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

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In the Matter of)	
)	
District of Columbia Housing Authority)	
)	
Petitioner)	PERB Case No. 19-A-11
)	
v.)	Opinion No. 1736
)	
American Federation of)	
Government Employees, Local 2725)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On August 29, 2019, the District of Columbia Housing Authority (Agency) filed an Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-605.02(6), seeking review of an arbitration award (Award) dated August 12, 2019.¹ The Agency seeks review of the Award on the grounds that the Arbitrator exceeded his jurisdiction and that the Award on its face is contrary to law and public policy.² The Union opposes the Request (Opposition) and seeks attorney fees, pursuant to D.C. Official Code § 6-215(e).³

Having reviewed the Arbitrator’s findings and conclusions, the pleadings of the parties, and applicable law, the Board concludes that the Arbitrator did not exceed his jurisdiction and that the Award is not contrary to law and public policy. Therefore, the Board denies the Request.

¹ The Union filed an arbitration review request of the same Award. *See* PERB Case No. 19-A-10.

² Request at 2.

³ Opposition at 1.

II. Arbitration Award

A. Background

Grievant worked for the Agency as a Maintenance Mechanic from September 28, 2009, until his discharge on May 30, 2018.⁴ Grievant had received two suspensions prior to his removal.⁵ In April 2018, Grievant missed seven scheduled workdays and one holiday.⁶ On May 30, 2018, the Agency issued Grievant a Notice of Removal for: “(1) inexcusable absence without leave (AWOL) between April 16, 2018 through April 25, 2018; and (2) other conduct during and outside of duty hours adversely affecting the employee’s or agency’s ability to perform effectively.”⁷

The Union invoked arbitration on behalf of Grievant and sought immediate rescission of the removal notice. However, the Union did not request back pay or benefits.⁸

B. Arbitrator’s findings and conclusions

On August 12, 2019, the Arbitrator issued an Award which: (1) sustained the AWOL charges for the scheduled workdays of April 17 through April 25, 2018; and (2) dismissed all other charges because the Agency failed to provide evidence that Grievant’s conduct impacted his ability to perform his job.⁹ The Arbitrator assessed what would be the appropriate remedy for the proven misconduct in light of the relevant mitigating and aggravating circumstances.¹⁰ Accordingly, the Arbitrator directed the Agency to “reinstate the Grievant forthwith, with full uninterrupted seniority, but no award is made of back pay or benefits, and the period between his improper removal and his return to work should be treated as a time-served disciplinary suspension.”¹¹

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify or set aside a grievance arbitration award only under three circumstances: (1) if the arbitrator was without, or exceeded his or her jurisdiction; (2) if the award on its face is contrary to law or public policy; or (3) if the award was procured by fraud, collusion or other similar or unlawful means.¹² The Agency argues that the Arbitrator exceeded his jurisdiction and that the Award on its face is contrary to law and public policy.¹³

⁴ Award at 1, 3.

⁵ Award at 3.

⁶ Award at 4.

⁷ Award at 2.

⁸ Award at 7.

⁹ Award at 15.

¹⁰ Award at 15.

¹¹ Award at 17.

¹² D.C. Official Code § 1-605.02(6) (2001).

¹³ Request at 1-2.

A. The Arbitrator did not exceed his jurisdiction.

The Agency contends that the Arbitrator exceeded his jurisdiction by determining the appropriate penalty.¹⁴ The Agency asserts that removal was the correct penalty because the parties' collective bargaining agreement (CBA) provides removal as the appropriate penalty for a third AWOL charge.¹⁵

An arbitrator derives his or her jurisdiction from the consent of the parties.¹⁶ This consent is expressed by the parties through their CBA.¹⁷ The Board will evaluate "whether the award draws its essence from the collective bargaining agreement" to determine whether an Arbitrator has exceeded his or her authority.¹⁸ To determine if an award "draws its essence" from a CBA, the Board will look to whether the arbitrator (1) resolved a dispute not committed to arbitration, (2) committed fraud, had a conflict of interest or acted dishonestly in issuing the award; or (3) arguably construed or applied the contract.¹⁹ If these errors were not committed, the award has "drawn its essence" from the CBA.²⁰

