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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 (Fahn Harris))

Petitioner,)

v.)

District of Columbia Housing Authority)

Respondent.)

PERB Case No. 13-A-11

Opinion No. 1481

DECISION AND ORDER

I. Statement of the Case

On July 1, 2013, Petitioner American Federation of Government Employee, Local 2725 (“Petitioner” or “Union”), filed the above-captioned Arbitration Review Request (“Request”), pursuant to the CMPA and D.C. Code §1-605.2(6), on behalf of Fahn Harris (“Grievant” or “Harris”), seeking review of Arbitrator Gail Smith’s Arbitration Award (“Award”) issued on June 10, 2013¹. Petitioner seeks review of the Award on its merits because:

(1) the Award violates existing District of Columbia law because it attempts to redefine the charge of “incompetency” under D.C. law, and the charge of incompetency was not and could not be found on the basis of this Award; and (2) the Arbitrator exceeded her jurisdiction because (a) she failed to decide a primary issue the parties submitted to her for determination, specifically the remedy in the case of a finding that the Agency did not have just cause to terminate the Grievant; and (b) to the extent she addressed remedy, her statements do not derive their essence from the collective bargaining agreement.

(Request at 1-2).

Respondent District of Columbia Housing Authority (“Respondent” or “Agency”) filed an Opposition to Union’s Arbitration Review Request (“Opposition”) on July 31, 2013. Agency

¹ An arbitration review request of the supplemental award in this case was filed as PERB Case No. 14-A-01.

reasons that the Union's Request is an interlocutory appeal, and thus, shall not be permitted because the Award is not final. (Opposition at 6-8). However, even assuming, *arguendo*, that the Board determines that the Award is final, the Agency asserts that the Union: (1) failed to establish that the Award violates existing District of Columbia law as it relates to the definition of the charge of "incompetency;" (2) failed to demonstrate that the Arbitrator exceeded her jurisdiction by failing to decide a primary issue the parties submitted to her for determination; (3) failed to establish that the Award's remedy does not 'derive its essence' from the parties' CBA; and (4) failed to demonstrate that the Arbitrator's authority was limited by terms in the contract between the parties or that her decision regarding remedy was inappropriate or exceeding her jurisdiction. (Opposition at 2).

The Union expressly does not seek review of the Award regarding the first issue regarding arbitrability, which was a procedural argument raised by the Agency. (Request at 1; Opposition at 2). As it relates to this issue, the Agency posits that the Arbitrator did, in fact, exceed her authority as it pertains to the arbitrability issue. (Opposition at 2).

The Union filed an Unopposed Motion to Stay Case Proceedings on January 23, 2014, which was granted by Interim Executive Director Keturah Harley on January 24, 2014. The parties were instructed to provide an update to PERB, due no later than March 24, 2014. On March 24, 2014, the Union filed its second Unopposed Motion to Stay Case Proceedings. Executive Director Clarene Martin granted the second Unopposed Motion to Stay Case Proceedings in part, until May 1, 2014. The Union filed its third Unopposed Motion to Stay Case Proceedings on May 16, 2014. Executive Director Clarene Martin granted the stay in part, until May 31, 2014; she also advised the parties that this will be the final stay granted in this matter, and in the absence of notice from the parties, independently or jointly, that this matter has been resolved by the end of the stay period, PERB will proceed with this case.

The Request and Opposition are now before the Board for disposition. Upon consideration of the pleadings and the record as a whole, and consistent with Board precedent, the Board affirms the Award and denies the Request.

