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

In the Matter of:)	
)	
District of Columbia Water and Sewer Authority,)	
)	PERB Case No. 03-A-07
Petitioner,)	
)	Opinion No. 733
and)	
)	
American Federation of Government Employees, Local 631,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of Case:

On September 15, 2003, the District of Columbia Water and Sewer Authority ("WASA"), filed an Arbitration Review Request ("Request"). WASA seeks review of an arbitration award ("Award") which rescinded the termination of seven Grievants. Specifically, the Arbitrator concluded that the collective bargaining agreement does not provide for an absolute guarantee of employment for those Waste Water Treatment Operators who did not obtain the necessary certification. However, he found that WASA should within 180 days of the Award attempt to transfer the Grievants to vacant positions. In addition, he determined that if an employee does not qualify for a vacant position during the 180-day period, then that employee can be terminated. Finally, the Arbitrator concluded that the date for determining when to apply the 20-year exemption should be October 4, 2001. (Award at p. 19). WASA contends that the Arbitrator was without authority to grant the Award. (Request at pgs. 2-3). In addition, WASA asserts that the award is contrary to law and public policy. The American Federation of Government Employees, Local 631 ("AFGE") opposes the Request.

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

II. **Discussion:**

On June 4, 1998, WASA and AFGE, Local 631 entered into a collective bargaining agreement (CBA). Article 27 of the CBA provided that "... [all] employees holding certain job positions should be certified or licensed." (Award at p. 5). Exemptions to this licensing requirement were provided for employees who had a: (1) current license or certification; (2) minimum of 20 years in a related job at WASA or its predecessor and who have a satisfactory work performance; and (3) minimum of 20 years of service and who have a prior license or certification. The above-noted exempted employees could retain their position without obtaining an additional license or certification.

In addition, the CBA provided that any employee who had a minimum of 20 years of service and a certificate in environmental science or other job related studies from the University of the District of Columbia or its equivalent, was deemed licensed and/or certified, and therefore exempt from the provisions of Article 27. (Award at p. 5).

Pursuant to Article 27, WASA agreed to assure that all individuals who were employed in these positions at the time this agreement became effective, would be trained and otherwise assisted in satisfying the licensing requirement. In order to accomplish this, WASA agreed to supply and pay for the training of employees for whom such licensing or certification was required as part of their job requirements. Furthermore, it was agreed that this training would be available for at least twelve (12) months before any certification or licensing test would be required. Also, any employee subject to this provision would be allowed to take the test at least twice before being deemed unable to continue in the affected position. Finally, if an employee failed the test, WASA agreed to train the employee for a minimum of six (6) months, prior to the second and third test, in those skill areas in which the employee was deemed deficient. Employees who wish to take the test again would only be required to be re-tested in the areas in which they were deemed deficient.

Finally, Article 27 of the 1998 agreement provided that in the event an employee could not obtain the required certification or license after being trained and tested at least three times, that employee would be transferred to any vacant position for which he/she is qualified or can perform with minimum training, regardless of seniority.¹ Transferred employees would be allowed to take a re-test for a license or certification (in their original position) whenever the test is scheduled.

The parties negotiated a new CBA which was signed on October 4, 2001. Article 34 of the 2001 agreement contained the same basic provisions that were in Article 27 of the 1998 Agreement. For example, Article 34 states that employees who have performed waste water treatment duties for 20 years, shall be exempt from the certification requirements. However, this provision does not state the time when the 20 year exemption begins to run. Also, Article 34, Section C, provides that employees who are unable to obtain their certification "shall be transferred to any vacant position for

¹If the employee is transferred to a position of a lesser grade, that employee would retain the salary that was in effect at the time of the third test, for a period of one (1) year after being transferred to a lesser grade position.

which he/she is qualified or can perform with minimal training." As with the 1998 agreement, the parties did not address what would happen if employees could not be placed in vacant positions.

In the present case, the seven Grievants are all Waste Water Treatment Operators (WWT) with varying degrees of experience. On January 21, 2001, WASA issued a Waste Water Treatment Operator Certification Policy. Pursuant to that policy, WWT Operators were required to be certified. "The policy language promulgated by [WASA] contains language that tracks much of the wording found in Article 27 of the . . . contract provision. Like that language, WWT Operators who do not obtain a certification, 'will be transferred to a vacant position for which he or she is qualified.' The policy also promises that [WASA] will provide minimal training, if needed." (Award at p. 12). The Arbitrator noted that WASA's certification "policy does not address how employees would be transferred or what they needed to do in order to obtain another position. [In addition, the arbitrator found] that the policy does state. . . that employees shall have a year to attain their certification. [Also, the arbitrator observed that pursuant to the certification policy,] if [employees] fail to [obtain the required certification] and an eligible vacancy does not become available within 180 days thereafter then the employees can be terminated." (Award at p. 12). The Arbitrator determined that the latter language was not contained in the CBA.

