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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
)	
District of Columbia Public Schools,)	
)	PERB Case No. 11-A-04
Petitioner,)	
)	Opinion No. 1130
and)	
)	
Washington Teachers Union,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case:

On February 28, 2011, the District of Columbia Public Schools (“DCPS” or “Complainant”) filed an Arbitration Review Request (“Request”) in the above captioned matter. DCPS seeks review of an arbitration award (“Award”) that sustained the Washington Teachers Union, AFT Local 6, AFL-CIO’s (“Union,” “WTU” or “Respondent”) grievance filed on behalf of probationary employees (“Grievants”) terminated by DCPS. The Arbitrator ruled that DCPS had violated the collective bargaining agreement (“CBA” or “the Agreement”) between the Union and DCPS and directed that the probationary employees be offered reimbursement.

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

II. Discussion

This case concerns the termination of approximately eighty (80) probationary teachers by DCPS in August 2008. In terminating the probationary employees, DCPS utilized a new initiative that required principals to either recommend renewal or non-renewal for all of their probationary teachers via a web portal. If the principal recommended non-renewal, they were

required to submit a one-page narrative explaining his or her recommendation. This system was an entirely new process, and DCPS neither negotiated nor informed the Union about it in advance. The probationary teachers were informed of their termination via letter in July 2008. The letter did not give the probationary teachers a reason for their termination beyond the recommendation of their principals, and they were given no opportunity to respond. On August 15, 2008, the Union filed a class action Step III grievance pursuant to Article VI of the parties' CBA. (Award at 3-6).¹

In addressing the parties' positions, the Arbitrator determined that the issues before him for resolution were: "Did the agency violate the CBA by the manner in which it terminated the employment of approximately 80 probationary teachers at the end of the school year 2007-2008? If so, what shall be the remedy?" (Award at p. 2).

In addressing the issue of whether the agency violated the parties' CBA by the manner in which it terminated the probationary teachers, the Arbitrator found that it had. He noted that the "glaring and fatal flaw in the process that DCPS used is that teachers were never told why they were terminated, other than it was based on the input from their principals." (Award at 24). He further stated DCPS had acknowledged that, because the probationary teachers were not 'at-will' employees, the employer had to demonstrate "cause" in order to fire them. (*Id.*). In addition, the Arbitrator noted the parties' CBA utilized the phrase "just cause" when describing the grounds on which not 'at-will' employees could be terminated. (*Id.*). He then held that "cause" and "just cause" required more than "merely informing employees they have been separated as a result of unspecified input from their supervisors." (*Id.*).

The Arbitrator next turned to the questions of whether the Union had the right under the parties' CBA to grieve a termination action and whether the grievance was arbitrable. (*Id.*). The Arbitrator answered affirmatively to both questions, citing: "DCPS' long-standing acceptance of such grievances;" prior probationary employees' termination notices informing them they could file a grievance under Article VI of the CBA; and "the non-exclusion language in the WTU contract compared to that in the IBT contract, which does not prohibit the use of grievance procedure by probationary employees to contest termination." (*Id.*).

The Arbitrator then stated:

If grievance and arbitration rights are to be meaningful, the Employer must give a substantive rationale for the terminations. The teachers must be told what their alleged shortcomings are and be given the opportunity to answer, to explain or refute what has been said about them. The process used in this case was so devoid of due process as to be arbitrary and capricious. It nullified the right of the probationers to an effective use of their grievance and arbitration procedures.

(Award at 24-25).

¹ For a complete recitation of the Arbitrator's finding of facts and deliberation see Award.

DCPS filed the instant review of the Award, contending that: "the arbitrator was without, or exceeded his or her jurisdiction" and "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02(6)(2001ed.).

When a party files an arbitration review request, the Board's scope of review is extremely narrow.² 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.).

As to DCPS' claim that the Award is on its face contrary to law and public policy, we disagree for the reasons discussed below.

As previously stated, 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 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).³

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*

² 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.

³ 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).

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).

