Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 872 (on behalf of James Thomas),	
Petitioner,	PERB Case No. 04-A-25
and	Opinion No. 847
District of Columbia Water and Sewer Authority,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

The American Federation of Government Employees, Local 872 ("AFGE"), filed an Arbitration Review Request ("Request"). The District of Columbia Water and Sewer Authority ("WASA") 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 § 1-605.02(6).

II. Discussion:

The Grievant is a Customer Service Dispatcher in WASA's Department of Customer Service Call Center. On December 5, 2003, Denise McClain, a temporary employee for National Associates, Incorporated ("NAI") was working in the Call Center with Timothy Butler, a customer Service Dispatcher, and the Grievant. "Ms. McClain and the Grievant were having a conversation on this date. Mr. Butler was sitting nearby and heard at least part of the conversation. Ms. McClain mentioned that she was separated from her husband. What the Grievant said in response to this is in dispute. [However,] Ms. McClain became upset during the discussion with the Grievant. Before leaving the office. . . .Ms. McClain talked to [the] supervisor of the Customer Service Call Center. [Subsequently,] Tricia Taylor, an NAI management official, wrote a memo to the file dated December

5, 2003, in which she stated that Ms. McClain had complained to her about the Grievant speaking to her in a disrespectful manner. She noted that Ms. McClain had stated that the Grievant had commented about her body parts. Ms. Taylor stated that Ms. McClain had also stated that the Grievant had told her to stand up so another employee could see her 'butt'." (Award at p. 4) In addition, WASA claimed that the Grievant made several other inappropriate comments to Ms. McClain.

On December 5, 2003, Ms. Taylor had a conference call with Eva Liggins, WASA Customer Service Manager and Edith Lanun, Supervisor concerning Ms. McClain's complaint. During that conversation Ms. Taylor indicated that NAI had decided to remove Ms. McClain from her assignment at the WASA Call Center. (See Award at p. 4) Subsequently, WASA officials conducted an investigation regarding Ms. McClain's complaint. As part of the investigation, on January 2, 2004, WASA officials interviewed the Grievant and Timothy Butler (the Grievant's co-worker). Also, it is undisputed that Ms. McClain: (1) left NAI shortly after the incident took place; (2) never returned to work at WASA; (3) relocated to Atlanta, Georgia and (4) was interviewed on January 29, 2004, by Carol Mason-Loubon (WASA Labor Relations Specialist). (See Award at p. 6).

On "March 2, 2003, WASA proposed that the Grievant should be disciplined for discourteous treatment in violation of [Section] 9E of the Disciplinary Code. The proposal was for a 5-day suspension based on the Grievant's alleged disrespectful treatment of Ms. McClain." (Award at p. 6) AFGE grieved the proposed 5-day suspension by filing for arbitration on behalf of James Thomas.

At arbitration, AFGE argued that WASA "was aware of the incident between McClain and the Grievant on December 5, 2003, and did not impose discipline until March 2, 2004. [Therefore, AFGE asserted that WASA]. . . violated the time limits contained in Article 57 (D) [of the parties' collective bargaining agreement]." (Award at p. 9). WASA countered "that it undertook the investigation in a timely manner but that it had difficulty reaching Ms. McClain because she no longer worked at NAI." (Award at p. 9) In addition, WASA claimed that it learned that the Grievant engaged in improper conduct only after Ms. Mason-Loubon interviewed Ms. McClain on January 29, 2004. Therefore, WASA argued "that the date it knew or should have known there was conduct subject to discipline was January 29, 2004 and the 45 workdays should run from that date. [As a result, WASA asserted that] it disciplined the Grievant in a timely manner." (Award at p. 9)

Arbitrator Jonathan Kaufmann determined that WASA "offered sufficient evidence to establish that the Grievant used offensive language and engaged in discourteous conduct and [that] [t]his [conduct was]. . . a violation under Section 9E in the Table of Penalties." (Award at p. 14) However, the Arbitrator found that WASA violated Article 57, Section D of the parties' collective bargaining agreement when it failed to initiate the "Notice of Proposed Disciplinary Action" within the 45-workday limit.[1] (See Award at p. 11). In addition, the Arbitrator noted that the Grievant had

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[1]The Arbitrator noted that WASA knew on January 29, 2004, that it had the basis to take disciplinary action against the Grievant. He stated that according "to the time deadlines described in Article 57(D), this was 36 workdays from the alleged occurrence (figuring from December 5

not been disciplined before. He further found that the Agency had not considered all of the relevant Douglas Factors, when considering disciplinary action. (See Award at p. 15) In light of the above, the Arbitrator reduced the proposed 5-day suspension to a letter of reprimand. (See Award at p. 15).

AFGE takes issue with the Arbitrator's Award. AFGE asserts that the Arbitrator exceeded his authority by allowing WASA to take disciplinary action against the Grievant in the form of a letter of reprimand. Specifically, AFGE claims that the Arbitrator rendered an award that: (1) conflicts with the express terms of the parties' collective bargaining agreement and (2) fails to derive its essence from the agreement. (See Request at pgs. 2-3)

In support of its argument, AFGE cites Article 57, Section D, of the parties' collective bargaining agreement which provides in pertinent part as follows:

> **No corrective or adverse action shall be commenced more than 45 workdays** (not including Saturdays, Sundays or legal holidays) after the date that [WASA]. . . knew or should have known the act or occurrence allegedly constituting cause. (Emphasis added.).