On January 22, 2001, each of the Grievants was notified that they had one year to obtain the necessary certification. To assist in meeting that requirement, WASA indicated that it would provide certification training and sponsor the certification examination at no cost.

Approximately two years later, on January 14, 2003, WASA notified the Grievants that they had not obtained the required certification. In addition, the notice indicated that effective January 26, 2003, the Grievants would be temporarily assigned to positions that did not require them to perform duties as certified WWT Operators. Specifically, the Grievants would be assigned work that would include performing housekeeping tasks at WASA.

On July 22, 2003, the seven Grievants received a "Notice of Proposed Disciplinary Action." The July 22nd Notice informed the Grievants that pursuant to Article 57 (disciplinary provision) of the CBA, they would be terminated because they failed to obtain the required certification.

AFGE filed for arbitration concerning the planned terminations. In an Award issued on August 29, 2003, the Arbitrator upheld AFGE's grievance. (Award at p. 19). Specifically, the Arbitrator concluded that the CBA does not provide for an absolute guarantee of employment for those WWT Operators who did not obtain the necessary certification. However, the Arbitrator found that WASA should within 180 days of the date of the Award, attempt to transfer the Grievants to vacant positions. The Arbitrator noted that at the beginning of this 180-day period, management should evaluate each of the Grievants to determine what their range of skills and ability are. "This can include reviewing their applications and also interviewing them." (Award at p. 18). In addition, he indicated that AFGE should participate, as appropriate, in trying to aid in finding appropriate jobs for these individuals. Furthermore, the Arbitrator ruled that if after 180 days these efforts do not result in the placement of some or all of the Grievants, then WASA has the right to terminate the individuals who could not be placed. Finally, the Arbitrator determined that the date for determining when to apply the 20-year exemption would be October 4, 2001.

WASA takes issue with the Arbitrator's Award. WASA claims that the award is contrary to law and public policy. In addition, WASA asserts that the Arbitrator was without authority when he: (a) modified the WWT certification policy by asserting that the actual effective date of the exemption status was October 4, 2001,² and (b) dictated to WASA the manner in which it should proceed to fill its vacant positions. (Request at p. 5). Specifically, WASA claims that the Arbitrator rendered an Award that: (1) was not supported by any contractual language and (2) fails to derive its essence from the parties' contract. (Request at pgs. 2 and 5).

As noted above, WASA claims that the award is contrary to law and public policy. In the present case, the Arbitrator reasoned that the issue before him was "whether WASA's conduct [was] consistent with the terms of the parties' collective bargaining agreement." (Award at p. 16). As a result, we believe that one of WASA's grounds for review only involves a disagreement with the Arbitrator's interpretation of Article 34 and Article 58 of the parties' CBA. Moreover, WASA merely requests that we adopt its: (1) interpretation of Article 34 and Article 58 of the parties' CBA and (2) evidentiary findings and conclusions. We have determined that a "disagreement with the Arbitrator's interpretation of the parties' contract does not make the Award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413 at p. 3, PERB Case No. 95-A-02 (1995). Moreover, the Board has held that "to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also, AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993) and W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983). After reviewing WASA's public policy argument, we find that WASA fails to cite any specific public policy or law that was violated by the Arbitrator's Award. Instead, WASA asserts that Article 34 does not state the date which should be used when computing the 20-year exemption. As a result, WASA claims that "the date for determining the 20-year exemption should be January 21, 2001, the date WASA issued its certification policy." (Request at p. 7). Also, WASA argues that pursuant to Article 58 of the CBA, AFGE should have raised the question of WASA's interpretation of the 20-year exemption at the time it (WASA) made the policy decision in January 2001 and not wait until July 2003. As a result, WASA asserts that the Arbitrator ignored the plain language of Article 58 when he considered the issue of the 20-year exemption. In view of the above, WASA's claims involve only a disagreement with the Arbitrator's interpretation of Article 34 and Article 58 of the parties' CBA. Furthermore, WASA's public policy argument does not rely on a well-defined policy or legal precedent. Thus, WASA has failed to point to any clear public policy or law which the Award contravenes.

In view of the above, we find no merit to WASA's public policy argument. Specifically, WASA disagrees with the Arbitrator's interpretation of Article 34 and Article 58 of the parties' CBA. This is not a sufficient basis for concluding that the Arbitrator's Award is contrary to law and public policy. Also, we believe that the Arbitrator's conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. For the reasons discussed, no statutory basis exist for setting aside the Award. Therefore, we cannot reverse the Arbitrator's Award on this ground.

