

**Notice:** This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:	)	
	)	
District of Columbia	)	
Department of Corrections,	)	
	)	
Petitioner,	)	PERB Case No. 05-A-02
	)	
and	)	
	)	Opinion No. 820
	)	
Fraternal Order of Police/Department of	)	
Corrections Labor Committee (on behalf	)	
Alvin Layne, James Drummond and Irvin Johnson),	)	
	)	
Respondent.	)	
	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case:**

The District of Columbia Department of Corrections ("DOC" or "Agency") filed an Arbitration Review Request. DOC seeks review of an Arbitration Award ("Award") which: (1) rescinded the termination of bargaining unit members Alvin Layne, James Drummond and Irvin Johnson ("Grievants") and (2) ordered DOC to reinstate the three Grievants with full back pay and without any reduction for interim earnings. DOC claims that the: (1) Arbitrator was without authority or exceeded the jurisdiction granted and (2) Award on its face is contrary to law and public policy. (See Request at p. 3) The Fraternal Order of Police/Department of Corrections Labor Committee ("FOP") opposes the Arbitration Review Request.

The issue before the Board is whether "the arbitrator was without or exceeded his or her jurisdiction" or whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02 (6) (2001 ed.)

## II. Discussion

On January 30, 2003, at approximately 6:00 a.m., correctional officers conducted a "shakedown" of the seven control cells at DOC's maximum security facility located in Lorton, Virginia to search for contraband such as weapons and other unauthorized items that may be in the cells.<sup>1</sup> While their cells were being searched, the inmates were placed in an adjoining recreation yard. Donovan Brown was an inmate at the facility and was in Cell 3. He alleged that on January 30, 2003, at about 6:30 a.m., he was "hit by [an] officer, kicked in [the] head, body[,] arm [and] chest." (Award at p. 2)

"The assault of Inmate Brown was alleged to have occurred in the recreation yard. Among those charged for committing the assault, were the three grievants (Correctional Officers) who were assigned to the first three cells: Cpl. Alvin Layne, an 8-year veteran of DOC and assigned to maximum security since 1995, Cpl. James Drummond and Cpl. Irvin Johnson, both 15-year veterans of DOC and who were serving their first day of duty in maximum security." (Award at p. 2) In addition, Lt. Edward Givan who was the officer in charge, was also charged for committing the assault.<sup>2</sup>

On the day in question, Inmate Brown told day shift officer Cpl. Opa Clegg that he was sick. Officer Clegg observed that Inmate Brown was spitting up blood. As a result, he advised Lt. David Tinsley who escorted Inmate Brown to the infirmary. (See Award at p. 2). "The Medical Report show[ed] that Inmate Brown claimed [that he was] hit by [an] officer [at] about 6:30 a.m. The Doctor found bruises behind [Inmate Brown's] right ear and on [his] right arm and minor abrasions [in] both wrist areas, while noting complaints of pain in the lumbar region. [The Doctor] prescribed Tylenol and rest. [Inmate Brown was] . . . returned . . . to his cell." (Award at p. 2)

On March 9, 2000, Deputy Warden Steven A. Smith received instructions from then Warden Adrienne Poteat to investigate the matter. (See Award at p. 2) On June 22, 2000, Mr. Smith issued an Investigation Report. Mr. Smith's report indicated that Inmate Brown was not interviewed because he refused to be interviewed unless his attorney was present. "Among Smith's recommendations were that Lt. Givan, the three grievants and another corporal should be removed because they 'assaulted an inmate with provocation and for retaliation of an incident that the inmate had been involved in'." (Award at pgs. 2-3).

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<sup>1</sup>Control cells are used to isolate in one-person cells difficult prisoners for various breaches of prison rules. (See Award at p. 2)

<sup>2</sup>Lt. Edward Givan is not a member of the FOP bargaining unit. As a result, he was not a grievant in the case.

