

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**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. 05-A-10
)	
and)	
)	Opinion No. 843
)	
American Federation of Government Employees,)	
Local 872, AFL-CIO,)	
)	
Respondent.)	
)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

The District of Columbia Water and Sewer Authority ("WASA" or "DCWASA"), filed an Arbitration Review Request. WASA seeks review of an Arbitration Award ("Award") that rescinded the termination of Donnell Banks and Cleveland Hill.

Arbitrator Jane Rigler was presented with the issue of "whether DCWASA had cause to terminate the employment of Donnell Banks and Cleveland Hill." (Award at p. 1) The Arbitrator found that WASA "failed to prove that it had cause to terminate the employment of Donnell Banks and Cleveland Hill; but did prove that it had cause to discipline them." (Award at p. 6) However, the Arbitrator opined that due to the Grievants' serious misconduct, the appropriate discipline in this case should be a lengthy, unpaid suspension covering the period February 14, 2005 (the date of the Grievants' termination) through August 16, 2005 (the date of the Arbitrator's Award). (See Award at p. 8). WASA is seeking review of the Award on the ground that the Award on its face is contrary to law and public policy. The American Federation of Government Employees, Local 872 ("AFGE" or "Union") opposes the Arbitration Review Request ("Request"). AFGE is requesting that the Board deny WASA's Request for two reasons. First, AFGE claims that WASA's Request is

untimely. Second, AFGE asserts that "WASA has failed to establish a statutory basis for the Board's review of this case." (Union's Opposition at p. 1)

The issues before the Board are whether WASA's Request is timely 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

Donnell Banks and Cleveland Hill were employed by WASA as Water Services Workers in the Water Services Department until February 14, 2005. (See Award at p. 1) Banks' employment with WASA began in 1986 and Hill's in 1978.

On October 26, 2004, Banks and Hill "working together, wearing uniforms which identified them as DCWASA employees, and riding in a DCWASA-owned truck (with DCWASA identifying marks on the outside), were arrested at approximately 11:40 a.m. in a high crime area of Washington, D.C., an area to which they had been assigned." (Award at p. 1). Banks and Hill were charged with possession of marijuana and intent to distribute. "Within a day or so of October 26, WASA management became aware of the arrests and began an investigation to determine whether internal discipline was appropriate. Martin Wallace, Distribution Manager for the Department of Water Services, assigned Ayoldele McClenney to conduct the investigation." (Award at pgs. 1-2) McClenney promptly sought to speak with Banks and Hill about their arrests. Banks and Hill declined to provide "McClenney with any information or explanation, asserting that the attorneys they had retained to represent them in the criminal proceeding had advised them to remain silent about the matter. McClenney did, however, obtain a copy of the police report which indicated marijuana had been found in Hill's and Banks' possession." (Award at p. 2).

"Relying on McClenney's investigation, Martin Wallace, by memo dated December 8, 2004, wrote Kofi Boateng, . . . [D]irector of the [D]epartment of [W]ater [S]ervices, and requested that . . . [Banks and Hill] be terminated from their positions." (Award at p. 2). Wallace's recommendation was based on Section 12 C, in the table of penalties, of the parties' collective bargaining agreement. (See Award at p. 2). The table, in Section 12, deals with "failure of good behavior or misconduct which is of such a nature that it would interfere with the efficiency or integrity of [WASA] operations or discredit the employee's performance. Subsection C describes, as such misconduct, 'commission of or participation in criminal, dishonest, or other conduct of a nature that would interfere with the efficiency or integrity of [WASA] operations; or adversely affect the public's perception of . . . [WASA] or the employee's performance'." Id.

