**THE DISTRICT OF COLUMBIA**

**PUBLIC EMPLOYEE RELATIONS BOARD**

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| In the Matter of: | ) | |
| District of Columbia Child and Family Services Agency, | ) | |
| Petitioner, | ) | PERB Case No. 08-A-07 |
| and | ) | Opinion No. 956 |
| American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO, | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

### I. Statement of the Case:

The District of Columbia Child and Family Services Agency ("CFSA" or "Agency") filed an Arbitration Review Request ("Request") in the above captioned matter. CFSA seeks review of an arbitrator's award ("Award"), which rescinded the termination of three (3) employees. CFSA contends that: (1) the arbitrator exceeded his authority; and (2) the Award is contrary to law and public policy. (See Request at pgs. 5 and 7). The American Federation of State, County and Municipal Employees, Council 20, Local 2401, AFL-CIO ("AFSCME" or "Union") opposes the Request.

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

## II. Discussion

On January 8, 2008, the bodies of four children were discovered at the home of Banita Jacks, a resident of the District of Columbia. (See Award at p. 2). Prior to this time, on July 12, 2006, and April 27, 2007, there had been calls to the CFSA hotline concerning Banita Jacks' family situation. The last call triggered a CFSA investigation that began on April 28, 2007. CFSA Social Workers Nikole Smith, Carl Miller, and Foletia Nguasong were identified as personnel who had contact with the family. On January 14, 2008, the CFSA gave each of the three (3) employees a 30-day advance notice of proposed removal. (See Award at p. 2). The proposed removal was based upon actions of the employees that: (1) "threatened the integrity of government operations," and (2) were "detrimental to public, health, safety and welfare." (Award at p. 2).

The employees were given the opportunity to be heard by an agency Hearing Officer, who on February 13, 2008, recommended that the removal actions be dismissed. (See Award at pgs. 2-3). The Mayor "prohibited the Agency Deciding Official from considering the Hearing Officer's recommendation." (Award at p. 3). Thus, the CFSA Director, who served as the Deciding Official, rejected the Hearing Officer's recommendation and issued Notices of Final Decision terminating the three (3) employees. (See Award at p. 3). On March 6, 2008, the Union filed grievances on behalf of the employees. The Agency denied the grievances on March 27, 2008. On April 22, 2008, the Union invoked arbitration over the terminations. (See Award at p. 3).

The issue before the arbitrator was: "Did the Agency have cause, as required by Article 7 of the collective bargaining agreement, to terminate Carl Miller, Nikole Smith and Foletia Nguasong and, if not, what shall be the remedy?" (Award at p. 2).

At arbitration the Agency argued that the Grievants were lawfully terminated from their positions for cause, because they did not follow CFSA policy. (See Award at p. 14). Specifically, the Agency claimed that "[Ms.] Nikole Smith's failure to probe the July 2006 caller exhibited poor professional judgment. [Mr.] Carl Miller failed to report that the caller said that one of the children was being held hostage, and did not ask what the caller meant by her use of the 'hostage' language. [Also,] Mr. Foletia Nguasong failed to make contact with individuals with close ties, such as paternal grandparents, relatives, and neighbors who could have provided information on the family. When he received additional information, he failed to conduct any follow-up investigation to contact or locate the family. Instead, the case remained closed." (Award at pgs. 14-15).

The Union countered that the Agency failed to establish by a preponderance of the evidence that it had cause to terminate the Grievants. The Union argued that the Agency's only witness testified that she was neither the deciding official nor the proposing official. Also, the Union contended that the Grievants were outstanding employees. The Agency's sole witness, Audry Sutton, stated that Nicole Smith "had an

outstanding record, was a valuable member of the Agency, had been promoted, and had never been disciplined." (Award at p. 8). Carl Miller testified that Mrs. Sutton told him that "[e]veryone here loves your work." (Award at p. 9). Sutton also stated about Foletia Nguasong, "He had an outstanding record." (Award at p. 12). The Union asserted that the Mayor ordered that the employees be terminated without investigation and prohibited CFSA from considering mitigating evidence. (See Award at p. 15). Finally, the Union asserted that the Grievants were provided no specific information concerning the reason for their termination.