In its Arbitration Review Request, DCPS challenges the Arbitrator's decision on two grounds: 1) the Award violates public policy, and 2) the Arbitrator exceeded the jurisdiction granted to him in the parties CBA. (Award at 5 and 9). DCPS divides its assertion that the Award violates public policy into two claims: 1) "Critical public policy requires DCPS to provide children attending schools in the District of Columbia with a quality education," and 2) "[t]he Award violates public policy because there has been no demonstration that 'but for' the lack of due process, as concluded by the Arbitrator, all employees would actually be entitled to receive pay." (Request at 5 and 7). Concerning the first public policy claim, the DCPS asserts that "a critical public policy exists to provide children with quality education." (Request at 5). It maintains this public policy is codified in Chapter 13 of the District of Columbia Municipal Regulations (DCMR) and requires probationary teachers receive a positive recommendation to maintain their employment. (Request at 7). DCPS also asserts the DCMR "contains an appeal provision that leads to the Office of Employee Appeals (OEA), not labor arbitration," and thus, the statute provides a mechanism for probationary teachers to protest their terminations. (*Id.*). DCPS then concludes: "[t]he Award requires a different form of dispute resolution by expanding the rights of probationary teachers...[and] therefore interferes with a system created by a critical public policy of providing quality education to children of the District of Columbia." (*Id.*).

In regards to the second claim that the Award violates public policy, DCPS states:

The Federal Back Pay Act (USC 5-5596) empowers the Arbitrator to award back pay when ruling an adverse employment action was improper. The Federal Personnel Manual Supplement, 990-2, Book 550, Pay Administration (General), Subchapter 8, Paragraph S804b, sets forth the 'but for' test as applied under Section 5596 of Title 5. This document states that it must be clearly established that, "but for" the unjustified or unwarranted personnel action, the employee would actually have been entitled to receive the back pay. [(]See *AFGE Local 1897 and Air Force Assistant Command Elgin, AFB, FL. No.81K10682* and Federal Personnel Manual Supplement, 990-2).

(Request at 7-8).

DCPS then asserts that the Arbitrator could not have applied the above-referenced "but for" standard because the nature of the grievance concerned the discharge process of the parties' CBA and the Arbitrator was not informed of the merits of each employee's termination. Therefore, DCPS contends, the Arbitrator was restricted to an Award granting the employees a right to process and not a monetary amount. (Request at 8).

In asserting the Arbitrator exceeded the jurisdiction granted him in the parties' CBA, DCPS references the United States Court of Appeals for the Sixth Circuit decision in *Cement Division, National Gypsum Co. v. United States Steelworkers of America, AFL-CIO, Local 135*, 793 F.2d 759 (6th Cir. 1986). In that case the court formulated a four-factor test for determining whether an arbitration award fails to derive its essence from the collective bargaining agreement:

1. Award conflicts with express terms of the collective bargaining 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 consideration of fairness and equity, instead of the precise terms of the agreement.

(Award at 9 (quoting *Cement*, 793 F.2d at 765)). DCPS then states:

The Award conflicts with the express terms of the CBA because the Arbitrator has ruled on an issue that is outside the scope of the authority vested in him by the CBA. In so doing, the Arbitrator has awarded the Union rights not granted to it in the CBA. The law, not the CBA, requires a positive recommendation from a supervisor. The Award, however, gives the Union a right to grieve a negative recommendation; an action not provided for in the CBA. In so doing, the Arbitrator based his Award on his own notions of fairness that are not rationally drawn from the language in the CBA that defines the power he has. The Award, therefore, must be vacated. (Request at 11).

