

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:

American Federation of
Government Employees, Local 1000
(on behalf of Samuel Ellison),

Petitioner,

and

District of Columbia,
Department of Employment Services,

Respondent.

PERB Case No. 87-A-10
Opinion No. 177

DECISION AND ORDER

On August 14, 1987 the American Federation of Government Employees, Local 1000 (Union), on behalf of Samuel Ellison (Grievant), filed an Arbitration Review Request seeking review by the Public Employee Relations Board (Board) of an Arbitration Award issued on July 25, 1987. The request alleges that the Award is contrary to law and public policy because it violates Section 1604.21 of the District Personnel Manual (DPM), which prohibits a deciding official from imposing a penalty in excess of that recommended by a disinterested designee. The District of Columbia, Department of Employment Services (DOES), filed an Opposition to the Arbitration Review Request on August 31, 1987.

As a result of an altercation between the Grievant and his supervisor, DOES initiated termination proceedings against the Grievant. A disinterested designee was appointed and the Grievant was informed of his right to a non-adversarial fact finding hearing. The Grievant waived this right and had a conference with the disinterested designee. Although the disinterested designee recommended that a four month suspension be imposed, DOES terminated the Grievant. The Union grieved the termination.

I. The Arbitration Award

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The Arbitrator denied the Union's grievance rejecting the Union's argument that the applicable DPM regulations and Implementing Guidelines prohibit the imposition by the deciding official of a penalty in excess of that recommended by the disinterested designee. ^{1/} The Arbitrator found that the deciding official's powers, as set forth in DPM Section 1604.35, are limited only in that the penalty originally proposed may not be increased by the deciding official. In finding DPM Section 1604.35 controlling, the Arbitrator concluded that DPM Section 1604.22 merely specifies that the deciding official may, at his or her discretion, remand the findings and recommendations to the disinterested designee or appoint a new disinterested designee in instances where the recommendation is not supported by the record. He further concluded that the DPM regulations, as the controlling regulatory authority, should take precedence over the unclear, non-controlling Implementing Guidelines. The Arbitrator therefore found that the deciding official's actions were in accordance with the applicable regulations.

II. The Award is Contrary to Law and Public Policy

Under the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code, Section 1-605.2(6), the Board is empowered to consider appeals from arbitration awards pursuant to a grievance procedure if the award on its face is contrary to law and public policy.

The Board has reviewed the Award, pleadings of the parties, and applicable law and finds that the Award is contrary to law and public policy. Accordingly, we grant the Arbitration Review Request and reverse and remand the Award to the Arbitrator with directions to issue an award in accordance with this decision.

A. The Award is Contrary to Law

We find that the imposition of a penalty by the deciding official in excess of that recommended by the disinterested designee is inconsistent with Sec. 1604.21 and 1604.22 of the DPM. The plain language of these sections gives a deciding official three (3) options in acting upon a disinterested designee's recommendation, none of which includes the right to

^{1/} All cited provisions of the DPM and Implementing Guidelines are set forth in an appendix to this Decision and Order.

increase the penalty recommended by the disinterested designee. DPM Sec. 1604.21 and 1604.22 permit a deciding official to impose or reduce the penalty recommended by the disinterested designee or, if the deciding official determines that the disinterested designee's findings or recommendations are not supported by the record, she or he may either remand the case to the disinterested designee or appoint a new disinterested designee. 2/

The Implementing Guidelines also define the options the deciding official may exercise in imposing disciplinary action. Section 2.13 of the Guidelines states that the deciding official must review and evaluate the report by the disinterested designee and determine whether it is supported by the record. If the report is not supported by the record, the deciding official has only three options. She or he may 1) remand the action to the disinterested designee for reconsideration, 2) dismiss the action, or 3) appoint a new disinterested designee. If the report is supported by the record, the deciding official may sustain or reduce the penalty but may not increase it. 3/ Thus, the Guidelines, by limiting the penalty a deciding official may impose to those which do not exceed the disinterested designee's recommendation, supports the Board's finding that imposition of such a penalty is inconsistent with DPM Sections 1604.21 and 1604.22.

Thus the deciding official's imposition of a penalty in excess of that recommended by the disinterested designee in this case was in violation of the DPM and Implementing Guidelines. The deciding official's actions violate D.C. Code Sec. 1-617.1(a) and DPM Sec. 1604.1(a) and (b) and the Award, likewise, violates these provisions.

2/ Contrary to DOES' contention, there is nothing in DPM Sec. 1604.35 that broadens the deciding official's power so that he or she can disregard DPM Sec. 1604.21 and 1604.22.