II. Discussion

A. Award

On April 10, 2009, the Agency issued a letter ("Removal Letter") to the Grievant, removing the Grievant from her position of Financial Reporting Analyst for reasons of incompetency. (Award at 2). The Removal Letter listed five incidents where the Grievant allegedly performed her work in an incompetent fashion in 2008. *Id.* The disciplinary action became effective on May 10, 2009, at which time the Agency officially terminated the Grievant. *Id.* On June 23, 2009, the Union filed a Step 3 grievance ("Grievance") on the Grievant's behalf, alleging that the Grievant had worked as a Financial Reporting Analyst for the Agency's Office of Finance Management since August 8, 2005, during which time the Agency did not issue any disciplinary actions against the Grievant prior to the Removal Letter. *Id.* As a remedy, the

Union requested in the Grievance that the Agency rescind the Grievant's discharge, that the Grievant be permitted to return to work in another capacity, or that she be allowed to submit her resignation with an effective date that allows her to participate in the Voluntary Severance Incentive. (Award at 3). The Agency, through Paulette Campbell, Director of Human Resources, responded to the Grievance on July 13, 2009, upholding the Grievant's termination and denying the Grievant's request to work in another capacity at the Agency. *Id.* Subsequent attempts to settle the grievance were unsuccessful. *Id.* On September 1, 2009, the Union filed a Notice of Intent to proceed to Arbitration on September 1, 2009, which is thirty-six (36) business days subsequent to the Agency's response to the Grievance on July 13, 2009. *Id.*

Article 9, Section D(4) of the CBA provides: (a) The Union may appeal an unresolved grievance to Arbitration after receipt of an unsatisfactory Step 3 Decision. (b) The Union shall provide the Executive Director with written notice of its intent to arbitrate a grievance within twenty (20) workdays of receipt of the unsatisfactory Step 3 response. (Award at 4-5). The Agency has raised the issue of the Union's untimely filing of the Notice of Intent to arbitrate, alleging that the Union's untimeliness constitutes a procedural bar to arbitration, precluding consideration of the Grievance on its merits. (Award at 3). The Union posits that the parties were in the midst of trying to settle the Grievance, and that it was not until the settlement discussions proved unfruitful that the Union filed a Notice of Intent to arbitrate the Grievance. *Id.*

The Award addresses two issues:

- (1) Did the Union file the Notice of Intent to arbitrate the grievance in this case in an untimely manner pursuant to the provisions of the parties' CBA? If so, is the grievance procedurally arbitratable or is the Union precluded from arbitrating the merits of the case?
- (2) Did the Agency have just cause to terminate the Grievant? If not, what is the remedy?

(Award at 4).

i. Arbitrator's Award on the Timeliness Issue

On the first issue, the Arbitrator found that the Agency is estopped from challenging the Union's untimely filing of the Notice of Intent to proceed to arbitration as a procedural bar that precludes arbitrating the merits of this case, and she rejected the Agency's timeliness defense. (Award at 20-21).

The Union did not file the Notice of Intent to proceed to arbitration until September 1, 2009, thirty-six (36) business days after the Agency's Step 3 response on July 13, 2009. (Award at 19). Article 9, Section D.4 of the parties' CBA states that the Union shall file the Notice of Intent to arbitrate a grievance within twenty (20) business days of receipt of an unsatisfactory Step 3 response. *Id.* However, Eric Bunn, the Union's President, testified that the parties never enforced or adhered to this deadline. *Id.* Moreover, Bunn, who has been the Union's President for twenty (20) years, testified that the Agency has **never** challenged the timeliness of a Notice

of Intent to arbitrate and produced five (5) cases where the Union failed to file a Notice of Intent to proceed to arbitration within twenty (20) business days of an unsatisfactory Step 3 response but the Agency did not raise a timeliness issue. *Id.* The Arbitrator found that Bunn had established that it was commonplace for the Agency to fail to timely issue a Step 3 response to the Union, and that at times, the Union even submitted a Notice of Intent to arbitrate prior to the Agency providing the Step 3 written decision to the Union. *Id.* Additionally, the Agency often failed to meet with the Union within fifteen (15) days after the filing of the Step 3 grievance, as required by Article 9, Section D.3.b of the CBA. *Id.* The Agency failed to present any evidence or witnesses to refute the facts presented by the Union, despite having two months of a delay between the second day and the third day of the arbitration. (Award at 20).

