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**District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
District of Columbia Department of Corrections,)	
)	
Petitioner,)	PERB Case No. 10-A-03
)	
and)	
)	Slip Opinion No. 1306
Fraternal Order of Police/ Department of Corrections Labor Committee,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

On October 7, 2009, the District of Columbia Department of Corrections (“DOC”, “Petitioner” or “Agency”) filed an arbitration review request (“Request”) in the above-captioned matter. DOC seeks review of Arbitrator Stephen E. Alpern’s award (“Award”) which reinstated Corporal Allen Claiborne (“Grievant”), reduced the penalty to sixty (60) days and provided the Fraternal Order of Police/Department of Corrections Labor Committee (“FOP”, “Union” or “Respondent”) the opportunity to file a motion for attorney fees. DOC contends that: (1) the Arbitrator exceeded his authority; and (2) the Award is contrary to law and public policy. FOP opposes the Request.

The issues before the Board are whether “the award on its face is contrary to law and public policy” and “whether the arbitrator was without or exceeded his or her jurisdiction.” D.C. Code § 1-605.02(6) (2001 ed.).

II. Background

The Grievance/Arbitration

On December 22, 2006, the Grievant, was designated the Officer-in-Charge of the 11:30 p.m. to 8:00 a.m. shift on the Northwest Three Housing Unit ("NW3"). That night he worked with Corporal Verine Young and Correctional Officer Kevin Hill. Pursuant to Post Orders, security inspections were to be conducted and recorded in a log book every half hour. Corporal Young entered into the log book that the Grievant had conducted security check towards the end of the shift, at 6:00 a.m., 6:30 a.m. and 7:30 a.m., on December 23, 2006. At 7:45 a.m. the Grievant and Corporal Young ended their shift. At 8:00 a.m., while conducting an inmate count, an officer found an inmate hanging in his cell. Department medical personnel were immediately called and they were unable to revive the inmate. The Agency's surveillance camera showed that there was no activity in the tier where the inmate was housed between 5:46 a.m. and 7:46 a.m. A report by the Agency's Internal Affairs concluded that the Grievant had spoken to the inmate at 6:00 a.m. and that the Grievant and Officer Young had failed to conduct security checks and inmate counts as required by the Post Orders. The report also concluded that there was "a strong possibility that [the inmate] was hanging in a position between his bunk and the toilet during the time when security checks and counts were allegedly being completed." (Award at pgs. 2-3).

On March 1, 2006, the Grievant received a proposed notice of adverse action terminating him for negligence.¹ The Grievant requested an administrative hearing. The Agency's hearing officer recommended that the Grievant be suspended for thirty (30) days and reprimanded for failing to keep an accurate log book. Eight (8) months later, the Director of DOC, Devon Brown, remanded the recommendation to the hearing examiner instructing her to reconsider her recommendation, noting that the log book and the videotapes contradicted the Grievant's testimony. This remand notice was not made available to the Grievant. The remand notice stated as follows:

You rely on the videotape when it supports Corporal Claiborne's testimony but reject it in favor Corporal Claiborne's representation that he was out of view of the cameras protecting the nurse without taking any steps to determine the credibility of his explanation despite the fact that a readily available log book proves that she did

¹ The notice recounted the events of December 23, 2006, and concluded as follows:

You were therefore, negligent in the performance of your duties inasmuch as you failed to follow the procedures set forth in the Northwest Three Housing Unit Post Orders. In addition, you willingly overlooked Corporal Young's false entries in the unit logbook and did not ensure that security inspections were conducted or properly documented. As a result of your negligence, [the inmate's] attempted suicide was not discovered until well after he had expired. Your negligence is aggravated by the fact that you were the Officer-in-Charge with the clear responsibility to ensure that the Unit functioned according to the Post Order.

not arrive until 7:05 a.m. Because Claiborne was neither guarding the nurse at 6:30 a.m., nor conducting the required security check, Young's recording in the logbook that a 6:30 a.m. security check was made by Claiborne is clearly false. According to the objective, recorded evidence, the 7:00 and 7:30 a.m. security checks were also not made but were fals[ely] reported by Corporal Young as completed.

