

II. Discussion:

The facts of the case as found by the Arbitrator are as follows: The Grievant held the position of Correctional Officer, Grade DS-8, with the rank of Corporal. At the time of the Grievant's discharge, her assignment was at Community Correctional Facility No. 4 ("CCC"), a half-way house, located in Washington, D.C. On May 31, 2001, the Grievant was working the 3:00 p.m. to midnight shift at Housing Unit One of the CCC. At about 8:50 p.m., Corporal Jesse Shelton was processing an inmate at the "shake-down" desk at the entrance to the facility. During the processing the inmate became agitated after being asked to provide a urine sample. The inmate also loudly indicated that he had not received his check for outside detail work. Corporal Shelton tried to calm the inmate, and asked Sergeant Lamont Wilson for a pair of handcuffs "in an effort to get the inmate's attention." (Award at p. 4). The Grievant, who had knowledge of the inmates failure to be paid for several months, went to the shake down area and urged that the inmate calm down. (See Award at p. 4).

Corporal Shelton asked the Grievant to let him deal with the inmate. Sergeant Wilson then instructed the Grievant to return to her post. Instead, the Grievant "got up on the control center desk in a kneeling position... [and] declared 'If you want to cuff somebody, cuff me.'" (Award at p. 5). Sergeant Wilson told the Grievant to get off the desk and return to her post. The Grievant complied. "However, as she passed Shelton, [she] stopped and called him 'a demon', and said he couldn't tell her what to do." (Award at p. 5). In addition, the Grievant told the inmate that he should call the Washington Post concerning the situation with his pay check and that she would support his story in writing. (See Award at p. 5).

"Shelton advised the Grievant she should not encourage [the inmate] to contact the newspaper; that this was inappropriate." (Award at p. 5). After the Grievant returned to her post, Corporal Shelton contacted the Assistant Administrator at CCC and informed her of the incident. He was then instructed to contact the Administrator. The chain of command was followed to Captain Minus and Acting Warden Brown. Corporal Shelton also completed a written report regarding the incident. (See Award at p. 5). Sergeant Wilson also contacted Capt. Minus about the incident, which was relayed to Warden Brown, who instructed Capt. Minus to go to CCC and place the Grievant on administrative leave. At approximately 11:40 p.m., Capt. Minus arrived at CCC and telephoned the Grievant; instructing her to report to his office, and that the Grievant could report with a representative. By 11:45 p.m. the Grievant had not reported to Capt. Minus' office. Therefore, at approximately 11:50 p.m., Capt. Minus telephoned Sergeant Wilson and told him to have the Grievant relieved from her post and have her report to his office. Sergeant Wilson carried out those instructions. However, when the relieving officer arrived at the Grievant's post, the Grievant did not depart for Capt. Minus' office, but remained at her post indicating that she had not determined who should act as her representative. The conflict for the Grievant concerned the fact the Union Steward was Corporal Shelton. (See Award at pgs. 6-7).

At approximately 11:53 p.m., Capt. Minus decided to go to Unit One and meet with the Grievant. Upon arrival, Capt. Minus directed the Grievant to report to his office before the end of her shift, with or without her representative. The Grievant asked Capt. Minus to repeat his order three times. She then informed Capt. Minus that "he would have to deal with her through the Union President." (Award at p. 7). At that point, Capt. Minus stated he was immediately placing the Grievant on administrative leave. "The Grievant abruptly got up from her chair, ran into the lobby area with her hands over her ears, loudly declaring: 'I don't hear a word you are saying.'" (Award at p. 7). No more communication occurred between the Grievant and Capt. Minus and the Grievant left the facility at approximately 12:12 a.m. (See Award at p. 7).

DOC conducted an investigation. On June 19, 2001, Warden Brown informed the Grievant by letter that she was summarily removed from her position. In a July 20, 2001 letter to the Grievant, Warden Brown wrote in part:

Pursuant to ... (DPM)² Section 1617.3, this is written notice that effective Tuesday, June 19, 2001, you were summarily removed from your position... based upon a determination that your conduct:

- a. Threatened the integrity of government operations;
- b. Constitutes an immediate hazard to the agency, to other District employees, or to the employee;
- c. Is detrimental to public safety.

