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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
District of Columbia Department of Consumer and Regulatory Affairs,)	
)	
Petitioner,)	PERB Case No. 11-A-06
)	
v.)	Opinion No. 1298
)	
American Federation of Government Employees, Local 2725, AFL-CIO,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Petitioner D.C. Department of Consumer and Regulatory Affairs (“Petitioner” or “Agency”) filed an Arbitration Review Request (“Request”) seeking review of an arbitration award (“Award”) in which the Arbitrator found that the Agency did not negotiate certain changes to its residential and commercial inspection and enforcement programs. (Award at 47). In its Request, the Agency alleges the Arbitrator exceeded his authority and that the Award is contrary to law and public policy. (Request at 2). The Union filed an Opposition to the Arbitration Review Request (“Opposition”), stating that the Agency failed to cite any valid reason to overturn the Award. (Opposition at 1).

II. Discussion

A. Background

The arbitration award at issue in this case resulted from a group grievance filed on behalf of commercial and residential housing inspectors employed by the Agency. (Award at 7). As early as 2005, the Agency and the Union began negotiating changes to the Agency’s residential and commercial inspection and enforcement programs. (Award at 8). Specifically, the Agency decided to supplant the District’s Municipal Housing Regulations (“DCMR”) with various codes

promulgated by the International Code Council ("ICC"). (Award at 8-9). For residential housing inspectors, this change would require certification in the ICC's International Property Maintenance Code and possibly its International Residential Code. (Award at 9). For commercial property inspectors, the change required ICC certification in the appropriate specialty area (*ie*: electrical, mechanical and plumbing).¹ *Id.*

At the end of 2006, the parties reduced their agreement with respect to the residential inspectors to a written instrument, which was signed by the former Agency Director on December 27, 2006. (Award at 12). The Union representative did not sign this agreement due to questions about the new job descriptions for the residential inspectors. *Id.*

The parties negotiated topics related to this changeover for approximately three years before the Agency began implementation. (Award at 38). Ultimately, the Agency enacted changes which the Union alleges were not properly bargained for. (Award at 24). The Agency then terminated thirty inspectors who could not or would not pass the exam to become ICC certified. (Award at 27).

The Union filed a group grievance on behalf of 59 commercial and residential housing inspectors who had been adversely impacted by the ICC changeover. (Award at 24). The issues were summarized as follows:

- (1) Failure to bargain in good faith...regarding certification requirements in position descriptions.
- (2) Imposition of certification standards that are not in compliance with applicable laws, rules, and regulations.
- (3) Imposition of certification standards that do not comport with the duties and responsibilities of the position descriptions.
- (4) Proposed punishments for failure to meet criteria established in items 1, 2, and 3 that are not in compliance with applicable laws, rules and regulations.

(Award at 24-25). The Agency denied the grievance and the parties proceeded to arbitration. (Award at 27).

The Arbitrator identified two areas where the Agency failed to satisfy its obligation to bargain with the Union: (1) the required ICC certifications for the residential and commercial inspectors; and (2) the intended termination of the inspectors who failed to obtain the required ICC certifications. (Award at 42).

The Arbitrator found that the parties had agreed residential inspectors would be required to be trained in the ICC International Property Maintenance Code, rather than the International Residential Code. (Award at 40). At the April 2007 training for the residential inspectors, the training included both the International Property Maintenance Code and the International

¹ Prior to the ICC changes, commercial property inspectors were deemed qualified if they held trade licenses in their designated specialties.

Residential Code. *Id.* The Arbitrator found this was a significant change from the parties' agreement and that the Agency did not respond to the Union's letters asking to discuss the issue. *Id.*

Additionally, the Arbitrator credited Union testimony that the Union and Agency had agreed that commercial inspectors in the specialty trades who possessed the required trade licenses would not be required to obtain new ICC licenses. (Award at 41). The Arbitrator found no indication that the parties discussed the alleged agreement to "grandfather in" commercial inspectors with trade licenses in their designated specialties. (Award at 42).

Finally, the Arbitrator found that the less severe penalty of demotion, rather than termination, was previously agreed to by the parties. (Award at 45). The Agency was obligated to provide clear and explicit notice of its intention to terminate inspectors who did not obtain the ICC certification. *Id.*

B. Allegation that the Award is contrary to law and public policy

When a party files an arbitration review request, the Board's scope of review is narrow. *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, __ D.C. Reg. __, Slip Op. No. 1206 at p. 3, PERB Case No. 05-A-11 (2011). The Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award only in 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).

The Board's scope of review is particularly narrow concerning the public policy exception. The U.S. Court of Appeals, District of Columbia Circuit, observed that "the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question "must be well defined and dominant," and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." The exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of "public policy." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F. 2d 1, 8 (D.C. Cir. 1986).

A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). *See also, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must "not be led astray by our own (or

anyone else's) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A.2d 319, 325 (D.C. 1989).

In the instant case, the Agency first alleges that the Award violates law and public policy by "void[ing] binding CBA and statutory language that forecloses 19 employees from any relief whatsoever." (Request at 7). Although the Agency treats this argument as a violation of law and public policy, it is properly considered an argument that the Arbitrator exceeded his jurisdiction and the Board will address it as such. In the remedies portion of the Award, the Arbitrator orders the Agency to "restore the *status quo ante*" and directs that "[a]ny employees adversely affected shall be made whole, including reinstatement to their positions if they were terminated." (Request at 7; Award at 47). The Agency asserts that this remedy is in conflict with Article 9, section B of the collective bargaining agreement, which states:

Employees have the right to contest corrective or adverse actions taken for cause through either Office of Employee Appeals (OEA) or the negotiated grievance procedure. An employee shall elect either of these procedures in writing and the selection once made cannot be changed.

