Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/ Department of Corrections Labor Committee,	
Petitioner,	PERB Case No. 10-A-20
v.	Opinion No. 1271
District of Columbia Department of Corrections,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The Fraternal Order of Police/Department of Corrections Labor Committee ("FOP" or "Petitioner") filed an Arbitration Review Request ("Request") in the above-captioned matter. FOP seeks review of an arbitration award ("Award") that denied a grievance filed by FOP challenging the termination of grievant Fabian Omenankiti ("Grievant"). FOP asserts that the arbitrator exceeded the jurisdiction granted and that the Award is contrary to law and public policy. (Request at 3).

The District of Columbia Department of Corrections ("Agency" or "Respondent") opposes FOP's Request ("Opposition") and contends that FOP fails to state an appropriate basis for review. (Opposition at 2).

The issues before the Board are whether the arbitrator exceeded her jurisdiction and whether the Award was contrary to law and public policy.

II. Background

At the arbitration, the arbitrator found the following facts: Grievant was employed by the Department of Corrections for twenty years before he was terminated on November 24, 2008. (Award at 9).

On March 24, 2008, Grievant submitted a request for 45 days of leave to travel to Nigeria in order to attend to cultural and ethnic duties surrounding his father's death. *Id.* Grievant was granted fifteen days of leave and was notified in writing that he was expected to return to duty on July 27, 2008. (Award at 10). Grievant was required to sign the memorandum approving his leave and notifying him of his date of return. *Id.*

Instead of returning to duty on July 27, 2008, Grievant did not return to work until August 26, 2008 – four weeks later. *Id.* Grievant did not call in to request an extension of his leave. *Id.* The Agency sought to terminate Grievant for insubordination and unauthorized leave, noting that Grievant had a prior history of requesting extended leaves of absence to deal with family emergencies, all in the months of June or September, and of overstaying those extended leaves of absence. (Award at 9, 11). Specifically, Grievant faced discipline for overstaying extended leave in 2004, overstayed extended leave by 48 days in 2005, overstayed extended leave by seven weeks in 2006, and overstayed extended leave by 11 days in 2007. (Award at 17-18). The Agency asked for Grievant's termination in connection with the 2007 offense but the removal action was later reduced to a three-day suspension. (Award at 18).

On September 29, 2008, the Agency sent a 20-day advance notice of proposal to remove Grievant from his position for insubordination and unauthorized leave. (Award at 10). An Agency hearing officer was assigned to the case, and Grievant was notified of his right to submit a response and/or request a hearing from the designated hearing officer, as well as the hearing officer's contact information. (Award at 11). Grievant did not submit a response or request a hearing, and no hearing was held. (Award at 38-39). After reviewing the documents related to Grievant's proposed termination, the hearing officer concurred with the Agency's proposal to remove Grievant for cause. (Award at 12).

III. Discussion

FOP contends that the Award is contrary to law and public policy. For the reasons listed below, the Board disagrees.

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).

The Board has held that 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).

Arbitration hearings in this matter were held over three days and involved the testimony of seventeen witnesses. (Award at 2). In the end, the arbitrator concluded that the "totality of the evidence supports the Agency's decision to remove the Grievant for cause due to Insubordination and Unauthorized Absence." (Award at 29).

A. Award does not violate law and public policy

FOP alleges that the Award is contrary to law and public policy because "the *Douglas* factors were never properly considered" and that the arbitrator "erred in arbitrarily concluding that those factors were considered, when, in fact, they were not." (Request at 9, 11). In support of this contention FOP cites to *D.C. Department of Public Works v. Colbert*, in which the D.C. Court of Appeals held that an agency must consider all relevant *Douglas* factors when making a disciplinary determination. 874 A.2d 353 (D.C. 2005).

In the Award, the arbitrator found that:

> [T]he evidence established that the Agency considered and weighed the relevant *Douglas* factors. With respect to *Douglas*

Factor 1, the evidence established that the Grievant's offense was serious, intentional and frequently repeated. His consecutive pattern of becoming AWOL affected the operation of the Department and imposed an undue burden on staffing and morale. Absenteeism requires the Agency to call in officers on their days off or require extended duty in an environment that is dangerous and stressful. It also results in overtime due to understaffing and has a negative affect [sic] on staff morale. Thus, the Grievant's conduct in 2008 not only affected his ability to perform but it also affected his supervisors' confidence in his ability to perform his duties as directed (Factor 5).

