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

In the Matter of:)	
)	
Government of the District of)	
Columbia, Department of)	
Consumer & Regulatory Affairs,)	
)	PERB Case No. 17-A-02
Petitioner,)	
)	Opinion No. 1616
v.)	
)	
American Federation of)	
Government Employees, Local 2725,)	
Respondent.)	

DECISION AND ORDER

I. Introduction

On December 19, 2016, the Department of Consumer & Regulator Affairs (“DCRA” or “Petitioner”) filed this Arbitration Review Request regarding an Arbitration Award sustaining a grievance filed by the American Federation of Government Employees, Local 2725 (“AFGE 2725”). The issue before the Board is whether the Award is contrary to law and public policy. The Board has reviewed the Arbitrator’s conclusions, the pleadings of the parties and applicable law, and concludes that the Award on its face is not contrary to law and public policy. Therefore, Petitioner’s Request is denied.

II. Statement of the Case

William C. Smith was employed by DCRA as a Housing Enforcement Specialist.¹ On November 22, 2011, between 3:00pm and 4:00pm Mr. Smith was eating lunch in his government vehicle. According to Mr. Smith a woman tapped on his side window and asked him to give her a ride to the bus stop. Mr. Smith agreed but as he was leaving the parking lot, he was flagged down by a man who claimed the passenger had stolen items from a nearby supermarket. The woman jumped out of the vehicle and fled the scene.²

Service Integrity Officer Hamilton Kuralt conducted an investigation and issued a final report on the incident. Mr. Kuralt’s report noted that Mr. Smith admitted to violating Agency

¹ Award at 3.

² *Id.* at 4.

policy by giving a non-government individual a ride in a government vehicle and that he was aware of this policy as well as the consequences for the violation.³ The report also stated that Mr. Smith omitted several facts from his written statement and noted inconsistencies between Mr. Smith's statement and eyewitness accounts. The report concluded that Mr. Smith willfully violated the vehicle policy and provided an incomplete and inaccurate account of the incident and his involvement in it.

On January 20, 2012, Mr. Smith received an Advanced Written Notice of Proposed Removal. The notice referenced an incident from January 2008 when Mr. Smith was issued a Notice of Proposed Removal for misuse of a government vehicle.⁴ Following the incident in 2008, Mr. Smith signed a Settlement Agreement which resulted in his removal being reduced to a 15-day suspension.⁵

An administrative review of the proposed removal action in 2012 was conducted by a Hearing Officer. The Hearing Officer's report stated that Mr. Smith's misconduct was knowing and willful, and taking into account the terms of the 2008 Settlement Agreement, his continued employment constituted a serious and unwarranted risk to DCRA and removal was appropriate.⁶ Mr. Smith was terminated effective March 23, 2012.⁷

III. Arbitrator's Award

The Arbitrator stated that there was no question that Mr. Smith violated the Vehicle Use Policy when he offered a ride to the woman who knocked on his truck window.⁸ According to the Arbitrator, it was clear he knew or should have known what the consequences of unauthorized use of a government vehicle would be. The Vehicle Operator's Acknowledgement Form, signed by Mr. Smith on November 3, 2011, clearly set forth the restrictions against transporting non-government employees in government vehicles and that failure to comply with the requirements may result in disciplinary action, up to and including termination.⁹ Mr. Smith had also stated to Mr. Kuralt that he was aware of the rule against transporting non-government employees.¹⁰

On the issue of Mr. Smith's dishonesty, the Arbitrator stated that she could not conclude that his omissions were calculated to deceive or misdirect the investigators.¹¹ The fact that the information given by Mr. Smith contained some inconsistencies and omissions, as compared to the statements given by the eyewitnesses, did not rise to the level of dishonesty in violation of DPM 1603.3(g).¹²

³ *Id.* 6-7.

⁴ *Id.* at 8.

⁵ *Id.*

⁶ *Id.* at 9.

⁷ *Id.*

⁸ *Id.* at 16.

⁹ *Id.* at 17.

¹⁰ *Id.*

¹¹ *Id.* at 19.

¹² *Id.*

The Arbitrator further stated that DCRA and the Hearing Officer gave inappropriate consideration to the Settlement Agreement in determining the penalty for Mr. Smith's misconduct.¹³ The Arbitrator noted that the Hearing Officer's finding that the Settlement Agreement had no expiration date is directly contrary to the provisions of DPM § 1601.6 which states that "Except as provided in § 1601.7, the final decision notice on a corrective or adverse action shall remain in the employee's Official Personnel Folder (OPF) for not more than three (3) years from the effective date of the action."¹⁴ This issue was raised by AFGE 2725 during the grievance procedure and during the arbitration hearing and the Arbitrator ruled that the Settlement Agreement should not have been considered in determining the penalty for this violation since it was put into effect more than three years prior to the action in this case.¹⁵ According to the Arbitrator, the November 22, 2011 incident should have been considered as a first offense.