The Arbitrator found “compelling” evidence that “both sides, and not just the Union, repeatedly failed to adhere to the time deadlines in the CBA.” (Award at 20). “Moreover, it is apparent that both sides often missed time limits with enough frequency that if the Agency intended to enforce or strictly adhere to the time deadlines in the parties’ CBA in this case, that it was incumbent on the Agency to provide notice of the same to the Union.” *Id.* Accordingly, the Arbitrator found that the Agency is now estopped to challenge the Union’s untimely filing of the Notice of Intent to proceed to arbitration in this case, as a procedural bar that precludes arbitrating the merits of this case. (Award at 20-21). The Agency’s timeliness defense was rejected. (Award at 21).

ii. Arbitrator’s Award on the Merits of the Case

As to the merits of the case, the Arbitrator found that “the Agency established that the Grievant performed her duties listed in the Removal Letter (incidents one, two, four, and five) in an ‘incompetent’ fashion or that the Grievant demonstrated ‘an inability to satisfactorily perform one or more major duties of her position.’” (Award at 21). There are five incidents listed in the Removal Letter that are used as the basis of the Grievant’s termination. (Award at 11).

In the first incident, the Grievant allegedly hid variances in other numbers when performing bank reconciliations for the Advances-Unlimited Revolving Fund account. (Award at 11). As a result, \$1,034,145.00 was not recognized as a reconciling item and therefore was not posted to the general ledger, even though the reconciliation reflected the correct amount of funds. *Id.* The Agency alleged that this was clear evidence that the Grievant intentionally plugged the number in order to complete the reconciliation. *Id.* The Agency did not present any evidence to support this allegation. (Award at 12). At the arbitration hearing, the Grievant denied this allegation. (Award at 12-13). The Arbitrator found that while the Agency established that the Grievant did not list the checks on the corporate books, and thus performed her duties in a negligent fashion, the Agency failed to establish that the Grievant acted intentionally or willfully. (Award at 21).

The second incident arose from the Grievant’s preparation of a schedule entitled “Notes & Mortgages Receivable – Non Current FDS #171 Low Rent Program” that listed Notes receivable as of September 30, 2007 that: “consists of amount advanced to various partnerships

and other entities in mixed finance deals related to DCHE's Hope VI Program."² (Award at 14). Daniel McLean, on behalf of the Agency, alleged that the Grievant used the previous year's FDS 171 Schedule created by an independent auditor to represent the notes' current worth, without calculating the amount of interest accrued from the prior year. *Id.* The Grievant testified during the arbitration that she was not assigned the responsibility of calculating the interest on the notes receivable listed on the FDS 171 schedule nor was she ever trained to perform this job, despite the fact that she was the only individual responsible for the Low Rent Income Program's financial records. (Award at 15).

The third incident in the Removal Letter arose from a document created by the Grievant titled "Other Assets FDS #174 Low Rent Program." (Award at 16). Daniel McLean, on behalf of the Agency, testified that this third incident is the "least egregious and most subjective," but "it adds color and validity to the overall case." *Id.* The Grievant testified that the adjustments or entries listed under "description" were taken from the Agency's general ledger, and she was trained to adopt from the general ledger. *Id.*

The fourth incident is similar to the second incident where the Grievant allegedly failed to update the value of an asset. (Award at 17). In this instance, the Agency's insurance company provided the value of the Agency's surplus accounts. *Id.* The Grievant failed to include the information from the insurance company in the value of the asset in the workpaper. *Id.* As a result, the Agency's income was understated. *Id.* The Grievant acknowledged that the Agency properly attributed poor performance in her handling of this assignment. *Id.*

The fifth incident in the Removal Letter, the Grievant allegedly used the same information or same workpaper as the year prior, without making any changes to the information. (Award at 17-18). The Grievant asserted that she updated the information on the workpaper for the FDS line 143 Schedule, but it was another employee who failed to include the updated workpaper. (Award at 18).

