Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Department of Corrections Labor Committee, (on behalf of Hugh Cummings)	
Petitioner,	
v.	PERB Case No. 10-A-22
	Opinion No. 1347
District of Columbia Department of Corrections,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The Fraternal Order of Police/Department of Corrections Labor Committee ("Union" or "Petitioner") filed an arbitration review request ("Request") in the above-captioned matter. The Union seeks review of an arbitration award ("Award") that denied a grievance filed on behalf of Cpl. Hugh Cummings ("Grievant") with the District of Columbia Department of Corrections ("DOC" or "Agency").

II. Discussion

A. The Award

The matter before the Public Employee Relations Board ("Board" or PERB") arises from a grievance filed by the Union on behalf of the Grievant challenging the Agency's termination of his employment for allegedly assaulting an inmate in the Male Receiving and Discharge Unit on April 26, 2007, and thereby violating D.C. regulations and the D.C. criminal code. (Award at p. 2).

On December 7, 2009, and April 8-9, 2010 Arbitrator Gail Smith held a hearing at which

testimony was received. (Award at p. 2). Following the arbitration hearing, both parties submitted briefs in support of their positions. Based on the testimony, evidence, and briefs, the Arbitrator found that:

> The Grievant is a correctional officer who began work for the Agency on October 10, 1989. . . . The Grievant primarily worked in the Male [Receiving and Discharge] Processing section of the jail. The Grievant's job duties included screening and strip search of "new intakes," "court returns," fingerprinting, picture taking and escorts.
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> During his tenure with the Agency, the Grievant received, on average, excellent annual performance evaluations. The Grievant did not have any history of disciplinary actions prior to his termination.

(*Id.* at p. 3).

The Arbitrator found that on April 26, 2007, the Grievant was assigned to work the third shift in the Male Receiving and Discharge Unit. (*Id.* at p. 4). During his shift, an altercation occurred between two inmates temporarily located in a holding cell. The inmates were separated and placed in individual cells. The Grievant approached the cell containing the aggressor inmate Taylor. An argument developed between inmate Taylor and the Grievant, during which inmate Taylor was observed reaching through the cell bars in an attempt to make contact with the Grievant. (*Id.*). The exchange escalated, with the Grievant reporting that he was grabbed and spat upon by inmate Taylor. (*Id.* at p. 9). Witnesses for the Agency testified that during the scuffle the Grievant repeatedly struck inmate Taylor's arms with a pair of handcuffs. (*Id.* at pp. 5-8).

As a result of the April 26 incident, "[o]n April 27, 2007, DOC placed the Grievant on administrative leave. DOC Director Devon Brown sent a request to [the Office of Internal Affairs ("OIA")] to investigate the incident involving the Grievant and inmate Taylor." (*Id.* at p. 11). An OIA investigator reviewed the reports of witnesses of the April 26 incident and also conducted interviews of the witnesses and the Grievant. (*Id.* at p. 11). "In [the] final report dated August 29, 2007, [the i]nvestigator concluded that the Grievant assaulted inmate Taylor without justification and intentionally struck inmate Taylor on the left forearm several times with a pair of handcuffs positioned in the Grievant's hand like brass knuckles, resulting in contusions and abrasions to inmate Taylor's left forearm. At the time of the assault, the inmate was secured in a confined area and did not present an immediate physical threat to the Grievant or to any other DOC staff or inmate." (*Id.* at pp. 11-12).

In addition, the Arbitrator noted that the investigator had concluded that:

> the Grievant's use of force was unjustified, excessive and violated the DOC Use of Force Program Statement 5010.9C and the D.C.

Criminal Code Assault Statute 22-404.

OIA sent its Internal Affairs report to the DOC Department of Human Resources who in turn sent the report to Warden William Smith. . . .

On October 17, 2007, Warden Smith sent a letter to the Grievant that notified the Grievant of his proposed removal from office within twenty days. The proposed removal was for: "Malfeasance, to wit: any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations."

The Grievant requested a hearing on his proposed removal from DOC. . . . A hearing was held on October 17, 2007. . . . On December 4, 2007, Hearing Officer Sheri S[a]luga issued her recommendation that the Grievant be terminated from employment.

