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

In the Matter of: )

Fraternal Order of Police/Department )  
of Corrections Labor Committee, )  
(on behalf of Joseph Lee), )

Petitioner, )

and )

District of Columbia Department of Corrections, )

Respondent. )

PERB Case No. 10-A-16

Opinion No. 1324

**DECISION AND ORDER**

**I. Statement of the Case:**

On December 18, 2009, the Fraternal Order of Police/Department of Corrections Labor Committee ("Petitioner", "Union" or "FOP") filed an Arbitration Review Request ("Request") in the above captioned matter. FOP seeks review of an arbitration award ("Award") that denied a grievance filed on behalf of Corporal Joseph Lee ("Grievant", "Lee" or "Cpl. Lee") and pursuant to the parties' collective bargaining agreement ("CBA") against the District of Columbia Department of Corrections ("Respondent", "DOC" or "Department").<sup>1</sup>

The issue before the Board is whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02(6) (2001 ed).

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<sup>1</sup> The Union's grievance concerned the termination of Corporal Lee's employment.

## II. Discussion

The FOP represents the non-management employees of the DOC, as described in the parties' CBA. The FOP and the DOC are parties to a CBA effective December 19, 2002, through September 30, 2005. (See Request at p. 2).

On April 17, 2008, Cpl. Lee was issued advance notice proposing to remove him because he allegedly was seen sleeping by a superior officer. (See Request at p. 3). An internal hearing was held and on June 20, 2008, and Cpl. Lee was recommended for removal from the DOC. (See Request at p. 3). "Agency Director Devon Brown issued a final decision removing Cpl. Lee on June 26, 2008." (Request at p. 3). The FOP filed a grievance on Cpl. Lee's behalf on June 27, 2008, which was denied on July 10, 2008. (See Request at p. 3). As a result, the FOP invoked arbitration pursuant to the parties' CBA and an arbitration hearing was held on December 2, 2009, before Arbitrator Andrée McKissick. (See Request at p. 3). Post-Hearing Briefs were submitted by both parties. On March 2, 2010, the Arbitrator issued an Award denying the FOP's grievance. (See Award at p. 15).

The Arbitrator identified the following issues for arbitration:

### STIPULATED ISSUES:

1. Whether or not the Department of Corrections had cause to terminate the Grievant for sleeping on an unsecured medical post with a loaded weapon?
2. If not, what is the appropriate remedy?

(Award at p. 3).

### DOC's Position

The Arbitrator found that the Grievant had been a Correctional Officer at DOC for approximately twenty (20) years and that "his duties included providing care, custody and control of inmates in unsecured, public areas such as: medical posts as this grievance depicts." (Award at p. 2). "On June 26, 2008, the Grievant was removed for neglect of duty by failing to observe precautions regarding safety." (Award at p. 2). Specifically, the Arbitrator determined that the incident "which brought about [the Grievant's] termination, occurred on March 27, 2008, at approximately 3:45 AM, when it is alleged that the Grievant fell asleep while on duty at the Medical Housing Unit (MHU), at Howard University Hospital (HUH) . . . an unsecured medical post with a loaded firearm creating a safety hazard." (Award at p. 2).<sup>2</sup>

<sup>2</sup> The Arbitrator also indicated that "[t]he record further reveals that the Grievant was on duty on March 12 and March 14, 2008, [which the Department] alleged [were] prior occurrences of sleeping on the job." (Award at p. 2).

The Department alleged at arbitration that on March 27, 2008, Acting Lieutenant Perry observed the Grievant as "sound asleep . . . for at least five (5) minutes where no movement occurred." (Award at p. 9). The Department also averred "that this was not the only time that the Grievant was asleep while on duty, but . . . that it occurred on at least two (2) other occasions." (Award at p. 9). In support of its contentions, the Department claimed that "a clear photograph was taken of the Grievant on March 14, 2008, by Acting Lieutenant Graham *via* his cell phone. Still further, the Department assert[ed] that Acting Lieutenant Perry [had] also warned and counseled the Grievant for sleeping on the job on March 12, 2008." (Award at p. 9). The "Department reason[ed] that the failure to maintain visual contact with an inmate is a neglect of official duty and requires termination, not progressive discipline . . ." (Award at p. 9).

#### FOP's Position

The FOP argued that on March 27, 2008, "the Grievant was not asleep, as the Department allege[d]" and provided a different factual scenario in which "the Grievant looked at Acting Lieutenant Perry coming to the doorway, but gave no verbal response to her presence. Thereafter, the Union contends that the Grievant looked back down. Thus, the Union argue[d] that the Grievant was awake. Based on this version of events, the Union reason[ed] that the Grievant was terminated without cause." (Award at pgs. 6-7).

