

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
District of Columbia Public Schools)	
Petitioner)	PERB Case No. 22-A-02
)	
v.)	Opinion No. 1809
)	
Washington Teachers' Union, Local 6)	
American Federation of Teachers, AFL-CIO)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On January 7, 2022, the District of Columbia Public Schools (DCPS) filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA)¹ seeking review of an arbitration award (Award) dated December 17, 2021. The Arbitrator sustained the grievance, which the Washington Teachers' Union, Local 6 (WTU) filed on behalf of a bargaining unit member (Grievant). DCPS seeks review of the Award on the grounds that the Award is contrary to law and public policy.² DCPS argues that the Arbitrator "erred by finding that DCPS should have placed [the] Grievant...into a vacant sixth grade teaching position instead of excessing him from his position as a seventh-grade social studies teacher."³ WTU filed an Opposition, requesting that the Board deny DCPS's Request.

Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Board remands this matter to the Arbitrator for the reasons discussed herein.

¹ D.C. Official Code § 1-605.02(6).

² Request at 1.

³ Request at 1.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. The Grievant began teaching at a District high school from 2015 to 2016, then took medical leave from 2016 to 2017.⁴ After the Grievant's medical leave and as an accommodation, DCPS transferred him to a District middle school for the remainder of the 2017-2018 schoolyear.⁵ The middle school ordinarily employed one social studies teacher for seventh grade and one for eighth grade, but the principal testified that the Grievant was hired as a social studies teacher for the sixth, seventh, and eighth-grade classes.⁶ The Grievant was retained to teach an elective course titled "African American Studies," due to his previous experience teaching that subject.⁷

The Grievant's position was funded by the Central Office and not included in the middle school's budget for the 2017-2018 fiscal year.⁸ According to the DCPS Director of Strategic Staffing (Staffing Director), there was no guarantee that the Central Office would continue to fund the Grievant's position after the 2017-2018 schoolyear.⁹ Due to budgetary and operational planning, the number of social studies teachers for the seventh and eighth grades was reduced from three to two for the 2018-2019 schoolyear.¹⁰ The Staffing Director stated that the middle school Personnel Committee recommended the Grievant's position for excessing, using the rubric contained in the parties' collective bargaining agreement (CBA).¹¹

The Grievant learned he would be excessed when he received a reduction notice (Notice).¹² The Notice was dated May 14, 2018, but the Grievant did not receive it until June 5, 2018.¹³ The Notice stated that "should a social studies teacher position at [the middle school] become vacant before June 15, 2018, his excess status would be rescinded."¹⁴ In the spring of 2018, a sixth-grade social studies teaching position became vacant at the middle school where the Grievant was employed.¹⁵ The position was for the 2018-2019 schoolyear.¹⁶ Interviews for this teaching position were conducted between April and June 2018.¹⁷ The Grievant was not afforded the opportunity to apply for this newly vacant position. The principal attested that "sixth grade teachers

⁴ Award at 4.

⁵ Award at 4.

⁶ Award at 7-8. The Board notes that an accommodation under the ADA does not require the employer to change the essential functions of a job, including changing certification requirements. There is no evidence that DCPS waived its certification requirements when it placed the Grievant into the accommodated position.

⁷ Award at 7.

⁸ Award at 7.

⁹ Award at 4.

¹⁰ Award at 6.

¹¹ Award at 6.

¹² Award at 6.

¹³ Award at 13.

¹⁴ Award at 6.

¹⁵ Award at 11.

¹⁶ Award at 11.

¹⁷ Award at 11.

are classified differently than seventh or eighth grade teachers” because sixth-grade teachers are dual certified to teach at both the elementary and middle school levels.¹⁸ No other social studies positions became vacant at the middle school.¹⁹

Following the Grievant’s excess and termination, WTU invoked arbitration.²⁰ The Arbitrator held a hearing on June 30, September 13, and September 14, 2021.²¹

B. Arbitrator’s Findings

In the Award, the Arbitrator considered the following issues:

- (1) Did the Agency violate the collective bargaining agreement (CBA) when it exceeded the Grievant..., and subsequently terminated him on June 15, 2018?
- (2) If so, what shall the remedy be?²²