In this case, the Agency merely disagrees with the Arbitrator's penalty determination.²¹ The Board has previously stated that "an arbitrator does not exceed his authority by exercising his equitable powers, unless these powers are expressly restricted by the parties' collective bargaining agreement."²² Article 9, Section E (12) of the parties' CBA provides that the "arbitrator shall have full authority to award appropriate remedies."²³ Furthermore, Article 10, Section C(e), states that the "Table of Appropriate Penalties provides a range of penalties for an offense" and that the Agency "shall not be restricted absolutely by the range of penalties as provided."²⁴

Here, the CBA provides the Arbitrator with the full authority to award appropriate remedies in arbitration and does not restrict his equitable powers. The parties expressly authorized the arbitrator to determine an appropriate remedy. For these reasons, the Arbitrator's decision to mitigate Grievant's termination to a time-served suspension was within his jurisdiction.

¹⁴ Request at 2.

¹⁵ Request at 3-4.

¹⁶ *Wash. Teachers' Union v. D.C. Pub. Schools*, 77 A.3d 441, 446 (D.C. 2013).

¹⁷ *Id.*

¹⁸ *MPD v. FOP/MPD Labor Comm. (on behalf of Jacobs)*, 60 D.C. Reg. 3060, Slip Op. No. 1366 at 5-6, PERB Case No. 12-A-04 (2013) (citing *D.C. Pub. Schools v. AFSCME, Dist. Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at 5, PERB Case No. 86-A-05 (1987)); see also *Dobbs, Inc. v. Local No. 1614, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 813 F.2d 85 (6th Cir. 1987).

¹⁹ *DOC v. FOP/DOC Labor Comm.*, 66 D.C. Reg. 443, Slip Op. No. 1715 at 3, PERB Case No. 19-A-05 (2019) (quoting *Mich. Family Res., Inc. v. SEIU Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007)).

²⁰ *Id.*

²¹ The Agency did not raise challenges to whether the Arbitrator resolved a dispute not committed to arbitration nor to whether the Arbitrator committed fraud, had a conflict of interest or acted dishonestly in issuing Award.

²² *MPD v. FOP/MPD of Labor Comm.*, - D.C. Reg. -, Slip Op. No. 933 at 8, PERB Case No. 07-A-08 (2008).

²³ Agreement at 21.

²⁴ Agreement at 24.

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

The Agency contends that the Award is contrary to law and public policy because the Arbitrator chose to mitigate the penalty issued against Grievant despite the finding of dishonesty.²⁵ However, the Agency does not cite any specific law or legal precedent to support its argument. Instead, the Agency asserts that in the present circumstances the Board should substitute its judgment for the Arbitrator's.²⁶

To overturn an arbitration decision on the basis of public policy represents a narrow exception to the rule that a reviewing body must defer to an arbitrator's interpretation of the contract.²⁷ For an arbitration award to be overturned on the grounds of public policy, the petitioner must demonstrate that the arbitration award itself violates established law or compels the violation of an explicit, well-defined public policy grounded in law or legal precedent.²⁸ As explained by the D.C. Circuit Court of Appeals, "the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy."²⁹ The petitioner carries the burden to specify the "applicable law and public policy that mandates that the Arbitrator arrive at a different result."³⁰

In the instant case, the Agency does not specify any public policy or legal precedent that has been violated, but instead relies on the facts presented to the Arbitrator to urge the Board to substitute its judgment for that of the Arbitrator. The Agency, in essence, merely disagrees with the Arbitrator's choice of remedy. Board precedent establishes that a disagreement with an Arbitrator's choice of remedy does not render an arbitration award contrary to law and public policy.³¹ Therefore, the Agency has failed to meet its burden to specify any law or public policy, which the Award contravenes.

²⁵ Request at 6.

²⁶ Request at 6.