3/ The Board rejects DOES' argument that the Implementing Guidelines are non-binding policy statements. The Guidelines appeared to have been formulated to assist in the interpretation and implementation of the regulations and should be relied upon to resolve any ambiguities.

Section 1-617.1(a) of the D.C. Code requires compliance with rules and regulations governing adverse action. ^{4/} These rules and regulations are set forth in the DPM. DPM Sec. 1604.1(a) and (b) require each agency to ensure that adverse actions are taken in accordance with rules set forth in the regulations and that an employee covered by the regulations is afforded the rights and protection provided therein. Sec. 1604.21 and 1604.22 of the DPM provide employees with protection concerning penalties. The Award, which is inconsistent with these provisions of the DPM, therefore violates Sec. 1-617.(a) of the D.C. Code and DPM Sec. 1604.1(a) and (b).

B. The Award is contrary to Public Policy

The Award, by violating the Grievant's right to have DOES comply with the DPM regulations and its limitation on disciplinary measures in a proceeding to determine the appropriateness of the adverse action taken against him, is contrary to the policy embodied in D.C. Code Sec. 1-617.1(a) and DPM Sec. 1604.1(a) and (b).

Sec. 1-617.1(a) of the D.C. Code and DPM Sec. 1604.1(a) and (b) embody a policy which requires agencies to comply with all rules and regulations involving adverse actions thereby ensuring that employees' rights are protected. To permit the Agency to violate the DPM by imposing a penalty greater than that recommended by the disinterested designee, when the D.C. Code and DPM explicitly require compliance with these regulations, would be contrary to the underlying policy of these statutory and regulatory provisions.

Thus, by violating DPM Sections 1604.21 and 1604.22, which prohibit the deciding official from increasing the penalty

4/ The relevant provisions of D.C. Code section 1-617.1(a) states:

Sec. 1-617.1 Adverse actions

(a) The Mayor ... shall issue rules and regulations establishing internal agency corrective, rather than punitive, measures. Adverse action procedures shall not be in conflict with these corrective measures nor with any provision of this subchapter.

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recommended by the disinterested designee, the Award violates D.C. Code Section 1-617.1(a) and DPM Section 1604.1, and the policy underlying these provisions. 5/

ORDER

IT IS ORDERED THAT:

The Arbitration Award is reversed and remanded to the Arbitrator, with instructions to issue an Award in accordance with this decision. 6/

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD.

Washington, D.C.

November 2, 1988

5/ The Board's authority to remand the Award is explicit in Board Interim Rule 107.9. Contrary to DOES' claim, Wiley & Sons v. Livingston, 376 U.S. 543, 55 LRRM 2769, 2775 (1964), which addresses questions of procedural arbitrability in the private sector, does not govern the Board's review of arbitration awards under the D.C. Code.

6/ DOES suggests that the proper remedy is to remand the case to the deciding official, citing District of Columbia v. Gray, 452 A.2d 962 (D.C. 1982). However, Gray is inapplicable to the instant matter since that case involved a lawsuit brought by an individual employee and did not arise in the collective bargaining context. Unlike in Gray where there was no other reviewing body, the parties' agreement in this case provides that grievances arising under the agreement are to be resolved through the arbitration process.

APPENDIX

DPM Section 1604.21

In any case where the disinterested designee is not the deciding official, the deciding official may impose or reduce the penalty recommended by the disinterested designee, or, as provided in subsection 1604.22 below, may remand the case.

DPM Section 1604.22

In any case where the disinterested designee is not the deciding official, if the deciding official determines that the disinterested designee's findings or recommendations are not supported by the record, the deciding official may remand the matter to the disinterested designee or appoint a new disinterested designee as appropriate.

DPM Section 1604.35

The deciding official shall either sustain the penalty proposed, reduce it, or dismiss the action with or without prejudice, but shall not increase the penalty.

DPM Implementing Guidance and Procedure

2.13 Action by Deciding Official

- A. Whenever the deciding official receives a report by a disinterested designee, the deciding official must review and evaluate the report, and:
 - 1. Determine whether findings, conclusions, and penalty recommendations are supported by the record;
 - 2. If not, the deciding official may either:
 - a. remand the action to the disinterested designee for reconsideration
 - b. appoint a new disinterested designee; or
 - c. dismiss the action with or without prejudice

3. If the report is found to be supported by the record, the deciding official makes an independent determination as to what penalty, if any, to impose. In making this determination, the deciding official may sustain or reduce the penalty recommended by the disinterested designee, but he or she may not increase it (Section 1604.21, D.C. Personnel Regulations).