To determine an appropriate penalty the Arbitrator looked to DPM § 1619.6(c), which states that the appropriate penalty for a first instance of neglect of duty ranges from reprimand to removal, and the Vehicle Operator's Acknowledgement Form signed by Mr. Smith, which states failure to comply with the requirements may result in disciplinary action up to and including termination of employment.¹⁶ The Arbitrator concluded that the appropriate penalty for the misconduct was a 30-day suspension.¹⁷

With respect to back pay, the Arbitrator ruled that DCRA's back pay liability would be limited because AFGE delayed in advancing the grievance to arbitration and did not present a compelling reason for the delay.¹⁸ The Arbitrator ruled that Mr. Smith was to be reinstated with back pay and benefits from April 23, 2012 until December 31, 2012.¹⁹

IV. Discussion

According to DCRA, the Arbitrator's Award should be overturned because it is contrary to law and public policy. DCRA argues that the Arbitrator incorrectly determined that the Settlement Agreement, signed in January of 2008, was untimely and could not be relied upon by the Agency because it was more than three years old.²⁰ DCRA looks to *Regents of University of Michigan and AFSCME, District Council 25, Local 1583*,²¹ which states that when a "Last Chance Agreement" is not limited within itself in time, it remains in force throughout the duration of the affected employee's tenure with the employer unless otherwise limited by agreement.²² DCRA states that the January 2008 Settlement Agreement is actually a Last

¹³ *Id.* at 20.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 20-21.

¹⁷ *Id.* at 21.

¹⁸ *Id.* at 21-22.

¹⁹ *Id.* at 22.

²⁰ Request at 4.

²¹ 96 LA 688, 689 (February 6, 1991) (Sugarman, Arb.).

²² Request at 4.

Chance Agreement and by ignoring the Last Chance Agreement and granting reinstatement with back pay, the Arbitrator acted contrary to law and public policy.²³

AFGE 2725 states that DCRA misplaced its reliance on *Regents* and has failed to state a valid reason for overturning the Arbitrator's award.²⁴ AFGE 2725 argues that the Settlement Agreement in question is not a Last Chance Agreement but is a simple settlement of a Step 4 Grievance.²⁵ According to AFGE 2725, a Last Chance Agreement requires the parties to have a meeting of the minds that the purpose of the agreement is to provide the employee his or her last opportunity to follow the rules or they will be terminated.²⁶ AFGE also states that typically Last Chance Agreements are waivers by the employee that in consideration for the agreement the employee cannot appeal the termination decision through Office of Employee Appeals or the grievance process.²⁷ The Settlement Agreement in this case, according to AFGE 2725, is a simple settlement of a Step 4 Grievance and it has been referred to as simply a Settlement Agreement in the Hearing Officer's Report, in DCRA's grievance response and during the arbitration hearing.²⁸ AFGE 2725 states that this is the first time DCRA has alleged that the agreement is a Last Chance Agreement and it is being done only to rely on the *Regents* case.²⁹

AFGE 2725 also states that during the Arbitration hearing, DCRA attempted to admit the Settlement Agreement into the record only as evidence to support a harsher penalty and the Arbitrator determined that consideration of the document was not allowable for penalty determination.³⁰

AFGE 2725 claims that DCRA's current claims in this matter are a mere disagreement with the Arbitrator's determination related to the Settlement Agreement and therefore the arbitration request should be denied.

Pursuant to D.C. Official Code § 1-605.2(6), the Board is authorized to consider appeals from arbitration awards pursuant to grievance procedures, provided such awards may be reviewed 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 was procured by fraud, collusion, or other similar and unlawful means. The Board has long held that it will not overturn an Arbitrator's findings on the basis of a mere disagreement with the Arbitrator's determination.³¹ By submitting a matter to arbitration, parties are bound by the arbitrator's interpretation of the collective bargaining agreement, related rules and regulations, and evidentiary and factual findings. In this case, the Arbitrator has determined that the Settlement Agreement should not be used to determine a penalty and the incident should be treated as a first offense. This decision was based

²³ *Id.*

²⁴ Response at 3.

²⁵ *Id.* at 4.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 4-5.

²⁹ *Id.* at 5.

³⁰ *Id.* at 7.

³¹ *Fraternal Order of Police/Metro. Police Dep't Labor Comms. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 9798, Slip Op. No. 1271, PERB Case No. 10-A-20 (2012).

on the Arbitrator's interpretation of DPM § 1601.6 which states "except as provided in § 1601.7, the final decision notice on a corrective or adverse action shall remain in the employee's Official Personnel Folder (OPF) for not more than three (3) years from the effective date of the action." Accordingly, the Board finds that DCRA's request is merely a disagreement with the Arbitrator's interpretation and evidentiary and factual findings.

Furthermore, the Board has previously held that an argument may not be raised for the first time in an arbitration review request.³² The Board has exclusive jurisdiction over appeals from grievance-arbitration awards, but it does not have original jurisdiction over such matters.³³ DCRA has not shown that they presented their argument, that the Settlement Agreement is actually a Last Chance Agreement, to the arbitrator. By not presenting this issue at arbitration, DCRA made it impossible for the Arbitrator to rule on this issue and DCRA cannot now bring this argument before the Board for the first time.

V. Conclusion

The Board rejects DCRA's arguments and finds no cause to set aside or modify the Arbitrator's Award. Accordingly, DCRA's request is denied and the matter is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
2. Pursuant to Board Rule 559. 1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, and Members Ann Hoffman and Douglas Warshof.

March 23, 2017
Washington, D.C.

³² *District of Columbia Housing Authority v. AFGE, Local 2725*, 62 DC Reg. 2893, Op. No. 1503, PERB Case 14-A-07 (2015).

³³ *Id.*

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 17-A-02, Op. No. 1616 was sent by File and ServeXpress to the following parties on this the 4th day of April, 2017.

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