip Op. No. 98, PERB Case No. 85-A-01 (1985). In that case, the Board found that although two separate grievances had been filed concerning the University's failure to promote the grievant, the Arbitrator only addressed the issues raised in the first of the two grievances. Therefore, the Board ordered that the case be remanded so that the arbitrator could consider the issue raised in the second of the two grievances.

The case before the Board is distinguishable from the *University of the District of Columbia* case. The *UDC* case involved two separate grievances and the Arbitrator failed to consider the issue involved in the second grievance. In the present case, only one grievance was presented to the Arbitrator. Moreover, here, the sole *issue* presented to the Arbitrator was whether there was just cause for the Grievant's removal and, if not, what should be the remedy. That issue was clearly identified and addressed by the Arbitrator. (See Award at p. 2). Furthermore, the *UDC* case does not stand for the proposition that an Arbitrator must address and consider all the arguments made at arbitration. Moreover, we find that DOC is asking this Board to adopt DOC's arguments, findings and conclusions. In view of the above, we believe that DOC's contention amounts to a mere disagreement with the Arbitrator's findings and conclusions. As stated above, a disagreement with the Arbitrator's findings and conclusions does not present a statutory basis for review. Thus, the Board cannot reverse the Award on this ground.[8]

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[7]DOC uses the term "issues". However, we believe that DOC is actually referring to its factual contentions and arguments.

[8]FOP counters that the Arbitrator did not exceed his authority by confining his decision solely to the issue submitted to arbitration. Specifically, FOP claims that the sole issue submitted to the Arbitrator was: "Did the Agency have just cause to summarily remove [the] Grievant and then terminate him. If not, what shall be the remedy?" FOP asserts that the Arbitrator was only required to address the issue submitted at arbitration and not all of DOC's arguments and factual contentions.

In support of its argument, the FOP cites *District of Columbia Public Schools and Washington Teachers' Association, Local 6, American Federation of Teachers*, 45 DCR 1283, Slip Op. No. 349, PERB Case No. 93-A-01 (1996). The FOP contends that this case overturns the *University of the District of Columbia Faculty Association/NEA and the University of the District of Columbia* case, cited by DOC. In *DCPS and WTU*, one of the issues concerned whether the grievant had improperly followed the grievance procedure, rendering the grievance not arbitrable. DCPS asserted that the arbitrator had failed to address the issue of arbitrability in the decision. Therefore, DCPS argued that the decision on the merits was "outside the confines of the authority and jurisdiction granted him under the contract." *Id* at p. 2. There, the Board found that, "arbitral error is within the outcomes that the parties accept when they agree that otherwise unresolved grievances under the collective bargaining contract shall be determined by arbitration. . . . Therefore, [the Board determined] that by neglecting to rule on the issue of arbitrability, the Arbitrator did not exceed his jurisdiction, but rather failed to fully exercise his authority with respect to all the matters over which he had jurisdiction. Such nonfeasance [did] not constitute a statutory basis for review." *Id.* at p. 3. The *DCPS* case involved the Arbitrator's decision not to rule on a

Finally, DOC claims that "[t]he Arbitrator's competence to hear and decide cases is questionable." (Memorandum at p. 14). While unclear, DOC appears to argue that the Arbitrator exceeded his authority due to his questionable competence. In support of its claim, DOC states that:

> While the [Board] does not have an express category for review based upon the mental competence of the arbitrator, such issue can be dealt with in the "exceeds authority," against "public policy."

(Memorandum at p. 15).

DOC argues that the Arbitrator's competence was questionable. As an example, DOC contends that the Arbitrator should have adopted its version of the facts. (See Memorandum at p. 15). DOC also claims that the Arbitrator's lack of competence was due to his health.[9] (See Memorandum at pgs. 14-15). In addition, DOC contends that the length of time it took for an Award to be issued was evidence of the Arbitrator's incompetence. (See Memorandum at p. 15).

FOP asserts that DOC waived any objection concerning the timeliness of the Award when it failed to raise any objection before the arbitrator. (See Opposition at p. 15).

In the present case, DOC acknowledges that the competence of an arbitrator is not one of the grounds noted in the CMPA for modifying or setting aside an arbitration award. (See Memorandum at p. 15). Nonetheless, DOC argues that the issue of the Arbitrator's competence can be reviewed under the "without, or exceeded, his . . . jurisdiction" standard. However, DOC has failed to present any legal authority to support its argument. Instead, DOC argues that the failure to issue the Award within thirty (30) days is an example of the Arbitrator's questionable competence. (See Request at p. 3). We find that DOC's factual assertions amount to a mere a disagreement with the Arbitrator's findings and conclusions and therefore do not present a statutory basis for review. Thus, we cannot reverse the Award on this ground.