1. Should the employee elect to appeal the action to OEA, such appeal shall be filed in accordance with OEA regulations.
2. Should the employee elect to grieve the action under the negotiated grievance procedure, the grievance must be filed at the appropriate step within twenty (20) work days from the effective date of the action. However, should the employee elect to utilize the negotiated grievance procedure, only the Union may take the appeal of a corrective or adverse action to arbitration.

(Request Ex. 3 at 11). Further, the Agency claims that the Arbitrator violated Article 10, Section E 11 of the CBA, which states that "[t]he arbitrator shall not have the power to add to, subtract from, or modify the provisions of this Agreement through the award. The arbitrator shall confine his/her decision to the issue(s) presented." (Request at 9).

The Union contends that the grievance at issue in the instant case is not interchangeable with the OEA appeals. (Opposition at 4). Further, the Union states that the Agency "is attempting to retroactively convert a contractual grievance about the employer's failure to negotiate with the Union over changes affecting the terms and conditions of employment of bargaining unit members into a group grievance challenging 19 terminations," thus creating "conflict with the statutory provision providing an exclusive choice of remedies between the collectively bargaining grievance procedure and the administrative appeal process available through the Office of Employee Appeals." (Opposition at 3).

The OEA is a quasi-judicial body empowered to review final agency decisions affecting, among other things, performance ratings which result in terminations, adverse actions for cause that result in removal, suspensions of 10 days or more, and reductions-in-force. *FOP/MPDLC v. MPD*, __ D.C. Reg. __, Slip Op. No. 882 at p. 6, PERB Case No. 06-A-13 (2008). By contrast, the Board is a quasi-judicial, independent agency that reviews, inter alia, arbitration awards affecting employees of the District of Columbia. *Id.*; see D.C. Code § 1-605.02(6). OEA and the Board are “two distinct independent agencies with separate and distinct jurisdiction.” *Id.*

Concerning the Agency’s claim that the Arbitrator exceeded her authority by failing to follow Article 10, Section E 11 of the collective bargaining agreement, the Board has held that “[b]y 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.” *University of the District of Columbia v. University of the District of Columbia Faculty Association*, 39 D.C. Reg. 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). Additionally, 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, the Board “will not substitute its own interpretation or that of the [Agency] for that of the duly designated arbitrator.” *District of Columbia Dept. of Corrections v. Int’l Brotherhood of Teamsters, Local Union 246*, 34 D.C. Reg. 3616, Slip Op. No. 157 at p. 3, PERB Case No. 97-A-02 (1987). In the instant case, the parties submitted their dispute to the Arbitrator in accordance with their collective bargaining agreement. Neither the Agency’s disagreement with the Arbitrator’s interpretation of Article 10, Section E 11 of the CBA, nor the Agency’s disagreement with the Arbitrator’s findings and conclusions, are grounds for reversing the Award. See *MPD v. FOP/MPDLC*, __ D.C. Reg. __, Slip Op. No. 845, PERB Case No. 05-A-01 (2006).

Next, the Agency alleges that the Arbitrator exceeded his authority by voiding the management rights statute² and related provisions of the CBA. (Request at 10). In support of this contention, the Agency states that the Arbitrator “gave total credibility to the Union protestations of wanting more bargaining and no credibility or consideration to [the Agency’s] responsibility to run the inspection program and attempt to improve it.” *Id.* Additionally, the Agency states that the Arbitrator “ignore[d] the statutorily granted rights and responsibilities incumbent upon [the Agency] and [gave] excessive deference to the Union.” (Request at 11).

By submitting a matter to arbitration, “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based.” *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); See also *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004). Further, the Board has long held that mere disagreement

² D.C. Code § 1-617.08 (2001).

with an arbitrator's findings and conclusions is not a ground for reversing an award. *See, e.g., D.C. Dep't of Public Works and American Federation of State, County and Municipal Employees, District Council 20, Local 2091*, 39 D.C Reg. 3344, Slip Op. No. 219, PERB Case No. 88-A-02 (1989).

In the instant case, the Agency is merely disagreeing with the Arbitrator's determination that the Agency did not satisfactorily bargain over the impact and effects of the ICC code implementation. Such grounds do not present a statutory basis for modifying or overturning an award. *Id.*

Finally, the Agency contends that "the Arbitrator declared the December 27, 2006, proposal that only [the former Agency Director] signed binding and denies [the Agency] the benefit of the document." (Request at 13). The Agency does not state which part of D.C. Code § 1-605.02(6) it believes has been violated, nor does it state any grounds for overturning the Award based on this alleged violation. Again, mere disagreement with the Arbitrator's decision is not a basis to modify or set aside an Award. *See, e.g., D.C. Dep't of Public Works and American Federation of State, County and Municipal Employees, District Council 20, Local 2091*, 39 D.C Reg. 3344, Slip Op. No. 219, PERB Case No. 88-A-02 (1989).

Therefore, in the absence of any statutory basis to modify or set aside the Arbitrator's Award, the Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Consumer and Regulatory Affairs' 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.

July 26, 2012

CERTIFICATE OF SERVICE

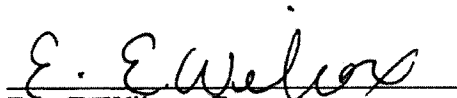
This is to certify that the attached Decision and Order in PERB Case No. 11-A-06 was transmitted via U.S. Mail and e-mail to the following parties on this the 26th day of July, 2012.

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