²⁷ *MPD v. FOP/MPD Labor Comm.*, 65 D.C. Reg. 12884, Slip Op. No. 1684 at 5, PERB Case No. 18-A-09 (2018) (citing *Am. Postal Workers Union v. U.S. Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

²⁸ *MPD v. FOP/MPD Labor Comm.*, 60 D.C. Reg. 5326, Slip Op. No. 1373 at 8, PERB Case No. 11-A-05 (2013); see also *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

²⁹ *American Postal*, 789 F.2d at 8.

³⁰ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No. 1705 at 6, PERB Case No. 19-A-02 (2018) (citing *MPD v. FOP/MPD Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at 2, PERB Case No. 00-A-04 (2000)).

³¹ *Id.* at 7 (citing *DCHA v. Bessie Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999)).

C. Attorney Fees under D.C. Official Code § 6-215(e)

Pursuant to D.C. Official Code § 6-215(e), the Union requests attorney fees related to the litigation of the instant Request.³² D.C. Official Code § 6-215(e) is a section within the District of Columbia Housing Authority's Establishment Act and provides the following:

If the Authority applies to the PERB for review of an arbitration award in accordance with § 1-605.02 and the PERB denies review, the PERB shall enter an order requiring the Authority to comply with the award and the Authority shall be liable to the labor organization for its litigation expenses, including attorneys' fees, in connection with the arbitration proceedings and the proceedings before the PERB. If the labor organization prevails in any subsequent litigation brought by the Authority with respect to the same award, the Authority shall be liable to the labor organization for its litigation expenses, including attorneys' fees, in connection with the litigation.³³

The Board has considered this issue before in PERB Case 14-A-07,³⁴ in which the Board denied an arbitration review request filed by the Agency. In that case, the arbitrator found a violation of the parties' contract and awarded backpay and attorney fees pursuant to 5 U.S.C. § 5596, the Back Pay Act.³⁵ In the Board's analysis of D.C. Official Code § 6-215(e), the Board considered the Federal Labor Relations Authority's (FLRA) treatment of appellate litigation expenses. The Board determined that "although the statutory schemes are not precisely parallel," the Board should follow the FLRA and remand appellate attorney fees to the arbitrator for resolution.³⁶

The instant matter is distinguishable from PERB Case 14-A-07, as there is neither an existing attorney fees award nor any need for an analysis of the Back Pay Act. Here, the question presented is whether D.C. Official Code § 6-215(e) provides the Board with authority to independently award attorney fees when the Board denies an arbitration review request filed by the D.C. Housing Authority. In reviewing the plain language of the statute and the legislative history, the Board finds that it was the intent of the Council of the District of Columbia to provide the Board with the authority to award attorney fees when the Board denies an arbitration review request filed by the D.C. Housing Authority.

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that the [lawmaker] has used."³⁷ The words of a

³² Opposition at 1.

³³ D.C. Code Official § 6-215(e) (2001).

³⁴ *DCHA v. AFGE, Local 2725*, 62 D.C. Reg. 2893, Slip Op. No. 1503, PERB Case No. 14-A-07 (2015).

³⁵ *Id.*

³⁶ *Id.* at 7.

³⁷ *People's Drug Stores v. District of Columbia*, 470 A.2d 751, 753 (1983) (citing *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 64 (D.C.1980) (en banc) (quoting *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897))).

statute should be construed in their ordinary sense and with the commonly attributed meaning.³⁸ Although looking to the plain language of the statute is the first step, it is appropriate to look beyond the plain meaning when a review of the legislative history may help the Board resolve ambiguities.³⁹

In PERB Case 14-A-07, the Board found that the language in D.C. Official Code § 6-215(e) was ambiguous. The statute's language states, "PERB shall enter an order requiring the [D.C. Housing] Authority to comply with the award and the Authority shall be liable to the labor organization for its litigation expenses, including attorneys' fees, in connection with the arbitration proceedings and the proceedings before the PERB." The Board found that § 6-215(e) "does not state explicitly that the Board itself is to award attorney fees, rather it states only that the [D.C. Housing] Authority shall be liable for such fees." The Board will now review the legislative history to resolve this ambiguity.