After the Grievants were summarily removed on August 8, 2000, Mr. Smith recommended that each of the Grievants be terminated. However, three separate Hearing Officers in separate decisions, dated September 26 and October 10, 2000, recommended that the charges be dismissed and that the three Grievants be reinstated. (See Award at p. 3). Despite the Hearing Officers' recommendations, on November 8, 2000, Warden Poteat "issued three separate Final Decisions removing each of the Grievants." (Award at p. 3) The summaries contained in Warden Poteat's Final Decisions "were identical . . . with the exception of an added paragraph for Grievant Johnson. In each [ case, Warden Poteat] found that Inmate Brown was singled out by being required to be on his knees, on the cold ground, with his knees crossed and head against the wall, therefore, making it more probable than not that Inmate Brown was treated differently in retaliation for grabbing a female officer's private parts. [Warden Poteat] also found that it was more probable than not that an assault had occurred based on eye witness accounts of them having participated in the assault . . . She also found that it was more probable than not that the officers attempted to cover up the incident." (Award at p. 3)

Warden Poteat was no longer in her position at the time that a signed final notice was to be sent to the Grievants. As a result, her successor, Odie Washington, "issued three separate but identical Notices of Final Decision, dated February 21, 2001, removing each [of the three Grievants] on the basis of participation 'in excessive and unnecessary use of force against Inmate Brown on January 20, 2000, which arbitrarily and capriciously subjected Inmate Brown to personal abuse and personal injury'." (Award at p. 3) In each Final Notice, [Odie Washington] stated that he disagreed with the Hearing Officer's findings and recommendations . . ." Id.

On March 8, 2001, each of the Grievants filed a grievance contesting their removal. Thereafter, FOP filed for arbitration and arbitration hearings were held on August 3 and 4, 2004.

At arbitration FOP argued that there was "no testimony or written statement by Inmate Brown that he was actually assaulted . . . [In addition, FOP asserted that,] DOC's evidence [was] based on Mr. Smith's synopses of unsworn statements of some 20 individuals, but no tapes or transcripts of them were submitted into evidence. [Also, FOP claimed that] of those interviewed only two were called to testify at the arbitration hearing. One of them was Cpl. Clegg, who Mr. Smith quotes as having said that Inmate Brown told him that he had been assaulted by officers he could not identify. However, [FOP argued that] Cpl. Clegg, on both direct and cross examination, testified that Inmate Brown never said he had been assaulted. [FOP contended that] the variance between Mr. Smith's synopses and Cpl. Clegg's testimony undercut the reliability of Mr. Smith's other synopses." (Award at p. 6)

FOP also noted that DOC's other witness was Corporal Sumter, who, according to Mr. Smith, identified the Grievants as hitting Inmate Brown. However, FOP pointed out that at the arbitration hearing Cpl. Sumter testified that he did not see aggressive force being used. In light of the above, FOP asserted that Mr. Smith's hearsay evidence could not outweigh the live testimony

of those cited by FOP and the live testimony of the Grievants who testified that they did not assault Inmate Brown.

DOC countered that the Arbitrator should recognize the self interest of the Grievants and asserted that all of DOC's witnesses did not stand to gain from their testimony. (See Award at p. 6) In addition, DOC argued that "[g]iven the strict isolation of the control cell environment, 7 men in 7 separate cells, it is impossible to conclude that Brown's fellow inmates beat him. [Therefore, DOC contended that] [t]he only individuals left to be considered were corrections officers." (Award at p. 6) Furthermore, DOC asserted that Inmate Brown had injuries that were consistent with others beating him. For example, DOC noted that the abrasions on Inmate Brown's wrists came from being in handcuffs for 30 to 40 minutes in the recreation area. Also, DOC claimed that the information contained in a medical report was reliable because patients have a self-interest in obtaining effective medical treatment and Cpl. Clegg's statement agrees with the medical report in this case. (See Award at p. 6)

DOC also pointed out that "Mr. Smith was able to overcome the gray wall of silence that inhibits discovery of the truth and obtained statements from both Cpl. Sumter and Thomas that they saw Brown beaten." (Award at p. 6)

In an Award issued on October 16, 2004, Arbitrator Jerome Barrett determined that based on a "careful examination of all the evidence and arguments of the parties, including the demeanor of the witnesses, . . . [DOC did] not meet its burden of proof in showing that Inmate Brown was assaulted and in showing, that even if Inmate Brown was assaulted or mistreated, any of the three Grievants participated in such activity." (Award at p. 10) As a remedy, the Arbitrator rescinded the Grievants' termination and directed that the three Grievants be reinstated. (See Award at 11) In addition, the Arbitrator indicated that "in view of the unwarranted personnel action taken against them, [the] Grievants shall receive back pay, with interest, for the period for which each was separated, in accordance with the Back Pay Act. [Also, the Arbitrator directed that] all records of [the] Grievants' termination shall be expunged and all emoluments, benefits, etc., be restored so they will not be disadvantaged by the period of their separation. The Arbitrator further [found that] in the absence of any citation of authority to allow offset of interim earnings against back pay due, [the Grievants' back pay should not be offset by any interim earnings]." (Award at p. 11)