B. Whether the Award is contrary to law and public policy.

DOC claims that the Arbitrator's Award is contrary to law and public policy because: (a) it provides for an award of back pay without deductions for interim earnings; (b) the Arbitrator's

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procedural issue; but rather to decide the case on the merits. Here, no procedural issue was presented to the Arbitrator. Furthermore, the Arbitrator ruled on the issue that was presented by the parties. Therefore, the Arbitrator exercised his authority with respect to all the matters over which he had jurisdiction. Thus, we find that the *DCPS* case is not applicable.

[9]DOC notes that the Arbitrator was unable to remain alert during the hearing. In addition, DOC states that the Arbitrator discussed "various significant and debilitative illnesses" with the parties during the hearing. (See Memorandum at pgs. 14-15).

competence was questionable; (c) it violates the Fourth Amendment of the United States Constitution; and (d) is unnecessarily punitive. (See Memorandum at pgs. 8-18). The Board will address each of these arguments individually.[10]

First, DOC asserts that an award of back pay without an offset for interim earnings is contrary to law and public policy because it violates Chapter 11B, Subpart 8, §§ 8.1 and 8.11 of the District Personnel Manual ("DPM").[11] Specifically, DOC argues that these provisions require an offset from back pay. (See Memorandum at p. 9). FOP counters that Chapter 11B, Subpart 8, §§ 8.1 and 8.11 of the DPM do not apply to arbitration awards. (See Opposition at p. 7).

The 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 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*

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[10]The Board notes that throughout DOC's Memorandum, DOC has combined the argument that the Award exceeds the Arbitrator's jurisdiction and that he was without authority with the argument that the Award is contrary to law and public policy. However, for the sake of clarity, we have addressed these contentions separately.

[11]Section 8.1 provides in pertinent part as follows:

> The regulations provide that whenever an employee of the District government, on the **basis of an administrative determination**, or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or any pay, allowances, or differentials, he or she is:
>
> 1. entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee would have earned during that period if the personnel action had not occurred, less any amount earned through other employment. (see section 8.11) during that period; and
> (Emphasis Added.)

. . .

Section 8.11 provides in pertinent part as follows:

> When an employee has been separated from his or her position by an unjustified or unwarranted personnel action, he or she is entitled to an amount (when this action is corrected) equal to the difference between his or her earnings and the pay he or she would have received had it not been for the separation.

Workers Union, AFL-CIO v. United States Postal Service, 789 F.2d 1, 8 (D.C. Cir. 1986). We have also held that to set aside an award as contrary to law and public policy, the Petitioner must specify applicable law and definite public policy that mandates that the arbitrator arrive at a different result. See *AFGE, Local 631 and Dept. of Public Works*, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993).[12] In addition, 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); see also, *Washington -Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F. 2d 1234, 1239 (D.C. Cir. 1971).[13] Furthermore, as the District of Columbia Court of Appeals has stated, we 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).

We have previously considered the issue of whether an arbitrator's failure to provide an offset for interim earnings is contrary to Sections 8.1 and 8.11 of the DPM and have found that these two sections were not applicable to arbitration awards issued prior to February 4, 2005. In *District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee (on behalf of Layne, Drummond and Johnson)*, _DCR_, Slip Op. No. 820 at p. 11, n. 9, PERB Case No. 05-A-02 (2006), we noted that:

> DOC . . . asserts that the Award violates the . . . (DPM 11B, Subpart 8, §§ 8.1 through 8.16). Specifically, DOC claims that the Award violates the offset provisions contained in § 8.11 of the DPM. (See Request at p. 8). However, we believe that [Sections 8.1 and 8.11 of the DPM are] only applicable to administrative determinations and statutory appeals and not awards issued by an arbitrator. (See § 8.1 - Legal Basis). Therefore, DOC's claim does not present a statutory basis for review. As a result, we cannot reverse the Award on this ground. Also, we note that Chapter 11 of the DPM was amended by adding a new § 1149 - Back Pay. (See 52 DCR 934, 985 (February

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[12] See also *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633, PERB Case No. 00-A-04 (2000); and *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).

