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

In the Matter of:)	
)	
District of Columbia Water and Sewer Authority,)	
)	
)	
Petitioner,)	PERB Case No. 02-A-02
)	
and)	Opinion No. 687
)	
American Federation of Government Employees,)	
Local 631,)	
)	
Respondent.)	
)	

DECISION AND ORDER

The District of Columbia Water and Sewer Authority (“WASA”), filed an Arbitration Review Request on October 19, 2001. WASA seeks review of an arbitration award (Award) which determined that the agency violated Article 18, Section E.2, of the parties’ collective bargaining agreement when it failed to give the Grievant preference and selected Bruce Beall and Yi-Ming Shih for two vacant DS-13 civil engineer positions. (Request at p. 4). WASA contends that the “Decision must be vacated as a whole because the Arbitrator exceeded [his] authority and jurisdiction and ... the Decision contravenes the parties’ agreement, controlling law and public policy.” (Request at p. 5). The American Federation of Government Employees, Local 631 (“AFGE” or “Union”), opposes the Arbitration Review Request.

The issue before the Board is whether “the award on its face is contrary to law and public policy” or whether “the arbitrator was without or exceeded his or her jurisdiction. . . .”. D.C. Code §1-605.02 (6) (2001 ed.).¹

¹Prior codification at D.C. Code §1-605.2 (6) (1981 ed.).

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The Grievant, Ronald Marshall, has been a WASA employee since October 28, 1996.² (Award at p. 10). In March 2000, WASA advertised two job vacancies for the position of civil engineer at the DS-13 level. The announcement indicated that the positions were “newly created within the Program Management Division of the Agency’s Department of Engineering and Technical Services and were dedicated to providing architectural and engineering project management for the construction of a new biosolids processing facility at Blue Plains and the reconstruction of the District’s aging sewer systems and pumping stations.” (Request at p. 2)

Ten candidates applied for the two positions, of whom seven (7) were internal (including the Grievant) and three (3) were external. WASA’s Human Resources Department determined that nine (9) applicants (including the Grievant) met the minimum education, licensing, and work experience requirements. (Award at p. 23). A three-member selection panel conducted the structured job interviews on May 16 and 17, 2000. (Award at p. 23). The Grievant was not selected for either position. Instead, the selection panel unanimously selected Bruce Beall (an external candidate) and Yi-Ming Shih (an internal candidate). The panel’s recommendation was adopted and Mr. Beall and Mr. Shih were offered the positions. The Union filed a grievance alleging that the Grievant was denied his seniority and preference rights under the parties’ collective bargaining agreement. (Award at p. 10). Specifically, the Union claims that in selecting Mr. Beall and Mr. Shih, WASA violated Article 18, Section E 2 and E 3 of the parties’ collective bargaining agreement. (Award at p. 11). WASA countered by arguing that Management was entitled to select “the ‘best qualified’ candidate under [D.C. Code §1-617.08 (2001 ed.)]³ of the District of Columbia Labor Management Relations Act, which is incorporated in the Agreement at Article 4, and that ‘preference’ to an internal candidate need only be shown where the qualifications of the internal and external candidates were substantially equal.” (Request at p. 3). In addition, WASA “maintained that Article 18, Section E. 3, of the Agreement expressly preserved Management’s statutory and Article 4 rights to determine job qualifications and evaluate the relative qualifications of job candidates.” (Request at p. 3). Furthermore, “[WASA] argued that under Article 18, Section E.3, when [WASA] determined that two internal candidates presented relatively equal qualifications, seniority would be the determining factor in the selection process.” (Request at pgs. 2-3).

In a decision issued on September 24, 2001, the Arbitrator held that by selecting the external candidate (Beall) for the pumping station construction position, WASA violated Article 18, Section E.2, of the parties’ collective bargaining agreement. Specifically, the Arbitrator ruled that WASA failed to give the Grievant preference over a non-WASA applicant. (Award at p. 59). Also, the Arbitrator found that WASA violated Article 18, Section E.3, of the parties’ collective bargaining

²The Grievant has been employed by WASA as a DS-12 civil engineer.

³Prior codification at D.C. Code § 1-618.8 (1981 ed.).

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agreement by selecting the internal candidate Yi-Ming Shih over the Grievant.⁴

In addition, the Arbitrator concluded that "Management failed to follow the proper selection procedure." (Award at p. 59). Specifically, he found that Management neglected to give proper consideration to objective factors and relied primarily on a subjective interview; which was manifestly unfair to the Grievant.⁵ As a result, the Arbitrator concluded that the "appointments of Mr. Beall and Mr. Shih to the two DS-13 positions must be rescinded at once." (Award at p. 59). Also, he ruled that WASA should develop a fair and objective selection process based primarily on objective factors. (Award at p. 67). Furthermore, he determined that: (1) Mr. Beall and Mr. Shih would not be given any credit for time already served in those positions; and (2) the two DS-13 positions must be readvertised.