In their Arbitration Review Request ("Request"), DOC indicates that it "divides the Arbitrator's decision into two parts: 1) the decision to reinstate the three grievants; and 2) the Arbitrator's decision to award back pay and affirmatively disallow any mitigation of damage due to interim earnings. As to the reinstatement, [DOC indicates that it] is in the process of returning the three grievants to work. [As a result, DOC is] not appeal[ing] that portion of the decision. However, [DOC is] request[ing] that [the Board] overturn the award of back pay because this award offends the well established doctrine requiring mitigation of damages through interim pay. [DOC asserts that] [t]his award, therefore, is punitive in nature and the Arbitrator has exceeded his

authority by granting it.”<sup>3</sup> (Request at pgs. 1-2) In addition, DOC contends that the awarding of back pay without offsets for interim earnings, is contrary to law and public policy.

FOP counters that DOC’s claim that the Award is contrary to law because it is “punitive in nature,” does not constitute a statutory basis for review and has no basis in fact. Specifically, FOP argues that the present award does no more than compensate the Grievants for the lost wages they should have received for their unwarranted terminations. Moreover, FOP contends that the Grievants were not awarded any extraordinary, punitive or exemplary damages. Also, FOP claims that it was within the Arbitrator’s discretion to fashion an equitable remedy that did not order offsets for interim earnings. In light of the above, FOP asserts that the Board should deny DOC’s Request.

When a party files an arbitration review request, the Board’s scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act (“CMPA”) authorizes the Board to modify or set aside an arbitration award in only 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).

In the present case, DOC contends that the Arbitrator exceeded his jurisdiction because the award violates the parties’ Compensation Agreement. In support of its argument, DOC cites Article 10 of the Collective Bargaining Agreement (“CBA”) between Compensation Units 1 and 2 and the District of Columbia Government. DOC claims that Article 10 of the parties’ CBA provides in pertinent part as follows:

Arbitration awards or settlement agreements in cases involving an individual employee shall be paid within sixty (60) days of receipt from the employee of relevant documentation, including documentation of interim earnings and other potential offsets.  
(Request at p. 6)

DOC asserts that Arbitrator Barrett ignored the plain reading of Article 10 of the CBA between Compensation Units 1 and 2 and the District of Columbia Government. In this regard, DOC contends that this “provision of the CBA clearly contemplates that the parties expect interim

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<sup>3</sup>The Arbitrator also stated that he was retaining jurisdiction for the purpose of resolving any disputes over the implementation of the award.

earnings will be deducted from any arbitration award. [Moreover, DOC argues that] [t]he union . . . is bound by this Compensation Agreement. [Furthermore, DOC claims ] that the Arbitrator lacked authority to waive the rule of mitigation of damages." (Request at pgs. 6-7)

We have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the collective bargaining agreement." District of Columbia General Hospital v. Public Employee Relations Board, D.C. Super. Ct. No. 9-92 (May 24, 1993). See also, United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). Furthermore, an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract." Misco, Inc., 484 U.S. at 38. Also, we have explained that:

[by] submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties agreement and related rules and regulations as well as his evidentiary findings and conclusions upon which the decision is based."

University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No 92-A-04 (1992).

In addition, we have found that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." D.C. Department of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). Also, we have 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.<sup>4</sup> See, District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Furthermore, the "Supreme Court held in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593,597 (1960), that arbitrators bring their 'informed judgement' to bear on the interpretation of collective bargaining agreements, and that is 'especially true when it comes to formulating remedies.'" Metropolitan Police Department v. Public Employee Relations Board, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6 (May 13, 2005). Therefore, once Arbitrator Barrett determined that DOC did not have cause to remove the Grievants,<sup>5</sup> he had the authority to determine what he deemed to be the

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<sup>4</sup>We note that if the parties' collective bargaining agreement limits the arbitrator's power, that limitation would be enforced.

