GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
D.C. Department of Public Works	)	
Petitioner	)	PERB Case No. 22-A-04
v.	)	Opinion No. 1819
American Federation of Government Employees, AFL-CIO, Local 631	)	CORRECTED
Respondent	)	

DECISION AND ORDER

I. Statement of the Case

On June 13, 2022, the District of Columbia Department of Public Works (DPW) filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA) seeking review of an arbitration award (Award) dated May 23, 2022.[1] The Award reversed the termination of an employee (Grievant) who had held the position of Heavy Mobile Equipment Operator Helper.[2] DPW seeks review of the Award on the grounds that the Arbitrator exceeded his authority and that the Award is contrary to law and public policy.[3] The American Federation of Government Employees, Local 631 (AFGE) filed an opposition requesting that the Board deny DPW's Request.

Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Board concludes that the Arbitrator did not exceed his authority and that the Award is not contrary to law and public policy. Therefore, the Board denies DPW's Request.

[1] D.C. Official Code § 1-605.02(6).
[2] This position is referred to as Heavy Mobile Equipment Mechanic Helper in the Award.
[3] Request at 1.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. DPW employed the Grievant as a Heavy Mobile Equipment Operator Helper beginning in September 2019.[4] Although DPW designated Heavy Mobile Equipment Operator Helper a safety sensitive position, DPW did not require a commercial driver's license (CDL).[5] On August 17, 2020, the Grievant submitted a urine sample for a random drug test and tested positive for cannabis.[6] After verifying the test results, DPW issued a notice of separation to the Grievant on September 22, 2020, for the charge of a positive result on the drug test.[7] AFGE advocated to DPW that the Grievant receive a suspension instead of termination.[8] However, a hearing officer upheld the Grievant's termination, which a decision official affirmed. On January 15, 2021 the Grievant was terminated.[9]

B. Arbitrator's Findings

The parties submitted one issue to the Arbitrator: whether there was just cause to remove Grievant from his position at DPW, and, if not, what shall be the remedy?

AFGE conceded that the Grievant tested positive for cannabis and did not dispute DPW's testing protocols.[10] However, AFGE argued that DPW's termination of the Grievant violated Article 39 of the parties' collective bargaining agreement (CBA), which covered progressive discipline. AFGE also argued that the Grievant's termination violated Article 43, which covered drug and alcohol testing for employees who held CDLs, including penalty determination for positive test results.[11] The Arbitrator acknowledged that Article 43 applied only to employees with CDLs.[12] However, the Arbitrator reasoned that the provision was "instructive when assessing an appropriate penalty for an employee who tests positive for a controlled substance" because DPW had also designated positions requiring CDLs as safety sensitive.[13] The Arbitrator further

[4] Award at 4.
[5] Award at 5.
[6] Award at 5.
[7] Award at 5.
[8] Award at 5.
[9] Award at 6.
[10] Award at 8.
[11] Article 39 states, in part, that "discipline shall be corrective rather than punitive in nature, and shall reflect the severity of the infraction, consistent with the principles of progressive discipline," that "immediate adverse action up to discharge is sometimes appropriate," and that "in selecting the appropriate penalty to be imposed in a corrective or adverse action, the Agency shall consider relevant factors, including any mitigating or aggravating circumstances." (Collective Bargaining Agreement Between the D.C. Government and AFGE, AFL-CIO Local 631, Article 39 at 47-48). Article 43 establishes the penalties for employees whose positions require a CDL and test positive for drugs or alcohol while on duty "in accordance with Article 39 of this Agreement and the chart of appropriate penalties listed below." The penalties chart includes a fifteen-to-thirty-day suspension for first offenses under that section. (Collective Bargaining Agreement, Article 43 at 53-54).
[12] And, therefore, was not violated by DPW's termination of the Grievant.
[13] Award at 8.

reasoned that the "Grievant's position was less sensitive, in terms of safety, than an employee who holds a CDL license, who, presumably, would be driving a commercial vehicle on public streets."[14] Reading Articles 39 and 43 together, the Arbitrator determined that the intention of the parties' disciplinary policy was to impose progressive discipline in a fair and equitable manner.[15] He found that terminating the Grievant for the first offense "was inappropriate because it was not aligned with what the parties understood to be a fair and reasonable penalty under these facts for other employees."[16] The Arbitrator found that Article 39 was controlling under the circumstances and that DPW violated that article by terminating the Grievant on his first offense.[17]

Although the Arbitrator determined that DPW did not have just cause to terminate the Grievant, he determined that the Grievant's egregious, inappropriate and dangerous conduct warranted the maximum penalty under Article 43 of the CBA – a thirty (30) day suspension.[18]

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an 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.[19] DPW requests the Board's review of the Award on the grounds that the Arbitrator exceeded his jurisdiction and that the Award is contrary to law and public policy.

