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

In the Matter of:)	
)	
District of Columbia Public Schools, Division of Transportation,)	
)	
Petitioner,)	
)	PERB Case No. 07-A-07
and)	
)	Opinion No. 926
Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case

On September 4, 2007, the District of Columbia Public Schools, Division of Transportation (“DCPS”) filed an Arbitration Review Request (“Request”). DCPS seeks review of an Arbitration Award (“Award”) issued on August 9, 2007, that sustained the grievance of Teamsters Local Union No. 639 (“Union” or “Teamsters”) and ordered DCPS to: (1) return to members of the Union’s bargaining unit all accumulated personal leave that was expended during the 2005 winter break; and (2) pay the members of the Union’s bargaining unit administrative leave for the days they did not work during the 2005 winter break. (Award at 8). DCPS asserts that the Arbitrator exceeded his authority and that the Award is contrary to law and public policy. The Union opposes the 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

The Union represents full-time bus operators for DCPS. There also exists another bargaining unit of bus operators for DCPS represented by American Federation of State,

County and Municipal Employees (“AFSCME”). The only difference between the Union’s bargaining unit and AFSCME’s bargaining unit is that the members of AFSCME’s unit are part-time. (Award at 2).

Every year prior to the winter of 2005, DCPS allowed school bus drivers to work during the winter break. (Award at 2). However, on December 21, 2005, DCPS issued a memorandum to all employees implementing a change in that practice. (Award at 2). Specifically, school bus operators would be required to use annual leave and/or personal leave during the winter break period; or, if no annual or personal leave was available, DCPS would record the employee’s time away from work as leave without pay. (Award at 2). This policy applied to all: (1) the full-time school bus operators represented by the Union; and (2) the part-time school bus operators represented by AFSCME. In addition, a letter was issued on December 21, 2005, informing the bargaining unit members that they were required to attend a two-to-four hour training session during the winter break period. (Award at 2).

The Union filed a grievance on December 27, 2005, complaining that bargaining unit members should not be required to attend a training session during a winter break in which the bargaining unit members were required to take annual or personal leave. (Award at 2). In addition, the grievance asserted that the bargaining unit members should not be required to take any annual or personal leave for the time they are required to attend the training session. (Award at 2). In a separate grievance, the Union complained that bargaining unit members should not be required to use annual or personal leave for the time DCPS is closed for the winter break. (Award at 2). As a remedy, the Union asked that DCPS restore all annual and personal leave to bargaining unit members and to make them whole. (Award at 2). One of the primary disputes raised in the second grievance concerned DCPS’ granting of administrative leave during the winter break to employees represented by AFSCME, while employees represented by the Union were required to utilize their annual and personal leave.¹ (Award at 3).

At arbitration the Union argued that DCPS had violated the “non-discrimination” clause of the parties’ Collective Bargaining Agreement (“CBA”). Union representatives testified that the parties’ CBA clause states “all employees are to be treated equally and not be discriminated against one another.” (Award at 3). Specifically, the Union claimed that DCPS had discriminated against bargaining unit members when it granted administrative leave to employees represented by AFSCME during the 2005 winter break, but required bargaining unit members to use annual or personal leave during the 2005 winter break.

DCPS countered that it had not discriminated against the Union, because in the case of AFSCME, its president asked for administrative leave. In addition, DCPS argued

¹ Despite the fact that the December 2005 memo stated that all bus operators were required to use their personal or annual leave during the winter break, DCPS only required the full-time bus operators to use such leave and granted the part-time operators administrative leave during the winter break.

“[e]mployers who have employees represented by more than one union have no duty to apply the terms of a grievance settlement, formal or informal, to the members of a different unit.” (Award at 5).