<sup>5</sup>As previously noted, Arbitrator Barrett found that DOC "[d]id not meet its burden of proof in showing that inmate Brown was assaulted and in showing, that even of Inmate Brown was assaulted or mistreated, any of the three Grievants participated in such activity." (Award at p.

appropriate remedy.

In light of the above, we find that DOC's assertion that the Arbitrator exceeded his authority by requiring "DOC to pay the grievant[s] back pay without offset for interim earnings for the period the three grievants were fired," involves only a disagreement with the Arbitrator's findings and conclusions as to the interpretation of Article 10 of the CBA between Compensation Units 1 and 2 and the District of Columbia Government. This does not present a statutory basis for review. Therefore, we cannot reverse the Award on this ground.

As a second basis for review, DOC claims that the award on its face is contrary to law and public policy because it violates the parties' CBA, the Back Pay Act (5 U.S.C. §5596) and District of Columbia Regulations (DPM 11B, Subpart 8, §§8.1 through 8.16). Specifically, DOC claims that Article 10 of the CBA between Compensation Units 1 and 2 and the District Government as well as both the Back Pay Act and District of Columbia Regulations call for "mitigation of back pay by deduction of interim earnings." (Request at p. 5)

Relying on Automobile Mechanics Local 701 v. Joe Mitchell Buick, Inc., 930 F.2d 576, 578 (7<sup>th</sup> Cir. 1991), FOP asserts that "Arbitrator Barrett's Award of back pay without offsets for interim earnings is not contrary to law or public policy because '[i]t is settled that arbitrators have discretion to decide whether lost earnings should be offset by interim earnings or a failure to mitigate' . . ."<sup>6</sup> (FOP's Opposition at p. 10)

In addition, FOP claims that in "Teamsters, Chauffeurs, Salesdrivers & Helpers, Local Union No. 330 v. Elgin Eby-Brown Co., 670 F. Supp 1393, 1397 (N.D. Ill. 1987), the district court

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11).

<sup>6</sup>FOP also cites the following additional cases to support its position that an award of back pay without offsets for interim earnings is not contrary to law or public policy: ICWU v. Columbia Chemicals Co., 331 F.3d 491, 498-99 (5<sup>th</sup> Cir. 2003) (holding that company waived the issue of offsets for interim earnings by not raising it before the arbitrator); IUOE v. Murphy Co., 82 F.3d 185, 189 (7<sup>th</sup> Cir. 1996) (holding the arbitrator's silence on the question of offsets for interim earnings means that no such offsets are to be made); Pennsylvania Nurses Ass'n v. John F. Kennedy Medical Center, 247 F. Supp 2 d 665, 676 (E.D. Pa. 2003) ("An arbitrator may, but need not, require mitigation of damages."); Coppage v. USPS, 119 F. Supp. 2d 1375, 1381-82 (M.D. Ga. 2000) (It may "be a good idea that an arbitrator should consider an employee's duty to mitigate, but failure to do so, specifically when not requested to do so, is not grounds to vacate an arbitrator's award or to decline enforcement."); Pittsburgh Metro Area Postal Workers' Union v. USPS, 1997 U.S. Dist. LEXIS 12582, at \*30-\*33 (W.D. Pa. May 12, 1997) (holding that the Postal Service's failure to raise the issue of mitigation to the arbitrator waived its right to dispute that portion of the award). (See FOP's Opposition at pgs. 10-11.)