It is your responsibility to test, where feasible, the credibility of employee testimony when they are responding to adverse action charges rather than to accept their statements without question. Apparently you did not view the tape, check the logbook or request the training records in this case. All three of these records contain objective evidence that directly contradicts Corporal Claiborne's testimony and the validity of Officer Young's log entries that Corporal Claiborne conducted the required security checks every half hour. Moreover, there is nothing in the record to suggest that the presence of nursing staff on the unit is an excuse for not conducting the required security checks. In fact, if an officer cannot handle all the required functions, he is required to call for the zone supervisor to provide guidance and assistance. Corporal Claiborne made no such request.

(Award at pgs. 7-8).

On January 31, 2008, the hearing officer issued a remand decision finding that the Grievant's testimony was contradicted by the log book and that his:

actions (not completing a live count, and not documenting movement of all persons in and out of the housing unit faithfully) combined with stated failure to act within policy guidelines (not requesting relief pool support to conduct a live count if the officer knew there was insufficient manpower on [the] unit to conduct the live counts) together constitute willful negligence on the part of the correctional officer, this is a terminable offense.

(Award at p. 8).

The Hearing Officer, therefore, recommended termination of the Grievant. On March 10, 2008, the Director of DOC issued a decision letter describing both the hearing officer's initial recommendation and her recommendation on remand and terminated the Grievant. The Director recounted the *Douglas* factors² that he considered to be relevant and concluded, *inter alia* that

² In *Douglas v. Veterans Administration*, 5 MSBP 312 (1981), the Merit Systems Protection Board established several factors to be considered when mitigating agency imposed discipline.

"[a]s a result of your negligence, the suicidal attempt was not discovered until well after [the inmate] had expired." The Union invoked arbitration. (Award at p. 9).

Before the Arbitrator, DOC argued that it had proven that the Grievant failed to conduct security checks at 6:00 a.m., 7:00 a.m. and 7:30 a.m. on December 23, 2006. DOC alleged that:

these failures seriously threatened the integrity of government operations, constituted an immediate hazard to inmates and employees, and were detrimental to public health, safety and welfare. Both the video and the Grievant's own admissions prove that he did not conduct the required security inspections. Thus, the logbook entries to the contrary were not accurate. . . . Because of his actions, DOC can no longer trust the Grievant to perform his core job functions, and that trust cannot be reestablished through corrective discipline.

(Award at p. 10).

Also, DOC maintained that it did not commit any procedural errors in the processing of the Grievant's removal, although neither the Grievant nor the Union was provided with a copy of the remand notice to the hearing officer. DOC contended that nothing in the collective bargaining agreement or in the District regulations contains such a requirement. DOC asserted that, "The pre-termination procedures . . . fully comported with constitutional requirements." (Award at p. 10).

The Union countered that DOC failed to meet its burden of proving the charge that the Grievant was negligent. "Even if the charge were to be sustained, the Union believed the penalty was too severe for several reasons. First, although DOC claimed that it was not the case; the inmate's suicide clearly affected the discipline. Second, DOC did not properly consider the *Douglas* factors in determining the penalty . . . [such as failing to consider] the Grievant's discipline-free record, his past work record and length of service, or the consistency of the penalty with that imposed on other employees for similar offenses." (Award at p. 11). The Union further argued that: (1) DOC violated the Grievant's constitutional rights; (2) DOC did not follow its own regulations in effecting the discipline; (3) regarding the pre-termination hearing, the hearing officer was not impartial and the DOC Director's role shows bias; (4) the remand memo confirms that a final decision had already been made; (5) DOC abused the remand process; and (6) the secretive remand process disadvantaged the Grievant. The Union also argued that should the Arbitrator reverse the termination, the Grievant is entitled to attorney fees under the Federal Back Pay Act. The Union maintains that DOC's actions were initiated in bad faith and clearly without merit. Further, the Union asserts that nothing in the collective bargaining agreement precludes payment of fees to a prevailing Grievant. (Award at p. 11).