WASA takes issue with the Arbitrator's ruling. Specifically, WASA contends that the Arbitrator exceeded his authority by: (1) reviewing the selection of the internal candidate Yi-Ming Shih; (2) improperly substituting his judgement for that of the agency in determining how the best qualified candidates were to be selected by management; and (3) improperly shifting the burden of proof to the agency. (Request at pgs. 5-8).

In support of its argument, WASA cites Article 18, Section E.2, of the parties' collective bargaining agreement ("CBA") which provides as follows:

Management has the right to determine job qualifications, provided they are limited to those factors directly required to satisfactorily perform his/her job. Where all job factors are relatively equal as determined by the Human Resources, Personnel Office, the employee with the greatest Agency seniority (including continuous service with WASA and WASAUA) shall be promoted.

WASA asserts that "the Arbitrator ignored the plain reading of the contract and strained to find a basis for imposing obligations upon the Agency which are not there." (Request at p. 7). Furthermore, WASA contends that approximately "30 pages of the Decision are copied word-for-

⁴The Arbitrator ruled that the Grievant was denied seniority consideration under Section E.3, of the parties' collective bargaining agreement. In addition, he determined that WASA did not prove that Mr. Shih had more seniority than the Grievant. (Award at p. 60).

⁵WASA asserts that the Arbitrator assumed jurisdiction of an issue not submitted to him by the parties. WASA points out that although "neither the Union nor the Agency had authorized the Arbitrator to do so, the Arbitrator ruled that the Agency had violated Article 18, Section E.3 of the Agreement by selecting internal candidate Yi -Ming Shih (a bargaining unit member) over the Grievant." (Request at p. 5) Furthermore, WASA contends that the Arbitrator erroneously assumed that Mr. Shih was junior to the Grievant in terms of seniority.

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word, without attribution, from Chapter 14, 'Seniority', of the Fifth Edition of How Arbitration Works by Elkouri & Elkouri." (Request at p.7). In addition, WASA claims that the arbitral decisions referenced in the [award], again without proper attribution, are drawn from another era and relate to industrial and trade positions that are in no way analogous to the facts and circumstances of the case." (Request at p.7).

Finally, WASA argues that the "Agency sought to fill two highly specialized engineering positions utilizing the experience and expertise of the Agency's managers to define base line job requirements and ultimately to select the best qualified from among the qualified candidates. [Furthermore,] to insist that the Agency be constrained by seniority rules developed on the plant floor to guide promotions to non-professional level positions is absurd, in addition to being contrary to the plain language of the contract." (Request at p. 7).

As noted above, WASA claims that the award is contrary to law and public policy. (Request at pgs. 8-11). In the present case, the Arbitrator reasoned that the grievance before him involved "the interpretation of subparagraph E.2 or E.3 of article [18]... of the parties' working conditions agreement." (Award at p. 26). As a result, we believe that one of WASA's grounds for review only involves a disagreement with the Arbitrator's interpretation of Article 18, Section E.2 and E.3 of the parties' CBA. Moreover, WASA merely requests that we adopt its: (1) interpretation of Article 18, Section E 2 and E 3 of the parties' CBA; and (2) evidentiary findings and conclusions. We have determined that a "disagreement with the Arbitrator's interpretation of the parties' contract does not make the Award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413 at p. 3, PERB Case No. 95-A-02 (1995). Moreover, the Board has 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." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also, AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993) and W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983). After reviewing WASA's public policy argument, we find that WASA fails to cite any specific public policy or law that was violated by the Arbitrator's Award. Instead, WASA asserts that "the Arbitrator ignored the plain reading of the contract and strained to find a basis for imposing obligations upon the agency which are not there." (Request at p. 7). Therefore, WASA's claims involve only a disagreement with the Arbitrator's interpretation of Article 18, Section E.2 of the parties' CBA. Furthermore, WASA's public policy argument does not rely on a well-defined policy or legal precedent. Thus, WASA has failed to point to any clear public policy or law which the Award contravenes.

In view of the above, we find no merit in WASA's public policy argument. Specifically, WASA disagrees with the Arbitrator's interpretation of Article 18, Section E.2 and E.3 of the parties' CBA. This is not a sufficient basis for concluding that the: (1) Arbitrator has exceeded his authority; or (2) Award is contrary to law or public policy. Also, we believe that the Arbitrator's conclusion

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is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. For the reasons discussed, no statutory basis exist for setting aside the Award. Therefore, we can not reverse the Arbitrator's Award on this ground.

As a second basis for review, WASA asserts that the Arbitrator exceeded his jurisdiction by: (1) reviewing the selection of the internal candidate Yi-Ming Shih; (2) improperly substituting his judgement for that of the agency in determining how the best qualified candidates were to be selected by management; and (3) improperly shifting the burden of proof to the agency. (Request at pgs. 5-8). Also, WASA claims that the Arbitrator exceeded his authority by ruling that the agency develop a fair and objective selection process (for future hiring decisions) based primarily on objective factors. (Request at p. 67) For the reasons discussed below, the Arbitration Review Request is granted in part and denied in part. Specifically, the Board sustains the Arbitrator's decision that management violated the selection process and finds that the two positions in questions should be readvertised. However, the Board finds that the Arbitrator exceeded his authority in prescribing whether or not management could use objective criteria in future hires.