examined the issue of mitigation of damages in determining back pay and concluded that there is not 'any case law which indicates that an arbitrator must always consider mitigation of damages in determining back pay. [Furthermore, FOP asserts that they] have [not] . . . been able to locate any case holding that as matter of law every arbitrator must take into account the grievant's duty to mitigate damages.' [Also, FOP notes that] . . . a review of [DOC's Request] . . . confirms that they were likewise unable to cite to a single case holding that an arbitrator is required to provide for offsets of interim earnings in awarding back pay to a grievant. . . Rather, [DOC] cites to practices under the National Labor Relations Act, the Civil Rights Act of 1964 and certain passages from Elkouri & Elkouri, How Arbitration Workers (6<sup>th</sup> Ed. 2003) to support its assertion that the Award is against public policy. [Furthermore, FOP observed that] [s]imilar arguments were made and rejected in Elgin Eby-Brown Co., 670 F. Supp at 1397, and Tenet Healthsystem MCP, L.L.C. v. Pennsylvania Nurses Ass'n Local 712, 2001 U.S. Dist LEXIS 21535, \*10-\*15, (E.D. Pa. Dec. 20, 2001). [FOP notes that] [i]n Tenet, the district court specifically found that the proposition that arbitrators must always reduce awards of back pay when the grievant fails to mitigate damages 'is not supported by well defined, explicit, and clearly applicable governing law.' Consequently, the Arbitrator's decision not to reduce the award of back pay was not in manifest disregard of the law. [In closing, FOP contends that] [i]n light of the overwhelming legal precedent holding that arbitrators are not required to offset back pay awards by interim earnings, there is no merit to [DOC's] claim that the Award at issue is contrary to law or public policy." (FOP's Opposition at pgs.10-11)

Also, FOP asserts that DOC's claim that the Award is contrary to law because it is "punitive in nature," does not constitute a statutory basis for review and has no basis in fact. Specifically, FOP argues that the present award does no more than compensate the Grievants for the lost wages they should have received for their unwarranted terminations. Moreover, FOP contends that the Grievants were not awarded any extraordinary, punitive or exemplary damages. Finally, FOP claims that it was within the Arbitrator's discretion to fashion an equitable remedy that did not order offsets for interim earnings. In view of the above, FOP is asking that the Board deny DOC's Request.

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling. "[T]he 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). Also, a petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well-defined, public policy grounded in law or legal precedent. See United Paperworkers Int'l Union, AFL-CIO v. Misco 484 U.S. 29, 43 (1987) and Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.,

442 F.2d 1234, 1239 (D.C. Cir. 1971).<sup>7</sup> In addition, the petitioning party has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). Furthermore, as the D.C. Court of Appeals has stated, we must “not be led astray by our own (or anyone else’s) concepts of ‘public policy’ no matter how tempting such a course might be in a particular factual setting.” Department of Corrections v. Local No. 246, 554 A.2d 319, 325 (D.C. 1989).

In the present case, DOC asserts that the Award is on its face contrary to law and public policy. In support of this claim, DOC contends that Article 10 of the CBA between Compensation Units 1 and 2 and the District of Columbia Government clearly contemplates that the parties expect that interim earnings would be deducted from any arbitration award. As a result, DOC argues that the Arbitrator should not have awarded back pay with no offset for interim earnings. As stated above, we believe that DOC’s grounds for review concerning Article 10 of the CBA, only involves a disagreement with the arbitrator’s interpretation of Article 10 of the parties’ CBA. Moreover, DOC merely requests that we adopt its interpretation of Article 10 of the parties’ CBA. We have held that a “disagreement with the Arbitrator’s interpretation of the parties’ contract . . . does not render the Award contrary to law and public policy.” AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995). Therefore, DOC’s claim does not present a statutory basis for review. As a result, we cannot reverse the Award on this ground.

Next we will consider whether the Arbitrator’s decision that back pay not be offset by interim earnings violates the Back Pay Act (5 U.S. C. §5596). When considering whether an arbitrator’s award is contrary to law, we have stated that the petitioner has the burden to specify the “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” MPD v. FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

In the present case, Arbitrator Barrett notes that “in view of the unwarranted personnel action taken against them, [the] Grievants shall receive back pay, with interest, for the period for which each was separated, in accordance with the Back Pay Act . . . The Arbitrator [also found that] in the

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<sup>7</sup> See, MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing AFGE, Local 631 and Dep’t of Public Works, 45 DCR 6617, Slip Op. 365 at p. 4 n, PERB Case No. 93-A-03 (1998); See District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987) (same).

absence of any citation of authority to allow offset of interim earnings against back pay due, he shall not direct such offset." (Award at p. 11, emphasis added.)

The Back Pay Act provides in relevant part as follows:

**§ 5596. Back pay due in unjustified personnel action**

- (a) For the purpose of this section, "agency" means-
- (1) an Executive agency;

\* \* \*

- (5) **the Government of the** District of Columbia.