It was also established that the penalty imposed was consistent with that imposed in similar circumstances (Factor 8). The evidence failed to establish the Union's claim that the Grievant was treated more harshly than other similarly situated employees. Moreover, the penalty was consistent with the Agency's table of penalties for discipline with respect to attendance (Factor 7). The Attendance Program Statement has specified penalties for unauthorized absences depending on the number of days AWOL and whether an employee calls in. While it was demonstrated that there are other employees in AWOL status who had not been disciplined that does not translate into inconsistent treatment. Unlike other officers, the Grievant had a pattern of misconduct and had been counseled and disciplined in the past. Finally, with respect to Factor 9, it was established that the Grievant was on notice of the rules for attendance and the consequences of violating them as he had narrowly averted removal only the year before.

With respect to the *Douglas* factors that the Union submits were ignored, the Agency did consider the employee's past disciplinary record (Factor 3) as his prior history of leave abuse was noted in the decision and was a serious aggravating factor. Further, although the Union asserts that the Agency did not consider mitigating factors such as the death of the Grievant's father-in-law and illness, this information was not presented because of the Grievant's failure to request a hearing or provide a response to the Hearing Officer. This argument, however, begs the question because the Grievant had been told that no extension would be granted under any circumstances. This is not an employee how had encountered an emergency while away on extended leave for the first time and the Grievant had consistently invoked both family illness and malaria as reasons for overstaying his leave in years past. As the Director observed in his memorandum approving the Grievant's leave it is difficult to accept that these

> events occurred at the exact same time every year. Nonetheless, even accepting the Grievant's mitigating factors, they do not outweigh the number and severity of aggravating factors that support the charge of Unauthorized Absence. Similarly, the Grievant's persistent inability to return to work on the date he was scheduled to return constitutes a blatant and willful disregard of the conditions of his leave and supports the additional charge of insubordination for which the mitigating factors were also unavailing.

(Award at 36-8) (internal citations omitted). On this point, FOP is simply disagreeing with the arbitrator's decision that the Agency hearing examiner properly considered the *Douglas* factors. The Board has long held that such grounds do not present a statutory basis for modifying or setting 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).

Additionally, FOP alleges that the Award is contrary to law and public policy because it violates Grievant's constitutional right to due process. (Request at 11). FOP states in its Request that "[t]he Arbitrator did not find that the Officer's rights were violated; however, the Agency clearly did not abide by its internal regulations in Sgt. Omenankiti's termination." *Id.* In support of this argument, FOP alleges that Grievant's due process rights were violated when he did not receive an internal hearing, when the Agency failed to engage in "scrupulous compliance" with its own regulations, and when Grievant was assigned a hearing examiner who was in the chain of command of the Agency director. (Request at 12-13).

FOP raised this due process argument before the arbitrator, and the arbitrator considered it when writing the Award. (Award at 38-9). In doing so, she stated:

> The Agency was required under Article 11, Section 9 to hold a hearing, if the employee requests one. The Grievant was advised on September 29, 2008 of his right to present the Hearing Officer with a response yet he did not submit any materials or request an extension. The fact remains that the Grievant was advised of his right to provide a defense and he had availed himself of this process on the removal charge just the year before.
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> Moreover, even if the Hearing Officer should have been more proactive in following up with the Union before he issued his Recommendation there is no evidence to support the Union's assertion that the Agency "refused" to hold a hearing or that it "manipulated" the process. Nor do I find that the absence of a hearing prejudiced the Grievant or resulted in any harm because none of the Hearing Officer's factual findings were in dispute. Even with respect to the call in issue, the Hearing Officer found

> that the Grievant did not contact a supervisor or receive and extension – facts which the Grievant did not dispute. As stated earlier, whether or not the Grievant called in or any mitigating circumstances that he might have raised at the hearing were outweighed by the presence of several serious aggravating factors.
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> In this arbitration process the Grievant has been afforded a full and fair opportunity to present a defense to the Agency's finding of "cause" for removal for Insubordination and Unauthorized Absence. The Grievant was able to present any mitigating circumstances, testify on his behalf, and he received a thorough and well-articulated defense by the Union.

(Award at 38-9).