In an award issued on September 2, 2008, Arbitrator John Truesdale found that "[CFSA] did not have cause to terminate [the Grievants][;] therefore [he] sustain[ed] the Union's grievances." (Award at pgs. 18-19).[1] In support of his decision that there was no cause to terminate the Grievants, the arbitrator found that the termination decisions: (1) failed to meet basic standards of fairness and due process[2] (see Award at p. 16); (2) violated Article 7 of the collective bargaining agreement (see Award at pgs. 16-17); and (3) merited reversal under *United Paperworkers International Union, AFL-CIO v. Misco*, 484 U.S. 29 (1987) (see Award at p. 18). The arbitrator ordered that the Grievants be reinstated without loss of seniority and be made whole for loss of pay and benefits, with interest, and that the Grievants' records be expunged. He also ordered that a letter be placed in the Grievants' personnel folders for three (3) years reiterating the Agency's Hotline Policy and the Intake and Investigations Policy. (See Award at pgs. 18-19).

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1 Arbitrator Truesdale first discussed various standards of proof used by arbitrators, stating as follows:

> In discharge and disciplinary cases, the burden of proof, a composite of the burden of proceeding and the burden of persuasion, lies with the employer. The amount of evidence necessary for a favorable decision is the 'quantum of proof'. As stated in *Elkouri & Elkouri*, the quantum of proof varies according to the issue to be decided. In ordinary discipline and discharge cases, arbitrators apply the "preponderance of the evidence" standard. But in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply the higher "clear and convincing" standard, and some go further to apply the 'beyond a reasonable doubt' standard.
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> This case certainly involves allegations of stigmatizing behavior, for in effect the Agency has laid the blame for the tragic deaths of these four children on the Grievants without solid evidence that the matter was fully investigated; that consideration was given to mitigating factors, that their stellar and unblemished records over many years of service to the Agency and to the public, to notions of progressive discipline; and that they were given a fair opportunity to be heard. (Award at p. 16).

2 The arbitrator found that the Grievants were only told that they had contact with the Jacks family and were not given any other reason for the proposed removal action. (See Award at p. 17).

CFSA filed a Request challenging the arbitrator's Award. CFSA asserts that the arbitrator exceeded his authority by "implicitly applying a higher level of proof and imposing a standard which is outside of [the] District's regulatory provisions that are applicable to District government employees in disciplinary proceedings." (Request at p. 6). CFSA also asserts that the Award on its face is contrary to law and public policy because Arbitrator Truesdale "improperly applied a higher level of proof whereas the District Personnel Regulations mandate that the standard of proof for the Agency is preponderance of the evidence ([pursuant to] DCMR § 6-1603.9)." (Request at pgs. 7-8).

The Union opposes the Request. CFSA's Request and AFSCME's Opposition are before the Board for disposition.

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 where:

1. "the arbitrator was without, or exceeded, his or her jurisdiction";

2. "the award on its face is contrary to law and public policy"; or

3. the award "was procured by fraud, collusion or other similar and unlawful means."

D.C. Code § 1-605.02(6) (2001 ed.).

**Procedural Claims**

The Agency asserts that the arbitrator applied a higher standard of proof than mandated by the District's regulatory provisions. (See Request at p. 6, citing 6 DCMR § 1603.9). (See also, District Personnel Manual ("DPM"), Chap. 16, § 1603.9,[3] which contains the identical provision.)

CFSA asserts that the preponderance of the evidence standard found in the DCMR is applicable in the three (3) terminations because Article 7, Section 8 of the parties' collective bargaining agreement

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[3] 6 DCMR §1603.9 provides as follows:

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

provides that "discipline shall be ... consistent with ... D.C. Office of Personnel regulations." (Request at p. 7). CFSA also claims that "the arbitrator could not impose a standard that was heavier and outside of the regulatory authority. Neither the collective bargaining agreement, nor the personnel regulations gave the arbitrator this authority." (Request at pgs. 6-7).

The Union disputes CFSA's assertion that the arbitrator must apply the standard of proof found in the DPM. Relying on D.C. Code § 1-616.52 (d),[4] the Union asserts that the parties' collective bargaining agreement takes precedence over DPM regulations. (See Opposition at pgs. 4-5).[5] The Union claims that "the section of the personnel regulations upon which the Agency relies is part of the statutory grievance procedure under D.C. Code § 1-616.53, and not one under a collective bargaining agreement." (Opposition at p. 4).

The Board has previously addressed the issue of whether an arbitrator must adopt the same standard of proof used by an agency when determining whether just cause for the discipline was met. In *District of Columbia Metropolitan Police Department and Fraternal Order of Police/ Metropolitan Police Department Labor Committee (on behalf of Officer Anthony Brown)*, - DCR-, Slip Op. No. 757 at pgs. 7-9, PERB Case No. 03-A-06 (2004), ("*Brown*"), the Board considered "*whether an [a]rbitrator, in reviewing a Police Disciplinary Trial Board decision, is authorized to use a different standard of proof than the [Police] Trial Board did when determining whether just cause for the discipline was met, where the Police Department procedures expressly set forth the standard of proof.*" (emphasis in the original).