Incidents two, four, and five involve the Grievant's failure to calculate or include interest accrued from the prior year when presenting the current value of the assets listed in the three Schedules. (Award at 21). The Grievant's reasons for her failure to accurately prepare the three Schedules were that the information was not readily available to her: the information was kept at DCHE (incident two); the HAIG letter "slipped through the cracks" (incident four); and someone else placed the wrong workpaper in the binders for the auditors (incident five). (Award at 21-22). The Arbitrator found that those reasons do not absolve the Grievant of her responsibilities. (Award at 22). "The Agency had a right to believe that once submitted, the information was correct, that it was dependable and that Mr. Coffey need not verify the Grievant's work, particularly as the Grievant failed to alert or point out any problems to Mr. Coffey when she submitted her work product or material. In submitting the Grievant's work product, the Grievant was inherently representing the Schedules were complete and up to date, when such in fact was not the case." *Id.* For those reasons, the Arbitrator concluded that the Grievant was not qualified

² The DCHE Hope VI Program is a separate entity from the District of Columbia Housing Authority. *See* Award at 14.

or was unable to perform one or more major duties of her position as a Financial Reporting Analyst. *Id.*

The Arbitrator notes that the Agency bears the burden of proof to establish 'just cause' to terminate the Grievant. (Award at 22). The parties' CBA Article 10, Section C.1.d establishes just cause for removal of an employee; it includes a Table of Appropriate Penalties ("Table"), which specifies the range of penalties that may be imposed for specific offenses. *Id.* The Arbitrator specifically declares that she will follow this Table. *Id.*

In the instant matter, the Agency's removal action is based on a single offense, "Incompetency," as listed in the Table. *Id.* For a first offense of proven incompetency, the penalty specified in the Table is a reduction in pay, grade, and/or rank, or removal. *Id.* The Arbitrator found that the Agency established that the Grievant was "incompetent" and unable to perform one or more major duties of her position, but that the Agency failed to provide any evidence or explanation as to why the Agency selected the penalty of removal, rather than the penalty of a reduction in pay, grade, or rank, particularly because the Agency had not issued any disciplinary measures to the Grievant prior to her termination. (Award at 22-23). The parties' CBA, in Article 10, Section C.1.e.(2), also requires the Agency to consider mitigating circumstances in assessing the appropriate penalty and to document the Agency's Assessment. (Award at 23).

The Arbitrator concluded that the Grievant was "incompetent" and unable to perform one or more major functions of her job, and thus, the Grievant was not qualified to remain in the position of Financial Reporting Analyst. (Award at 23). However, because the Agency failed to consider mitigating circumstances that may have resulted in a disciplinary measure short of termination, the Arbitrator held that the Agency failed to establish that it had just cause to terminate the Grievant. *Id.*

As for the remedy, the Arbitrator directed the Agency 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." (Award at 23). "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.*

B. PERB's Review

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. Code § 1-605.02(6) (2001 ed.).

The Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator. *Dist. of Columbia Dep't of Corrs. v. Int'l Bhd. Of Teamsters, Local*

Union No. 246, 34 D.C. Reg. 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). 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, 38 (1987). By submitting the 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." *Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm. (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

