Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
District of Columbia Water & Sewer Authority,	
Petitioner,	PERB Case No. 04-A-24
v.	Opinion No. 1276
American Federation of State, County and Municipal Employees, Local 2091,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Water and Sewer Authority ("the Authority" or "the Petitioner") disciplined its employee Nathaniel Booth ("Booth" or "Grievant") for absence without leave. Booth's union, the American Federation of State, County and Municipal Employees, Local 2091 ("the Union") filed a grievance. The issue of whether the grievance was barred as untimely was presented to an arbitrator. After a hearing, the arbitrator issued an award finding that the grievance was timely and therefore arbitrable. The Petitioner filed an arbitration review request ("Request") with the Board. The Union did not file an opposition. Petitioner's Request is before the Board for consideration.

II. Background

Unbeknownst to the Authority, Grievant was arrested for a misdemeanor and incarcerated from March 10, 2004 until April 22, 2004. After the Grievant was absent without leave for a month, the Authority issued two notices of final decision disciplining him for his absence. The first notice proposed suspending Booth for being absent five (5) or more days, and the second proposed terminating him for being absent ten (10) or more days. On April 13, 2004, while Booth was still incarcerated, the two notices were sent to him by regular and certified mail. A

copy of the notices was placed in the Union's mailbox, and the U.S. Postal Service attempted to deliver the certified mail to Grievant on April 16. Award at pp. 1 and 3.

Following his release, Booth returned to work on April 23. On that day he met with management and Union representatives. He received copies of the notices and signed them, as did management and Union representatives. On April 28, the Union filed a step 1 grievance to oppose the discipline. Nonetheless, Booth was terminated on April 29. The Authority denied the Union's grievance on the ground that it was not filed within the 5 days allowed by the collective bargaining agreement for the filing of grievances. The Union filed a step 2 grievance requesting arbitration of the suspension and termination. *Id.* at p. 3; Arbitration Review Request at p. 4.

The arbitration award states that the question to be resolved by the arbitrator is "whether or not the grievance is barred based on timeliness." The portions of the collective bargaining agreement cited to the arbitrator were:

> ARTICLE 57
> DISCIPLINE
>
> Section N Final Decision
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> Notice of final decision, dated and signed by the deciding official, shall be delivered to the employee on or before the date that the action is to be effective. If the employee is not in duty status at that time, the notice shall be sent to the employee's last known address by certified or registered mail.
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> If a final decision is grieved through the negotiated grievance procedure, a written grievance shall be filed with the deciding official, except as specified in Section K of this Article.
>
> ARTICLE 59
> EXPEDITED GRIEVANCE AND ARBITRATION PROCEDURES
>
> Section C the Grievance Process
>
> * * * * *
>
> Step 1. If an employee disputes the imposition of discipline or the wage payment made to him/her or once the occurrence of events giving rise to the grievance becomes known to the employee or Local Union, the employee and/or the Local Union shall orally or in writing raise the matter within five (5) workdays with the supervisor or manager who imposed the action. The supervisor or

> manager receiving this complaint shall respond in writing within five (5) workdays after presentation of the grievance.

(Award at p. 2).

The arbitrator interpreted the above articles of the collective bargaining agreement to require receipt of actual notice. She found that the Grievant did not receive actual notice until the April 23 meeting, when the grievant was handed and asked to sign the notices. Having found that the Grievant received actual notice on April 23, 2004, the arbitrator held that the grievance filed April 28 was timely.