*Brown* involved an arbitration review request concerning discipline for conduct that was considered to be a criminal act. In *Brown*, the arbitrator applied the higher standard of proof found in criminal cases, i.e., beyond a reasonable doubt, when determining whether the MPD had cause for terminating the grievant in that case. The Board found that MPD's regulations set forth the preponderance of the evidence standard as "the appropriate standard of proof to be used in a disciplinary proceeding based on criminal charges." (*Brown* at p. 8). The Board held that "if a standard of proof is set forth in law, rule, regulation, or a collective bargaining agreement, an arbitrator's failure to apply the prescribed standard will constitute a basis for finding the award deficient, as contrary to law, rule, regulation, or as failing to draw its essence

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[4] D.C. Code § 1-616.52(d) provides as follows: "Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by a labor organization."

[5] DPM, Chap. 16, Sec. 1601.2, provides: "Any procedural system for the review of adverse actions negotiated between the District of Columbia and a labor organization shall take precedence over the provisions of this chapter for employees in a bargaining unit represented by a labor organization, to the extent that there is a difference. A contract, memorandum of understanding or collective bargaining agreement cannot modify the standard for cause as defined in § 1603."

from the agreement."[6] *Brown* at p. 8. The Board concluded that the arbitrator in *Brown* "clearly failed to follow MPD's [established] regulations and procedures ... [and therefore] exceeded his authority [when he applied] a higher standard of proof. Thus, [MPD] established a [statutory] basis for review." (*Id.* at p. 8).

It must be noted that *Brown* was a case of first impression. Nothing the record suggests that *Brown* has been applied in District agencies other than the MPD, where a specific regulation states that in discipline matters, including criminal charges, the preponderance of the evidence standard is to be used. Nothing in the record indicates that CFSA has a similar rule or regulation.

Here, the Board must determine whether to grant CFSA's Request based on its argument that, in reviewing the disciplinary actions of three (3) employees, the arbitrator was not authorized to apply a different standard of proof than CFSA applied, where the collective bargaining agreement requires, at Article 7, Section 3, that discipline will be "consistent with ... D.C. Office of Personnel Regulations."[7] CFSA requests that the Board overturn the Award.[8]

In the present case, the arbitrator concluded that "[CFSA] did not have cause to terminate [the Grievants] and therefore [he] sustain[ed] the Union's grievances." (Award at pgs. 18-19). In reaching his conclusion on the whether there was cause for discipline, the arbitrator discussed the standard of proof as follows: *"In ordinary discipline and discharge cases, arbitrators apply the 'preponderance of the evidence' standard. But in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply the higher 'clear and convincing' standard, and some go further to apply the 'beyond a reasonable doubt' standard. This case certainly involves allegations of stigmatizing behavior. . . ."* (emphasis added). (Award at p. 16; also, see n. 1 *supra*).

While the arbitrator states that the preponderance of the evidence standard is used in termination cases, he also states that "the higher 'clear and convincing' [and] 'beyond a reasonable doubt' standard" may be used in cases involving criminal conduct or stigmatizing behavior. (Award at p. 16). He then comments that "[t]his case certainly involves allegations of stigmatizing behavior." (Award at p. 16). This creates an ambiguity as to which standard was actually used by the arbitrator. In the present case, we find that the arbitrator does not clearly state which standard of proof he applied when determining whether there was cause for termination. In the absence of an articulated standard of proof, we cannot rule on whether

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6 Citing *U.S. Department of Defense Education Activity v. Federal Education Ass'n*, 56 FLRA 779 (2000).

7 It should also be noted that CFSA's cite to Section 3 is subject to more than one interpretation.

8 CFSA also requests that the Board "overturn this Award, deny the grievance, and assess the fee and expenses of the arbitrator to the Union." (Request at p. 10).

there is merit in CFSA's assertion that the arbitration award conflicts with law and public policy or whether the arbitrator exceeded his authority.

