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

In the Matter of:)	
)	
American Federation of)	
Government Employees, Local 2725,)	
)	PERB Case No. 14-A-01
Petitioner,)	
)	Opinion No. 1480
v.)	
)	
District of Columbia Housing Authority,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Petitioner American Federation of Government Employees, Local 2725 (“AFGE”) filed the instant arbitration review request (“Request”), seeking review of Arbitrator Gail Smith’s Supplemental Opinion and Award (“Supplemental Award”), issued October 13, 2013¹. In its Request, AFGE alleges that the Supplemental Award exceeds the Arbitrator’s authority and is contrary to law and public policy because it imposed a time-served suspension on Grievant Fahn Harris (“Grievant”) for the offense of incompetence. (Request at 1-2). AFGE contends that the time-served suspension conflicts with an express term of AFGE’s collective bargaining agreement (“CBA”) with the Respondent District of Columbia Housing Authority (“DCHA”), does not rationally derive from the CBA, and is arbitrary and capricious. (Request at 1-2).

DCHA filed an Opposition to the Supplemental Award (“Opposition”), disputing AFGE’s characterization of the Supplemental Award’s discipline as a time-served suspension and contending that the Arbitrator did not exceed her authority. (Opposition at 2).

¹An arbitration review request of the initial award in this case was filed as PERB Case No. 13-A-11.

II. Discussion

A. Background

In the Supplemental Award, the Arbitrator found the following facts: on April 10, 2009, DCHA issued a Notice of Removal to the Grievant for "Incompetency: Inability to satisfactorily perform one or more major duties of his or her position." (Supplemental Award at 2). The Notice of Removal listed several incidents where the Grievant allegedly performed her work in an incompetent manner. *Id.* AFGE filed a grievance, which proceeded to arbitration. *Id.* In her initial Award, the Arbitrator upheld the Grievant's termination for incompetence, but found that DCHA failed to consider mitigating circumstances which may have warranted a penalty short of termination, as required by the parties' CBA to establish just cause for termination. (Supplemental Award at 2-3). Specifically, the Arbitrator considered Article 10, Section C1.(2), which stated: "In selecting the appropriate penalty to be imposed in a disciplinary action, consideration shall be given to any contributing mitigating or aggravating circumstances. The results of such consideration shall be in writing and shall be placed in the disciplinary action file." (Supplemental Award at 3). Article 10, Section C1.(2) also incorporated the Table of Appropriate Penalties in Appendix A of the CBA, which lists the range of penalties that may be imposed for specific offenses. *Id.* The Arbitrator noted that the Table of Appropriate Penalties provides that the penalty for the first offense of proven incompetency may be a reduction in pay, grade, and/or rank or removal, but first required the consideration of mitigating factors. *Id.*

In her initial Award, the Arbitrator instructed DCHA to:

Immediately ascertain whether there were mitigating circumstances that should have been considered by the Agency in assessing the appropriate penalty in this case, including whether the Agency has another position available and appropriate for the Grievant, one that is not necessarily at the same rank or grade that the Grievant previously held. The Agency is directed, consistent with the CBA, to provide the results of its assessment in writing to the Union, within thirty (30) days of the date of this Opinion and Award. *Id.*; citing initial Award at p. 23.

DCHA subsequently submitted a declaration of Ronnie Thaxton, the Labor and Employee Relations Manager at DCHA. (Supplemental Award at 4). The DCHA did not submit a statement from the Grievant's supervisor, who left DCHA in 2009 and did not testify at the arbitration hearing². *Id.*

The Arbitrator found that in his declaration, Mr. Thaxton listed several neutral and aggravating factors on which he relied to conclude that the Grievant's termination was

² The Arbitrator noted that Mr. Thaxton discussed the proposed termination with the Grievant's direct supervisor, but did not make the decision to terminate the Grievant, nor did he examine any mitigating factors at the time of the Grievant's termination. (Supplemental Award at 4).

warranted, but that the factors were listed “in a perfunctory manner without describing the source of those conclusions or how he arrived at the same,” and that Mr. Thaxton “failed to demonstrate that he made an original or independent examination of the Grievant’s record and past performance.” (Supplemental Award at 4). The Arbitrator also found that Mr. Thaxton had listed two aggravating factors that were contrary to the record established at the arbitration hearing, and expressed concern that DCHA terminated the Grievant for reasons that should not have been considered. (Supplemental Award at 4-5). For those reasons, the Arbitrator concluded that DCHA failed to establish by a preponderance of the evidence that it had considered mitigating, neutral, or aggravating factors when deciding on the Grievant’s penalty for incompetence. *Id.*