III. Discussion

In its Request, the Petitioner contends that the arbitrator exceeded her jurisdiction and that the award on its face is contrary to law and public policy. Those are two of the three narrow grounds upon which the Board may modify, set aside, or remand an arbitration award.[1]

A. Jurisdiction of the Arbitrator

An arbitrator derives his jurisdiction from the collective bargaining agreement and any applicable statutory or regulatory provision. *D.C. Metropolitan Police Dep't v. F.O.P./Metropolitan Police Dep't Lab. Committee (on behalf of Anthony Brown)*, Slip Op. No. 757 at p. 8, PERB Case No. 03-A-06 (Nov. 24, 2004). To exceed that jurisdiction, an arbitrator must do more than arguably misinterpret the agreement. *D.C. Metropolitan Police Dep't v. F.O.P./Metropolitan Police Dep't Lab. Committee (on behalf of Dennis Baldwin)*, Slip Op. No. 1133 at p. 7, PERB Case No. 09-A-12 (Sept. 15, 2011). The U.S. Supreme Court discussed in *United Paperworkers International v. Misco, Inc.* how far an award must stray from an agreement before it is subject to reversal:

> As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

484 U.S. 29, 38 (1987). This Board has followed the principles that the Court enunciated in *Misco*: "One of the tests that the Board has used when determining whether an arbitrator has exceeded her jurisdiction and was without authority to render an award is 'whether the award draws its essence from the collective bargaining agreement.'" *Am. Fed'n of Gov't Employees, Local 872 v. D.C. Water & Sewer Auth.*, Slip Op. No. 908 at p. 4, PERB Case No. 04-A-17 (June 27, 2007)(quoting *D.C. Pub. Schs. v. AFSCME, Dist. Council 20*, 34 D.C. Reg. 3610, Slip Op.

[1] D.C. Code § 1-605.02(6); PERB R. 538.3. The other ground, which is not alleged, is that the award was procured by fraud, collusion, or other similar or unlawful means.

No. 156 at p. 5, PERB Case No. 86-A-05 (1989)). "Furthermore," we have held, "an arbitrator's decision must be affirmed by a reviewing body 'as long as the arbitration is even arguably construing or applying the contract.'" *D.C. Water & Sewer Auth. v. Am. Fed'n of Gov't Employees, Local 872*, 52 D.C. Reg. 5163, Slip Op. No. 779 at p. 5, PERB Case No. 04-A-05 (2005) (quoting *Misco*, 484 U.S. at 38).

The Board has quoted with approval the following explanation of the meaning of "draws its essence from the contract" and "arguably construing or applying the contract" given by the Sixth Circuit Court of Appeals:

> Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator "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. . . .
>
> An interpretation of a contract . . . could be "so untethered to" the terms of the agreement . . . that it would cast doubt on whether the arbitrator indeed was engaged in interpretation. Such an exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that. . . .
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> This view of the "arguably construing" inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes, a view that respects the finality clause in most arbitration agreements . . . and a view whose imperfections can be remedied by selecting better arbitrators.

Mich. Family Resources, Inc. v. SEIU Local 517M, 475 F.3d 746, 753-54 (6th Cir. 2007), *quoted in Nat'l Ass'n of Gov't Employees (on behalf of Yolanda Geter) v. D.C. Office of Unified Commc'ns*, Slip Op. No. 1203 at pp. 6-7, PERB Case No. 10-A-08 (Oct. 7, 2011); *D.C. Metropolitan Police Dep't v. F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Dennis Baldwin)*, Slip Op. No. 1133 at pp. 7-8, PERB Case No. 09-A-12 (Sept. 25, 2011); *D.C. Metropolitan Police Dep't v. F.O.P./Metropolitan Police Dep't Labor Comm.(on behalf of Kenneth Johnson)*, Slip Op. No. 925 at p. 9, PERB Case No. 08-A-01 (July 12, 2010).[2]

[2] Petitioner cites *D.C. Water & Sewer Auth. v. Am. Fed'n of Gov't Employees, Local 631*, 49 D.C. Reg. 1123, Slip Op. 687, PERB Case No. 02-A-02 (2002), for its holding on when an award does not derive its essence from the agreement. (Request at p. 5). The decision Petitioner cited relied on a test for that issue

In the present case, the Authority argues that the arbitrator "exceeded her authority by expanding the scope of the Authority's duty to deliver the Notice of Final Decision to the Grievant beyond the requirement of the contract. The Collective Bargaining Agreement dictates that Notice shall be sent to the employee's last known address by certified or registered mail if the employee is not in a duty status at the time, the notice is sent. The Authority met this requirement." (Request at pp. 5-6).

