

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:

American Federation of State,
County and Municipal Employees,
District Council 20, Local 2776,
AFL-CIO,

Petitioner,

and

District of Columbia
Department of Finance and Revenue,

Respondent.

PERB Case No. 90-A-01
Opinion No. 246

DECISION AND ORDER

On October 2, 1989, the American Federation of State, County and Municipal Employees, Local 2776 (AFSCME) filed an Arbitration Review Request with the Public Employee Relations Board (Board). AFSCME contends that an arbitration award, which upheld the termination of Charles Mills (Grievant), should be set aside because it is contrary to law and public policy.

The D.C. Department of Finance and Revenue (DFR) filed an Opposition on October 26, 1989 asserting that the Arbitration Award is "fully consistent with the applicable law, policy, and the collective bargaining agreement" and AFSCME's request for review must therefore be denied.

The pertinent facts found by the Arbitrator are as follows:

A. The Grievant was terminated by DFR for unexcusable absence without leave. The initial notice proposing the Grievant's termination was withdrawn due to its nonconformance with procedural requirements regarding timeliness. A second notice was issued proposing the Grievant's termination for the same reasons stated in the initial notice. The same disinterested designee who was appointed pursuant to the initial notice was again appointed to serve in this capacity under the second notice. The Grievant did not reply to the charges in the second notice. The disinterested designee then recommended that the proposal removing the Grievant be sustained on the basis of the findings contained in a report he had issued following the first notice of proposed termination and a hearing conducted thereon. DFR's director then issued a final decision directing that the Grievant be removed from his position.

B. AFSCME grieved the removal. The grievance asserted that the termination should be overturned for the following reasons: (1) DFR committed procedural errors by selecting the same disinterested designee twice, by failing to furnish the Grievant with a copy of the disinterested designee's recommendation, and by omitting the words "with" or "without prejudice" from the letter rescinding the first proposed notice; and (2) DFR also failed to offer any evidence that these actions did not prejudice the Grievant.

The Arbitrator rejected AFSCME's argument that by selecting the same person to serve as the disinterested designee twice on the same proposed action DFR violated certain provisions of the District Personnel Manual (hereafter, DPM)^{1/} and its Implementing

^{1/}Section 1601:

"Disinterested Designee - the official, other than the proposing official, who has no direct and personal knowledge (other than hearsay) of the matters contained in the proposed corrective or adverse action...."

Section 1613.2:

"The Disinterested Designee shall meet the following criteria...
(d) have no direct and personal knowledge (other than hearsay) of the matter contained in the proposed corrective or adverse action."

Section 1613.3:

"A disinterested designee shall...
(d) Make a written report and recommendation with a copy to the employee."

Subpart 2, Section 2.6:

"An employee against whom a corrective or adverse action is proposed, is entitled, at a minimum, to the following:

* * *

(7) a review of the proposed action by a disinterested designee;

(8) fair and impartial consideration of the proposed action, and the employee's reply, if any, before a final decision is made."

* * *

Guidelines.

AFSCME had argued that selection of the same person as Designee under the second notice was improper because the Designee already had knowledge of the matters contained in the action. The Arbitrator concluded, however, that the Disinterested Designee was not prejudiced or biased in his role, and concluded also that the Grievant and Union were required to object to the selection of the Designee and, having failed to do so, they were precluded from subsequently challenging the selection.

The Arbitrator also rejected AFSCME's contentions that by failing to furnish the Grievant a copy of the Disinterested Designee's Report and by not stating in the letter rescinding the first notice whether such rescission was with or without prejudice, DFR committed additional procedural errors. The Arbitrator concluded that the omission of the words "with" or "without prejudice" did not violate any rule or regulation, since the letter withdrawing the proposed termination did not constitute a notice of final decision concerning the proposed action. The Arbitrator declined to find whether or not the Disinterested Designee's report and recommendation had been received by the Grievant, but concluded that the "failure to supply the [Disinterested Designee's] decision was not sufficient to overturn the position the Department took in discharging the Grievant." (Award p. 24)

Section 1-605.2(6) of the D.C. Code authorizes the Board to consider appeals from arbitration awards pursuant to a grievance procedure only on specified grounds, of which the only one involved here is that the award on its face is contrary to law and public policy.

The Board has reviewed the record and applicable law and concludes that we lack jurisdiction to review the Award because it is not on its face contrary to law and public policy. AFSCME's principal contention is that "law and public policy" as embodied in the above-quoted sections of the DPM precluded the Arbitrator's acceptance of the agency's second selection of the same individual to serve as Disinterested Designee on this adverse action proposal because (so the argument runs) that individual had, via the first hearing, obtained disqualifying "direct and personal knowledge (other than hearsay)" of the matters involved. We reject that contention as, in our view, the quoted phrase from the Manual does not necessarily, nor plausibly, include the knowledge obtained by a presiding officer in a contested hearing conducted pursuant to the DPM requirements and its Implementing Guidelines. Indeed, the knowledge of an employee's job performance that is obtained by a presiding

official at a hearing on proposed adverse action is more reasonably described as "hearsay" than it is as "direct and personal." We find support for this reading of the quoted DPM language in the common practice that an appellate tribunal, when it reverses a lower body's decision and sends the case back for further hearing, sends it back to the very trial body that heard the case in the first instance. There are certainly situations in which this is not done, but they turn on special circumstances, not on the simple fact that the trial body has already heard evidence in the case. We find further support in the DPM itself, which in Subpart 2, Section 2.13 of the Implementing Guidelines provides for reconsideration of a decision to be made by the body that issued that decision.^{2/}

AFSCME's additional procedural objections avail it no better. First, the Union claims that the agency erred fatally in failing to furnish the Grievant a copy of the Disinterested Designee's report and recommendation. The Arbitrator noted testimony for the Union that the Grievant did not receive a copy of that document and that the Union did not know of its existence prior to the day of the Arbitration, and testimony by the Disinterested Designee that he directed the report delivered to the Union and Grievant in accordance with his office's routing procedure. The DPM creates no agency obligation here, saying only (Section 1613.3(d)) that the Disinterested Designee is to make a written report and recommendation "to the deciding official with a copy to the employee." Moreover, no appeal is available from a disinterested designee's report and recommendation, which is simply advisory to the deciding official. If the Union and Grievant did not learn of the Report's existence until the day of the arbitration, they cannot thereby have been deprived of any appeal right, for none existed, and if at the arbitration's opening they perceived a need for additional time to prepare, they could have so requested. Thus, taking all the testimony as true (and it is not contradictory), we find no prejudice, and no violation of law and public policy.

Finally, the Union points to the failure of the agency's letter rescinding the first proposed notice to indicate whether that action was being taken with or without prejudice. It suffices to note that Subpart 2, Section 2.14(D) of the Implementing Guidelines provides that a notice of final decision

^{2/} Since we find no violation of law and public policy in the Arbitrator's acceptance of the Designated Designee in that role here, it is immaterial whether -- had that assignment been erroneous -- the Union or Grievant would have had an obligation to object to the assignment, or whether and how such an objection may be waived. Hence we need not pursue these questions.

is to state whether withdrawal or dismissal of the proposed action is with or without prejudice, and the agency's letter at issue here was not a notice of final decision. But we must point out, in addition, that the agency's second notice of proposed termination issued but five days after the first notice was revoked, so that neither the Union nor the Grievant can have been in more than virtually momentary doubt. We conclude, here as with the matter dealt with in the preceding paragraph, that even if we could say with confidence (as we cannot) that there was a technical violation, it would have to be said also that the violation was without consequence.

For the foregoing reasons the Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Review Request is denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

May 20, 1990