A. The Arbitrator did not exceed his jurisdiction in issuing the Award.

DPW contends that the Arbitrator exceeded his authority and jurisdiction by extending the applicability of Article 43 – which outlined drug and alcohol testing for employees with CDLs – to employees not explicitly covered by that article. DPW relies on the disciplinary guidelines laid out in Article 39, which allowed for "immediate adverse action up to discharge" under appropriate circumstances, to argue that the Grievant's termination was fair and equitable.[20] DPW argues that, because the plain language of Article 43 restricts its applicability solely to employees with CDLs, the Arbitrator imposed additional requirements not expressly provided for in the CBA by drawing from that Article to analyze the appropriateness of the Grievant's termination.[21] DPW asserts that the Arbitrator based his Award on general considerations of fairness and equity rather than the precise terms of the agreement and without rational support for his interpretation of the CBA.[22]

When determining whether an arbitrator exceeded his or her authority in rendering an award, the Board analyzes whether the award "draws its essence" from the parties' collective

[14] Award at 9.
[15] Award at 9.
[16] Award at 9.
[17] Award at 9.
[18] Award at 9.
[19] D.C. Official Code § 1-605.02(6).
[20] Request at 7-8.
[21] Request at 7.
[22] Request at 8.

bargaining agreement.[23] The Board's analysis is limited to whether the resolved dispute was committed to arbitration and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.[24] The Board avoids intervention in arbitration awards even where an arbitrator arguably has made "serious, improvident, or silly errors" in resolving the dispute as long as an arbitrator does not "offend" the above requirements.[25]

The Arbitrator confined his Award to the issue submitted by the parties – whether DPW had just cause to terminate the Grievant and, if not, what the remedy should be. Although DPW asserts that the CBA permitted immediate termination under appropriate circumstances, the Arbitrator's finding that termination was not appropriate in this case drew its essence from the CBA's emphasis on progressive discipline and the consideration of all factors in the Grievant's employment record. The Arbitrator did not impose additional requirements, but rather applied the full scope of Article 39 of the CBA and used the penalty chart of Article 43 as guidance. The Board has long held that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement."[26] Neither of the articles of the CBA at issue expressly excluded the Arbitrator's construal of the discipline policy. Therefore, the Board finds that the Arbitrator did not exceed his jurisdiction in issuing the Award.

B. The Award is not contrary to law and public policy.

DPW argues that the Award violated 6B §§ 400, *et seq.* and § 1605.4(h) of the D.C. Municipal Regulations (DCMR).[27] Section 1605.4(h) authorizes "corrective or adverse action" against an employee for "unlawful possession of a controlled substance or paraphernalia or testing positive for an unlawful controlled substance while on duty."[28] Section 400, *et seq*. of the DCMR addresses D.C. employee suitability policies. DPW contends that 6B DCMR § 400.4 compels the Grievant's termination because that section includes the language "an employee deemed unsuitable pursuant to this chapter, will be subject to immediate removal."[29] However, the cited clause begins "unless otherwise specified in this chapter."[30] Section 429 then explicitly differentiates between employees who test positive for cannabis following "a reasonable suspicion

[23] *See D.C. DYRS and DCHR v. FOP/D.C. DYRS Labor Comm.*, 68 D.C. Reg. 46, Slip Op. No. 1800 at 6, PERB Case No. 21-A-09 (2021) (holding that an arbitrator did not exceed his jurisdiction in deciding an issue stipulated by the parties where the language of the CBA did not expressly limit the arbitrator's equitable power).
[24] *Id.* at 7 (citing *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. No. 1480 at 5, PERB Case No. 14-A-01 (2014).
[25] *Id.* at 7.
[26] *See University of the District of Columbia v. AFSCME Local 2087*. 59 D.C. Reg. 15167, Slip Op. No. 1333 at 6, PERB Case No. 12-A-01, *rev'd sub nom University of the District of Columbia v. D.C. PERB*, 2012 Daily Wash. L. Rptr. 8393 (D.C. Super. Ct. 2013), *rev'd sub nom. AFSCME v. University of the District of Columbia*, 166 A.3d 967 (D.C. 2017) (citing *MPD v. FOP/MPDLC*, 59 DCR 12709, Slip Op. No. 1327, PERB Case No. 06-A-05 (2012) (reversing D.C. Superior Court order to vacate award and reinstating the Board's affirmation of arbitration award as falling under the arbitrator's inherent equitable powers)).
[27] Request at 8.
[28] *See* 6B DCMR § 1605.4.
[29] *See* 6B DCMR § 400.4.
[30] *Id.*