We have found that by submitting a matter to arbitration, "the parties also agree to be bound by the Arbitrator's decision which necessarily includes the Arbitrator's interpretation of the parties' agreement and related rules and/or regulations as well as his evidentiary findings and conclusions upon which the decision is based." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p.2, PERB Case No. 92-A-04 (1992). Also, "the Board will not substitute its own interpretation or that of the Agency for that of the duly designated Arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). Furthermore, with respect to the Arbitrator's findings and conclusions, we have stated that resolution of "disputes over credibility determinations" and "assessing what weight and significance such evidence should be afforded" is within the jurisdictional authority of the Arbitrator. See, American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO and District of Columbia General Hospital, 37 DCR 6172, Slip Op. No. 253 at p. 2, PERB Case No. 90-A-04 (1990) and University of the District of Columbia and District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248 at n. 8, PERB Case No. 90-A-02 (1990), respectively.

In view of the above, we believe that WASA's claim that the Arbitrator exceeded his authority by finding that management violated the selection process, does not present a statutory basis for review. Therefore, we cannot reverse the Award on this ground.

With respect to WASA's argument that the Arbitrator exceeded his authority by directing that management develop objective standards for future hirings, we find that WASA's request for review of this portion of the Award does present a statutory basis for review. For the reasons discussed below, we reverse this part of the Award.

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One of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining agreement." D.C. Public Schools v. AFSCME, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). See also, Dobbs, Inc. v. Local No. 1614, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 813 F. 2d 85 (6th Cir. 1987). The Board has recently expounded on what is meant by "deriving its essence from the terms of the collective bargaining agreement." See, MPD and FOP/MPD Labor Committee, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001). In addition, the U.S. Court of Appeals for the Sixth Circuit in Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135, has also explained the standard by stating the following:

An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765 (6th Cir. 1986).

We find that the portion of the Award which prescribes whether or not management can use objective or subjective criteria in future hiring decisions, fails to derive its essence from the parties' collective bargaining agreement and, therefore, does not meet the standard noted in the MPD⁶ and Cement Division cases.

Furthermore, we believe that the portion of the Award concerning WASA's future hiring decisions, involves a matter that conflicts with the terms of the parties' agreement because it concerns future conduct. Also, this part of the Award imposes additional requirements that are not expressly provided in the parties' CBA. As a result, we conclude that this portion of the Award cannot be rationally derived from the terms of the parties' CBA. Moreover, the Board cannot find evidence which identifies the Arbitrator's authority to impose certain criteria on management concerning their future hiring decisions.

While the parties' CBA does not explicitly limit the Arbitrator's equitable powers, the Board believes that in the present case the Arbitrator's powers should, at the very least, be limited to the scope of the present grievance and not involve WASA's future hirings. In addition, we find that the portion of the Arbitrator's Award regarding WASA's future hiring decisions, is without rational support and cannot be rationally derived from the terms of the parties' CBA. Therefore, we agree

⁶MPD and FOP/MPD Labor Committee, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001).

with WASA's argument that the parties' CBA did not give the Arbitrator the authority to dictate whether WASA must use objective or subjective criteria in future job selection decisions. For the above-noted reasons, we find that the Arbitrator's Award concerning WASA's future hiring decisions cannot stand. As a result, we reverse this portion of the Arbitrator's Award.

Pursuant to D.C. Code §1-605.02(6) (2001 ed.),⁷ the Board finds that the Arbitrator exceeded his jurisdiction and was without authority to direct that WASA use objective or subjective criteria in future hiring decisions. As a result, we grant in part, WASA's Arbitration Review Request. Therefore, pursuant to Board Rule 538.4, the Board orders that the Arbitrator's Award be modified to reflect this ruling.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Water and Sewer Authority's Arbitration Review Request is hereby granted in part and denied in part. Specifically, WASA's request for reversal of the Arbitration Award is denied to the extent it requests that the Board overturn the entire Arbitration Award. However, the request is granted in part to the extent that the Board finds that the Arbitrator lacked authority to prescribe whether objective or subjective criteria govern WASA's future hiring decisions.
2. Pursuant to D.C. Code §1-605.02(6) (2001 ed.) and Board Rule 538.4, the portion of the Arbitration Award which concerns WASA's future hirings is reversed. Therefore, the Arbitrator's Award is modified to reflect this ruling.
3. Pursuant to D.C. Code § 1-605.02 (6) (2001 ed.) and Board Rule 538.4, the Board sustains the Arbitrator's decision that: (1) management violated the selection process; and (2) the two positions should be readvertised. Furthermore, we sustain the Arbitrator's ruling that Mr. Beall and Mr. Shih should not be given credit for time already served in those two positions

⁷Prior codification at D.C. Code §1-605.2(6) (1981 ed.).

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4. 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 17, 2002

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 02-A-02 was transmitted via Fax and U.S. Mail to the following parties on this 17th day of September 2002.

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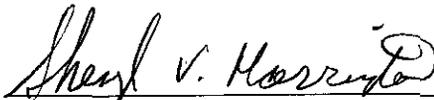
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