GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

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| In the Matter of: | |
| American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO, Local 2095, Petitioner, | PERB Case No. 89-A-03<br>Opinion No. 224 |
| and | |
| Commission on Mental Health Services, Department of Human Services, Government of the District of Columbia, Respondent. | |

## DECISION AND ORDER

On January 3, 1989, the American Federation of State, County and Municipal Employees, Local 2095 (AFSCME) filed with the D.C. Public Employee Relations Board (Board) an Arbitration Review Request. AFSCME requested that the Board review an arbitration award that stems from a grievance filed by AFSCME on behalf of several bargaining unit employees (Grievants) of the Commission on Mental Health Services (CMHS) who were suspended for failing and refusing to administer medication to patients. The Award, AFSCME contended, is contrary to law and public policy because the Arbitrator sustained the disciplinary action against the Grievants for their refusal to perform what AFSCME claimed were illegal job duties. In reaching his conclusions, the Arbitrator is alleged to have "failed to apply accepted legal standards in cases involving employee refusal to perform illegal or unsafe job duties" and thus, urged AFSCME, must be reversed by the Board.

On January 23, 1989, CMHS timely filed a document styled "Employer Opposition to Union Arbitration Review Request," in which it contended that AFSCME did not demonstrate in its Request any valid bases for the Board to review this Award and that the Arbitrator properly considered and rejected the Union's arguments concerning the reasons for the Grievants' refusal to dispense medication. CMHS maintained that the Arbitrator gave "full and fair consideration to the evidence presented and the arguments made by the parties." CMHS asserted that AFSCME's claims were therefore merely a disagreement with the Arbitrator and did not supply a basis for review by the Board.

For the reasons stated later in this Opinion, we agree that there is no basis for the Board to review this Award and therefore deny AFSCME's request.

The pertinent facts, as found by the Arbitrator, may be summarized as follows.

The Grievants are employed by CMHS at the St. Elizabeths Hospital (SEH) as Forensic Psychiatric Technicians, Mental Health Counselors and Psychiatric Nursing Assistants. In October, 1987, pursuant to Public Law 98-621, SEH was transferred from the Federal Government to the District Government's newly-established CMHS, under the administration of the D.C. Department of Human Services.

The Grievants are non-professional employees who are not licensed to dispense medication. [1]/ They are included in a bargaining unit of employees that is represented exclusively by AFSCME Local 2095 and the American Federation of Government Employees (AFGE) Local 383. [2]/ There had been a practice at SEH while a Federal Hospital, of permitting unlicensed personnel to dispense medicine to patients. All of the Grievants had performed this task prior to their transfer to CMHS. While there had been no similar practice of unlicensed personnel in the District facilities administering medication, the Grievants continued to dispense medication after the transfer of SEH to the District Government.

The question whether the unlicensed personnel could continue to dispense medicine was a subject of discussions between AFSCME and CMHS officials during Labor-Management Advisory Committee (LMAC) meetings, since in the Union's view D.C. Municipal Regulations (DCMR) prohibited such a practice. [3]/ According to the Arbitrator's findings, the issue was brought before CMHS management in a number of different settings, including a proposal presented by AFSCME during negotiations that if it was not unlawful for the non-licensed staff to dispense medication they should receive additional compensation. Despite the Union's repeated efforts to resolve this matter, however, CMHS officials provided no definitive response to the question of whether the affected employees could

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[1]/ The Arbitrator notes in his Award that licensed employees are Physicians, Registered Nurses and Licensed Practical Nurses.

[2]/ AFGE Local 383 is not, however, a party to this proceeding.

[3]/ DCMR 3228.1 states that "all medications shall be prepared and administered only by a physician or professional nursing personnel."

legally continue to give medicine to patients. [4]/

During a regular meeting of the Union membership on March 22, 1989, Union representatives informed the members that continuing to administer medication was illegal, and that the unlicensed personnel who did so were at risk. The membership voted unanimously to cease administering the medications.

On March 23, 1989, AFSCME officials delivered a letter to Hon. Mayor Marion Barry, Jr. advising him that Local 2095 had voted to discontinue dispensing medication by the unlicensed personnel at SEH because such a practice was contrary to the provisions of DCMR 3228.1.

A memorandum was distributed to employees later on that same day in which CMHS officials advised employees that their "job action" was illegal and could result in disciplinary action. The Union was further advised by CMHS officials on March 24, 1989 that the D.C. Department of Consumer and Regulatory Affairs had implemented emergency regulations amending Title 22 DCMR and thus clarifying that non-professional employees were permitted to dispense medicine.

On March 25, 1989, CMHS issued Notices of Proposed Removal to those employees who refused to administer medicine after receipt of the March 23rd memorandum advising them of the implications of their actions. However, AFSCME and CMHS representatives reached a settlement on April 1, 1989 providing, inter alia, that each Notice of proposed discipline be submitted to a disinterested designee for a recommendation, and that any discipline imposed would not exceed a two-day suspension.

The disinterested designee found that DCMR 3228.1 did not apply to the SEH facility and that there was just cause for the disciplinary action based on the Grievants' refusal to administer medication after being advised of the consequences of such action. As recommended, each Grievant was suspended for two days.