or post-accident or incident drug test"[31] and employees in safety sensitive positions who test positive for cannabis in a random drug test "with no additional evidence of impairment."[32] In the case of a random drug test with no additional evidence of impairment, 6B DCMR § 429.2(a) does not require termination and states, in part, that safety sensitive employees "shall be subject to a five (5) day suspension without pay."[33] DPW further argues that 6B DCMR § 428.1 supports DPW's termination of the Grievant.[34] The cited portion of § 428.1 states, "Notwithstanding Subsection 400.4, an employee shall be deemed unsuitable and there shall be cause to separate an employee from a covered position as described in Subsections 436.9 and 440.3 for: (a) a positive drug or alcohol result."[35] Section 436.9 states that "[i]f an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action procedure as specified in this subtitle or any applicable collective bargaining agreement."[36] However, both 6B DCMR §§ 428.1 and 436.9 each appear merely to permit termination of an employee deemed unsuitable rather than mandate termination.

The law and public policy exception is "extremely narrow."[37] The narrow scope limits potentially intrusive judicial reviews under the guise of public policy.[38] DPW has the burden to demonstrate that the Award itself violates established law or compels finding an explicit violation of "well-defined public policy grounded in law [and/or] legal precedent."[39] The violation must be so significant that law and public policy mandate a different result.[40] The Board may not modify or set aside an Award as contrary to law and public policy in the absence of a clear violation on the face of the Award.[41]

DPW has not demonstrated that law and public policy required the Arbitrator to reach a different result. Article 4, Section B of the parties' CBA, the 2015 and 2016 memoranda of agreement between the parties, and the DCMR all affirm that the CBA controls in matters of discipline.[42] While the amended employee suitability provisions allow for immediate and severe adverse actions, they do not proscribe termination for a first offense positive random drug test,

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[31] *See* 6B DCMR § 429.1.
[32] *See* 6B DCMR § 429.2.
[33] *Id.*
[34] Request at 9.
[35] *See* 6B DCMR § 428.1. The Request cites a previous version of the statute in which the sections referenced in 428.1 were numbered 435.9 and 439.3, respectively.
[36] *See* 6B DCMR § 436.9.
[37] *D.C. DYRS and DCHR*, Slip Op. No. 1800 at 8.
[38] *Id.* at 8.
[39] *Id.* at 8.
[40] *D.C. MPD v. FOP/MPD Labor Comm.*, 68 D.C. Reg. 5072, Slip Op. No. 1784 at 8, PERB Case No. 21-A-08 (2021) (holding that MPD's "value statement" was not a well-defined public policy in the law for which violation justified granting an arbitration review request).
[41] *D.C. DYRS and DCHR*, Slip Op. No. 1800 at 8.
[42] "Collective Bargaining Agreement between the D.C. Government and AFGE Local 631" at 7, May 13, 2010; "Memorandum of Agreement Between AFGE and the D.C. Government on the Implementation of the D.C. Personnel Manual, Chapter 4 Suitability" at 1, October 5, 2015; "Memorandum of Agreement Between AFGE and the D.C. Government on Chapter 16 Discipline" at 1, May 11, 2016; 6B DCMR § 1602.2(c) (stating that "where a specific provision of a collective bargaining agreement cannot be reconciled with a provision of this chapter, the labor agreement shall control with respect to that provision.").

even for safety sensitive employees.[43] Therefore, the Board finds that the Award is not on its face contrary to law or public policy.

IV. Conclusion

The Board rejects DPW's arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, DPW's Request is denied, and the matter is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The 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
By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons and Peter Winkler.

September 15, 2022
Washington, D.C.

[43] *See* 6B DCMR § 429.2(a).

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.