i. PERB's Review on the Timeliness Issue

"It is well-settled that arbitrators are permitted to decide questions involving procedural arbitrability." *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 52 D.C. Reg. 8591, Slip Op. No. 784 at p. 5, PERB Case No. 04-A-13 (2005) (quoting *UDC v. AFSCME Council 20, Local 2087*, 36 D.C. Reg. 3344, Slip Op. No. 219 at p. 3, PERB Case No. 88-A-02 (1989)). "An arbitrator possesses the jurisdictional authority to interpret the parties' agreement to determine issues of procedural arbitrability." *Dist. of Columbia Dep't of Recreation & Parks v. Am. Fed'n of Gov't Emps., Local 2741, AFL-CIO*, 46 D.C. Reg. 4844, Slip Op. No. 579 at p. 2, PERB Case No. 99-A-01 (1999). Thus, it cannot be said that the Arbitrator exceeded his authority by making a determination that the grievance was timely. *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 52 D.C. Reg. 8591, Slip Op. No. 784 at p. 5, PERB Case No. 04-A-13 (2005). As we have explained, 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. *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 52 D.C. Reg. 8591, Slip Op. No. 784 at p. 5, PERB Case No. 04-A-13 (2005); *Univ. of the Dist. of Columbia v. Univ. of the Dist. of Columbia Faculty Ass'n/NEA*, 39 D.C. Reg. 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).

Notwithstanding, this issue is not under review by this Board. "A party to grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board . . ." Board Rule 538.1. The Union expressly did not seek review of the Award regarding the timeliness issue. (Request at 1; Opposition at 2). Though the Agency posits that the Arbitrator did, in fact, exceed her authority as it pertains to the arbitrability issue, it does not specifically request the Board to review the Award as it relates to this issue. (Opposition at 2). Because neither party has asked the Board to review this issue, the Board will not review the timeliness issue.

ii. PERB's Review on the Merits of the Case

The Union alleges that the Award is “contrary to law because the charge of ‘incompetency’ could not be and was not established in the Award and the Award attempted to alter the legal definition of ‘incompetency.’” (Request at 7).

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. *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)).

(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.

Id. (citations omitted).

The Board's scope of review, particularly concerning the public policy exception, is extremely narrow. *Am. Fed'n of Gov't Emps., Local 2725 v. Dist. of Columbia Dep't of Consumer & Regulatory Affairs*, Slip Op. No. 1444, PERB Case No. 13-A-13 (2013). The petitioning party has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” *Id.* (citing to *D.C. Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000); see also *Dist. of Columbia Pub. Schools v. Am. Fed'n of St. Cnty. & Mun. Emps., Dist. Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). “Absent a clear violation of law evident on the face of the arbitrator's award, the Board lacks authority to substitute its judgment for the arbitrator's.” *Am. Fed'n of Gov't Emps., Local 2725 v. Dist. of Columbia Dep't of Consumer & Regulatory Affairs*, Slip Op. No. 1444, PERB Case No. 13-A-13 (2013) (citing to *Fraternal Order of Police/Dep't of Corrs. Labor Comm. v. Pub. Emp. Rels. Bd.*, 973 A.2d 174, 177 (D.C. 2009)).

The Union, while heavily citing to the Federal Labor Relations Authority (“FLRA”) and the District of Columbia Office of Employee Appeals (“OEA”), argues that the Award is contrary to law because the charge of “incompetency” could not be and was not established in

the Award, and the Award attempted to alter the legal definition of incompetency. (Request at 7). The Union states that the 'contrary to law' exception requires the Board to conduct a *de novo* review for legal sufficiency, citing to *NTEU, Chapter 24 and U.S. Dep't of the Treasury, IRS*, 50 FLRA 330, 332 (1995); *see also Teamsters, Local Union 1714 v. D.C. Dep't of Corrs.*, 38 D.C. Reg. 5080, Slip Op. No. 284, PERB Case No. 87-A-11 (1991) (contrary to law exception granted). The Union asserts that under District of Columbia law, the offense of "incompetency" holds a specific legal definition: "the physical inability, the legal inability or likely the mental inability to satisfactorily perform one or more major duties of the position." (Request at 8 (citing to *Dist. of Columbia v. Brown*, 738 A.2d 832 (D.C. Ct. App. 1999) (addressing an "incompetence" charge against attorney due to his disbarment))). "The theme of District of Columbia law in defining 'incompetency' is the 'inability' to perform the major duties, rather than a simple failure to do so on particular dates and times. The offense of 'incompetency,' because it means inability and lack of capacity to perform, therefore[,] carries a high level of discipline for the first infraction: 'reduction in pay/grade/rank or removal.'" (Request at 11 (citations omitted)). The Union asserts that when an employee has failed to carry out his duties, as opposed to being incapable to do so, the appropriate charge is "inefficiency," which is either "negligent or careless work performance," or "failure to satisfactorily perform one or more major duties of his or her position." (Request at 11 (citing to *Palmer v. D.C. Metro. Police Dep't*, 545 D.C. Reg. 8116, OEA Matter No. 1601-0048-05, pp.7-8 (2007))). In the parties' CBA, the charge of "inefficiency" results in a first offense penalty of a "reprimand to suspension for 14 days," and does not call for removal until the third offense. (Request at 11). The Union argues that while the Award may be sustainable for "inefficiency," or failure to perform or negligent performance, the Award does not support a determination for "incompetency," as the Award does not support that the Grievant was physically, legally, or mentally unable to perform satisfactorily one or more major duties of her position. *Id.*

