GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: The District of Columbia Public Schools, Petitioner, and The American Federation of State, County and Municipal Employees, Council 20, on behalf of Norman J. Isaac, Respondent.	PERB Case No. 86-A-03 Opinion No. 155 ~~File Closed~~

DECISION AND ORDER

On June 19, 1986, the District of Columbia Public Schools (DCPS) filed an "Arbitration Review Request" with the Public Employee Relations Board (Board) contending that the duly designated Arbitrator's Award reinstating the grievant and amending his personnel records to reflect an oral warning rather than his discharge, was on its face, contrary to law and public policy and that the Arbitrator was without authority or exceeded the jurisdiction granted.

On July 9, 1986, the Board received an Opposition to Arbitration Review Request from the American Federation of State, County and Municipal Employees, AFL-CIO, District Council 20, (Union), contending that DCPS's Arbitration Review Request should be dismissed as untimely or in the alternative denied pursuant to Board Rule 107.1.

The issue before the Board is whether the Arbitration Review Request is timely and whether a statutory basis for review exists in this case.

The threshold question which the Board must address is the timeliness of the Arbitration Review Request.

Board Rule 107.2 requires that an Arbitration Review Request be filed with the Board no later than twenty (20) days after the award is served.

Board Rule 100.26 provides that "filing" with the Board shall not be complete until the document is received in the office of the Executive Director.

Board Rule 100.16 provides:

> Whenever a period of time is measured from the service of a paper, and service is by mail, three (3) days shall be added to the prescribed period.

The record in this case established that the Award was served by mail to the parties on May 27, 1986. Based on the foregoing rules the Arbitration Review Request is timely. The Arbitration Review Request was received by the Executive Director on June 19, 1986. By adding three days from the date of Service of the Award to the prescribed twenty (20) days period, June 19th was the deadline for the submission of the Review Request.

Having determined the review request to be timely filed the Board must ascertain if a statutory basis exists in this case to grant a review of the Arbitration Award.

D.C. Code Section 1-605.2(6) and Board Rule 107.1 authorizes the Board to consider appeals from arbitration awards pursuant to a grievance procedure only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy, or the Award was procured by fraud, collusion, or other similar and unlawful means.

The May 23, 1986 Award that DCPS petitions the Board to review held:

> There was no just cause for the grievant's discharge for failure to follow established leave procedure/policy and the record is ordered amended to reflect an oral warning consistent with the sequential order of discipline set-out provided by (SIC) the terms of the labor agreement. It is further ordered that the grievant be reinstated pursuant to Article 10 Section G of the labor agreement.

The facts of this case can be summarized as follows. The grievant, an admitted substance abuser who sought rehabilitative assistance during the course of his employment, was intermittently successful with his attendance requirements. The School Board was tolerant, to a point, of the grievant's scheduled medical

appoinments which oftentimes conflicted with his scheduled work hours. The grievant had accumulated eight (8) disciplinary actions between the period December 1981 and May 1985, prior to the alleged infraction leading to his dismissal.

During a period in which the grievant had a relapse concerning his attendance problems, the School Board imposed restrictions on the grievant's use of sick leave. The Arbitrator found the restrictions to be neither arbitrary nor unreasonable and was satisfied that the grievant had a duty to comply. These restrictions, imposed in February 1985, required the grievant to produce medical certification of illness for any future absences. Additionally, the labor agreement in effect at all relevant times, mandated that the School Board utilize the progressive sequential order of discipline (oral reprimand, written reprimand, and suspension) before discharging the grievant. In this respect the question before the Arbitrator, as he defined it, was whether the School Board had met its burden in establishing that the grievant's alleged misconduct constituted just cause for his discharge for (1) failure to follow the established leave policy, and (2) falsification of official records. For the resolution of these issues the Arbitrator addressed the dates of May 20th and June 7, 1985, when the grievant failed to report to work and was given three (3) days to submit the requisite medical certification.