In an Award issued on August 9, 2007, Arbitrator Clark’s analysis of the case arose from his “interpretation of the relevant portion of the parties’ [CBA], ‘Union Activities.’ In pertinent part, that provision states, ‘nor shall there be any discrimination against any employee because of union membership or activities.’” (Award at 5-6). The Arbitrator credited the Union’s testimony that the clause means “all employees are to be treated equally and not be discriminated against one another.” (Award at 6). The Arbitrator also found that the parties stipulated that the language of the “non-discrimination” clause raises the issue of whether DCPS discriminated against the Union when it granted administrative leave to the AFSCME bargaining unit but not to the Union bargaining unit. (Award at 6).

The Arbitrator stated that “‘Discrimination’ in the context of this case means the failure of an employer to treat a union equally where no reasonable distinction can be found between those favored and those not favored.” (Award at 6).² Based on this meaning the Arbitrator turned to whether the elements of discrimination were present. Specifically, the Arbitrator determined that the Union must demonstrate the following, that: (1) the Union and AFSCME bargaining units were similarly situated; (2) DCPS had treated the Union differently than the AFSCME bargaining unit; and (3) DCPS’s actions resulted in the Union members receiving less favorable treatment. (Award at 6). The Arbitrator reasoned that these elements would constitute discriminatory conduct on the part of DCPS. (Award at 6).

The Arbitrator found that the Union demonstrated that DCPS had treated the Union in a discriminatory manner. (Award at 6). First, the only difference the Arbitrator found between the Union and AFSCME is that AFSCME employees are part-time. (Award at 6). The Arbitrator also found that DCPS had made an exception to the new leave policy during winter break, but only as to AFSCME employees. (Award at 6). Specifically, the Arbitrator noted that DCPS granted administrative leave only to AFSCME employees for days they did not work during the winter break; while the Union members were required to use annual or personal leave, or leave without pay. (Award at 6). The Arbitrator determined that DCPS’ actions established that DCPS treated the Union differently than the AFSCME bargaining unit. (Award at 6). Lastly, the Arbitrator stated that AFSCME bargaining unit members were able to retain their accumulated annual and personal leave during the winter break and granted additional pay (administrative leave) for days they did not work, while the Union members were required to use their accumulated leave. (Award at 6). The Arbitrator concluded that this established that DCPS treated the Union less favorably than AFSCME. (Award at 6).

² The Arbitrator cited *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 613 (1999) and *City of Dayton Ohio*, 105 LA 614, 621 (Fullmer 1995).

The Arbitrator found DCPS' explanations for the disparity in treatment between the two bargaining units to be unconvincing. (Award at 7). Specifically DCPS asserted that because AFSCME requested administrative leave, and the Union did not, no discrimination resulted from granting AFSCME's request. (Award at 7). The Arbitrator determined that this reason ignores the fact that both AFSCME and the Union approached DCPS concerning the same problem with the use of leave during the winter break. (Award at 7). Whereas both AFSCME and the Union were "similarly situated with respect to the problem they brought the employer," the Arbitrator reasoned that the fact that the Union did not specifically request administrative leave, did not make DCPS's actions any less discriminatory. (Award at 7). The second explanation offered by DCPS was "[e]mployers who have employees represented by more than one union have no duty to apply the terms of a grievance settlement, formal or informal, to the members of a different bargaining unit." (Award at 7). However, the Arbitrator noted that DCPS' grant of administrative leave was not in response to a grievance nor was DCPS' actions "by nature a settlement of any kind." (Award at 7). The Arbitrator's analysis returned to the fact that it was not reasonable to have treated the two bargaining units differently concerning the same problem, resulting in less favorable treatment to the Union bargaining unit members. In light of the above, the Arbitrator concluded that DCPS violated the non-discrimination clause of the parties' CBA. (Award at 7). As a remedy, the Arbitrator directed that DCPS: "(1) return to members of the Union's bargaining unit all accumulated personal leave that was expended during the 2005 winter break; and (2) pay the members of the Union's bargaining unit administrative leave for the days they did not work during the 2005 winter break." (Award at 8).

In its Request, DCPS claims that: "(a) the Award exceeded the arbitrator's authority as granted by the parties' [CBA]; and (b) the award on its face is contrary to law and public policy." (Request at 3). The Union opposes the Request, asserting that DCPS' Request "fails to establish the existence of any of the limited statutory reasons that would provide [the Board] with a basis for reviewing the [Award] issued in this case." (Opposition at 1).

