

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, Office of
Unified Communications,

Respondent,

and,

National Association of
Government Employees, SEIU,
Local R3-07,

Petitioner.

PERB Case No. 12-E-02

Slip Opinion No. 1244

DECISION AND ORDER

I. Statement of the Case

On December 13, 2011, the National Association of Government Employees, SEIU, Local R3-07 (“Nage” or “Petitioner”) filed a Petition for Enforcement (“Petition”) against the District of Columbia Office of Unified Communications (“Petitioner”, “OUC” or “Agency”). NAGE seeks enforcement of PERB Case No. 10-A-07, Slip Opinion No. 1132. On December 1, 2009, the Agency by and through its representative, the District of Columbia Office of Labor Relations and Collective Bargaining (“OLRCB”), filed an Arbitration Review Request (“Request”) in the above captioned matter. The Petitioner sought review of an arbitration award (“Award”) that sustained a grievance filed on behalf of Yolanda Geter (“Grievant”, or “Geter”) and reversed her termination from employment.

II. Discussion

On September 30, 2008, the OUC terminated the Grievant from her position as a telecommunications equipment operator. The OUC charged the Grievant with Absent Without Official Leave (AWOL) and Insubordination totaling six specifications. (See Award at pgs. 1-2). The Grievant elected to challenge her termination through the grievance procedure provided in the parties’ collective

bargaining agreement ("CBA") and arbitration was invoked in November 2008. A hearing was held on July 30, 2009, before the Arbitrator.

The Arbitrator identified the following issue for arbitration: Was the Grievant's termination for just cause, and if not, what is the appropriate remedy? (See Award at p. 1).

After considering the positions of the parties, the Arbitrator reasoned that "[the Agency had just cause to formally counsel and suspend the Grievant for the [July 24 and August 8, 2008] incidents under the just cause standard, but did not have the right to base the Grievant's termination on said incidents." (Award at p. 7). The Arbitrator considered factors such as the Grievant's disciplinary history, the use of suspension in most other incidents of employee AWOL, and the reasonableness OUC's decision to base its decision to terminate the grievant on previous AWOL incidents for which the grievant had already been disciplined. Consequently, as to the AWOL incidents occurring on July 25 and 27, 2008, the Arbitrator determined that termination was "too severe a penalty under the just cause standard." (See Award at p. 7). Instead, the Arbitrator directed OUC:

to offer the Grievant reinstatement into her former or an equivalent position, without loss of seniority. However, based upon the Grievant's recent work history, she shall not be entitled to a make whole remedy. Furthermore, the Grievant should understand that this award affords her an opportunity to be reinstated on a last chance basis, thereby conditioning her right to continued employment in the future on her ability to work without an AWOL incident for 24 months from the date of her reinstatement if she is found, under the just cause standard, to be AWOL during said period, the Employer will have the right, without further progressive discipline, to terminate her.

(Award at pgs. 7-8).

On December 1, 2009, the Agency submitted its Arbitration Review Request asserting the Arbitrator exceeded his jurisdiction by applying *the just cause standard* and thus, should not be made to reinstate the Grievant. The Union opposed the Agency's Request.

The Board noted, in Slip Opinion No. 1132, that 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 ed.).

In its Arbitration Review Request, the OUC contended that the Arbitrator exceeded his jurisdiction by introducing the “just cause” standard to frame the issue presented, “when the parties did not frame the issue in that manner.” (Request at p. 3). The Agency disagreed with how the Arbitrator ultimately framed the issue in his award, and insisted that the Arbitrator was limited to the use of the phrase “for cause.” (See Request at pgs. 3-4).

In Slip Opinion No. 1132, the Board noted that under its precedent, an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties’ collective bargaining agreement. 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). However, OUC did not cite any provision of the parties’ CBA that limited the Arbitrator’s equitable power. Therefore, where the Arbitrator was empowered to determine if OUC had cause to discipline the Grievant, pursuant to Article 24, Section H (12) of the parties’ CBA, he also had the authority to determine the appropriate penalty. Contrary to OUC’s contention, the Arbitrator did not add to, or subtract from, the parties’ CBA but merely used his equitable power to formulate the remedy, which in this case involved rescinding the Grievant’s termination. Thus, the Board found that the Arbitrator acted within his authority. In addition, the Board noted that it viewed the distinction between “cause” and “just cause” as a distinction without a difference.

The Board found that OUC’s argument essentially asked that the Board adopt its findings and interpretation of the CBA—which merely represented a disagreement with the Arbitrator’s findings and interpretation. As stated above, the Board will not substitute its, or OUC’s, interpretation of the CBA for that of the Arbitrator. Thus, OUC did not present a ground establishing a statutory basis for review.

The Board found no merit in OUC’s argument and concluded that the Arbitrator’s decision was based on a thorough analysis and could not be said to be clearly erroneous or in excess of his authority under the parties’ CBA. The Board concluded that no statutory basis existed for setting aside the Award.

On December 13, 2011, the Union filed the present Petition for Enforcement with the Board. The Union contends that the OUC has failed to comply with Slip Op. No. 1132. Specifically, NAGE asserts that despite the Board’s denial of OUC’s Arbitration Review Request, OUC has not provided the Grievant with her back pay and benefits, from November 20, 2009, when the Arbitrator ordered her returned to work, to November 14, 2011, when the Grievant did, in fact, return to work. The Union requests that the Board enforce Slip. Op. No. 1132 and compel OUC to comply with the terms of the Arbitrator’s Award.

Board Rule 560.1 provides in relevant part as follows:

560.1 – Enforcement

If any party fails to comply with the Board's decision within the time period specified in Rule 559.1, the prevailing party may petition the Board to enforce the order.

As previously discussed, the Board's decision denying the OUC's Arbitration Review Request was issued on September 15, 2011. Sufficient time has passed and the OUC has had more than a reasonable amount of time to comply with the terms of the Arbitrator's Award. The Agency's failure to comply with the terms of the Award is not based on a genuine dispute over the terms of the Arbitrator's Award but rather on a simple refusal to comply with the Award itself. As a result, NAGE's Petition is granted.

ORDER

IT IS HEREBY ORDERED THAT:

1. The National Association of Government Employees, SEIU, Local R3-07's "Petition of Enforcement of PERB Decision and Order" is granted.
2. The Board shall proceed with enforcement of Slip Op. No.1132, pursuant to D.C. Code §1-617,13(b) (2001 ed.), if full compliance with Slip Opinion No. 1132 is not made and documented to the Board within ten (10) days of the issuance of this Decision and Order.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ISSUANCE OF THE PUBLIC EMPLOYEE RELATIONS BOARD

**Washington, D.C.
February 4, 2012**

CERTIFICATE OF SERVICE

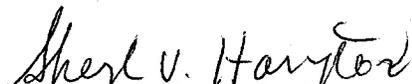
This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 12-E-02 are being transmitted via Fax and U.S. Mail to the following parties on this the 6th day of February, 2012.

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