In addition, the FOP claimed that the Department erred because the April 17, 2008 advance notice of proposed discipline did not allege the prior sleeping incidents of March 12 and March 13, 2008, and that the Arbitrator should consider their absence to be a procedural omission. (See Award at p. 7). The FOP also disputed the veracity and authenticity of the photographic evidence and witness' accounts and other evidence relied upon by the Department. (See Award at pgs. 7-8). Furthermore, the FOP claimed that "Director Brown failed to properly consider the twelve (12) *Douglas* factors, as required by D.C. law in executing the termination. Specifically, the Union maintain[ed] that Director Brown neglected to consider these relevant *Douglas* factors, which weighed in the Grievant's favor." (Award at p. 7).<sup>3</sup>

The FOP also argued that the Department "failed to interview or obtain a statement from Corporal Harrison, the second officer on duty with the Grievant, on [March 27, 2008]." (Award at p. 7). Additionally, the FOP asserted that the Department's termination of the Grievant evidenced disparate treatment, because three similar cases of sleeping on the job had resulted in reprimands, not discharge. (See Award at p. 8). Thus, the Union argued that the Department should have employed progressive discipline. Based on the foregoing, the FOP requested that the Arbitrator: (1) reinstate the Grievant with back pay and full benefits; (2) expunge the Grievant's records; and (3) grant reimbursement for all costs and attorneys fees associated with the grievance. (See Award at pgs. 8-9).

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<sup>3</sup> The *Douglas* Factors refers to the mitigating and aggravating factors assessed in determining the appropriate level of employee discipline. See *Douglas v. Veterans Administration*, 5 MSPR 280 (1981).

### Arbitrator's Findings and Conclusions

The Arbitrator rejected the FOP's position and supporting arguments. (See Award at pgs. 11-15). As a result, the Arbitrator concluded that "the Department rightfully terminated [the Grievant] for "Neglect of Duty" due to his omission to be attentive under these circumstances in his unsecured medical outpost assignment." (Award at p. 15). Specifically, the Arbitrator denied the grievance, and that the Grievant was "terminated for cause in accordance with Department of Personnel Manual (DPM) §1603 and §1619.6(C) due to "Neglect of Duty" and failure to observe safety regulations on a medical outpost assignment on more than one occasion." (Award at p. 15).

The Union filed the instant review of the Award, contending that the Award is contrary to law and public policy. (Request at p. 4).

When a party files an arbitration review request, the Board's scope of review is extremely narrow.<sup>4</sup> Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only 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.).

In the present case, the Union argues that the Award is contrary to law and public policy because "the *Douglas* factors were never properly considered". (Request at p. 4). In support of its Request, the Union cites *D.C. Department of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005). Specifically, the Union contends "[t]he state of the current law in the District of Columbia under *Colbert* is clear, all relevant factors are required to be balanced in terminating a D.C. public employee. There was never any actual evidence presented that was done. Arbitrator McKissick's failure to sustain the grievance on the *Douglas* factors is a "clear error" that must be reversed under PERB precedent." (Request at p. 5).

The Board's scope of review, particularly concerning the public policy exception, is extremely narrow. Furthermore, the U.S. Court of Appeals, District of Columbia Circuit, observed that "[i]n *W.R. Grace*, the Supreme Court has explained that, in order to provide the

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<sup>4</sup> In addition, 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.

basis for an exception, the public policy in question “must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’ Obviously, the 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).<sup>5</sup> 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). Furthermore, the petitioning party has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, *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). As the Court of Appeals has stated, we must “not be led astray by our own (or anyone else’s) concept of ‘public policy’ no matter how tempting such a course might be in any particular factual setting.” *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A2d 319, 325 (D.C. 1989).

Furthermore, the public policy exception:

is not available for every party who manages to find some generally accepted principle which is transgressed by the award. Rather, the award must be so misconceived that it “compels the violation of law or conduct contrary to accepted public policy.”

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*Revere Copper and Brass Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (D.C. Cir. 1980), ) (citing *Union Employers Division of Printing Industry, Inc. v. Columbia Typographical Union No. 101*, 353 F.Supp. 1348, 1349 (D.D.C.1973)).

Even if an arbitrator’s award runs contrary to some generally recognized policy, it still does not justify applying the “public policy exception” unless the award is itself illegal or requires a party to act illegally. *District of Columbia Dept. of Corrections v. Teamsters Union Local No. 246*, 554 A.2d 319, 323 (D.C. 1989) (refusing to “apply some free-floating notion of ‘policy’”).

The Board must also defer to the arbitrator’s interpretation of external law incorporated into the contract:

When construction of the contract implicitly or directly requires an application of “external law,” i.e., statutory or decisional law . . . , the parties have necessarily bargained for the arbitrator’s interpretation of the law and are bound by it. Since the arbitrator is

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<sup>5</sup> See *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 2176, 76 L. Ed. 2d 298 (1983).

the “contract reader,” his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties to the contract.