The summary removal action is based on the following cause(s):

- a. Malfeasance: an on-duty act that interferes with the integrity of government operations; and
- b. Insubordination: refusal or failure to comply with written instruction or direct orders by a superior.

The letter set forth specifications supporting these charges. They also cited the following:

BASIC REGULATIONS FOR ALL EMPLOYEES

- 1.3 Authority and Chain-of-Command: Employees must regard

²"DPM" refers to the District Personnel Manual.

themselves as directly responsible to their immediate supervisor. Obedience to all orders must be followed with promptness and efficiency.

THE CORRECTIONAL OFFICERS' GENERAL ORDERS

2. Obey all orders of my superiors. . .
10. Be courteous toward all supervisors, fellow employees, residents and members of the public, act in a gentlemanly manner or lady-like manner at all times, and commit no act which will discredit me, the Department of Corrections, or the Government of the District of Columbia.
12. Leave my Post only when properly relieved, or when emergency conditions require me to do so.

(Award at pp. 8-9).

The letter also informed the Grievant that she was entitled to an administrative review by a Hearing Officer. The Grievant exercised this right, and in a report dated August 9, 2001, the Hearing Officer concurred with the action to summarily remove the Grievant from her position. On October 19, 2001, the Director of DOC informed the Grievant of a final decision, stating in part:

I have carefully reviewed the evidence of record, which consists of all documents giving rise to issuance of the written notice, the Hearing Officer's report and your written response. Consequently, I have decided to uphold the action proposed against you. The evidence adduced makes it abundantly clear that your unpredictable and erratic behavior jeopardized the safety and security of the staff, inmates and the community at large. Your continued presence would adversely compromise the security, operations, and integrity of the Department. Accordingly, the summary removal effected on June 19, 2001, is sustained.

(Award at p. 9).

The Union filed a grievance, which was denied. As a result, the Union invoked arbitration on behalf of the Grievant. The Arbitrator identified the issue before him to be: "Was the Grievant... discharged for cause in accordance with Chapter 16 of the [DPM]; if not, what should the remedy

be?" (Award at p. 1).³

At arbitration, DOC presented testimony and evidence of the Grievant's actions on May 31, 2001. DOC argued that the discharge of the Grievant was proper due to her disruptive behavior. (See Employer's Post Hearing Brief ("DOC Brief") at p. 8). In addition, DOC contended that discharge was appropriate because of the Grievant's defiant behavior to Capt. Minus, in violation of DOC Basic Regulation 1.3, regarding the Chain-of-Command. (See DOC Brief at p. 11). Also, DOC argued that progressive discipline was not required by Chapter 16 of DPM. (See DOC Brief at p. 14).

³Chapter 16 of the DPM provides, in pertinent part, as follows:

1603 DEFINITION OF CAUSE: GENERAL DISCIPLINE

1603.2 Except where a less restrictive standard is provided by statute or other provision of law, a corrective or adverse action, including ... removal, may be taken only for cause...

1603.3 For the purpose of this chapter, "cause" means ... any on-duty ... act that interferes with the efficiency or integrity of government operations; and any other on-duty ... reason for corrective action that is not arbitrary or capricious. This definition includes... insubordination, misfeasance, malfeasance. . .

1603.5 No employee may be subject to a corrective or adverse action under this chapter for a *de minimus* violation of the cause standard contained in this section.

1603.8 Removal is not mandated under any provision of this section. Unless otherwise mandated by law, previous standards or doctrines for selection of a corrective or adverse action for cause are hereby repealed. . .

1603.9 Unless otherwise required by law, in selecting the appropriate penalty to be imposed in a corrective or adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate.

1603.10 In any disciplinary action, the government shall bear the burden of proving by a preponderance of the evidence that the corrective or adverse action may be taken or, in the case of summary action, was taken, for cause as that term is defined in this section. . .

1617 SUMMARY REMOVAL: GENERAL DISCIPLINE

1617.1 An agency head may remove an employee summarily when the employees conduct:

- (a) Threatens the integrity of government operations;
- (b) Constitutes an immediate hazard to the agency...
- (c) Is detrimental to public health, safety, or welfare.