On December 10, 2004, Wallace wrote Banks and Hill and "provided each with notice that his termination has been proposed. Hill and Banks remained on the job and, as provided in the parties' contract, sought review of Wallace's recommendation from a 'neutral third party', DCWASA employee Warren McHenry. McHenry, in making a recommendation to Kofi Boateng, opined that he could find nothing in the collective bargaining agreement which would preclude the

termination of Hill and Banks but believed “[that] the information and evidence available at [the] time [was] speculative and [did] not solidly support the proposed action’.” (Award at pgs. 2-3)

On January 19, 2005, Kofi Boateng wrote Hill and Banks. In his January 19th letter, Boateng referred to Hill’s and Banks’ infraction in the following way: “12. Failure of Good Behavior or Misconduct which is of such a Nature that it would Interfere with the Efficiency or Integrity of [WASA] Operations or Discredit the Employee’s performance.” (Award at p. 3) In addition, Boateng stated that he found the “disciplinary charge . . . fully supported by the preponderance of the evidence and warrant[ing] that [their] employment be terminated . . . His letter also advised . . . [Banks and Hill that they] were entitled ‘to grieve this action’. Choosing to do so, Banks and Hill remained on the job.”¹ (Award at p. 3)

“The criminal charges against Banks and Hill resulted in a single trial, before a judge, on February 1, 2005. Each was convicted of the crime of ‘possession of marijuana’ . . . Warren McHenry learned of the convictions and, by memo dated February 11, 2005, [he] informed Boateng. McHenry’s February 11, 2005 memo also indicated that, because of the convictions, he had changed his opinion and now believed there was sufficient evidence to justify terminating Banks and Hill. . . Charles Kiely, Acting Director, Water Services, wrote Hill and Banks on February 14, 2005, referred to the infraction as a ‘12. Failure of Good Behavior or Misconduct which is of such a nature that it would interfere with the efficiency or integrity of [WASA] operations or discredit the Employee’s performance’, and informed them that they were terminated. . . Banks and Hill were removed from duty that day.” (Award at pgs. 3-4)

Banks and Hill grieved their terminations. The matter proceeded to a June 16, 2005 arbitration before Arbitrator Jane Rigler. The issue before the Arbitrator was whether WASA had cause to terminate the employment of Donnell Banks and Cleveland Hill. In an Award issued on August 16, 2005, the Arbitrator indicated that it was “clear that . . . [Donnell Banks and Cleveland Hill] were each convicted of the crime of possession of marijuana . . . [and that]] [i]t is beyond dispute that criminal convictions must be established by proof beyond a reasonable doubt. [Moreover,] [n]either Banks or Hill . . . appealed [their] criminal conviction. [Furthermore,] [a]ll these facts support [a] conclusion that . . . WASA established that Banks and Hill possessed marijuana on October 26, 2004.” (Award at pgs 4-5).

^{1/} The Arbitrator indicated that provisions of the collective bargaining agreement, in effect at that time, specifically provided that employees whose termination had been proposed were entitled to remain employed until an expedited arbitration proceeding determined whether they could be terminated. However, the Arbitrator noted that the expedited arbitration provisions of the contract were apparently no longer operative when she considered Hill’s and Banks’ grievances. (See Award at p. 3, n.2)

The Arbitrator also found "that Banks' and Hill's convictions would adversely affect the public's perception of [WASA]." (Award at p. 5). Specifically, the Arbitrator noted that :

Most people, I believe, regard a criminal conviction as a very serious matter. The crime committed by. . . [Banks and Hill], although a misdemeanor, was committed in the middle of their work day, while Banks and Hill were in uniform, and entailed the use of a truck not only owned by DCWASA but also bearing DCWASA identifying marks. The factual circumstances surrounding Banks' and Hill's crimes persuade me that the public's perception of [WASA] would be adversely affected by the misconduct of Banks and Hill. (Award at p. 5)

Despite her conclusion that WASA "had cause to discipline Hill and Banks, [the Arbitrator found]. . . that discharge was an unreasonable sanction." (Award at p. 6) She noted that the infraction with which Hill and Banks were charged specified a range of discipline, from reprimand to removal, for a first offense. In addition, the Arbitrator observed that both Hill and Banks were longtime employees with "lengthy and blemish-free employment history." *Id.* In light of the above, the Arbitrator determined that the more appropriate sanction in this case was a "lengthy, unpaid suspension." *Id.*

WASA contends that the Award is on its face is contrary to law and public policy because the Arbitrator's "decision runs directly contrary to the strong public interest in maintaining a drug-free workplace." (Request at p. 5) AFGE opposes WASA's Request on the grounds that: (1) WASA's submission is untimely and (2) WASA has failed to establish a statutory basis for the Board's review of this case.