*District of Columbia Metropolitan Police Department v. Public Employee Relations Board*, 901 A.2d 784, 789 (D.C. App. 2006) (citation omitted).

Thus, the Board may not set aside the Award solely because the arbitrator may have made some legal error in reaching his conclusions. It is not enough for the Union to raise supposed deficiencies in the Arbitrator’s legal reasoning. In the instant matter, the Union contends that the Department “was required to analyze all relevant *Douglas* factors under prevailing District case law; however, the Agency’s decision official did not properly do so. Moreover, the Arbitrator erred in erroneously concluding that the Agency did. The Union relies on *D.C. Department of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005) to support its contention.<sup>6</sup> (Request at p. 9). However, the Board notes that the *Colbert* case inapplicable because the matter involves decisions made by the District of Columbia Board of Office of Employee Appeals. 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. See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/ Metropolitan Police Department Labor Committee*, 38 DCR 6101, Slip Op. No. 228, PERB Case No. 89-A-02 (1989). Moreover, OEA and the Board are two distinct and independent agencies with separate and distinct jurisdictions. Also, in the present case, the Arbitrator’s review of MPD’s disciplinary action against Corporal Lee arises out of the parties’ CBA in conjunction with D.C. Code § 1-617.08 and not D.C. Law 8-128 and D.C. Code § 1-606.1 and § 1-606.3 (establishing the Office of Employee Appeals). See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/ Metropolitan Police Department Labor Committee (on behalf of Desariee Haselden)*, 59 D.C. Reg. 3543, Slip Op. No. 882, PERB Case No. 06-A-13 (2008); see also *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985). Furthermore, even if the *Colbert* case were applicable, the Board does not see, as the Union suggests, that the case requires an adjudicator to analyze an employee’s discipline using all 12 *Douglas* factors. The Union’s request merely states its disagreement with the Department’s consideration of the *Douglas* factors, and believes the Arbitrator erroneously concluded that DOC did have cause to terminate Cpl. Lee.

The Union bargained for Arbitrator McKissick’s interpretation of the CBA. Therefore, FOP must show that carrying out the Award would compel the violation of law and public

<sup>6</sup> In the *Colbert* case, a district employee was discharged for inexcusable neglect of duty and insubordination, and the union challenged the severity of the sanction. An administrative law judge (“ALJ”) determined that DPW’s decision took into account impermissible evidence and failed to consider all relevant factors. DPW appealed the matter to the Board of the Office of Employee Appeals. The Board affirmed DPW’s sanction and vacated the ALJ’s order, and an appeal was taken. The Superior Court set aside the Board’s order and reinstated the ALJ’s determination that employer’s decision to discharge the employee was not substantially supported by permissible evidence, and DPW appealed. The Court of Appeals held that Board’s decision vacating ALJ’s order would be set aside because the Board failed to comply with the regulations governing the admission of evidence and there were no permissible legal bases for overturning the ALJ’s order.

policy. Arbitrator McKissick denied the Union's request to reverse the Department's termination of the Grievant. The Union has not shown that carrying out this Award would require the breach of any law and/or public policy. Even if the Arbitrator arrived at this result through arguably faulty logic or a misapplication of law, that is not enough for the Board to modify or set aside the Award. See D.C. Code § 1-605.02(6); and *MPD v. D.C. PERB*, 901 A.2d at 789.

We find that FOP has not cited any specific law or public policy that was violated by the Arbitrator's Award. We decline FOP's request that we substitute the Board's judgment for the Arbitrator's decision for which the parties bargained. FOP had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Instead, FOP repeats the same arguments considered and rejected by the Arbitrator; this time asserting that the holding in *Colbert* establishes that the Arbitrator misinterpreted, or misapplied the provisions of the *Douglas* factors.

We have held that a disagreement with the Arbitrator's interpretation does not render an award contrary to law. See *DCPS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 49 DCR 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. FOP's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. See *University of the District of Columbia and UDC Faculty Association*, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991).

In view of the above, we find no merit to FOP's argument. We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law or public policy. Therefore, no statutory basis exists for setting aside the Award.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The Fraternal Order of Police/Department of Corrections Labor Committee's 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.

December 15, 2010

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case Nos. 10-A-16, Slip Opinion No. 1324 was transmitted *via* U.S. Mail and e-mail to the following parties on this the 27<sup>th</sup> day of August, 2012.

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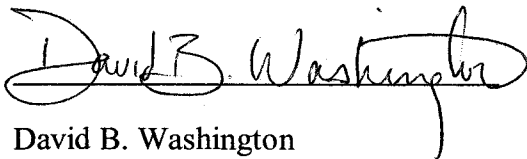
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