The Union countered that the Grievant's actions did not rise to the level of malfeasance or insubordination. (See Union Post-hearing Brief ("Union Brief") at pg. 6). The Union further argued that the Grievant's actions should be considered a *de minimus* violation and, therefore, DOC did not have cause to terminate the Grievant. (See Union Brief at p. 8). In addition, the Union contended that the summary termination of the Grievant was excessive and out of proportion to the character of the offenses for which she was charged. (See Union Brief at p. 9). In support of their argument the Union cited *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), identifying 12 factors which are relevant when determining the appropriateness of the penalty. Utilizing the *Douglas* factors, the Union provided several mitigating factors which it believed should have been taken into account by DOC. (See Union Brief at p. 10-12).

In an Award dated March 8, 2005, Arbitrator James M. Harkless found that while DOC had proven that the Grievant's actions on May 31, 2001, were "wrong", "unprofessional", and "discourteous", "[the evidence] falls short of proving that her summary removal for this misconduct was for cause; that it threatened the integrity of government operations, was an immediate hazard to the Department, other employees or to the Grievant, or was detrimental to public safety." (Award at pgs. 10-12). In addition, the Arbitrator noted that there was no further disturbance from the inmates and found that DOC had failed to establish that the Grievant's misconduct "jeopardized the safety and security of the staff, inmates and the community at large, as the DOC Director determined." (Award at p. 12). The Arbitrator stated, that while the Grievant's conduct was improper, it "was not so egregious that it warrant[ed] discharge..." (Award at p. 15). The Arbitrator added, "in determining to remove the Grievant, DOC did not appear to consider her prior employment history. Both [DOC] and Union witnesses praised the Grievant's performance as a Correctional Officer, and her performance evaluations prior to her removal supported that praise." (Award at p. 15).

As a remedy the Arbitrator stated the following:

For the reasons given, the Grievant's discharge was not for cause. The Grievant shall be reinstated as an employee, and the discharge is reduced to a thirty day suspension without pay, effective July 19, 2001. The Grievant shall be entitled to all lost pay, benefits, and seniority resulting from cancellation of her discharge. (Award at p. 15)

In their Arbitration Review Request ("Request"), DOC asserts that "[t]he evidence presented at the arbitration hearing clearly supports the Agency's decision to summarily remove the Grievant from her position as a correctional officer." (Request at p. 5). Based upon this contention, DOC argues that the Award is contrary to law and public policy. In addition, DOC asserts that the "proposed remedy is impermissible under the [DPM] and the parties' [CBA] and is unnecessarily punitive." (Award at p. 6).

FOP counters that DOC's "disagreement with the remedy of reinstatement does not present a statutory basis for review, and therefore, should be denied." (Opposition at p. 5).

When a party files an arbitration review request, the Board's scope of review is extremely narrow. 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, DOC's first basis for review is that the Award is contrary to law and public policy. DOC argues that the proposed remedy is impermissible under the DPM and the parties' CBA and is unnecessarily punitive. (See Request at p. 5). In support of this argument, DOC contends that it submitted sufficient evidence to support its decision to terminate the Grievant. (See Request at p. 6). DOC requests that the Board review this evidence and find that the Arbitrator's decision is "impermissible under the DPM, clearly erroneous, irrational, [and] cannot be supported by the record evidence and is contrary to law and public policy and must be vacated." (Request at p. 6).

FOP counters that DOC has failed to present a statutory basis for review. We agree.

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of the contract. "[T]he 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). We have also held that to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the arbitrator arrive at a different result. See *AFGE, Local 631 and Dept. Of Public Works*, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). In addition, a petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law or legal precedent. See *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 43 (1987); see also, *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F. 2d 1234, 1239 (D.C. Cir. 1971).⁴ Moreover, the petitioning party has the burden to specify applicable law and definite public

⁴ See, *Metropolitan Police Department and Fraternal Order of Police/Metroplitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing *American Federation of Government Employees, Local 631 and Department of Public Works*, 45 DCR 6617, Slip Op. No.

policy that mandates that the Arbitrator reach a different result. *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633, PERB CASE No. 00-A-04 (2000); See also *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). Furthermore, as the District of Columbia Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." *Department of Corrections v. Local No. 246*, 554 A.2d 319, 325 (D.C. 1989).