"PERB is a different agency than OEA, and does not share the same statutory authority." *Dist. of Columbia Office of Chief Fin. Officer v. Am. Fed'n of State, Cnty., & Mun. Emps., Dist. Council 20, Local 2776 (Robert Gonzales)*, 60 D.C. Reg. 7218, Slip Op. No. 1386, PERB Case No. 12-A-06 (2013). "The Board finds [an] analogy to a case involving [OEA] to be in error. The Board has regularly held that nothing in the CMPA sets forth a requirement of consistency or conformity between decisions of OEA and contractual arbitral determinations. These are two completely separate procedures with two different bodies of authorities." *Dist. of Columbia Metro. Police Dept' v. Fraternal Order of Police/Metro. Police Dep't Labor Comm. (Darrell Best)*, 59 D.C. Reg. 12689, Slip Op. No. 1325, PERB Case No. 09-A-14 (2010); *See Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 38 D.C. Reg. 6101, Slip Op. No. 228, PERB Case No. 89-A-02 (1989). When the Board lacks precedent on an issue, it looks to the decisions of other labor relations authorities, such as the National Labor Relations Board ("NLRB") or the FLRA. *Am. Fed'n of Gov't Emps., Local 631 v. Dist. of Columbia Water & Sewer Auth.*, 60 D.C. Reg. 16462, Slip Op. No. 1435, PERB Case No. 13-N-05 (2013).

In the present case, it is clear that the Arbitrator was "arguably construing or applying the contract" when she defined "incompetent" to mean "unable to perform one or more major functions of her job." *See Mich. Family Res., Inc. v. Serv. Emps. Int'l Union Local 517M*, 475

F.3d 746 (6th Cir. 2007); *see also* Award at 23. The Agency correctly states that the language is taken nearly verbatim from the CBA, which defines “incompetency” as the “inability to satisfactorily perform one or more major duties of his or her position.” (Opposition at 11). The Union incorrectly cites to *Brown*, 739 A.2d 832, as a case that “address[es] [the] ‘incompetence’ charge against attorney due to his disbarment.” (Request at 8). *Brown* is a case where an employee sought enforcement OEA’s decision that he was unlawfully terminated; the Superior Court ruled that he was entitled to interest on his back pay award, and the Court of Appeals held that, as a matter of first impression, the amendment to the Federal Back Pay Act did not entitle a pre-1980 District of Columbia employee to interest on a back pay award. In essence, this case does not regard or define incompetency, as it relates to the present case. In fact, the term “incompetency” is used once in the entire opinion, in footnote three, and the term is never defined or “addressed,” as asserted by the Union in its Request at 8.