In his declaration, Mr. Thaxton also stated that DCHA is currently under a hiring freeze and had no appropriate positions available for the Grievant at the same grade or rank. (Supplemental Award at 6). However, the Arbitrator noted that the hiring freeze did not affect the Grievant, as she was a “reinstatement” instead of a new hire. *Id.* Additionally, AFGE submitted to the Arbitrator numerous job vacancy announcements from the time of the Grievant’s termination, as well as in 2012 and 2013, leading the Arbitrator to conclude that DCHA did not prove that it had considered any alternative positions for the Grievant, including the job vacancies submitted by AFGE. (Supplemental Award at 7).

Ultimately, the Arbitrator concluded that DCHA had not complied with her initial Award, and instead “devoted no more than a perfunctory effort to comply with the Award.” (Supplemental Award at 7). She further found that DCHA “made no effort to review the Grievant’s personnel record and past performance for the purpose of determining which alternative positions might be appropriate in which to place the grievant,” and that to remedy DCHA’s non-compliance, it was instructed to reinstate the Grievant to employment “at a lower rank than is suitable for her.” *Id.* Due to DCHA’s “undue delay” in complying with the initial Award, the Arbitrator awarded the Grievant back pay “at the salary grade she last held prior to her termination, less any interim earnings or unemployment insurance compensation,” for the period from June 10, 2013 (the date of the initial Award) to the date of the Grievant’s reinstatement in compliance with the Supplemental Award. *Id.*

B. AFGE’s Position Before the Board

In its Request, AFGE contends that the Arbitrator exceeded her authority by issuing a time-served suspension of four years and one month to the Grievant – a discipline award which fails to draw its essence from the parties’ CBA. (Request at 3). AFGE asserts that the Supplemental Award conflicts with the express terms of the CBA, which permits only two possible disciplines for the offense of incompetence, and is without rational support, as time-served suspensions are inherently arbitrary. (Request at 4).

AFGE argues that the two penalties for incompetence expressly authorized by the CBA are removal or reduction in pay, grade, or rank. (Request at 5). In the Supplemental Award, the Arbitrator not only ordered that the Grievant should be reduced in rank (by ordering her reinstated at a lower grade), but also a time-served suspension of four years and one month (by

ordering back pay only from the date of the initial Award until reinstatement, instead of from the date of the Grievant's termination). *Id.* AFGE contends that the time-served suspension is arbitrary, and thus conflicts with the "just cause" requirement of the parties' CBA, as it does not involve a "careful assessment of whether the penalty is commensurate with the offense, among many other factors, including an assessment of mitigating and aggravating circumstances." (Request at 5-6).

In support of its argument, AFGE cites to *Greenstreet v. SSA*, 543 F.3d 705 (Fed. Cir. 2008), in which the Federal Circuit reviewed an arbitration award issued 342 days after an employee's termination, where the arbitrator determined that termination was excessive and ordered the employee reinstated without back pay. (Request at 6). The court determined that when the length of a suspension is based solely on the time already served by an employee, such a decision is arbitrary and capricious, and must be vacated and remanded for appropriate consideration. *Id.*

AFGE notes that in reaching its holding in *Greenstreet*, the Federal Circuit reviewed the history of the law regarding time-served suspensions, going back to *Cuiffo v. United States*, 131 Ct.Cl. 60 (1955). In *Cuiffo*, a grievance review board ordered that a terminated employee be reinstated, but not compensated for the time between his termination and his reinstatement as "just punishment for his attempt to remove Government property without proper authority." (Request at 6; citing *Cuiffo*, 131 Ct.Cl. at 63). The court found that the 320 day suspension without pay was arbitrary, stating that it was "out of all proportion to the offense," and that it was "determined by accident, and not by a process of logical deliberation and decision." (Request at 7; citing *Cuiffo* 131 Ct.Cl. at 68-9). AFGE also states that the Merit Systems Protection Board consistently relies on *Cuiffo* to find that mitigating a termination to a time-served suspension without articulating a basis for the length of the of the suspension is inherently arbitrary. (Request at 8; citations omitted). Finally, AFGE contends that the District of Columbia statutes and regulations equate the absence of just case with arbitrary and capricious action. (Request at 8).