In reviewing DCPS' Arbitration Review Request, the Board turns first to the Petitioner-Appellant's assertion that the Award violates public policy. The Court of Appeals stated that:

no one disputes the importance of this governmental interest; the question remains whether it suffices to invoke the "extremely narrow" public policy exception to enforcement of arbitrator awards. *Am. Postal Workers*, 252 U.S. App. D.C. at 176, 789 F.2d at 8 (emphasis in original). Construing the similar exception in federal arbitration law, the Supreme Court has emphasized that a public policy alleged to be contravened "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.” *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L.Ed.2d 298 (1983) (citation and internal quotation marks omitted); *see E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 63, 121 S. Ct. 462, 148 L.Ed.2d 354 (2000) (for exception to apply, the arbitrator’s interpretation of the agreement must “run contrary to an explicit, well-defined, and dominant public policy”). Even where, in *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L.Ed.2d 286 (1987), an employer invoked a “policy against the operation of dangerous machinery [by employees] while under the influence of drugs” a policy judgment “firmly rooted in common sense” the Supreme Court reiterated “that a formulation of public policy based only on ‘general considerations of supposed public interests’ is not the sort that permits a court to set aside an arbitration award ... entered in accordance with a valid collective-bargaining agreement.” *Id.* at 44, 108 S. Ct. 364.

Id. at pgs. 789-790.

We find that DCPS has not cited any specific law or public policy that was violated by the Arbitrator’s Award. We decline DCPS’ request that we substitute the Board’s judgment for the arbitrator’s decision for which the parties bargained. DCPS 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 DCPS repeats the same arguments considered and rejected by the Arbitrator; this time asserting that the Arbitrator failed to properly apply the Federal Back Pay Act.

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. DCPS’ 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).

Furthermore, the Board has held, as has the Court of Appeals for the Sixth Circuit, that “questions of procedural aberration, asking whether the arbitrator acted outside his authority by resolving a dispute not committed to arbitration, whether the arbitrator committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award, and whether the arbitrator, in resolving any legal or factual disputes in the case, was arguably construing or applying the contract; so long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made serious,

improvident, or silly errors in resolving the merits of the dispute.” See *Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M*, 475 F. 3d 746, 753 (2007) (overruling *Cement Divisions, Nat. Gypsum Co. (Huron) v. United Steelworkers of America, AFL-CIO-CLC, Local 135*, 793 F.2d 759).

As previously noted, DCPS argues that the Arbitrator exceeded his authority and relies on the *Cement Division* case in support of its argument. However, the United States Court of Appeals for the Sixth Circuit overruled *Cement Division*. Furthermore, DCPS’ arguments represent a disagreement with the Arbitrator’s interpretation of the CBA and applicable rules and regulations. As a result, the Award cannot be overturned on this ground.

We have held and the District of Columbia Superior Court has affirmed that, “[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the [CBA].” *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int’l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator’s decision must be affirmed by a reviewing body “as long as the arbitrator is even arguably construing or applying the contract.” *Misco, Inc.*, 484 U.S. at 38. We have explained that:

[by] submitting a matter to arbitration “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based.”

District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

In the present case, the Board finds that DCPS’s arguments are a repetition of the positions it presented to the Arbitrator and its ground for review only involves a disagreement with the Arbitrator’s interpretation of the parties’ CBA. DCPS merely requests that we adopt its interpretation and remedy for its violation of the above-referenced provision of the parties’ CBA. This we will not do.

In addition, we have found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties’ collective bargaining agreement.⁴ See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Here, DCPS states that the Arbitrator is prohibited from issuing an award that would modify, or add to, the CBA. DCPS does not cite any provision of the parties’ CBA that limits

⁴ We note that if DCPS had cited a provision of the parties’ CBA that limits the Arbitrator’s equitable power, that limitation would be enforced.

the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that DCPS violated the parties' CBA, he also had the authority to determine the appropriate remedy. Thus, the Arbitrator acted within his authority.

In view of the above, we find no merit to DCPS' argument. We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' CBA.

THEREFORE, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Public Schools 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 15, 2011

CERTIFICATE OF SERVICE

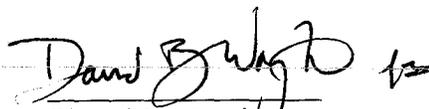
This is to certify that the attached Decision and Order in PERB Case No.11-A-04 was transmitted via Fax and U.S. Mail to the following parties on this 15th day of September 2011.

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