In his consideration of the first issue, the Arbitrator found that DCPS committed harmless errors when DCPS violated the CBA by disallowing the Grievant’s additional evidence to the Personnel Committee and relying on the improper schoolyear for his performance.²³ The Arbitrator determined that both violations constituted harmless errors because they did not affect DCPS’s ultimate decision regarding which teacher would be excessed.²⁴ The Arbitrator further found that DCPS did not commit any other CBA violations when it chose to excess the Grievant.²⁵ The Arbitrator concluded that the excessing pool was appropriate,²⁶ as there was a “targeted reduction” in the middle school’s budget, directed specifically at social studies teachers.²⁷

Although the Arbitrator found that DCPS rightfully excessed the Grievant, the Arbitrator concluded that DCPS had a duty to rescind the Grievant’s excess because there was an appropriate vacancy available at the middle school at the time of the Grievant’s excessing.²⁸ The Arbitrator found that the Grievant was qualified for the vacant sixth-grade social studies teaching position and thus, pursuant to the CBA, DCPS had an obligation to offer that position to the Grievant.²⁹ The Arbitrator stated, “[w]ithout definite and specific proof in the record that he was not also qualified to teach social studies at the sixth grade level – and there is no such definite and specific

¹⁸ Award at 11.

¹⁹ Award at 13.

²⁰ See Award at 1.

²¹ Award at 1.

²² Award at 2.

²³ Award at 26-28.

²⁴ See Award at 26-28.

²⁵ See Award at 24-33.

²⁶ Award at 29-30.

²⁷ Award at 25.

²⁸ Award at 32.

²⁹ Award at 29-33.

proof – I find that he was also qualified for the sixth grade position.”³⁰ Therefore, the Arbitrator ordered DCPS to reinstate the Grievant, and ordered the parties to negotiate appropriate backpay.³¹

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an 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.³² DCPS requests review of the Award on the grounds that the Award is contrary to law and public policy.³³

DCPS bears the burden of demonstrating that the Award itself violates established law or compels an explicit violation of “well defined public policy grounded in law and or legal precedent.”³⁴ The D.C. Court of Appeals has reasoned that, “[a]bsent a clear violation of law[,] one evident on the face of the arbitrator’s award, the [Board] lacks authority to substitute its judgment for the arbitrator’s.”³⁵ Overturning an arbitration award because of law and public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to the arbitrator’s interpretation of the contract.³⁶ The exception is designed to be narrow in order to “limit...potentially intrusive judicial review...[of arbitration awards] under the guise of public policy.”³⁷

In its Request, DCPS claims that the Award violates D.C. Official Code § 47-2853.04(a), which identifies public school teachers as an occupation that requires regulation.³⁸ DCPS contends that “the public policy of strict adherence to this statute is well-documented.”³⁹ In support of this contention, DCPS quotes the D.C. Court of Appeals’ holding that, in the interest of consumer protection, “a contract made in violation of a licensing statute that is designed to protect the public will usually be considered void and unenforceable.”⁴⁰

Additionally, DCPS alleges that the Award violates D.C. Official Code § 38-2601.01, which empowers OSSE to “serve as the state education agency and perform the... state educational agency functions for standards... for elementary and secondary education.”⁴¹ DCPS contends that

³⁰ Award at 32.

³¹ Award at 33.

³² D.C. Official Code § 1-605.02(6).

³³ Request at 2.

³⁴ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No. 1702 at 4, PERB Case No. 18-A-17 (2019) (quoting *APWU v. USPS*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

³⁵ *FOP/DOC Labor Comm. v. D.C. PERB*, 973 A.2d 174, 177 (D.C. 2009).

³⁶ *MPD*, Slip Op. No. 1702 at 4 (citing *APWU*, 789 F.2d at 8, accord *MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 8, PERB Case No. 09-A-05 (2014)); *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. No. 925 at 11-12, PERB Case No. 08-A-01 (2012)).

³⁷ *Id.* (citing *APWU*, 789 F.2d at 8).

³⁸ Request at 8 (citing D.C. Official Code § 47-2853.04(a)).

³⁹ Request at 9.

⁴⁰ Request at 9 (quoting *Sturdza v. United Arab Emirates*, 11 A.3d 251, 257-258 (D.C. 2011)).

⁴¹ Request at 10 (quoting D.C. Official Code § 38-2601.01).

