Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Housing Authority,	
Petitioner,	
v.	PERB Case No. 13-A-07
	Opinion No. 1415
American Federation of Government Employees Local 2725 (on behalf of Senta Hendrix-Smith)	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Housing Authority ("Authority" or "Petitioner") filed an arbitration review request ("Request") in the above-captioned matter on May 14, 2013. The Petitioner seeks review of an arbitration award ("Award") that sustained in part and denied in part a grievance filed by the American Federation of Government Employees Local 2725 ("Respondent") on behalf of Senta Hendrix-Smith ("Grievant" or "Hendrix-Smith").[1]

The Arbitrator found the following facts:

> The Grievant . . . had worked for the District of Columbia Housing Authority ("DCHA" or "Agency") for four and one-half (4 ½) years having served as a Housing Management Assistant at several different DCHA properties with her last assignment at the

[1] The Petitioner's certificate of service states that the Request was served by mail on May 14, 2013. The Respondent asserts that the envelope was postmarked May 15, 2013, and consequently the Request was not concurrently served as required by Board Rule 501.12. The Respondent argues that the Request should be dismissed for that deficiency but does not cite any authority of the Board for that sanction. Our finding that the Request does not present a statutory basis for setting aside the Award renders this issue moot.

Benning Terrance property commencing in 2009. The Grievant has been a resident of the DCHA for over eight (8) years, currently residing at its Stoddard property.

At the Benning Terrance property, Hendrix-Smith served as the Assistant Housing Manager under the supervision of Ms. KaShamba Williams, the Housing Manager. . . .

[B]ased upon what management considered her poor customer service with clients, the Grievant was counseled and received a Letter of Instruction (not disciplinary, but corrective in nature), dated March 5, 2010.

About six months later, on September 10, 2010, the Grievant and her co-worker, Housing Management Assistant Denise Butler, got into an argument after the Grievant had engaged in a telephone conversation which Butler characterized as "misinforming the residents." The argument allegedly escalated with the Grievant using profanity toward her co-worker and allegedly threatening her. This resulted in Regional Administrator Nathan E. Bovelle issuing the Grievant a seven-day suspension, via DCHA suspension letter, dated October 8, 2010. (See Attachment #6 to Agency Exhibit No. A-6). While the incident occurred on September 10, 2010, DCHA policy requires that a supervisor, higher than the first-line supervisor, issue the suspension action. Thus, the investigation, associated briefings of higher level officials, etc. took over a month and the suspension letter was not issued prior to the October 4th & 5th incidents resulting in the termination of the Grievant. Thus, technically, the Grievant was not disciplined before the incident resulting in her termination although she was suspended for seven days prior to receiving her Notice of Termination letter on November 30, 2010.

On October 4, 2010, the Grievant called a meeting with the Benning Terrace employees which some employees objected to as meetings were typically called by the Housing Manager, KaShamba Williams ("Williams"), not the Housing Management Assistant. When Williams returned to duty on October 5, 2010, she called a routine staff meeting and at the end of the meeting, she permitted the staff to address issues of concern. At this time, one employee, Angela Eggleston ("Eggleston"), a probationary employee of the Clean & Green staff complained about some of the actions of the Grievant. The Grievant and Eggleston then got into a heated argument with profane comments being directed to each other. Eggleston was escorted out of the meeting to cool off,

> but several other members made comments which the Grievant felt were offensive, and she countered them with aggressive, insulting language. Believing she was being ganged up on, and that her supervisor was not going to intervene to end the arguments, Hendrix-Smith got up to leave and started toward the door. Supervisor Williams then asked the Grievant to come back and sit down (the Grievant characterized her comments as "sit down and shut up"). When Hendrix-Smith did not return but kept heading toward the door, Williams told her to return or face discipline for being insubordinate (the Grievant characterized her remarks as "if you walk out that door, just keep going because you won't be coming back").
>
> The Grievant did not return to her seat, but did stop and listened to the rest of the conversation before Williams ended the meeting. Williams then decided to recommend termination of the Grievant for her actions and recommended termination to her superiors. Regional Director Nathan E. Bovelle then issued a DCHA termination letter to the Grievant, dated November 30, 2010. (See Agency Exhibit No. A-6). While the incidents occurred on October 4-5, 2010, a number of higher level officials had to be briefed and sign off on the action which occurred up through November 12, 2010. The termination was scheduled to take effect thirty (30) days after the Grievant received the termination notice, i.e. thirty (30) days after November 30, 2010.

(Award pp. 3-5).