On December 13, 2007, DOC Director Devon Brown issued a final notice of removal of the Grievant from his position. Director Brown determined that the Grievant's termination was warranted based on the OIA and hearing officer's reports. In rendering his final decision, Director Brown also relied on Douglas Factors[1] (1), (5), (6) and (9). With respect to Factor (1) which is consideration of the nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional, Director Brown stated that: "Your behavior constitutes an aggressive and intentional act of use of force, without provocation and a violation of Program Statement 5010.9D, Use of Force and Application of Restraints, dated July 15, 2007."

As to Factor (5) which is the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisors' confidence in the employee's ability to perform assigned duties, Director Brown stated that: "Acts of the instant nature impugns [*sic*] an employee's integrity and credibility. It also creates and fosters an environment of revenge, because inmates will find a way to physically attack staff if we do not police the inexcusable actions of employees."

With respect to Factor (6) concerning consistency of the

[1] The *Douglas* Factors are mitigating and aggravating factors assessed in determining the appropriate level of employee discipline. *See Douglas v. Veterans Admin.*, 5 M.S.P.B. 280 (1981).

> penalty imposed with those imposed upon other employees for the same or similar offenses, Director Brown noted that the Agency has consistently terminated employees for committing assaults on inmates. As to Factor (9) which is to consider the clarity with which the employee was on notice of any rules that were violated in committing the offense, Director Brown stated that: "Officer Cummings is a Senior Correctional Officer and therefore, he either knew or should have known that behavior of this nature was impermissible."

(*Id.* at pp. 12-14).

The Arbitrator found that "[t]he parties stipulated to the issue as follows: Was the Grievant terminated for cause? If not, what shall be the remedy?" (*Id.* at p. 3). In making her determination, the Arbitrator stated that:

> Article 11 entitled "Discipline (Corrective/Adverse Actions)" of the [CBA] and D.C. Official Code Section 1-616.51(1) . . . provide that discipline shall be imposed for cause, as defined in the District Personnel Manual ("DPM"). According to DPM 1603.3(e), "cause" includes "(a)ny on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law." Chapter 2, Section 2.4 of the DOC Basic Regulations for Employees also provides that "correctional personnel are not permitted to use physical force on an inmate except in clear instances of self-defense or for the obvious protection of life or property.
>
> According to DPM Section 1603.9, the Agency has the burden of proof to establish cause. I find that the Agency established cause to discipline the Grievant for assaulting inmate Taylor. Whether or not inmate Taylor grabbed the Grievant's protective vest and sp[a]t at the Grievant, I find that the Grievant used his handcuffs as brass knuckles and struck the inmate several times on the inmate's left arm that went beyond any reasonable use of force for any purpose under these circumstances.

(*Id.* at p. 16).

Having determined that the Grievant was terminated for cause, the Arbitrator also determined that the penalty of termination was warranted. (*Id.* at p. 18). The Arbitrator noted that the Union maintained that the Agency violated article 11, section 14 of the CBA, which provides:

> The Employer agrees that disciplinary action shall not be punitive but based on conduct or performance deficiencies. The selection of the appropriate penalties shall be based on progressive discipline principles consistent within the department. Consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist.

(*Id.* at p. 18).

The Arbitrator rejected the Union's position and found that the Grievant was not justified in the use of force. (*Id.* at p. 18). Based upon the foregoing, the Arbitrator denied the Union's grievance. (*Id.* at p. 19).

The Petitioner filed the instant review of the Award, contending that the Arbitrator exceeded the jurisdiction granted by the parties' CBA and that the award is contrary to law and public policy. (Request at p. 8).

B. Jurisdiction of the Arbitrator

After reviewing the tests this Board has used in determining whether an arbitrator exceeded his jurisdiction under a collective bargaining agreement, the Petitioner acknowledges, "The only outstanding question, for the Board's consideration then is whether the arbitrator 'arguably construed' the CBA?" (Request at p. 14); *see Mich. Family Resources, Inc. v. SIEU, Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007). Although the Petitioner correctly stated the question as whether the arbitrator arguably construed the CBA, the Petitioner then proceeded to argue that the answer to that question was no because "the Arbitrator did not interpret the CBA properly." (Request at 15). The argument is its own rebuttal: the Arbitrator did construe the CBA, although perhaps not properly in the Union's view. This Board has held, and the D.C. 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 [CBA]." *D.C. Gen. Hosp. v. Pub. Employee Relations Bd.*, No 9-92 (D.C. Super. Ct. May 24, 1993).

