

requested a Disinterested Director's Hearing per the Collective Bargaining Agreement ("CBA"). On September 3, 2014 Cuthbert Braveboy ("Braveboy"), Director of Sewer Services, was appointed by DC Water as the Disinterested Department Director, and on September 16, 2014 Braveboy issued a written decision supporting the decision to terminate.⁶ AFGE filed a request for arbitration on September 29, 2014.⁷

The parties submitted the following issues to the Arbitrator:

1. Whether the Respondent committed harmful procedural errors to invalidate the termination.
2. Whether the Respondent met its burden of proving that the Grievant's performance constituted cause for the Respondent to terminate the Grievant and properly considered the *Douglas* factors in determining the penalty.

AFGE argued that DC Water did not follow the proper procedures to terminate Grievant, as required in the CBA and a negotiated Memorandum of Understanding ("MOU") between the parties that defines the guidelines for evaluating employee performance. AFGE's primary complaint was that the Grievant was not given proper notice that his failure to improve his employment behaviors could result in termination. According to DC Water, Grievant's objectionable behavior included inappropriate communications with customers, attendance and punctuality issues, and his tendency to talk loudly on the phone and to pace while on the phone that distracted other employees. Arbitrator Stephen B. Forman credited the testimony of two of Grievant's supervisors that they did put Grievant on notice that his actions could result in termination, and that there was constant communication regarding the deficiencies in Grievant's performance. The Arbitrator stated, "with respect to the Union's claim, that the Authority failed to give the Grievant guidance as required by the MOU to assist him to achieve satisfactory performance, the evidence proved otherwise."⁸

The MOU states:

At the end of the ninety (90) day period, the employee's immediate supervisor shall make a determination as to whether the employee has met the requirements of the Performance Improvement Plan and shall issue a written determination. The employee shall be given a written determination within twenty (20) workdays after the ninety (90) days have passed. If the employee has met the requirements of the plan, then the matter is closed, and the employee is expected to maintain the improvement. Employees who fail to show improvement after being given a Performance Improvement Plan shall be subject to a reassignment, demotion, or removal.⁹

The parties agreed that the Grievant was not given any written determination after any of the PIPs. Neither the Grievant's supervisor or the AFGE's Shop Steward was aware of that

⁶Award at 4.

⁷Award at 4.

⁸Award at 7.

⁹Award at 5.

provision in the MOU. However, the Arbitrator found that the purpose of the written determination was to put the employee on notice that his failure to show improvement subjected the employee to be disciplined severely, and that Grievant was on constant notice that his performance needed improvement.

AFGE also complained that the Grievant's PIP in 2013 was extended for another 90 days even though the MOU does not authorize such an action. The Arbitrator disagreed finding that the MOU did not prohibit the extension of a PIP and that if the Grievant had not been offered the second PIP in 2013, he would not have had a further opportunity to improve his job performance and likely would have been terminated months earlier.¹⁰

For the first time at the arbitration hearing, AFGE raised the issue of DC Water's failure to give the Grievant a written determination following the PIPs. The CBA states, "After a grievance has been put in writing, regardless of the step at which it is filed, the grievance shall not be amended."¹¹ Citing this CBA provision and the "general rule of arbitration that parties are considered to have waived matters not raised before the hearing,"¹² the Arbitrator found that AFGE should be barred from raising this procedural argument. The Arbitrator concluded by saying, "the Authority's procedural errors did not possibly affect its decision to terminate the Grievant and did not constitute harmful error requiring reversal of the Authority's decision to terminate the Grievant."¹³

As to the issue of whether the Grievant's performance constituted cause for his dismissal, the Arbitrator credited the testimony of six senior DC Water employees from the Customer Service Department who testified that there were numerous customer complaints about the Grievant's rudeness, disrespect and discourteous attitude on the phone.¹⁴ All of the supervisors testified about his loud telephone voice and his constant pacing that disrupted the work environment. In addition, his attendance and punctuality were problems, and he also often entered information into the wrong customer accounts.¹⁵ The supervisors testified that the customer care management team worked daily with the Grievant to improve his job performance and his customer interaction. According to them, he also received numerous training courses to improve his skills; including classes in handling customer service complaints, communication with tact and professionalism and working with challenging personalities.¹⁶ Finally, it was decided that nothing more could be done to improve the Grievant's job performance. Finally, the Arbitrator cited DC Water's application of the *Douglas* factors to reach the conclusion that termination was the appropriate penalty.¹⁷

In his Decision and Award, dated March 19, 2015, Arbitrator Forman found there were no procedural violations in how DC Water handled the Grievant's termination and that DC

¹⁰ Award at 7.