The Arbitrator found that as to fifteen (15) of the twenty (20) Grievants, the charges of insubordination, engaging in a

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[4]/ According to the Arbitrator's findings, the Union did not previously grieve this issue because of its anticipation that CMHS officials would deny the grievance, as they had other grievances, on the basis that the matter was not within the limited scope of the parties' Interim Agreement in effect during the relevant time period.

strike and inexcusable neglect of duty had been proven, thereby warranting the imposed discipline of a two day suspension. [5]/ Despite the Union's protestations that the refusal to give medicine was justified, the Arbitrator concluded that the provisions of the DCMR 3228.1 were ambiguous regarding their applicability to the Grievants and thus did not justify the (15) Grievants' conduct.

Although the Arbitrator determined that, it is unclear whether SEH is "skilled care facility" within the meaning of DCMR 3228.1, he nevertheless found it unnecessary to rule on the applicability of DCMR 3228.1 because under the law transferring SEH to the D.C. Government (P.L. 98-621, Section 7(a)), new District Government employees were allowed an 18-month grace period in which to meet any licensing requirements. Since only six (6) months had elapsed at the time of the action in question, the Arbitrator reasoned that the Grievants had no basis to believe that they were in any jeopardy because of their continued administration of medication. The Arbitrator concluded that "[a]n employee may refuse an illegal order, or one that is outside the authority of supervision, but, absent circumstances not here present, the refused order must be clearly and unquestionably illegal or unauthorized." [6]/ (Award p.44).

D.C. Code Section 1-605.2(6) authorizes the Board to review, in limited circumstances, appeals from grievance-arbitration awards only if, inter alia, the award on its face is contrary to law and public policy.

We note that AFSCME's primary contentions concerning the basis for review are (1) that the Arbitrator failed to apply the objective "reasonable person" standard in determining whether the Grievants were protected from discipline resulting from their refusal to perform an "illegal" job assignment, and (2) that the Arbitrator erred as a matter of law in failing to rule on the legality or illegality of the Grievants' dispensation of medication

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[5]/ As to the other five Grievants, the Arbitrator found that there was insufficient evidence to demonstrate that these employees continued to refuse to administer medicine after the issuance of the March 23rd Memorandum.

[6]/ Although the Arbitrator concluded that there was no justification for the Grievants' action, he observed: "a degree of insensitivity, if not unresponsiveness, on the part of the employer.... Employees were owed more definitive answers than they received [and] the Union was entitled either to a clear explanation as to why CMHS considered the practice still permissible, or an indication of what it intended to do to prepare for the end of the grace period." (Award p. 44-46).

at SEH. The effects of the Arbitrator's award in these respects, AFSCME argued, are devastating for public policy since it encourages an individual to violate the law in order to avoid disciplinary action for refusing to perform an illegal or unsafe job assignment. AFSCME urges that had the Arbitrator applied the well-accepted objective standard of whether a reasonable person under the circumstances believed that dispensing medication was illegal, the inescapable conclusion would have been that the Grievants reasonably believed that they were violating the law. Instead, the Arbitrator determined that the provisions of DCMR 3228.1 are less than clear and therefore the Grievants were not justified in their refusal to give medication. According to AFSCME, both law and public policy required the Arbitrator to determine whether dispensation of medicine by the Grievants actually violates the law.

We conclude that the Award is not, as AFSCME contended, contrary to law and public policy for failure of the Arbitrator to apply a reasonable person standard in judging the Grievants' concerted refusal to perform the job assignment of administering medication to patients. There is no requirement in the law, and AFSCME has not shown any, that an Arbitrator must apply a reasonable person standard in cases involving the questionable legality of a work assignment. Absent any statutory, regulatory, contractual or other legal authority that would be binding on the Arbitrator, there is no basis for the Board to conclude that the Award on its face is contrary to law and public policy.

The Union's argument that the Arbitrator erred by not determining whether the provisions of DCMR 3228.1 are applicable to SEH is similarly without merit. We do not find this contention to be a basis for review of the Award because the Arbitrator read the statute (P.L. 98-621) as not requiring the licensure of personnel for 18 months. Therefore, it was immaterial in the Arbitrator's view, whether or not SEH was a skilled care facility and thus DCMR 3228.1 was applicable. AFSCME's disagreement with the Arbitrator's conclusion does not constitute a basis for the Board's review of this Award.

We are not authorized by the CMPA to review an award that results from the exercise of judgment on truly discretionary matters. As we have held in many of our opinions, the mere disagreement with an arbitrator's interpretation of applicable statutory, regulatory or contractual provisions does not supply the

basis for the Board's review under D.C. Code Sec. 1-605.2(6). [7]/

In conclusion, for the reasons stated, we cannot grant AFSCME's request to review the Award, as no statutory basis exists for the granting of such review.

ORDER

The Arbitration Review Request is denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

August 4, 1989

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[7]/ Cf. AFSCME, Council 20, Local 2776 and D.C. Department of Finance and Revenue, 35 D.C. Reg. 7072 (1988), Slip Op. No. 165, PERB Case No. 87-A-03; UDC and UDCFA/NEA, 36 D.C. Reg. 2472 (1989) Slip Op. No. 216, PERB Case No. 87-A-09. As the agency charged with the responsibility of ensuring the orderly resolution of collective bargaining disputes, we are obliged to express our dismay at the unresponsiveness of CMHS officials to the understandable concerns of their employees. In our estimation, it is counter-productive for an agency to delay for as long as CMHS officials did in clarifying for the Union the status of the medication issue. CMHS, at the very least, owed an explanation to the employees and to the Union as to what action would be undertaken at the conclusion of the grace period, in the event that licensure was found to be required.