In the present case, DOC asserts that the Arbitrator's Award is contrary to law and public policy. However, DOC does not cite any specific provision of the DPM, law or public policy which mandates that the Arbitrator arrive at a different result. Instead, DOC requests that the Board review the evidence it submitted at the arbitration hearing and find the Award was "impermissible under the DPM, clearly erroneous, irrational, [and] cannot be supported by the record evidence and is contrary to law and public policy. . ." (See Request at p. 6). In light of the above, we believe that DOC's argument merely represents a disagreement with the Arbitrator's findings and conclusions. We have held that a disagreement with the Arbitrator's findings is not a sufficient basis for concluding that an arbitration award is contrary to law and public policy. See, *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 31 DCR 4159, Slip Op. No. 85, PERB Case No. 84-A-05 (1984). Therefore, DOC's claim does not present a statutory basis for review. As a result, we cannot reverse the Award on this ground.

In its second argument DOC asserts that the Arbitrator's remedy is impermissible under the DPM and the CBA, and is unnecessarily punitive. (See Request at p. 6). In support of these assertions, DOC raises two issues. First, DOC argues that the Grievant was, prior to her summary removal, part of a group of employees who were subjected to a Reduction-in-Force ("RIF"), and consequently she cannot be returned to work. Second, DOC indicates that it believes that the Award would allow for back pay with no offset for interim earnings, which is impermissible under the DPM.

FOP counters that the DOC's assertion that the Grievant "would have been RIF'd is pure speculation based on the assumption that she would have received a RIF notice had she not been summarily terminated." (Opposition at p. 6). In addition, FOP asserts that the issue of the RIF was never presented to the Arbitrator. (See Opposition at p. 6). FOP argues that "[i]ssues not presented to the Arbitrator cannot subsequently be raised before the Board as a basis for vacating an award." (Opposition at p. 6 citing *District of Columbia Police/Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip

365 at p. 4 n. 4, PERB Case No. 93-A-03 (1998); 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).

Op. No. 282 at p. 4 n. 5, PERB Case No. 87-A-04 (1992)). Also, FOP contends that DOC's request would require the Board "to substitute its judgment on remedy for that of the Arbitrator. (Opposition at p. 7). Therefore, FOP contends that DOC has not presented a statutory basis for review.⁵ For the reasons described below, we agree.

After reviewing the Award, the Board has found no evidence to support DOC's assertion that that these two issues were raised during the Arbitration hearing. As a result, we conclude that DOC has raised these issues for the first time in its Request. This Board has held that "[i]ssues not presented to the arbitrator cannot subsequently be raised before the Board as a basis for vacating an award." *Id.* Moreover, a Petitioner cannot base an arbitration review request on issues not first presented to an arbitrator. See *District of Columbia Fire and Emergency Services and AFGE, Local 3721, _DCR_, Slip Op. No. 756, PERB Case No. 02-A-08 (2004)*. In light of the above, DOC's assertions, being raised for the first time on appeal to this Board, cannot be considered a basis for review.

Lastly, DOC argues that the Award provides for the payment of back pay without deductions for interim earnings, and is, therefore, impermissible under the DPM. We note that, in its Opposition to DOC's Request, FOP asserts that through counsel, it has informed the Office of Labor Relations and Collective Bargaining that it does not object to having the interim earnings, if any, deducted from the Grievant's back pay Award. (See Opposition at p. 2). Therefore, we find that DOC's argument regarding interim earnings is moot.

In view of the above, we find that there is no merit to DOC's arguments. Also, we believe 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.

⁵FOP did not present any argument countering the DOC's assertion that the Award would provide for back pay without deductions for interim earnings.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The District of Columbia Department of Correction'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.**

September 28, 2006

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-A-08 was transmitted via Fax and U.S. Mail to the following parties on this the 28th day of September 2006.

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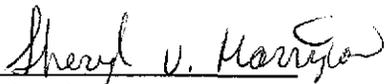
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