The Union next cites to *Boswell v. D.C. Fire & Emergency Med. Servs. Dep’t*, 54 D.C. Reg. 6129, OEA Matter No. 1601-0155-06, p. 4 (2007) (“incompetence is defined as the physical inability [of an employee] to satisfactorily perform the major duties of his or her position”); *Browner v. D.C. Taxicab Comm’n Agency*, 54 D.C. Reg. 6112, OEA Matter No. 1601-0071-06, p. 4 (2006) (employee was properly removed for the offense of “incompetency” because he was legally unable to perform his duties); and *Jackson v. D.C. Office of Contracting & Procurement*, 55 D.C. Reg. 1161, OEA Matter No. 1501-0024-05, pp.2, 7 (2008) (OEA “appeared to believe that instances of work deficiencies which have not previously been criticized or counseled against did not rise to the level of incompetency”). (Request at 8-11). As stated above, the Board has regularly held that PERB and OEA are “two completely separate procedures with two different bodies of authorities.” *Dist. of Columbia Metro. Police Dept’ v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm. (Darrell Best)*, 59 D.C. Reg. 12689, Slip Op. No. 1325, PERB Case No. 09-A-14 (2010); *See Dist. of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 38 D.C. Reg. 6101, Slip Op. No. 228, PERB Case No. 89-A-02 (1989). The Board does not find the cases to which the Union has cited to be persuasive or instructive.

The Board finds that the Award drew its essence from the parties’ CBA when it adopted the language from the CBA nearly verbatim to define “incompetency” and applied it to the facts in this case—reviewing each incident listed in the Removal Letter. (Award at 21-23).

The Union attempts to point to the Award’s mere mention of the phrase “negligent fashion” to mean that it redefined “incompetency.” (Request at 14 (citing to Award at 10, 21)). The sentence in question in (Award at 10) is: “The Removal Letter sets forth five areas or incidents as the basis for the Agency’s conclusion that the Grievant performed her work in an incompetent manner.” The sentence in question in (Award at 21) is: “While the Agency established the Grievant did not list the checks on the corporate books and hence performed her duties in a negligent fashion, the Agency failed to establish the Grievant ‘hid’ this information or that there was any intentional or willful misconduct on the Grievant’s part.” The Union attempts to say that if the Award is reviewing each of the five incidents to find whether the Grievant was incompetent (Award at 10), but the Award uses a standard of “negligent fashion” (Award at 21), then this must mean that the Award has redefined “incompetency.” (Request at 14). The Board

does not find this argument to be persuasive. In fact, the sentence in question in (Award at 21) uses the phrase “negligent fashion,” not to establish a standard on which to judge the five incidents, but rather to express its findings: the Agency has established the Grievant performed her duties in a negligent fashion in the first incident.

The Union also argues that the Arbitrator must and should have used the “District of Columbia legal definition of incompetency.” (Request at 14). The Union states that “PERB must ensure that a contractual definition that mirrors a statutory or regulatory definition remain consistent with the statutory or regulatory definition.” (Request at 14-15 (citing to D.C. DPM § 1-1603.3(f)(5); D.C. Code § 1-616.51; *Dep’t of Defense, DMA, Aerospace Ctr. & NFFE, Local 1827*, 43 FLRA 147, 153 (1991); *Cornelius v. Nutt*, 472 U.S. 648, 660 (1985))). As an initial matter, the Board notes that there is no general “District of Columbia legal definition of incompetency.” D.C. Code §1-616.51 does not support the Union’s statement; this statute address the policy for general discipline and grievances, as it relates to the District of Columbia Board of Education and the Board of Trustees of the University of the District of Columbia. The Union does, however, correctly cite to 43 FLRA 147, 153 (1991), as it provides:

As a general proposition, we will not disturb an award that is based solely on a contract interpretation. However, where [] that contract provision is a reiteration of the management rights provision of the Statute, we must exercise care to ensure that the interpretation is consistent with the Statute, as well as the parties’ agreement. If parties intend that a contractual management rights provision which is identical to the language set forth in [the Statute] be interpreted in a manner that differs from, but is not inconsistent with, the Statute, that should be made known to the arbitrator, who can then clearly specify the basis for an award.