²WASA claims that the October 2001 date is ten months after it implemented the WWT certification policy.

As a second basis for review, WASA asserts that the Arbitrator acted outside the scope of his authority when he: (1) allowed the union to raise the issue concerning the effective date of the 20-year exemption; (2) created a date of October 4, 2001, as the date for determining when to apply the 20-year exemption and (3) dictated to WASA the manner in which it should fill its vacant positions.

In support of its argument WASA cites Articles 21, 34 and 58 of the parties' collective bargaining agreement which provide in pertinent part as follows:

Article 21 - Job Placement and Changes

The Authority agrees that vacancy announcements shall be posted on official bulletin boards for a period of at least ten (10) workdays prior to the vacancy announcement closing date. Such announcements shall provide a synopsis of duties to be performed, qualifications required, any special knowledge, skills or ability that shall be given consideration.

Article 34, Section A - License and Certification

It is determined by the Authority that employees holding certain positions should be certified or licensed, the Authority agrees that all employees with a minimum of twenty (20) years in the position and/or related position at the Authority or its predecessor and an annual satisfactory work performance shall be exempt from the licensing and certification requirement and may retain their present position. (Emphasis added)

Article 58, Section G - General Grievance and Arbitration Procedures

The aggrieved employee. . . and/or the Local Union shall orally or in writing present and discuss. . . the grievance . . . within ten (10) workdays of the occurrence of the event giving rise to the grievance becomes known to the . . . Local Union.

WASA asserts that Article 34 is silent on the issue of the effective date of the 20-year exemption and that the Arbitrator acknowledged this fact. In addition, WASA claims that pursuant to Article 58, the union should have raised the question of the interpretation of the 20-year exemption at the time WASA implemented the certification policy in January 2001 rather than waiting until July 2003. In view of the above, WASA contends that the Arbitrator acted outside the scope of his authority when he: (1) allowed the union to raise the issue concerning the effective date of the 20-year exemption and (2) concluded that the date for determining when to apply the 20-year exemption should be October 4, 2001. (Request at p.6).

Finally, WASA notes that the Arbitrator concluded that the collective bargaining agreement does not provide for an absolute guarantee of employment for those Waste Water Treatment Operators who did not obtain the necessary certification. (Award at p. 19). Nevertheless, the Arbitrator found that WASA should within 180 days of the Award attempt to transfer the Grievants to vacant positions. In addition, he determined that if an employee has not qualified for a vacant position during the 180-day period, then that employee can be terminated. WASA contends that the Arbitrator was without authority when he dictated to the agency the manner in which it should proceed to fill its vacant positions. (Request at p. 5). Specifically, WASA claims that when the

Arbitrator provided detailed language concerning the procedure that WASA should follow, he violated Article 4 and Article 21 of the parties' CBA. (Request at pgs. 5-6).

The Arbitrator acknowledged that Article 58(G)(1) of the CBA indicates that the union shall raise claims within ten working days of the occurrence. However, he noted that one of the Grievants (Mr. Parker) was terminated because management believed that he was not entitled to the 20-year exemption. Furthermore, the Arbitrator determined that this Grievant appealed his termination in a timely manner. As a result, the Arbitrator stated that the issue before him was whether there was just cause to terminate this Grievant. Therefore, in order to determine whether this Grievant should have been terminated, it was necessary to resolve the issue of whether this Grievant was eligible for the 20-year exemption. In view of the above, the Arbitrator concluded that it was appropriate (during the arbitration) to consider the question concerning how to compute the 20-year exemption.

In the present case, the Arbitrator notes that Article 34, Section A of the parties' CBA does not state when the time for the 20-year exemption should run. Also, the Arbitrator reasoned that the parties could have adopted a start date or incorporated the deadlines noted in WASA's Wastewater Treatment Operator Certification Policy (WWT Policy), but did not do so. In view of the above, the Arbitrator indicated that "[t]ypically, in instances where a contract term provides for a particular action or benefit but does not state when it comes into effect, the most logical approach is to use the date in which the contract became effective." (Award at p.17). Using this approach, the Arbitrator concluded that "the 20-year exemption would run backwards from October 4, 2001" (the date the parties signed the new CBA). (Award at p. 17). The Arbitrator noted that this interpretation of Article 34 places it in conflict with WASA's WWT certification policy statement that made January 21, 2001, the date for determining certification. However, he concluded that WASA's certification policy was not a mutually agreed upon document. Furthermore, he determined that Article 2 of the CBA states that in such situations the contract language should prevail over a WASA policy. (Award at p.18). As a result, he found that the correct date should be October 4, 2001 (the date the new CBA was signed). WASA contends that consistent with the "logical approach" reasoning employed by the Arbitrator, the 20-year exemption should run backwards from June 4, 1998 and not October 4, 2001. WASA's claim is based on the fact that June 4, 1998 is the effective date of the collective bargaining agreement which first introduced the 20-year exemption. (Request at p. 5). However, the Arbitrator was not persuaded by WASA's argument.