¹¹ Award at 6.

¹² Award at 6.

¹³ See *Cornelius v. Nutt*, 472 U.S. 648 (1985) and *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672 (1991).

¹⁴ Award at 8.

¹⁵ Award at 9.

¹⁶ Award at 7-8.

¹⁷ Award at 12.

Water met its burden of proving that the Grievant's poor performance was the cause of his termination. The grievance was denied.

II. Analysis

D.C. Official Code § 1-605.02(6) authorizes the Board to modify or set aside an arbitration award in only three limited circumstances: (1) if an 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.¹⁸

AFGE bases its Arbitration Review Request on two arguments. First, it states that the Arbitrator's Award should be reversed because the Arbitrator exceeded his authority by not requiring a written determination after the PIPs, by ruling that the extension of the 2012 PIP was not a harmful procedural error, and by ruling that the use of letters of direction as prior disciplinary actions was not a harmful procedural error. Second, AFGE states that the Arbitrator should be reversed because DC Water made a clear error of judgment in violation of law and public policy. AFGE does not contend that the award was procured by fraud, collusion or other similar and unlawful means.

- A. *The Arbitrator did not exceed his authority by not requiring a written determination after the PIPs, or by allowing the extension of the 2012 PIP and letters of direction as prior disciplinary actions.*

An arbitrator derives his jurisdiction from the collective bargaining agreement and any applicable statutory or regulatory provision.¹⁹ The question of when an arbitrator's award is within that jurisdiction was "addressed in *Steel Workers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960), wherein the Court stated that the test is whether the Award draws its essence from the collective bargaining agreement."²⁰ The Board has held that when determining whether an award draws its essence from the CBA the Board will ask, "Did 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?"²¹ In this case, the arbitrator did not offend any of these requirements, so there is no basis for judicial intervention.

AFGE makes much of the fact that the arbitrator did not put more significance on the fact that DC Water did not produce written determinations after the PIPs, especially the 2012 PIP. As

¹⁸ *University of the District of Columbia v. PERB*, 2012 CA 8393 P (MPA) (2014).

¹⁹ *D.C. Water & Sewer Auth. v. AFSCME, Local 2091*, Slip Op. No. 1276 at 3, PERB Case No. 04-A-24 (June 12, 2012).

²⁰ *D.C. Pub. Schs. v. AFSCME, District Council 20 (on behalf of Johnson)*, 34 D.C. Reg. 3610, Slip Op. No. 156 at 5, PERB Case No. 86-A-05 (1987).

²¹ *D.C. Dep't of Corrections v. Fraternal Order of Police/Dep't of Corrections Labor Committee* 60 D.C. Reg. 7185, Slip Op. No. 1380 at 2, PERB Case No. 10-A-03 (April 30, 2013).

the arbitrator points out, this argument was raised in an untimely fashion because it was not part of the original grievance and was not raised until the arbitration hearing.²² The CBA prohibits amending a grievance, and “it is a general rule of arbitration that parties are considered to waive matters not raised before the hearing.”²³ The arbitrator further stated that even if AFGE had raised the issue of the written determination in a timely fashion the result would be the same. The purpose of the written determination after a PIP is to apprise the employee of his or her progress in curing the behavior that made the PIP necessary. In this case, the Grievant was made fully aware of the necessity of improving his performance consistently and in a number of ways. There was regular counseling by supervisors, several letters of direction, and the extension of the 2013 PIP, of which AFGE complained, should have made clear to Grievant that his progress in the first 2013 PIP was not satisfactory.

It is clear that the Arbitrator’s Award drew its essence from the CBA. Also, AFGE sought to attribute significance to the fact that DC Water did not produce written determinations after the PIPs. But aside from the fact that issue was not raised until the hearing, the purpose of the written determinations was accomplished by the regular communications supervisors had with Grievant about his job performance, including that his actions could result in termination. Therefore, we find that the Arbitrator did not exceed his authority in his determination of the Award.

B. The Award is not contrary to law and public policy.

A petitioner claiming that an arbitration award is contrary to law and public policy has the burden to specify applicable law and definite public policy that mandate that the arbitrator arrive at a different result.²⁴ The Board’s scope of review, particularly concerning the public policy exception, is extremely narrow. To justify judicial intervention, a petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well-defined, and dominant public policy grounded in law or legal precedent and not from general considerations of supposed public interest.²⁵ Furthermore, the petitioning party has the burden to specify the “applicable law and definite public policy that mandate that the Arbitrator arrive at a different

²² Award at 6.