C. DCHA's Position Before the Board

In its Opposition, DCHA disputes AFGE's contention that the award of back pay from the date of the initial Award until the date of reinstatement constitutes a time-served suspension, and states that in reaching her decision to award back pay, the Arbitrator did not exceed her authority or commit fraud, have a conflict of interest, or otherwise act dishonestly. (Opposition at 5-6). DCHA asserts that the award of back pay was "specifically related to the Arbitrator's belief that the Agency failed to comply with her previous Award," and that the decision to award back pay is consistent with the federal Back Pay Act ("BPA"). (Opposition at 6). DCHA notes that nothing in the CBA prohibits the remedy ordered in the Supplemental Award. *Id.* Further, DCHA calls AFGE's argument that the Supplemental Award contravenes District law a disagreement with the Arbitrator's evidentiary findings and application of relevant law and the CBA. *Id.*

DCHA argues that AFGE's reliance on *Cuiffo* and *Greenstreet* are misplaced, stating that the Federal Circuit in *Greenstreet*:

could not have been clearer regarding their interpretation of *Cuiffo* and “time served” suspensions generally: *Cuiffo* did not expressly hold that any “time served” suspension is necessarily arbitrary. Rather, the court reasoned that *Cuiffo*’s “time served” suspension was “arbitrary and unfair” because it was solely ‘determined by accident, and not by a process of logical deliberation and decision.

(Opposition at 7; citing *Greenstreet*, 543 F.3d at 708). Thus, DCHA contends, a petitioner must prove more than that a remedy was a time-served remedy; he must prove that the remedy was “solely determined by accident, and not by a process of logical deliberation and decision.” *Id.* DCHA argues that the Supplemental Award was based on a process of logical deliberation and decision consistent with the essence of the parties’ CBA. *Id.* DCHA also notes that one of the Merit Systems Protection Board cases relied upon by AFGE has been treated negatively by the Federal Circuit, which determined that an arbitrator may mitigate a removal penalty to a time-served disciplinary suspension without pay if the petitioner was at least partially responsible for the removal action, and a personnel action was justified. (Opposition at 8; citing *Ollett v. Dep’t of the Air Force*, 253 F.3d 692, 694 (Fed. Cir. 2001)).

Additionally, DCHA contends that the BPA prohibits an agency from including in a back pay award time during which the employee was not “ready, willing, and able” to perform his or her duties. (Opposition at 10; citing 5 CFR § 550.805(c)(1)). DCHA notes that if an agency produces “concrete and positive evidence” that an employee was not ready, willing, and able to work during all or part of the period during which back pay is claimed, the burden shifts to the employee to prove her entitlement to back pay. (Opposition at 10). DCHA asserts that based upon the Arbitrator’s initial Award finding the Grievant to be incompetent, the Grievant would not be entitled to back pay because she was unable to perform one or more major functions of her job. (Opposition at 11). Therefore, DCHA concludes that the award of back pay from June 10, 2013, until the time of reinstatement “is not a time served suspension as an award of back pay is not allowed in a case, such as this, where the employee has been determined to be incompetent.” *Id.* Instead, had the Arbitrator awarded back pay dating back to the date of the Grievant’s termination, the Arbitrator would have been acting outside of her authority by issuing an Award that was expressly prohibited by the BPA. *Id.*

D. Analysis

The CMPA authorizes the Board to modify or set aside an arbitration award in 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. Official Code § 1-605.02(6) (2001 ed.).

One of the tests the Board uses in determining whether an arbitrator has exceeded his jurisdiction and was without authority to render an award is “whether the Award draws its essence from the collective bargaining agreement. *Dist. of Columbia Pub. Schools v. AFSCME*,

Dist. Council 20, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987); *Dist. of Columbia Child & Family Servs. Agency v. AFSCME, Dist. Council 20, Local 2401, AFL-CIO*, 60 D.C. Reg. 15960, Slip Op. No. 1025 at p. 5, PERB Case No. 08-A-07 (2010). See also *Dobbs, Inc. v. Local No. 1614, Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 813 F.2d 85 (6th Cir. 1987). The Board has adopted the U.S. Court of Appeals for the Sixth Circuit standard in determining if an award “draws its essence” from a collective bargaining agreement:

(1) Did the arbitrator act “outside his authority” by resolving a dispute not committed to arbitration?; (2) Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award?; and (3) 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.