On September 15, 2009, Arbitrator Alpern found that the Grievant's constitutional rights had not been violated; nor did the Director of DOC violate the collective bargaining agreement or the District Personnel Regulations by remanding the case to the hearing officer; also, the hearing officer was properly designated. (See Award at pgs. 13-15). The Arbitrator also found that the Grievant:

did not conduct required security checks and ... the log book ... was not accurately maintained on the night in question. However, while DOC charged the Grievant with negligence, DOC argued that the charges should be sustained because the Grievant "intentionally did not perform the required security inspections and ensure that the unit's log book was accurately documented, [and that he] deliberately failed to perform security inspections." The Arbitrator also relied on the fact that in one of the specifications in the notice of adverse action DOC stated that the Grievant "willingly overlooked Corporal Young's false entries in the unit logbook [and] deliberately failed to perform safety inspections."

(Award at pgs. 15-16).

Arbitrator Alpern concluded that, "[a]lthough there is some basis to conclude that DOC was charging the grievant with an intentional act, the overall structure and content of the proposal and decision support the conclusion that the charge was 'negligence' and that is all DOC must prove." (Award at p. 16). Therefore, in order to show culpable negligence, DOC must show that the Grievant failed to 'exercise the degree of care required under the particular circumstances, which a person of ordinary prudence in the same situation and with equal experience would not omit. [The Arbitrator found that] the Grievant knew or should have known [that he was to conduct security checks], yet he failed to conduct the scheduled inspections.... [Therefore,] the Grievant did not exercise the ordinary prudence that is expected of a corrections officer with equal experience. This specification is sustained." (Award at p. 17).

However, the Arbitrator noted that "DOC attempts to bolster its negligence specification with respect to the log book by asserting that 'the Grievant chose to conspire with Officer Young to falsify the record'... however there is no evidence in the record to support this allegation." (Award at pgs. 17-18). Thus, the Arbitrator concluded that DOC failed to prove by a preponderance of the evidence that an OIC is expected to check the accuracy of entries made in the log book by other officers. Accordingly, this specification is not sustained." (Award at p. 18)

In sum, the Arbitrator concluded that the removal of the Grievant was not for cause. He found that the Agency erroneously relied on the death of the inmate as cause for discipline. (Award at p. 19). He reinstated the Grievant with back pay and benefits and imposed a sixty-day suspension. He also stated that, "the Grievant should receive all pay, benefits and entitlement under the Back Pay Act and under the Agreement"; and that, within twenty-one (21) days, the Union was permitted to file a motion for attorney fees. (Award at p. 27). Furthermore, he

instructed the parties to negotiate the proper amount of attorney fees and, in the event they were unsuccessful, the Arbitrator held the record open for ninety days from the issuance of the Award, to resolve any disputes. *Id.*

DOC filed a request to review the Award. In its Request for Review, DOC argued that the Award is contrary to law and public policy and the Arbitrator exceeded his authority.

The Union filed an Opposition to the Request stating that the Award was not contrary to law and public policy, nor did the Arbitrator exceed his authority.

III. Discussion

The issue before the Board is whether: (1) Arbitrator Alpern's Award is contrary to law and public policy; (2) the Arbitrator exceeded his authority; and (3) whether to allow the parties to brief the issue of attorney fees.

When a party files an arbitration review request, the Board's scope of review is extremely narrow.³ Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances where:

1. "the arbitrator was without, or exceeded, his or her jurisdiction";
2. "the award on its face is contrary to law and public policy";
or
3. 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 Award Exceeds Authority

DOC argues that the Arbitrator exceeded his jurisdiction because the collective bargaining agreement ("CBA") between the parties provides at Article 10, Section 6 (B) that,

³ 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.

“[a]ll parties shall have the right, at their own expense, to legal and/or stenographic assistance at the hearing.” [emphasis in the original]. DOC contends that this language means that “the parties specifically agreed that FOP and DOC would each be responsible for their own legal expenses incurred in arbitration cases.” (Request at p. 5). DOC concludes, therefore, that the Award violates the plain language of the CBA, and the Arbitrator is bound by the clear and unambiguous language of the CBA. In addition, DOC claims that FOP has not previously sought attorney fees under the CBA. (Request at pgs. 6-7).