The documentation submitted by the grievant, according to DCPS's investigation, was falsified. In this regard, DCPS produced evidence ih the form of the clinic's physician's written statement that in fact the grievant was not seen by him on the dates in question. The grievant's testimony apparently persuaded the Arbitrator that the grievant had visited the clinic on May 20th and June 7th, and although he was not seen by the physician, he obtained the disputed certification from the receptionist regarding his visit. The Arbitrator credited grievant's testimony over the written statement of the physician, proffered by the School Board during the hearing. The Arbitrator found that the doctor's letter added nothing to DCPS's quantum of proof as it neither alleged that the grievant failed to visit the clinic, nor that he was not sick on either occasion. The Arbitrator accorded greater weight to the grievant's testimony because hearsay evidence is to be given little weight if contradicted by evidence which has been subject to cross-examination. See for instance Howall Refining Co 27 LA 486, 492 (Hale 1956). Also see Arbitrator Rubin in 20 LA 483, 484. The Arbitrator concluded that the grievant obtained the certification to comply with the sick leave restrictions and DCPS failed to show that the grievant altered any aspect of the certification.

In resolving the falsification issue the Arbitrator stated:

> ...[H]ere, the Arbitrator is asked to decide the propriety of the discharge of an employee where a certification of illness has been provided to substantiate an absence but where the document is rejected as insufficient proof of illness ... the Arbitrator finds it irreconcilable how an employee may be subject to a greater penalty for purposes of sick leave by providing a certification of illness, then when none is provided at all. It seems to the Arbitrator that the basic nature of the offense remains an attendance infraction whether or not the employee attempts to substantiate the absence.

The Arbitrator's review of the grievant's disciplinary record revealed that attendance infractions have historically been dealt with by school officials as a non-serious offense for disciplinary purposes. Further:

> By express terms of the labor agreement, disciplinary measures are to be applied in a sequential order beginning with an oral warning. On this point, the Arbitrator finds the union arguments persuasive. Here, there can be no doubt that school officials clearly failed to follow the requisite disciplinary steps in effectuating the grievant's discharge for failure to follow established leave procedure/policy. It is well established that a discharge is to be set-aside where there is a corrective disciplinary system but officials fail to abide by it. See Elkouri and Elkouri, How Arbitration Works, p. 632, n 99 (BNA 3rd Ed.)

The DCPS's contention that the Award is contrary to law is not supported by citation of any law which mandated that the Arbitrator arrive at a contrary decision. DCPS refers to Section 1-617.1 of the D.C. Code to support its claim that the Award is contrary to law and public policy. This section defines "cause" which may trigger adverse action provided there is a list of 21 specific causes. The Board notes that Section 1-617.1 of the D.C. Code does not require discharge nor did DCPS prove that the grievant was guilty of falsifying any document, which would constitute "cause" for an adverse action.

In pertinent part Section 1-617.1 states:

> "Adverse action procedures shall not be in conflict with these corrective measures nor with any provisions

> of this subchapter...The extent of the corrective action shall reflect the severity of the infraction."

No law or public policy is transgressed by requiring a party to follow progressive discipline as required by the collective bargaining agreement by which it is bound.

Based on the foregoing, the Board finds that the Award does not impose requirements upon DCPS which are inconsistent with Section 1-617.1. No law or public policy is breached by the Award.

It is well established that Arbitrators may set aside a discharge where there is a corrective disciplinary system but officials fail to abide by it. See Arbitrator Belshaw in 49 LA 573, 576-577; Morgan in 45 LA 280, 283; Kates in 43 LA 1031, 1034-1035, and in 39 LA 286, 290-292 (the established sequence should be adhered to in the absence of compelling circumstances otherwise); Dworkin in 41 LA 862, 866. The argument that the Arbitrator exceeded his jurisdiction and was without authority to render the Award, is premised on mere speculation as to the Arbitrator's subjective thoughts on the issue, a realm which this Board declines to explore.

The Board finds that there is insufficient basis upon which to conclude that the Arbitrator's Award is contrary to law and public policy or beyond the scope of the authority granted.

O R D E R

IT IS ORDERED THAT:

The request for review of the arbitration award is hereby denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
May 7, 1987