[13] See, *Metropolitan Police Department and Fraternal Order of Police/Metroploitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing *American Federation of Government Employees. Loval 631 and Department of Public Works*, 45 DCR 6617, Slip Op. No. 365 at p. 4 n. 4, PERB Case No. 93-A-03 (1998); 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 p.6, PERB Case No. 86-A-05 (1987).

> 4, 2005)). Effective February 4, 2005, the back pay provision of the DPM is now applicable to arbitration awards. (See § 1149 .1). The Award in this case was issued in October 2004; therefore, the February 2005 amended provision of Chapter 11, is not applicable to this case.[14]

As noted above, Sections 8.1 and 8.11 of the DPM do not apply to arbitration awards issued prior to February 4, 2005. In the present case, the Award issued was issued on May 13, 2004. Therefore the February 2005 amended provision of Chapter 11 is not applicable to this case. DOC has the burden to specify applicable law and definite public policy that mandates that the Arbitrator reach a different result. We find that DOC has failed to do so. Thus, we find that denying an offset for interim earnings in this case does not violate any specific law or public policy. Therefore, DOC's argument does not present a statutory basis for review. As a result we cannot reverse the Award on this ground.

Next, DOC asserts that the Award is contrary to law and public policy because it violates the Fourth Amendment of the United States Constitution.[15] As stated above, DOC had the burden to specify an applicable law or public policy that mandates that the Arbitrator reach a different result. However, DOC does not point to any language in the Fourth Amendment that would mandate a different result in this case. Instead, DOC argues that the Grievant's actions deprived a student of his Fourth Amendment constitutional rights and that the Award, by condoning such behavior, does the same. (See Memorandum at p. 17). Moreover, we believe that by its argument, DOC is requesting that the Board adopt DOC's version of the facts, as well as its conclusions. We find that

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[14]In addition, the Board found that in the Award involved in Slip Op. No. 820, the Arbitrator had relied on the Back Pay Act, 5 U.S.C. § 5596, for awarding back pay, and that the statute expressly required an offset for interim earnings. Thus, the Board found that the award violated a specific law and, thus, a statutory basis for review did exist. *Id.* at 11 However, the Board also stated as follows:

> We want to make it clear that by our holding in this case, we are not saying that an arbitrator can not use his/her equitable power to deny a deduction for an offset of earnings; however, where an arbitrator expressly states (as he has in the present case) that he relied on a specific statute for awarding back pay and that statute expressly requires offset of earnings, the arbitrator must follow the statutory mandate. *Id* at p. 11.

[15]DOC cites the Fourth Amendment to the Constitution, which provides, in part, as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

this argument amounts to a disagreement with the Arbitrator's findings and conclusions that the Grievant did not participate in the incident. This Board has held that a party's disagreement with an arbitrator's findings of fact does not render an award contrary to law and public policy. See *District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, 46 DCR 6284, Slip Op. No. 586, PERB Case No. 99-A-02 (1999). Consequently, no statutory basis for review exists. As a result, we cannot reverse the Award on this ground.

DOC also claims that the Arbitrator's lack of competence was contrary to law and public policy. However, DOC cites no specific law or public policy to support its position. Therefore, DOC has not met its burden of specifying any law or public policy that mandates that the Arbitrator reach a different result. Again, we find that DOC's argument represents a mere disagreement with the Arbitrator's findings and conclusions. As stated above, this is not a statutory basis for review. As a result, the Board cannot reverse the Award on this ground.

Lastly, DOC contends that the award is contrary to law and public policy because it is "unnecessarily punitive" to the Agency and "exceptionally unusual". (Memorandum at p. 10). FOP counters that DOC's claim "amounts to no more than a disagreement with the remedy." (Opposition at p. 8). We agree.

In the present case, DOC has not cited any specific law or public policy that the remedy contravenes. Instead, DOC requests that the Board adopt DOC's arguments with respect to the remedy. As previously discussed, this Board has held that a disagreement with an arbitrator's remedy does not render an award contrary to law and public policy. Therefore, DOC has not presented a statutory basis for review.

In view of the above, we find that there is no merit to any of DOC's arguments. Also, we believe that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, or contrary to law or public policy 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 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.

October 19, 2006

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.04-A-14 was transmitted via Fax and U.S. Mail to the following parties on this the 19th day of October 2006.

Natasha Campbell, Esq.
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