With regard to the Agency’s allegation that the Arbitrator exceeded his authority because he relied on the Federal Back Pay Act, one of the tests that the Board has used when 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.” *D.C. Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). See also, *Dobbs, Inc. v. Local No. 1614, Int’l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987). The U. S. Court of Appeals for the Sixth Circuit in *Michigan Family Resources, Inc. v. Service Employees Int’l Union Local 517M*, has explained what it means for an award to “draw its essence” from a collective bargaining agreement by stating the following standard:

[(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.

475 F.3d 746, 753 6th Cir. (2007), (overruling *Cement Division, Nat’l Gypsum Co. v. United Steelworkers for America, AFL-CIO, Local 135*, 793 F.2d 759 (C.A.6 1986)).

In the present case, “[nothing in the record ... suggests that fraud, a conflict of interest or dishonesty infected the arbitrator’s decision or the arbitral process. [In addition,] no one disputes that the collective bargaining agreement committed this grievance to arbitration [n]or ... that this arbitrator was ... selected by the parties to be eligible to resolve this dispute. The arbitrator, in short, was acting within the scope of his authority. *Id.* at 754.

This leaves the question of whether Arbitrator Alpern’s interpretation of the parties’ CBA was “arguably construing” the collective bargaining agreement. “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 finality clause in most arbitration agreements, ... [stating that] ‘the arbitrator shall have full authority to render a decision which shall be final and binding upon both parties’ and a view whose imperfections can be remedied by selecting [different] arbitrators.” *Id.*

at 753-754. In the present case, the Arbitrator's opinion has all the hallmarks of interpretation. Arbitrator Alpern refers to, and analyzes the parties' positions, and at no point does he say anything indicating that he was doing anything other than trying to reach a reasonable interpretation of the contract. "Neither can it be said that the [A]rbitrator's decision on the merits was so untethered from the agreement that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his 'own brand of industrial justice.'" *Id.* at 754. "Such an 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." *Id.* at 753. For the reasons cited above, we find that the Arbitrator's Award draws its essence from the collective bargaining agreement.

Furthermore, we have held that "an arbitrator does not exceed his authority by exercising his equitable powers, unless these powers are expressly restricted by the parties' collective bargaining agreement. *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, - D.C. Reg. -, Slip Op. No. 933, PERB Case No. 07-A-08 (2008). In the instant matter, we find no such provision in the parties' CBA limiting the arbitrator's equitable authority. Therefore, we find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to have exceeded his authority.

DOC also asserts that the Award misapplies the Federal Back Pay Act⁴ because the Union did not totally prevail in this matter, and "the Arbitrator did not find the Grievant totally

⁴ The Federal Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii), provides:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A)

...
(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title;

⁵ U.S.C.A. §7701(g)(1) provides:

Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or

inculpable.” (Request at p. 9). The Agency argues that the Arbitrator found that the Agency had cause to discipline the Grievant because the Grievant was negligent, but the negligence did not warrant termination. (Request at pgs. 9-10). DOC also argues that there must be an “unjustified or unwarranted personnel action” for the Federal Back Pay Act to apply.

The Board finds that DOC does not state which basis for review this argument asserts. What DOC does argue, based upon its overview of the Arbitrator’s findings, is that it disagrees with the Arbitrator’s conclusion that he has the authority to grant attorney’s fees pursuant to the Federal Back Pay Act. As stated above, DOC’s disagreement with the Arbitrator’s interpretation of the parties’ CBA or external laws does not establish that the Arbitrator exceeded his authority. If DOC’s argument is that the arbitrator’s determination was contrary to law, the basis for that argument also consists of a disagreement with the Arbitrator’s interpretation. As a result, and for reasons elaborated upon below, this argument is rejected as a basis for reversal of the Arbitrator’s Award.