“[t]he DC Municipal Regulations make clear in numerous provisions that this section of the Code authorizes OSSE, and OSSE alone, to set credential standards for teachers.”⁴² DCPS contends that the Arbitrator impermissibly relied on “his own laymen’s logic” in the Award.⁴³

In its Opposition, WTU contends that the Award was not contrary to law and public policy. WTU argues that the Arbitrator decided that the Grievant was “qualified” in accordance with the CBA and that “qualified” does not require “certified.”⁴⁴ Although the Grievant was not certified to teach sixth-grade social studies in the District, WTU argues that he had the requisite experience and skill and, thus, was qualified.⁴⁵ Therefore, WTU argues that he had a right to the vacant sixth-grade social studies teaching position, pursuant to the CBA. WTU also argues that “[the Grievant] would have had several months to obtain any required certification from OSSE before he would begin teaching that grade level in the fall,” even if he lacked the necessary teaching certification to fill the sixth-grade vacancy.⁴⁶

Although the Arbitrator acknowledged that the Grievant was not certified to teach the sixth-grade in the District, the Arbitrator found no “specific proof of qualification or non-qualification in the context of DCPS.”⁴⁷ The Arbitrator concluded that it “st[ood] to reason that a teacher qualified to teach seventh and eighth grades social studies should be qualified to teach sixth grade.”⁴⁸ The Arbitrator found that DCPS should have offered the Grievant the vacant sixth-grade social studies position at the time of the Grievant’s excessing.

The Board finds that the Arbitrator failed to address the certification issue raised by DCPS. The Award is unclear as to how the Arbitrator reached his conclusion that the Grievant was “qualified” without a discussion of the District’s licensing requirements in D.C. Official Code § 47-2853.04(a).

The D.C. Court of Appeals has found that seeking clarification of an arbitrator’s award is appropriate when the award is ambiguous and the proceedings are not reopened.⁴⁹ Furthermore, in Opinion No. 956, when an arbitrator did not address a dispositive issue in an arbitration award, the Board found the appropriate course was to remand the award back to the arbitrator for clarification.⁵⁰ In reaching its decision, the Board declined to decide the merits of the arbitration review request without clarification from the arbitrator.⁵¹

⁴² Request at 10 (citing 5-A DCMR §§ 1601, 1602).

⁴³ Request at 13.

⁴⁴ Opposition at 2.

⁴⁵ See Opposition at 10.

⁴⁶ Opposition at 11.

⁴⁷ Award at 30.

⁴⁸ Award at 30.

⁴⁹ *Williams v. Richey*, 948 A.2d 564, 567 (D.C. 2008)(citing *American Postal Workers Union v. Unites States Postal Service*, 254 F.Supp.2d 12, 15 (DDC 2003), which states, “Because of a remand’s limited purpose, remand to clarify an ambiguity does not run afoul of the common-law doctrine of *functus officio*.”).

⁵⁰ *D.C. Child and Family Services Agency and AFSCME, District Council 20, Local 2401*, 61 D.C. Reg. 011736, Slip Op. No. 956 at 8, PERB Case No. 08-A-07 (2014).

⁵¹ *Id.*

In the present case, the Arbitrator has failed to address: (1) DCPS's argument that the Grievant was not qualified to teach a sixth-grade social studies class because he lacked the required teaching certification; (2) WTU's argument that, notwithstanding the D.C. certification requirement, DCPS either waived or postponed the requirement when the Grievant was first hired without being certified to teach in D.C.; and (3) WTU's argument that, notwithstanding the D.C. certification requirement, DCPS could have waived or postponed the requirement to teach the sixth-grade position as the Grievant would have had months to obtain the required certification before the next school year began. The Board cannot reach a decision on whether the Award is contrary to law and public policy as a result. Therefore, the Board finds that the matter should be remanded to the Arbitrator to clarify how he reached his decision that the Grievant was "qualified" for the sixth-grade position without a D.C. teaching certification. The Arbitrator should also address why DCPS's argument that the Grievant was unqualified because of an absence of the appropriate certification when DCPS did not excess him on that basis.

IV. Conclusion

The Board finds that the Award requires clarification. The Board remands this matter to the Arbitrator for additional findings as discussed in this Decision and Order.

ORDER

IT IS HEREBY ORDERED THAT:

1. This matter is remanded to the Arbitrator for a finding consistent with this Decision and Order.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Mary Anne Gibbons and Peter Winkler. Member Renee Bowser abstained from voting.

March 17, 2022

Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.