Based on the above and the Board's statutory basis for reviewing arbitration awards, WASA contends that the Arbitrator exceeded his authority by: (1) ignoring the contractual language in Article 58 and extending the time frame for raising a grievance and (2) unilaterally changing the effective date of the 20-year exemption that was established by WASA's certification policy which was issued on January 22, 2001. (Request at p. 5). We disagree.

We have 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 and University of the District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248 at pgs. 3-4, PERB Case No 90-A-02 (1990). Moreover, "[t]he Board will not substitute its own interpretation or that of the [petitioner] for that of the duly designated Arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). Also, 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 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, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).

In addition, we have held that an Arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194 at p. 2, PERB Case No. 87-A-08 (1988). Furthermore, we have determined that an Arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.³ See, D.C. Metropolitan Police Department and FOP/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). In the present case, WASA does not cite any provision of the parties' collective bargaining agreement which limits the Arbitrator's equitable power. Therefore, once the Arbitrator determined that Article 34 requires that an employee who does not obtain the necessary certification shall be transferred to a vacant position, he also had authority to direct that WASA should within 180 days of the award attempt to transfer the Grievants to any vacant position. Furthermore, since the CBA does not limit the Arbitrator's equitable power, he could also outline the procedures for placing these individuals into vacant positions within the 180 day period.

In view of the above, we believe that WASA's second claim only involves a disagreement with the Arbitrator's findings and conclusions. This is not a sufficient basis for concluding that the Arbitrator acted outside the scope of his authority.

As a third basis for review, WASA asserts that the Arbitrator was without authority when he dictated to the agency the manner in which it should proceed to fill its vacant positions. For example, WASA claims that the Arbitrator gave "detailed language of the procedure that the [agency] should follow which was not supported by any contractual language nor [agency] policy." One of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining agreement." D.C. Public Schools v. AFSCME, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). See Also, Dobbs, Inc. v. Local No. 1614, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 813 F. 2d 85 (6th Cir. 1987). The Board has expounded on what is meant by "deriving its essence from the terms of the collective bargaining agreement." See, MPD and FOP/MPD Labor Committee, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001). In addition, the U.S. Court of Appeals for the Sixth Circuit in Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135, has also explained the standard by stating the following:

An arbitration award fails to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of

³We note, that if the parties' collective bargaining agreement limits the arbitrator's equitable power, that limitation would be enforced.

fairness and equity, instead of the precise terms of the agreement. 793
F.2d 759,765 (6th Cir. 1986).

We find that the portion of the Award which prescribes the procedure that should be used when attempting to transfer the Grievants to vacant positions, derives its essence from the parties' collective bargaining agreement and, therefore, meets the standard noted in the MPD and Cement Division cases. Specifically, Article 34, Section C, of the CBA provides that an employee who cannot achieve the required certification or license shall be transferred to any vacant position for which he or she qualifies. The Arbitrator reasoned that "the plain meaning of [Article 34] is that the Grievants' credentials have to be examined to see whether or not they could be placed in a vacant position with or without some training assistance. [Furthermore, the Arbitrator observed that] such analysis ordinarily would be performed by individuals who have experience evaluating not only an employee's qualifications but also whether, with some minimal training, the employee could be qualified to perform the job. [Finally, the Arbitrator concluded that management,] has both the expertise and the responsibility for evaluating employees to determine whether or not they are qualified." (Award at p. 16). In view of the above, the Arbitrator decided that it was necessary to indicate how to proceed when attempting to transfer the Grievants to a vacant position. We believe that the procedures established by the Arbitrator were an attempt to comply with the transfer requirements of Article 34. As a result, we believe that the noted procedures are rational. Therefore, we conclude that this portion of the Award is rationally derived from the terms of the parties' CBA.

For the above noted reasons, we find that WASA's third claim lacks merit. Specifically, WASA's third claim involves only a disagreement with the Arbitrator's interpretation of Article 34 of the parties' CBA and his findings and conclusions. This is not a sufficient basis for concluding that the Award fails to derive its essence from the collective bargaining agreement.

We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. For the reasons discussed, no statutory basis exist for setting aside the Award; the Request is therefore, denied.

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
Washington, D.C.

February 6, 2004

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 03-A-07 was served via Fax and U.S. Mail, on the following parties on this the 6th day of February, 2004.

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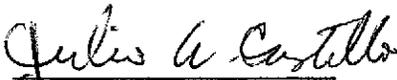
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