B. Whether the Award is Contrary to Law and Public Policy

DOC argues that the Award is contrary to law and public policy because the Federal Back Pay Act is inapplicable to the instant matter. The Agency argued before the Arbitrator that Article 10, Section 6(b), of the parties’ CBA constituted a waiver of entitlement to attorney fees under the Federal Back Pay Act. (Award at p. 24). Article 10, Section 6(b) provides, in part, that parties in a grievance arbitration hearing “shall have the right, at their own expense, to legal and/or stenographic assistance.” (Award at p. 24). The Arbitrator, however, rejected DOC’s argument, indicating in his reasoning that the parties’ CBA lacked a clear and unambiguous waiver of an employee’s right to recoup attorney’s fees under the Federal Back Pay Act. In addition, the Arbitrator cited *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456 (2009), for the Supreme Court’s holding that a union may not waive an employee’s substantive statutory rights, but may waive an employee’s procedural right to bring claims in federal court by “clearly and unmistakably” requiring the employee to arbitrate the claims. The Arbitrator did not make a determination as to whether an employee has a substantive right to recoup attorney’s fees. Instead, he found that the parties’ CBA did not contain a clear and unmistakable waiver to seeking recovery of attorney fees.

In its Request, DOC contends that the Arbitrator’s reference to *14 Penn Plaza* should be considered “a serious misapplication of the law because it confers rights solely belonging to a union on an individual.” (Request at p. 11). DOC argues that the holding in *14 Penn Plaza* is not relevant because the instant matter concerns contractual rights to arbitration, as opposed to a federal statutory right to arbitration.

applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency’s action was clearly without merit.

The Board finds that DOC's argument misses the mark. The issue before the Arbitrator, and ultimately before the Board, was not whether a union can waive an individual employee's right to recover attorney fees, but whether the parties' CBA precludes an arbitrator from granting attorney's fees to the union as part of his remedy. The Arbitrator plainly determined that he was not precluded by the parties' CBA from awarding attorney's fees. In addition, the Board has long recognized the applicability of the Federal Back Pay Act to District of Columbia employees and its application in arbitration awards. *International Brotherhood of Police Officers, Local 445 (On behalf of Officer Cecyl A. Nelson) and District of Columbia Office of Administrative Services*, 41 D.C. Reg. 1597, Slip Op. No. 300, PERB Case No. 91-A-05 (1992).

The Board has held that "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 ruling.... [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 Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). 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 Board has determined that the petitioning party has the burden to specify applicable law and definite public policy, the violation of which is so significant, mandates that the arbitrator arrive at a different result. *MPD and FOP/MPD Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). *See also, 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). Instead, DOC merely disagrees with the Arbitrator's interpretation of the parties' CBA and the Federal Back Pay Act.

This Board has held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's that the parties have bargained for." *University of the District of Columbia and University of the District of Columbia Faculty Association/NEA*, 39 D.C. Reg. 9628, Slip Op. No. 320 at p.2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, the parties agree to be bound by the arbitrator's interpretation of the parties' agreement and related rules and regulations, as well as his evidentiary findings and conclusions upon which the decision is based. *Id.* Also, we have held that a disagreement with the arbitrator's interpretation . . . does not render the award contrary to law and public policy. *See AFGE, Local 1975 and Dep't of Public Works*, 48 D.C. Reg. 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995).

It should also be noted, that the Arbitrator did not make a determination on whether the Union has established that an award of attorney's fees is appropriate in this case, only that he had the authority to make the determination. Paragraphs four (4) and five (5) of the Award reserve that determination for a later proceeding, if requested by the Union. (Award at p. 27). Whereas the Arbitrator has not yet made findings or analysis concerning the application of the Federal Back Pay Act, briefs from the parties on the issue would be premature.

Based upon the foregoing, the Board finds no basis for turning aside Arbitrator Alpern's Award. Therefore, we deny the Request in this matter.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia District Department of Corrections' 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.

August 18, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-03, Slip Opinion No. 1306 was transmitted *via* U.S. Mail and e-mail to the following parties on this the 9th day of August, 2012.

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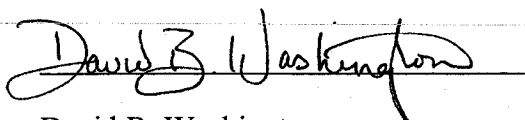
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