With respect to timeliness, AFGE asserts that "WASA admits receiving the Award on August 18, 2005 . . . [However,] WASA initiated review of the Award by filing its Arbitration Review Request with the Board on September 9, 2005 There are twenty-two (22) calendar days between August 18 and September 9, 2005. Therefore, [AFGE claims that] WASA's Review Request is untimely and should be denied." (Union's Opposition at p. 5)

Board Rules 538.1, 501.4 and 501.5 provide in relevant part as follows:

538.1 - Filing

A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board **not later than twenty (20) days after service of the award**
(Emphasis added)

501.4 - Computation - Mail Service

Whenever a period of time is measured from the service of a pleading and service is by mail, five (5) days shall be added to the prescribed period. (Emphasis added)

501.5 - Computation - Weekends and Holidays

In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included. . . . Whenever the prescribed time period is eleven (11) days or more, [Saturdays, Sundays and District of Columbia Holidays] shall be included in the computation. (Emphasis added)

In the present case, Arbitrator Rigler issued her Award on August 16, 2005. (See Award at p. 7). There is no dispute that the Award was served on the parties by mail. However, AFGE argues that the Award was received by WASA on August 18, 2005 and that pursuant to Board Rule 538.1, WASA was required to file their Request within twenty days after the receipt date, or by September 7, 2005. WASA did not file their Request until September 9, 2005. Thus, AFGE claims that WASA's September 9th filing was two (2) days late. For the reasons discussed below, we disagree.

AFGE's timeliness argument is based on their belief that the receipt date is the operative factor which triggers the computation of the twenty-day filing requirement noted in Board Rule 538.1. However, Board Rule 538.1 states that an arbitration review request must be filed "no later than twenty (20) days after service of the award." (Emphasis added.) Pursuant to Board Rule 501.4, five days must be added to the prescribed twenty-days if service is by mail, as it was in this case. In view of the above, WASA was required to file their Request no later than twenty-five (25) days after the service date. Since it is undisputed that the Award was mailed on August 16, 2005, WASA was required to submit their pleading no later than September 10, 2005. Therefore, we find that WASA's September 9th filing was timely.

We now turn to WASA's claim that the Award on its face is contrary to law and public policy. 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:

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).

In the present case, WASA claims that the Award on its face is contrary to law and public policy because the Arbitrator's "decision runs directly contrary to the strong public interest in maintaining a drug-free workplace." (Request at p. 5)

In attempting to show that the Award violates law and public policy, WASA argues that the "public policy contravened by [Arbitrator Rigler's] reinstatement of these two employees is WASA's, the District of Columbia's and the Federal Government's express interest and obligation to provide a drug-free workplace. [Also, WASA asserts that,] it is beyond dispute that Banks and Hill were found – beyond a reasonable doubt no less – to have been in possession of *a quarter pound of marijuana* during work hours. [Furthermore, WASA contends that][i]n direct contradiction of the public policy announced by the Drug-Free Workplace Act of 1988 and its progeny, the arbitrator has inexplicably ruled that possession of even this massive quantity of illicit drugs at WASA is not a terminable offense." (Award at p. 5, emphasis in original.)

In support of its public policy argument WASA states the following:

On September 15, 1986, President Reagan signed Executive Order 12564, 51 Fed. Reg. 32,889 (1986), calling for various measures designed to create a "drug-free Federal workplace." Thereafter, in 1988, Congress passed the Federal Drug-Free Workplace Act. 41 U.S.C. § 701, et seq. The law requires that both federal contractors and recipients of federal grants establish various policies to ensure a drug-free workplace, including the promulgation of a statement notifying employees, *inter alia*, that "the unlawful . . . possession or use of a controlled substance is prohibited" in the workplace. See 41 U.S.C. §§ 701(a)(1)(A), 702(a)(1)(A).