A consideration of the Union's specific objections demonstrates that the Arbitrator did in fact construe or apply the CBA with regard to the matters in question. The Union objects to the Arbitrator's application of the standard for cause provisions in the D.C. Personnel Manual and objects that the Arbitrator did not apply the principles of progressive discipline in article 11, section 14 of the CBA. The arbitrator quoted and discussed what she determined to be the pertinent provisions of the CBA, the D.C. Official Code, and the District Personnel Manual concerning cause. (Award at p. 16). Similarly, on the matter of progressive discipline, the Arbitrator quotes the pertinent provision of the CBA (*id.* at 18) and concludes, "In finding that termination is appropriate discipline upon the facts presented, I have taken into account the Grievant's past service history, and I have weighed it against his duties as a sworn correctional officer." (*Id.* at 19). The parties agreed to be bound by the arbitrator's interpretation and application of the CBA and related rules and regulations. *D.C. Metro. Police Dep't and F.O.P./ Metro. Police Dep't Labor Comm. (on behalf of Richard Moats)*, 59 D.C. Reg. 6115, Slip Op.

No. 1014 at p. 7, PERB Case No. 08-A-02 (2010).

In addition, the Union argues that "[t]he CBA expressly provides that 'The Hearing Officer must . . . not be in the chain of command between the proposing and deciding officials.' *See* Ex. A at 21, CBA, Article 11, § 9(c). Ms. Saluga is in Director Brown's chain of command, and, therefore, she is not disinterested. . . . [T]he Arbitrator ignored the Union's arguments on this issue. . . ." (Request at p. 15). In fact, the Arbitrator did not ignore the Union's argument that the hearing officer was in the director's chain of command because the Union did not allege below that she was in the chain of command. To the contrary, the Union stated in its post-hearing brief, "While she may not be in the chain of command between the proposing and deciding officials, she does report directly to the Final Decision Maker in this matter." (Request Exhibit C at p. 31). The Union's chain-of-command argument may not be raised for the first time on appeal to this Board. *F.O.P./Dep't of Corrections Labor Comm. v. D.C. Dep't of Corrections*, 59 D.C. Reg. 9795, Slip Op. No. 1271 at pp. 6-7, PERB Case No. 10-A-20 (2012).

The Union's objection that the hearing officer reported to the final decision maker does not show a conflict between the Award and the CBA. Article 11, sections 9(C) and (D) of the CBA provide that proposed disciplinary actions are to be reviewed by a "Disinterested Designee" or a "Hearing Officer" and that "[t]he Hearing Officer must be DS-13 or higher and have no direct or personal knowledge of the matter contained in the disciplinary case, and not be in the chain of command between the proposing and deciding officials." Nothing in article 11, section 9 bars an employee, who is outside the chain of command between the proposing and deciding officials, from serving as hearing officer because he reports to the final decision maker.

C. Law and Public Policy

The Union argues that the Award is contrary to law and public policy because: (1) "the *Douglas* factors were never properly considered"; (2) "[t]he District of Columbia Court of Appeals has held that a D.C. agency must consider all relevant *Douglas* Factors when making a disciplinary determination"; and (3) "[t]he Award . . . also violates Cpl. Cummings' constitutional rights." (Request at pp. 8 and 11)(emphasis in the original).

The Union contends that the Agency was required to analyze all relevant *Douglas* factors, but did not properly do so and that the Arbitrator erred in concluding that the Agency did. The Union relies on *D.C. Department of Public Works v. Colbert,* 874 A.2d 353 (D.C. 2005) to support its contention.[2] (Request at p. 9). However, the *Colbert* case is inapplicable