Reviewing bodies have limited power to remand cases to an arbitrator. Furthermore, it is well-settled that once an arbitrator has issued an opinion, "he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration." *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Company*, 442 F.2d 1234, at p. 1238 (D.C. Cir. 1971); and see *Williams v. Richey,* 948 A.2d 564, 567 n. 1 (D.C. 2008). We note that under *United Steel Workers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960), an arbitration decision may not be modified simply because the arbitrator's decision is ambiguous.[9] Nevertheless, when an arbitration award is ambiguous, reviewing bodies may remand the award for clarification. "[A]n award is ambiguous if it is susceptible to more than one interpretation." *American Postal Workers Union, AFL-CIO* v. *United States Postal Service,* 254 F. Supp. 2d 12, 16 (D.D.C. 2003) (citations omitted). Here, the only ambiguity is in the standard of proof used by the arbitrator, rather than the award. Remand for clarification permits the reviewing body to avoid "judicial guessing" and instead gives the parties the decision for which they bargained. *Id.* at 15. The power to remand for clarification has been described as the "necessary corollary to the courts' reluctance themselves to interpret either the collective bargaining agreements or arbitration awards based on the construction of such agreements." (*Id.* at 15, n.1). (citation omitted).

In the present case, the arbitrator mentioned the three (3) standards of proof and under what conditions each is sometimes used by the arbitrators, but did not indicate which one he applied. In *Williams v. Richey,* 948 A.2d at 568, the District of Columbia Court of Appeals found that the trial court appropriately remanded a case for clarification where the arbitrator's remedy was subject to more than one interpretation. "[T]he [trial] court sought to clarify the award that it was being asked to enforce." *Id.* at

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[9] In *United Steel Workers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597-98 (1960), the Supreme Court opined as follows:

> The opinion of the arbitrator in this case . . . is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to 'the law' for help in determining the sense of the agreement. A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable, for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. Moreover, we see no reason to assume that this arbitrator has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration. It is not apparent that he went beyond the submission.

566. While the remedy in the present case is clear, the standard of proof used to determine the case is subject to more than one interpretation. Therefore, under *Williams v. Richey,* the Board may remand this case for clarification. In *Williams v. Richey,* the D.C. Court of Appeals approvingly noted that the trial court was clear in its order that the proceedings were not being remanded, but rather the court only sought clarification on two specific questions.[10] (See *Williams v. Richey,* 948 A.2d at 566). We find the arbitrator created an ambiguity regarding the standard of proof he utilized. Therefore, consistent with *Williams v. Richey,* we are remanding this case to Arbitrator Truesdale for the limited purpose of seeking clarification on the question of what standard of proof the arbitrator used when determining the question of cause.[11] The merits of this case are not being remanded. As in *Williams*, "[we are] in no way reopening the arbitration proceedings." *Williams v. Richey,* 948 A.2d at p. 566.

Furthermore, the Federal Labor Relations Authority ("FLRA") has determined that re-submission to the arbitrator is necessary when the record does not permit it to determine whether the arbitration award conflicts with law and public policy. See *United States Department of Justice Federal Bureau of Prisons Federal Correctional Complex Coleman, Florida v. American Federation of Government Employees Council of Prison Local 506*, 63 FLRA 351, 354-355 (2009) ("*Bureau of Prisons*").[12] Similarly here, in the absence of the arbitrator's articulation of the standard of proof used, it is difficult for the Board to determine the merits of the Agency's assertion that the arbitrator exceeded his authority or whether the Award is contrary to law and public policy. *(Id.* at 5).

In remanding this case, the Board is not making a determination as to whether grounds exist to modify or set aside the Award. Therefore, it is not necessary to rule on the Union's request to file briefs under Board Rule 538.2.

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[10] Specifically, the D.C. court of Appeals listed the questions for remand and stated, "[i]n remanding this matter to you for clarification, I am in no way reopening the arbitration proceedings." *Williams v. Richey,*, 948 A. 2d at 566.

[11] The Board seeks clarification with respect to one question only: What standard of proof was used to determine whether there was 'just cause' to terminate the three (3) Grievants?

[12] It should be noted that the FLRA describes its role in determining a law and public policy claim as "*de novo* review." See *Bureau of Prisons, id.*

## ORDER

**IT IS HEREBY ORDERED THAT:**

1. This matter is remanded to Arbitrator John Truesdale for the sole purpose of clarification of the standard of proof used in determining whether the District of Columbia Child and Family Services Agency had cause to terminate the Grievants.

2. The arbitrator's clarification award shall be issued within fifteen (15) days of the issuance of this Decision and Order.

3. Pursuant to Board Rule 559.1, this Decision and Order shall be final upon issuance.

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

May 21, 2010

## CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-A-07 was transmitted via Fax and U.S. Mail to the following parties on this the 21st day of May 2010.

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