FOP alleges that the arbitrator "erroneously concluded" that Grievant did not request a hearing. (Request at 12). FOP goes on to state that "[t]he evidence and testimony belies that conclusion," but does not cite to any evidence or testimony that would contradict the arbitrator's conclusion.[1] This contention merely takes issue with the arbitrator's factual findings and credibility resolutions. The Board will not second guess credibility determinations, nor will it overturn an arbitrator's findings on the basis of a disagreement with the arbitrator's determination. *Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 31 DC Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984); *FOP/DOC Labor Comm. v. Dep't of Corrections*, 52 D.C. Reg. 2496, Slip Op. No. 722, PERB Case Nos. 01-U-21, 01-U-28, 01-U-32 (2005).

Similarly, FOP alleges that the Agency failed to engage in "scrupulous compliance" with its own regulations in regard to the disparate treatment of Grievant. (Request at 13). This allegation is another instance of FOP merely disagreeing with the arbitrator's findings. The Board declines to overturn the arbitrator's award on this basis. *Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 31 DC Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984).

Though couched in an arbitration review request, FOP's "chain of command" argument was not addressed in the Award. In making the "chain of command" argument, FOP does not cite to any part of the Award where the arbitrator discussed the issue, nor does FOP claim that the issue was raised in arbitration but ignored in the Award. Instead, FOP appears to be raising this argument for the first time on appeal to the Board. It is a well-settled legal principle that a party may not raise an argument for the first time on appeal. *See, e.g., Badawi v. Hawk One Sec., Inc.*, 21 A.3d 607, 613 n. 4 (D.C. 2011) (*quoting Goodman v. District of Columbia Rental Housing Comm.*, 573 A.2d 1293, 1301 (D.C. 1990) ("Absent a showing of 'exceptional injustice,' we cannot consider arguments 'not presented before the administrative agency at the

[1] FOP does follow its allegation with "*Id*," but this citation seems to be erroneous. The citation immediately preceding is to the Award and does not point to any relevant testimony or evidence.

appropriate time.")). FOP did not provide the arbitrator with a chance to consider this due process violation, and it would be improper for the Board to consider such a violation now.

B. Arbitrator did not exceed her jurisdiction

In the present case, the Arbitrator did not exceed the authority granted to her by the CBA by failing to derive the Award from the essence of the agreement. In support of its contention to the contrary, FOP cites four factors from the Sixth Circuit's decision in *Cement Division, National Gypsum Co. v. United States Steelworkers of America*, AFL-CIO, Local 135, 793 F.2d 759 (6th Cir. 1986) (Request at 15). However, the Board has agreed with the Sixth Circuit when it overruled *Cement Divisions* in *Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M*, 475 F.3d 746 (2007). In considering a similar "essence of the agreement" contention in *Michigan Family Resources*, the Sixth Circuit stated that:

> we will consider the questions of "procedural aberration"...[and ask]: [D]id the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract?" So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made "serious," "improvident" or "silly" errors in resolving the merits of the dispute.
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> The Court's repeated insistence that the federal courts must tolerate "serious" arbitral errors suggests that judicial consideration of the merits of a dispute is the rare exception, not the rule. At the same time we cannot ignore the specter that an arbitration decision could be so "ignor[ant]" of the contract's "plain language," [citation omitted]...as to make implausible any contention that the arbitrator was construing the contract...Such exception, of course, is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that...This view of the "arguably construing" inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes...

National Ass'n of Government Employees, SEIU, Local R3-07 v. District of Columbia Office of Communications, __ D.C. Reg. __, Slip Op. No. 1203, PERB Case No. 10-A-08 (2011) (citing *Michigan Family Resources*, 475 F.3d at 753) (overruling *Cement Divisions*, 793 F.2d 759).

In the instant case, the Board finds nothing in the record to suggest that fraud, a conflict of interest, or dishonesty affected the Arbitrator's decision or the arbitral process. Additionally, there is nothing in the Award to show that it was so "ignorant of the contract's plain language as to make implausible any contention that the arbitrator was construing the contract." No one disputes that the collective bargaining agreement committed this grievance to arbitration. Furthermore, the Arbitrator was mutually selected by the parties to resolve the dispute. *See Michigan Family Resources*, 475 F.3d at 754. Hence, the Board rejects the argument that the Arbitrator exceeded her authority.

In light of the above, we find no merit to FOP's Request. We find that the Arbitrator's conclusions are based on a thorough analysis. In short, the Arbitrator's ruling cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of her authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police's 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.

May 30, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-20 was transmitted via U.S. Mail and e-mail to the following parties on this the 31st day of May, 2012.

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