Consistent with the public policy encapsulated by this federal Drug-Free Workplace Act of 1988, the District of Columbia has promulgated its own Drug Free Workplace Policy via Mayor's Order 90-27 . . . That Order affirmatively states that "[i]t is the policy of the District of Columbia government to provide a drug free workplace for all employees" and expressly prohibits "possession . . . of a controlled substance in the workplace." . . .

As a grantee of federal assistance, WASA is required to comply with the requirements of the Drug-Free Workplace Act of 1988, and, consistent with Mayor's Order 90-27, . . . [WASA] also has promulgated a Drug-Free Workplace policy . . . Moreover, Article 17 of the Parties' collective bargaining agreement makes specific reference and requires adherence to the Drug-Free Workplace Act . . . The policy explicitly states that "it is the policy of . . . [WASA]

that all workplaces, facilities and vehicles be kept drug-free.” . . . In light of this articulated goal, “employees and contractors are prohibited from unlawfully possessing . . . any controlled substances in the workplace.” . . .

* * *

The arbitrator’s ruling in this matter flies in the face of all of the above authorities. The employees in question were arrested for possession with intent to distribute, and the quantity of drugs in their possession surely supports that charge. It is not disputed that they were ultimately convicted of possession – a drug-crime indisputably occurring during working hours, while in uniform, while riding in a marked WASA truck. Rather than fostering a drug-free workplace, the arbitrator’s decision establishes that possession – *and criminal conviction of such possession* – of mass quantities of marijuana in the WASA workplace is not, in fact, a terminable offense. In so doing, the arbitrator’s decision is in direct conflict with the affirmatively stated public policies of the District of Columbia and the United States.

(Award at pgs. 6-8, emphasis in original)

The possibility of overturning an arbitration decision on the basis of public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to an arbitrator’s interpretation of the contract. American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F.2d 1, 8 (D.C. Cir. 1986). “[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of ‘public policy.’” Id. Also, a petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well-defined, public policy grounded in law or legal precedent. See United Paperworkers International Union, AFL-CIO v. Misco, Inc. 484 U.S. 29, 43; Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971). Moreover, the violation must be so significant that the law or public policy “mandates that the Arbitrator arrive at a different result.”² Furthermore, WASA has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” MPD v. FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

WASA argues that the Award violates the Federal Drug-Free Workplace Act (“Act”) 41 U.S.C. § 701 et seq., the District of Columbia Mayor’s Order 90-27 and WASA’s own Drug-Free

² MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing AFGE, Local 631 and Dep’t of Public Works, 45 DCR 6617, Slip Op. 365 at p. 4 n, PERB Case No. 93-A-03 (1998); see District of Columbia Public Schools and The 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) (same).

Workplace Policy. The Act, the Mayor's Order and WASA's own Drug-Free Workplace Policy all contain language regarding the fact that it is the policy of both the federal government and the District of Columbia government to provide a drug-free workplace for all employees, and to require all employees to abide by this policy. In addition, the above referenced policies all contain language concerning employee sanctions and remedies. However, none of the policies identified by WASA, mandate removal. Instead, they all provide that violations of these policies may result in disciplinary action up to and including removal. Since termination is not mandatory under any of the above-referenced policies, we find that WASA has not cited any specific law or public policy that was violated by the Award. It is clear that WASA's argument involves a disagreement with the Arbitrator's ruling. This Board has held that a "disagreement with the arbitrator's interpretation . . . 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 pgs. 2-3, PERB Case No. 95-A-02 (1995).

WASA also claims that "Article 17 of the [p]arties' collective bargaining agreement makes specific reference to and requires adherence to the Drug-Free Workplace Act . . ." (Request at pgs. 6-7) Therefore, WASA believes that the Award violates the public policy articulated in Article 17 of the collective bargaining agreement.