Notwithstanding, in the present case, the Board does not find this argument persuasive. We do not find that the Agency attempted to re-define the meaning of “incompetency.” Furthermore, the Board has reviewed *Cornelius*, 472 U.S. at 660, as the Union cited, but does not find it relevant to the present case here.

Next, the Union alleges that “the Arbitrator exceeded her jurisdiction because the remedy she ordered is subject to the Agency’s predilection and possible negotiation, and therefore does not comport with the parties’ submission for a specific remedy following a finding that there was not just cause for termination.” (Request at 15). Simply stated, the Union asserts that the Arbitrator exceeded her jurisdiction when she failed to issue a determination on a primary issue submitted to her by the parties for determination, specifically the issue of remedy here. (Request at 15) (citing to *D.C. Dep’t of Human Servs. v. FOP*, 50 D.C. Reg. 5028, PERB Case Nos. 02-A-04 and 02-A-05, Slip Op. No. 691 (2002)). The Board in *D.C. Dep’t of Human Servs. v. FOP*, 50 D.C. Reg. 5028, considered the parties’ disagreement regarding the arbitrators’ resolutions of the issue of arbitrability and ultimately denied the Arbitration Review Requests. Thus, this case is not on point to the issue raised by the Union in the present case. The Agency correctly argues that while the Union may not agree with the remedy ordered, this does not mean that the Arbitrator exceeded her jurisdiction, and, in fact, as it relates to this issue, the Arbitrator “arguably construed and applied the contract” when directing the remedy in this matter and the remedy ordered by the Arbitrator is not contrary to the express language of the CBA. (Opposition at 13).

The Union argues that the Arbitrator exceeded her jurisdiction because the alleged remedy does not derive its essence from the parties' CBA. (Request at 17). The Union states, "An arbitration award *fails* to derive its essence from a collective bargaining agreement when there is no argument that the Arbitrator applied the contract." (Request at 17) (citing to *Major League Players Ass'n v. Garvey*, 532 U.S. 509 (2001) (emphasis in original)). The Board finds that the Arbitrator did not exceed her jurisdiction or otherwise act outside of her authority. The Arbitrator did not exceed her jurisdiction by ordering the Agency to provide an assessment regarding the circumstances that were considered by the Agency, including whether there is another position available and appropriate for the Grievant. Moreover, the Union is incorrect in arguing that the Arbitrator exceeded her authority by failing to issue a determination on a primary issue submitted to her by the parties for determination. The Arbitrator did make a determination as she sustained the grievance, in part, finding Harris incompetent and ordered an assessment by the Agency as a remedy. The Board finds that the remedy derives its essence from the parties' CBA.

The Board has held that an arbitrator does not exceed her authority by exercising her equitable power, unless it is expressly restricted by the parties' CBA. *Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police Metro. Police Dep't Labor Comm. (Charles Jacobs)*, 60 D.C. Reg. 3060, PERB Case No. 12-A-04, Slip Op. No. 1366 (2013); *see Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992); *see also Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 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 grievant, but mitigating the penalty, because it was excessive). The Union has not provided any provision of the parties' CBA that restricts the Arbitrator's exercise of equitable power.

The Board finds that the Union's position and Request is merely a disagreement with the Arbitrator's finding and conclusions. The Board has previously held that a "disagreement with the Arbitrator's interpretation . . . does not make the award contrary to law and public policy." *Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008) (quoting *AFGE, Local 1975 v. Dep't of Public Works*, 48 D.C. Reg. 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995)).

The Union's Request on the grounds that the Arbitrator exceeded her authority when she considered subsequent disciplinary actions of the Grievant is denied.

III. Conclusion

The Board has reviewed the Arbitrator's conclusions, the pleadings of the parties, and applicable law. The Board concludes that the Award does not violate existing District of Columbia law, and the Award derives its essence from the parties' CBA.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 2725, 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.

July 24, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 13-A-11 was transmitted to the following parties on the 29th day of July 2014.

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