[2]In the *Colbert* case, an employee of the Department of Public Works ("DPW"), who was discharged for inexcusable neglect of duty and insubordination, challenged the severity of the sanction. An administrative law judge ("ALJ") determined that DPW's decision took into account impermissible evidence and failed to consider all relevant factors. DPW appealed the matter to the Board of the Office of Employee Appeals. The Board affirmed DPW's sanction and vacated the ALJ's order, and an appeal was taken. The Superior Court set aside the Board's order and reinstated the ALJ's determination that the employer's decision to discharge the employee was not substantially supported by permissible evidence, and DPW appealed from that ruling. The Court of Appeals held that Board's decision vacating the ALJ's order would be set aside because the Board failed to comply with the regulations governing the admission of evidence and there

because that matter involved decisions made by the Office of Employee Appeals. The Board has regularly held that nothing in the CMPA sets forth a requirement of consistency or conformity between decisions of the Office of Employee Appeals and contractual arbitral determinations. These are two completely separate procedures with two different bodies of authorities. *See D.C. Metro. Police Dep't and F.O.P./Metro. Police Dep't Labor Comm.*, 38 D.C. Reg. 6101, Slip Op. No. 228, PERB Case No. 89-A-02 (1989). Moreover, the Office of Employee Appeals and the Board are two distinct and independent agencies with separate and distinct jurisdictions. Also, in the present case, the Arbitrator's review of MPD's disciplinary action against the Grievant arises out of the parties' CBA in conjunction with D.C. Code section 1-616.51(1) and not D.C. Law 8-128 and D.C. Code sections 1-606.1 and 1-606.3 (establishing the Office of Employee Appeals). *See D.C. Metro. Police Dep't and F.O.P./Metro. Police Dep't Labor Comm. (on behalf of Desariee Haselden),* 59 D.C. Reg. 3543, Slip Op. No. 882, PERB Case No. 06-A-13 (2008); see also *Stokes* v. *District of Columbia,* 502 A.2d. 1006 (D.C. 1985).

Furthermore, even if the *Colbert* case were applicable, the Board does not read the case as requiring an adjudicator to analyze an employee's discipline using all twelve *Douglas* factors, only that the adjudicator analyze the relevant *Douglas* factors. In the instant case, the Arbitrator determined that Director Brown did just that: he analyzed factors 1, 5, 6, and 9 in arriving at his final decision. (Award at pp. 13-14).

With regard to the constitutional claim, the Union maintains that the Grievant's constitutional right to due process was violated because in terminating him, DOC did not comply with its own procedures. Petitioner argues, "Government agencies are precluded from modifying or relaxing regulations that 'provide the only safeguard [employees] have against unlimited agency discretion in hiring or termination.'" (Request at p. 12) (*quoting Lopez v. FAA*, 318 F.2d 242, 247 (D.C. Cir. 2003)).

The procedures Petitioner alleges that DOC violated are in article 11, section 9 of the CBA. According to the Union, an impartial hearing and a disinterested hearing officer are required by article 11, section 9 but were denied to the Grievant. The alleged partiality of the hearing is not explained in the Request, but the Union's post-hearing brief argues that the hearing was not impartial because the Agency gave too much weight to evidence adverse to the Grievant. (Request, Exhibit C at pp. 23-30). The Union asserts without citation that the hearing officer admitted that she served at the pleasure of the Director, the deciding official, and assumes that as result she was not disinterested. Denial of a disinterested hearing officer, the Union maintains, violated the Grievant's due process rights under the CBA and the Constitution. (Request at pp. 12-13) (*citing Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980)).

The parties contracted for the Arbitrator's findings of fact upon which her award is based. *AFGE v. D.C. Bd. of Parole*, 45 D.C. Reg. 5071, Slip Op. No. 551 at p. 3, PERB Case No. 98-A-01 (1998). The arbitrator stated, "I further have considered only the facts of this record to reach my findings, and I have not given weight to the administrative conclusions of the Hearing Officer inasmuch as this is a de novo proceeding." (Award at p. 19). As any earlier errors of the Agency were remedied by the Arbitrator's de novo review of the evidence, the

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were no permissible legal bases for overturning the ALJ's order.

Union has not demonstrated a denial of due process. *See AFGE Local 3947 and U.S. Dep't of Justice Fed. Bureau of Prisons*, 47 F.L.R.A. 1364, 1374-75 (1993).

In view of the above, PERB finds no merit to Petitioner's arguments. 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 or public policy. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Award is sustained. Therefore, the Arbitration Review Request of the Fraternal Order of Police/Department of Corrections Labor Committee 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.

December 20, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-22 is being transmitted via U.S. Mail to the following parties on this the 21st day of December, 2012.

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