Upon its introduction, the District of Columbia Housing Authority Act of 1999, B13-0169, was referred to the Council of the District of Columbia's Committee on Consumer and Regulatory Affairs (Committee).⁴⁰ The bill was reported favorably out of the Committee on November 15, 1999.⁴¹ In the report, the Committee explains that § 6-215(e) was specifically requested by unions and their representatives to "ensure the agency's compliance with [the] collectively bargained arbitration process."⁴² Furthermore, the report cites to PERB Case 99-U-18,⁴³ in which the Board awarded costs to the union after finding that "DCHA has established a pattern and practice of refusing to implement arbitration awards."⁴⁴ The Committee found that PERB indicated if it had the statutory authority to do so, it would award attorney fees in addition to costs.⁴⁵ The Committee found that the language of § 6-215(e) was a necessary deterrent because the D.C. Housing Authority had "undermined the advantages of utilizing alternative dispute resolution systems and increased the cost to the union, the agency, and the PERB."⁴⁶

The Board finds that the legislative history clarifies the ambiguity of § 6-215(e). The Committee acknowledged that PERB indicated that if it had the statutory authority to award attorney fees it would do so. The Committee found that there was a need to deter the Agency from continuing its pattern and practice of non-compliance with arbitration awards. The Committee approved language, which was later adopted in the final version of the bill and not amended,⁴⁷ that directs the Board to enter an order that requires compliance with the arbitration award and makes the Agency liable for costs and attorney

³⁸ *People's Drug Stores*, 470 A.2d, at 753.

³⁹ *Id.* at 754.

⁴⁰ Council of the District of Columbia, Bill 13-0169 (April 1, 1999).

⁴¹ B13-0169, Council of the District of Columbia Comm. on Consumer and Regulatory Affairs, Rpt. at 1 (1999).

⁴² B13-0169, Council of the District of Columbia Comm. on Consumer and Regulatory Affairs, Rpt. at 92 (1999).

⁴³ *AFGE, Local 2725 v. DCHA*, 46 D.C. Reg. 10388, Slip Op. No. 603, PERB Case No. 99-U-18 (1999).

⁴⁴ B13-0169, Council of the District of Columbia Comm. on Consumer and Regulatory Affairs, Rpt. at 93 (1999).

⁴⁵ B13-0169, Council of the District of Columbia Comm. on Consumer and Regulatory Affairs, Rpt. at 93 (1999).

⁴⁶ B13-0169, Council of the District of Columbia Comm. on Consumer and Regulatory Affairs, Rpt. at 93 (1999).

⁴⁷ District of Columbia Housing Authority Act, L13-105 effective May 9, 2000, 47 D.C. Reg. 1325 (2000).

fees. Therefore, the Board concludes that D.C. Official Code § 2-615(e) provides the Board with the authority to require the Agency to pay costs and attorney fees to the Union arising from the litigation of the instant Request.

In this case, the Board finds that the Agency must pay the Union's costs and attorney fees arising from litigation of this Request.

IV. Conclusion

The Board rejects the Agency's arguments and finds no grounds to modify, set aside, or remand the Award. Therefore, the Arbitration Review Request is hereby denied. The Agency must pay the Union's costs and attorney fees associated with the litigation of this Request.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Review Request is hereby denied.
2. The District of Columbia Housing Authority shall comply with the Award issued on August 12, 2019.
3. The District of Columbia Housing Authority shall pay the litigation costs and attorney fees associated with PERB Case No. 19-A-11.
4. American Federation of Government Employees, Local 2725 shall submit its actual costs and attorney fees to the District of Columbia Housing Authority within 30 days of this Decision and Order for payment.
5. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Douglas Warshof and Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Peter Winkler.

February 20, 2020

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 19-A-11, Opinion No. 1736 was sent by File and ServeXpress to the following parties on this the 25th day of February, 2020.

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