²³ *Id.*

²⁴ *Univ. of the Dist. Of Columbia. v. Am. Fed’n of State, County and Mun. Employees, Council 20, Local 2087*, 59 D.C. Reg. 15167, Slip Op. No. 1333 at 3, PERB Case No. 12-A-01(2012), cited in *Dist. Of Columbia Dep’t of Corrections v. Fraternal Order of Police/Dep’t of Corrections Labor Committee*, DC Reg. 7185 (2013), Slip Op. No. 1380, PERB Case No. 10-A-03 (April 30, 2013).

²⁵ See *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 US 29, 126 LRRM 3113 (1987).

result.”²⁶ Absent a clear violation of law evident on the face of the arbitrator’s award, the Board lacks authority to substitute its judgment for that of the arbitrator.²⁷

By submitting a grievance 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 on which the decision is based.”²⁸ The Board has held that a mere “disagreement with the Arbitrator’s interpretation ... does not make the award contrary to law and public policy.”²⁹ In the instant case, AFGE has failed to specify applicable law and definite public policy that mandates the Arbitrator arrive at a different result.

To support its contention that the Arbitrator’s award should be overturned because it violates law and public policy, AFGE cites *Payne v. Metro. Police Dep’t*,³⁰ and *Stokes v. District of Columbia*.³¹ Neither of these cases stands for the propositions that AFGE suggests. *Payne* makes no reference to Table of Penalties, *Douglas* factors or “a clear error in judgment,” as asserted by AFGE. In citing *Stokes*, AFGE mistook the holding to apply to an arbitrator. It did not. In fact, the D.C. Court of Appeals, in that case, upheld an agency’s dismissal of an employee stating that the Office of Employee Appeals was arbitrary and capricious when it overturned the agency’s decision. *Stokes* is not the correct standard to apply to an arbitrator’s review of agency decisions because the parties agreed to submit this case to arbitration. Further, the Superior Court of the District of Columbia has recently held in *MPD v. PERB* that “PERB reasonably found that [the Arbitrator] was not bound by the standards that apply to OEA’s review of agency decisions set forth in *Stokes*.” In that case, the Court upheld a PERB decision that affirmed an arbitrator’s finding reducing a police officer’s penalty from termination to a thirty day suspension.³²

²⁶ *District of Columbia Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Committee*, 59 D.C. Reg. 11329, Slip Op. No. 1295, PERB Case No. 09-A-11 (2012). *Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Committee*, 47 DC Reg. 717, Slip Op. No. 633 at 2, PERB Case No. 00-A-04 (2000); see also *District of Columbia Public Schools and American Fed’n of State, County and Municipal Employees, District Council 20*, 34 DC Reg. 3610, Slip Op. No. 156 at 6, PERB Case No. 86-A-05 (1987).

²⁷ *Fraternal Order of Police/Dep’t Of Corrections Labor Committee v. PERB*, 973 A.2d 174, 177 (D.C. 2009).

²⁸ *District of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 47 DC Reg. 7217, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Comm. (Grievance of Angela Fisher)*, 51 DC Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

²⁹ *District of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Committee*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008); see also *District of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Committee (on behalf of Thomas Pair)*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 7-8, PERB Case No. 09-A-05 (2014) and *Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 31 DC Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A-05 (1984).

³⁰ OEA Matter No. 1601-0054-01 (2005).

³¹ 502 A.2d 1006, 1010-11 (1985).

³² *District of Columbia Metro. Police Dep’t. v. District of Columbia Public Employee Relations Board*, 2014 CA 007679 P(MPA) (December 16, 2015).

As the Court of Appeals has stated, the Board must “not be led 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.”³³ In the absence of a clear violation of law and public policy apparent on the face of the Award, the Board may not modify or set aside the Award as contrary to law and public policy. AFGE has offered no such clear violation of law and public policy. Therefore, AFGE’s allegation must be dismissed.

III. Conclusion

The Board has reviewed the Arbitrator's conclusions, the pleadings of the parties, and applicable law, and concludes that the Arbitrator did not exceed his authority and the Award, on its face is not contrary to law and public policy. The Board finds that the Arbitrator’s conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. For the reasons discussed, no statutory basis exists for setting aside the Award. The Arbitration Review Request is hereby denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, AFL-CIO, Local 872 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

By unanimous vote of Chairman Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, and Member Keith Washington.

Washington, D.C.

February 18, 2016

³³ *District of Columbia Dep’t of Corrections v. Teamsters Union Local 246*, 54 A.2d 319, 325 (D.C. 1989).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-A-09, Opinion No. 1566, was served by File & ServXpress on the following parties on this the 29th day of February, 2016.

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