The Authority may have met that requirement of Article 57, section N ("Article 57"), but the question before the arbitrator was when does the time period established by Article 59, section C ("Article 59") begin? Article 57 does not answer that question. The Arbitrator looked at Article 59, "which states that an employee has five workdays to file a grievance 'once the occurrence of events giving rise to the grievance becomes known to the employee or Local Union.'" Award at p. 5. In addition, the arbitrator considered the analogous and somewhat clearer provisions of section K of Article 57, which "provides that 'A written grievance may be filed within five (5) workdays of the employee's *receipt of the notice of proposed corrective or adverse action.*'" *Id.* (arbitrator's emphasis). It is clear that the arbitrator was construing or applying the agreement when she concluded based on this review that "the purpose of these provisions is that the employee have actual notice of the adverse action." *Id.*

Furthermore, the Authority argues that the arbitrator ignored the language of Article 59 because the article commences the five-day period when the occurrence of the events becomes known either to the employee or to the union. "In the August 11, 2004 [arbitration] hearing," the Authority points out, "the Union admitted that they had received the Notices of Final Decision but could not move forward with the grievance without the Grievant." (Request at p. 2). The Authority asserts that "the Union was not required to meet with the employee prior to raising the matter with the supervisor or manager." *Id.* at 5. That assertion is difficult to reconcile with the text of Article 59, which allows the matter to be raised "[i]f the *employee* disputes the imposition of discipline." (emphasis added). Even if the arbitrator had misread Article 59 in this regard, we would be mindful that a reviewing body "should not reject an award on the ground that the arbitrator misread the contract." *Misco*, 484 U.S. at 38.

As the arbitrator reached her conclusions by construing and applying the collective bargaining agreement, her award drew its essence from the agreement and was well within her jurisdiction.

B. Law and Public Policy

The law and public policy that the Authority claims the award contravenes is the managerial right of the Authority under section 1-617.08(a) of the D.C. Code to discipline its employees. We rejected a similar contention in *District of Columbia Public Works v. American Federation of Government Employees*, noting that the arbitrator had not decided whether the agency had authority to implement a reduction in force but only whether the agency had met its contractual obligations before doing so. 49 D.C. Reg. 1140, Slip Op. No. 438 at p. 4, PERB

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which was overruled by *Michigan Family Resources*, 475 F.3d at 753, and is no longer used by this Board. *Johnson*, Slip Op. No. 925 at p. 9 n.2.

Case No. 95-A-08 (2002). In the case at bar, the arbitrator did not overturn the Petitioner's authority to discipline but rather determined *when* the agency had met its contractual obligations before doing so.

The award neither overturns the discipline even in this particular case nor removes the Authority's right to discipline generally. If the arbitrator had found the discipline inappropriate under the circumstances and overturned it, the arbitrator's award still would not usurp the Authority's managerial right to discipline. *See D.C. Metropolitan Police Dep't v. F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Clark Gutterman)*, 39 D.C. Reg. 6232, Slip Op. No. 282 at pp. 4-5, PERB Case No. 87-A-04 39 (1992).

The award does not conflict with section 1-617.08(a), nor does it exceed the jurisdiction of the arbitrator. There is no basis upon which to modify, set aside, or remand the award. Therefore, the award is sustained.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Award is sustained. Therefore, the arbitration review request of the District of Columbia Water & Sewer Authority 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.

June 12, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 04-A-24 is being transmitted via U.S. Mail to the following parties on this the 13th day of June 2012.

Moustaafa Dozier
Labor Relations Manager
D.C. Water and Sewer Authority
5000 Overlook Ave. SW
Washington, D.C. 20032

U.S. MAIL

James Ivey, President
AFSCME, Local 2091
D.C. Council 20
1724 Kalorama Avenue NW
Washington, D.C. 20009

U.S. MAIL

Sheryl V. Harrington
Secretary