Dist. of Columbia Child & Family Servs. Agency v. AFSCME, Dist. Council 20, Local 2401, AFL-CIO, 60 D.C. Reg. 15960, Slip Op. No. 1025 at p. 5, PERB Case No. 08-A-07 (2010) (citing *Mich. Family Res., Inc. v. Serv. Emps. Int'l Union Local 517M*, 475 F.3d 746 (6th Cir. 2007)) (citations omitted).

In the instant case, the Arbitrator clearly acknowledged, and neither party disputes, that the parties' CBA provides for two penalties for a first offense of incompetence: termination, or a reduction in pay, rank, or grade. (Supplemental Award at 3). Equally clear is the CBA's directive that the DCHA consider any mitigating or aggravating circumstances when making a disciplinary decision. *Id.*; citing Article 10, Section C1.(2). In ordering the Grievant be reinstated at a lower grade, the Arbitrator unquestionably acted within the bounds of the CBA. The more difficult issue is whether, in awarding back pay only for the period between the issuance of the initial Award and the Grievant's reinstatement exceeds the authority granted to the Arbitrator by the party's CBA.

AFGE characterizes the back pay award as a time-served suspension – in AFGE's view, the Grievant should have received back pay dating back to the date of her termination, and the gap between termination and the date of the initial Award is an unpaid suspension. DCHA characterizes the back pay award as an award constrained by the requirements of the BPA – if the Grievant was incompetent between the time of her termination and the date of the initial Award, then she could not legally receive back pay for that time.

When examining the Supplemental Award, however, it becomes apparent that what the back pay award *actually* represents is punitive damages. The evidence of this is clear on the face of the Award:

Based on the record submitted to me by the Agency and the Union,
I conclude that the Agency did not comply with my prior

Arbitrator's Opinion and Award dated June 10, 2013. Instead, from the record submitted, the Agency devoted no more than a perfunctory effort to comply with the Award.

The Agency made no effort to review the Grievant's personnel record and past performance for the purpose of determining which alternative positions might be appropriate in which to place the Grievant. In order to remedy the Agency's past non-compliance with my Award, I instruct the Agency to reinstate [the Grievant] to employment at a lower grade or rank that is suitable for her.

Because of the Agency's undue delay in performance as I had instructed, I direct the Agency to pay backpay to [the Grievant] and to make her whole at the salary grade she last held prior to her termination, less any interim earnings or unemployment insurance compensation. The period of this backpay award shall be from June 10, 2013, the date of my previous Opinion and Award, to the date of the Grievant's reinstatement in compliance with this Award.

(Supplemental Award at 7) (emphasis added).

However, Article 9, Section E(12) of the parties' CBA grants the Arbitrator "full authority to award appropriate remedies." The CBA does not prohibit punitive damages, and the only limitation placed upon an arbitration award is that "[t]he arbitrator shall not have the power to add to, subtract from, or modify the provisions of [the CBA] through the award." Article 9, Section E(11). An arbitrator does not exceed her authority by exercising her equitable power, unless it is expressly restricted by the parties' CBA. *See D.C. Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-01 (1992); *see also D.C. Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (upholding an arbitrator's award when the arbitrator concluded that MPD had just cause to discipline the grievant, but mitigated the penalty). Arbitrators bring their "informed judgment" to bear on the interpretation of collective bargaining agreements, and that is "especially true when it comes to formulating remedies." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Given the wide latitude in crafting a remedy afforded to the Arbitrator by the parties' CBA, the Board finds that the Arbitrator was arguably construing the contract when crafting the back pay portion of the Award. The Award thus draws its essence from the CBA, and will not be disturbed. *Dist. of Columbia Pub. Schools*, Slip Op. No. 156 at p. 5.

The portion of the Supplemental Award reinstating the Grievant at a lower grade, though also done for the stated reason of remedying DCHA's noncompliance with the initial Award, is

one of the permissible disciplinary actions contemplated by the CBA. The order of reinstatement will not be disturbed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 2725's Arbitration Review Request is denied.
2. The District of Columbia Housing Authority will reinstate Ms. Harris at a suitable lower rank within thirty (30) days of the issuance of this Decision and Order.
3. The District of Columbia Housing Authority will issue back pay for the period of June 10, 2013, until Ms. Harris' reinstatement.
4. Pursuant to Board Rule 559.1, this Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

July 24, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 14-A-01 was transmitted to the following parties on the 29th day of July 2014.

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