The Arbitrator issued the following award:

> The grievance is sustained in part and denied in part.
>
> It is sustained in that the termination is not supported by the evidence of record. However, discipline is supported by the Agency's charges. The appropriate penalty is a twenty-eight (28) calendar day suspension that will be substituted for the termination. Back pay and benefits are awarded to the Grievant although appropriate deductions will be made for any compensation earned or unemployment compensation received during the period from the end of the twenty-eight (28) day suspension period until the Grievant is placed back on the DCHA employment rolls. The Agency will provide evidence of compliance with this Award within sixty days of receipt of the Award. I will retain jurisdiction for purposes of insuring compliance with the Award.

> Following the Union's production of the enabling authority and appropriate statutes, I will make a determination on the Union's request for me to entertain their request for attorney's fees.

(Award p. 31).

II. Discussion

The Authority seeks review of the Award on the ground that the Arbitrator exceeded his jurisdiction as the Award does not draw its essence from the collective bargaining agreement. Citing *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Labor Committee (on behalf of Ray)*, 59 D.C Reg. 12663, Slip Op. No. 1317, PERB Case Nos. 10-A-23 and 10-A-24 (2012), the Authority takes the position that an arbitrator does not have the power to add to, subtract from, or modify the provisions of a collective bargaining agreement. (Request pp. 4, 5).

The *Ray* case, however, involved a collective bargaining agreement that had as one of its provisions "The Arbitrator shall not have the power to add to, or subtract from or modify the provisions of the Agreement in arriving at a decision of the issue presented. . . ." *Id.* at p. 5 (quoting collective bargaining agreement). The case was not stating a general proposition regarding the power of arbitrators to add to, subtract from, or modify a collective bargaining agreement. The principle that that the Board has applied in determining whether an award draws its essence from the contract is that "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 *United Paperworkers Int'l v. Misco, Inc* , 484 U.S. 29, 38 (1987)). *See also Mich. Family Resources, Inc. v. SEIU Local 517M*, 475 F.3d746, 753-54 (6th Cir. 2007).

Applying that test to the Authority's objections to the Award leads to the conclusion that the Award draws its essence from the parties' collective bargaining agreement ("CBA"). The Authority objects that "the Arbitrator overturned DCHA's legitimate termination of the Grievant under the theory that DCHA's past practices of corrective action must be viewed as leniency that can overrule the clear authority granted to DCHA in the CBA to terminate the Grievant when she engaged in serious infractions." (Request at pp. 3-4). Further, the Authority objects that Arbitrator failed to consider the Grievant's prior disciplinary record—specifically an offense on September 10, 2010—because he found that the Authority was not entitled to consider a pending disciplinary action that had not been served on the Grievant.

Article 10, section (C)(1) of the CBA provides in part:

> (a) In the administration of this Article, a basic principle shall be that discipline shall be corrective in nature, rather than punitive.

> (b) Except in cases of serious infractions that warrant immediate discipline, disciplinary actions must be progressive in nature.

(Award p. 7). The Arbitrator construed and applied these provisions when he considered the leniency of the Authority's past practices of corrective action and the pending disciplinary action:

> Was the discipline corrective or punitive? Perhaps it was both, but I contend the Agency showed unusual leniency in not disciplining the Grievant in some way for prior offenses. It was a merciful twist of fate that the Grievant did not receive her first suspension (for the September 10, 2010 incident) until after the second incident occurred. However, it was for this very reason that I adjudge the October 5, 2010 incident to be considered as a first offense. Had it been a second offense, termination might have been justified. It was not in this instance. . . . Had the Grievant been notified that her September 10, 2010 confrontation with co-worker Butler was going to result in discipline and had that initial discipline been issued prior to the October 4th and 5th incident, I would have ruled these latest incidents as 2nd offenses and may well have supported the discharge just based on the two second offense incidents. However, that is not the case.

(Award at pp. 24, 28).

The Authority objects that "[b]y granting the Grievance in part and substituting the termination with a suspension, the Arbitrator interfered with DCHA's right to '...suspend, demote, discharge or take other disciplinary action against employees for cause.[']" *See* CBA, Article 4 § A.2, in part." (Request at p. 5). The CBA provides, "No employee may be reprimanded, suspended, reduced in rank, grade or pay, or removed (except by reduction-in-force) except for just cause." (Award at p. 7). The Arbitrator applied this provision when he held, "the Grievant's discharge is not supportable in light of the provisions of the Collective Bargaining Agreement and the record before me." (Award at p. 30).

An arbitrator's award must be upheld if the arbitrator was even arguably construing or applying the CBA. The Board will not substitute its interpretation for that of the arbitrator. *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Lab. Comm.*, 60 D.C. Reg. 3052, Slip Op. No. 1365 at p. 5, PERB Case No. 11-A-02 (2013). Here, the Arbitrator was construing or applying the CBA with respect to every finding to which the Petitioner objects. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Award is sustained. Therefore, the Arbitration Review Request of the Fraternal Order of Police/Department of Corrections Labor Committee 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.

September 3, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-A-07 was transmitted to the following parties on this the 3d day of September, 2013.

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