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. the arbitrator was without, or exceeded his or her jurisdiction;
2. the award on its face is contrary to law and public policy; or
3. the award was procured by fraud, collusion or other similar and unlawful means.

D.C. Code § 1-605.02 (2001 ed.).

DCPS argues that the Arbitrator's "key findings are unsupported by the evidence in the record and are in fact countered by the evidence in the record." (Request at 3). In

addition, DCPS contends that an Award requiring it to apply the terms of a settlement agreement with AFSCME (i.e. the grant of administrative leave) to the Union's bargaining unit members "would impose additional requirements that are not expressly provided in the parties' [CBA], cannot rationally be derived from the terms of the parties' [CBA], and is therefore based on general considerations of fairness and equity instead of on the precise terms of the parties' [CBA]." (Request at 3-4). In addition, DCPS claims that requiring DCPS to apply the same agreement with AFSCME to pay administrative leave to the Union's bargaining unit members would be contrary to law and public policy. (Request at 3).

We have held that "[t]he Board, will not substitute its own interpretation or that of the Agency's for that of the duly designated arbitrator." *District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246*, 34 D.C. Reg. 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).³ *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). 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. 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, 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); *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). In the present case, DCPS contends that the Arbitrator exceeded his authority because his findings are not supported by the record. Our review of the record indicates that there was evidence which could be found to support the Arbitrator's ruling. The Board finds DCPS' argument to be merely a disagreement with the Arbitrator's findings and conclusions. The Board will not substitute its, or the Agency's, findings and conclusions for those of the Arbitrator. Thus, the Board finds this argument does not present a statutory ground for review.

DCPS also contends the Arbitrator exceeded his jurisdiction because the Award "would impose additional requirements that are not expressly provided in the parties'

³ See also *District of Columbia General Hospital v. Public Employee Relations Board*, MPA 92-09 (D.C. Super Ct. May 24, 1993); and *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

[CBA] . . .” (Request at 3-4). 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.⁴ See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). 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 judgment” to bear on the interpretation of collective bargaining agreements, and that is “especially true when it comes to formulating remedies.” Courts have followed the Supreme Court’s lead in holding that arbitrators have implicit authority to fashion appropriate remedies for violations of collective bargaining agreements. See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at 6 (May 13, 2005). In the present case, the Arbitrator found that DCPS violated the CBA and exercised his equitable power to restore the Grievants’ leave and direct DCPS to pay administrative leave for the 2005 winter break. DCPS has not shown that any provision of the parties’ CBA limited the Arbitrator’s equitable powers. Instead, DCPS asks the Board to adopt its findings and conclusions. This we will not do.

Lastly, DCPS claims that requiring DCPS to apply the same agreement with AFSCME to pay administrative leave to the Union’s bargaining unit members would be contrary to law and public policy. (Request at 3).

“[T]he 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). 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). 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 A2d 319, 325 (D.C. 1989).

In the present case, DCPS alleges that the Award is contrary to law and public policy but fails to specify any applicable law or definite public policy that mandates that

⁴ We note that if MPD had cited a provision of the parties’ CBA that limits the Arbitrator’s equitable power, that limitation would be enforced.

the Arbitrator arrive at a different result. DCPS had 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 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, DCPS has failed to do so.

In view of the above, we find no merit to DCPS’s arguments. We find that the Arbitrator’s conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy or in excess of his authority. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The District of Columbia Public Schools, Division of Transportation’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.**

July 9, 2012

CERTIFICATE OF SERVICE

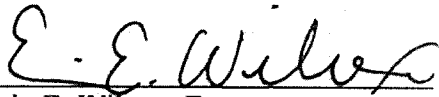
This is to certify that the attached Decision and Order in PERB Case No. 07-A-07 was transmitted via U.S. Mail and e-mail to the following parties on this the 9th day of July, 2012.

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