We have held that by agreeing to submit the settlement of a grievance to arbitration, it is the Arbitrator's interpretation, not the Board's, that the parties have bargained for. See, 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). In addition, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement . . . as well as his evidentiary findings and conclusions . . ." Id. Moreover, "[this] 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 246, 34 DCR 3616, Slip Op. No. 157 at P. 3, PERB Case No. 87-A-02 (1987). In the present case, the parties submitted their dispute to an Arbitrator and WASA's disagreement with the Arbitrator's interpretation of the language in Article 17 of the parties' collective bargaining agreement is not grounds for reversing the Arbitrator's Award. See, Metropolitan Police Department v. Public Employee Relations Board, D.C. Sup. Ct. No. 04 MPA 0008 (May 13, 2005) and Metropolitan Police Department v. Public Employee Relations Board, D.C. Sup. Ct. No. 01 MPA 18 (September 17, 2002).

We find that Arbitrator Rigler was within her authority to rescind the Grievants' termination. We have held that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." D.C. Department of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). In addition, we have found that an arbitrator does not exceed her authority by exercising her equitable power, unless it is expressly

restricted by the parties' collective bargaining agreement.³ 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). Furthermore, the

Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.* 363, U.S. 593, 597 (1960), that arbitrators bring their "informed judgment" to bear on the interpretation of collective bargaining agreements, and that is "especially true when it comes to formulating remedies." [Also,] [t]he . . . courts have followed the Supreme Court's lead in holding that arbitrators have implicit authority to fashion appropriate remedies . . . (See, Metropolitan Police Department v. Public Employee Relations Board, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6, (May 13, 2005))

In the present case WASA does not cite any provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that WASA "failed to prove that it had cause to terminate the employment of Donnell Banks and Cleveland Hill; but did prove that it had cause to discipline them," she had the authority to determine what she deemed to be the appropriate remedy.

In addition to the above-referenced public policy argument, WASA also argues that "the National Labor Relations Board, to whose decisions PERB turns for guidance, has similarly identified a strong public interest in curbing employee drug offenses. For example, in the matter, Pennsylvania Power and Light Co. and Local 1600, Int'l Brotherhood of Electrical Workers, AFL-CIO, 301 NLRB 1104 (1991), the NLRB held that an employer was not required to provide to the union the identity of employees who had informed the employer of their coworkers violation of the employer's drug-free workplace policy. [WASA contends that in Pennsylvania Power the NLRB] . . . recognized that its ruling departed from its usual position that the parties should bargain over the disclosure of partially confidential information. [However, WASA notes that the NLRB] . . . explained . . . that this departure was necessitated by the 'strong interest in fostering efforts to create safe and drug-free workplaces.' [Furthermore, WASA points out that]. . . Member Devaney specifically stressed that 'he accords decisive weight in this matter *to the public policy* of encouraging employers – and labor organizations – to work *to providing drug-free workplaces.*'" (Request at p. 7) In view of the above, WASA claims that the Award in this case is not consistent with the NLRB's strong public policy regarding removal of drugs from the workplace. As a result, WASA is requesting that the Board reverse the Award on this ground.

The decision in Pennsylvania Power is not analogous to the instant matter. The issue in

³ We note that if WASA had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

Pennsylvania Power concerned the employer's discovery obligation during the parties grievance and arbitration process and not any express public policy requiring that an employee convicted of possession of marijuana be terminated. Therefore, WASA has failed to provide a basis to vacate the Award.

In view of the above, we find no merit to WASA's arguments. Also, we believe that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law or public policy. Therefore, no statutory basis exists for setting aside this Award. As a result, we deny WASA's Arbitration Review Request.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Water and Sewer Authority's 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.

June 7, 2006

CERTIFICATE OF SERVICE

This is to certify that the attached corrected Decision and Order in PERB Case No. 05-A-10 was transmitted via Fax and U.S. Mail to the following parties on this the 8th day of June 2006.

Andres M. Grajales, Esq.
Legal Rights Attorney
AFGE-Field Services Department
80 F Street, N.W.
Washington, D.C. 20001

FAX & U.S. MAIL

David R. Warner, Esq.
Venable, Baetjer, Howard
& Civiletti, LLP
575 7th Street, N.W.
Washington, D.C. 20004

FAX & U.S. MAIL


Sheryl Harrington
Secretary