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

- (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, **less any amounts earned by the employee through other employment during that period**; and

- (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701 (g) of this title; and

\* \* \*

5 U.S.C. §5596 (Emphasis added.)

DOC has the burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at a different result.” MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, DOC asserts that Arbitrator Barrett indicated that he relied on the Back Pay Act for awarding back pay with interest for the period the Grievants were separated. (See Request at p. 5). Also, DOC claims that the Back Pay Act expressly requires an offset for earnings.<sup>8</sup> Specifically, DOC notes that Section (b)(1)(A)(i) of the Back Pay Act, provides that an individual who is found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action is entitled to receive “an amount equal to all or any part of the pay . . . less any amounts earned by the employee through other employment during that period . . .” In light of the above, DOC claims that Arbitrator Barrett’s Award is contrary to law because it violates Section (b)(1)(A)(i) of the Back Pay Act. After reviewing the record, we find that DOC has demonstrated that Arbitrator Barrett’s Award with respect to the offset of earnings, *violates a specific law*. Thus, we find that a statutory basis exists for setting aside that part of the Award that denied the offset of earnings. As a result, we reverse that portion of the Award that denies an offset for earnings received during the period of the Grievants’ termination.<sup>9</sup> Therefore, we grant DOC’s Arbitration Review Request in part and deny it in part. Specifically, we are only reversing that portion of the Award that denies an offset for earnings received during the period of the Grievants’ termination.

By reaching this holding we reject FOP’s argument that the granting of an offset is not mandatory in this case. Also, the cases relied on by the FOP did not involve awards that were issued in accordance with the Back Pay Act, and did not involve agencies of the District of Columbia Government. Thus, we believe that this case can be distinguished from those cited by the FOP.

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<sup>8</sup>See 5 U.S.C. §5596 (b)(1)(A)(i).

<sup>9</sup>DOC also asserts that the Award violates the District of Columbia Regulations (DPM 11B, Subpart 8, §§8.1 through 8.16). Specifically, DOC claims that the Award violates the offset provision contained in §8.11 of the DPM. (See Request at p. 6) However, we believe that this section of the DPM is only applicable to administrative determinations and statutory appeals and not awards issued by an arbitrator. (See §8.1 - Legal Basis). Therefore, DOC’s claim does not present a statutory basis for review. As a result, we cannot reverse the Award on this ground. Also, we note that Chapter 11 of the DPM was amended by adding a new §1149 - Back Pay. (See 52 DCR 934, 985 (February 4, 2005)). Effective February 4, 2005, the back pay provision of the DPM is now applicable to arbitration awards. (See §1149.1) The Award in this case was issued in October 2004; therefore, the February 2005 amended provision of Chapter 11, is not applicable to this case.

Also, we want to make it clear that by our holding in this case, we are not saying that an arbitrator cannot use his/her equitable power to deny a deduction for an offset of earnings; however, where an arbitrator expressly states (as he has in the present case) that he relied on a specific statute for awarding back pay and that statute expressly requires offset of earnings, the arbitrator must follow the statutory mandate.

For the reasons discussed above, DOC's Request is granted in part and denied in part. Specifically, we deny DOC's request that Arbitrator Barrett's award of back pay be reversed. As a result, the Grievants are entitled to back pay in this case. However, we grant DOC's request that the portion of the Award disallowing offset for interim earnings be reversed. Therefore, the Grievants are entitled to back pay less any amount earned by the Grievants through other employment during the period of their separation from DOC.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The District of Columbia Department of Corrections' ("DOC") Arbitration Review Request is granted in part and denied in part. Specifically, we deny DOC's request that back pay not be allowed. As a result, the Grievants in this case are entitled to back pay. However, we grant DOC's request that the portion of the Award disallowing offset for interim earnings be reversed. Therefore, the Grievants are entitled to back pay less any amount earned by the Grievants through other employment during the period of their separation from DOC.
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.**

June 22, 2006

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No.05-A-02 was transmitted via Fax and U.S. Mail to the following parties on this the 22<sup>nd</sup> day of June 2006.

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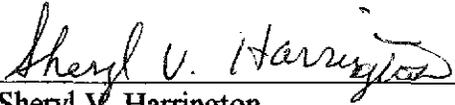
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Sheryl V. Harrington  
Secretary