AFGE asserts that Arbitrator Kaufmann ignored the plain language of Article 57, Section D, of the parties' collective bargaining agreement. Specifically, AFGE contends that "the language in the collective bargaining agreement is clear [and] unambiguous when it states that no corrective or adverse action shall commence [more than] forty five days (45) workdays . . . [after the act or occurrence allegedly constituting cause]." (Request at p. 3) AFGE further notes that consistent with the parties' collective bargaining agreement, Arbitrator Kaufmann found that the "Notice of Proposed Disciplinary Action" was untimely. Nevertheless, Arbitrator Kaufmann concluded that WASA had cause to take disciplinary action against the Grievant. As a result, the Arbitrator still allowed WASA to issue a letter of reprimand to the Grievant. In view of the above, AFGE asserts that the Arbitrator acted outside the scope of his power by modifying the time frame that was bargained for under the parties' collective bargaining agreement. In addition, AFGE claims that the award fails to derive its essence from the agreement. (See Request at p. 3)

Based on the above and the Board's statutory basis for reviewing arbitration awards, AFGE contends that the Arbitrator exceeded his authority by modifying the time frame for meeting out discipline under the collective bargaining agreement. (See Request at p. 3). For the reasons discussed below, we disagree.

We have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for

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and excluding weekends and three holidays: Christmas, New Year's, and Martin Luther King Day). Therefore, WASA had nine additional workdays after January 29, 2004, in which it could have instituted discipline within the existing contractual requirement of 45 workdays. (Approximately February 11, 2004.) [Also, the Arbitrator indicated that WASA]. . .did not explain whether or not this was sufficient time to complete the disciplinary action or why the proposed discipline was not issued until March 2, 2004. (Approximately 13 workdays after the deadline)." (Award at p. 11)

PERB or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the collective bargaining agreement." District of Columbia General Hospital v. Public Employee Relations Board, No. 9-92 D.C. Super. Ct. (May 24, 1993). Also see, United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987) Furthermore, 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. Also, we have explained that:

> [by] agreeing to submit a matter to arbitration, the parties also agree to be bound by . . . the Arbitrator's interpretation of the parties' [collective bargaining] agreement and related rules and/or 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/NEA, 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). Also, 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.[2] 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, AFGE does not cite any provision of the parties' collective bargaining agreement which limits the Arbitrator's equitable power. Therefore, once the Arbitrator determined that WASA had cause for taking disciplinary action against the Grievant, he also had authority to reduce the proposed 5-day suspension to a letter of reprimand.

In the present case, the Arbitrator reasoned that the grievance before him involved the interpretation of Article 57, Section D of the parties' collective bargaining agreement. (See, Award at p. 11). He noted that two previous arbitrators had interpreted the provision in two different ways. (See Award at p. 12) He found that: "[t]he contract does not state, . . . what happens (in terms of consequences) when management does not meet the 45-day deadline contained in Article 57D." (Award at p. 12) As a result, we believe that AFGE's assertion that the Arbitrator exceeded his authority by ignoring the time frame in the collective bargaining agreement, is inaccurate. The Arbitrator acknowledged the clause, found it had been violated, and used that as one basis for decreasing the penalty imposed on the grievant. In view of the above, we find that AFGE's claim only involves a disagreement with the Arbitrator's interpretation of Article 57, Section D. AFGE requests that we adopt its interpretation of the above-referenced provision of the collective bargaining agreement. This we cannot do. Therefore, we cannot reverse the Award on this ground.

As a second basis for review, AFGE asserts that the Arbitrator's Award is contrary to law and public policy.

The possibility of overturning an arbitration decision on the basis of public policy is an

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[2]We note, that if the parties' collective bargaining agreement limits the Arbitrator's equitable power, that limitation would be enforced.

"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). Also, a petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well-defined, public policy grounded in law or legal precedent. SeeUnited Paperworkers Int'l. Union, AFL-CIO v. Misco, 484 U.S. 29, 43 (1987) and Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971)."[3] In addition, the petitioning party has the burden to specify. "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). Furthermore, as the D.C. Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." Department of Corrections v. Local No. 246, 554 A.2d 319, 325 (D.C. 1989).

In the present case, AFGE asserts that the Award is on its face contrary to law and public policy. However, AFGE has not presented any applicable law and definite public policy that mandates that the Arbitrator arrive at a different result. Instead, AFGE contends that Article 57, Section D, of the parties' collective bargaining agreement clearly states that no corrective or adverse action shall commence more than forty five days (45) workdays after the act or occurrence constituting the cause. As a result, AFGE argues that the Arbitrator should not have allowed WASA to take disciplinary action against the Grievant. As previously discussed, we believe that AFGE's ground for review only involves a disagreement with the Arbitrator's interpretation of Article 57, Section D of the parties' collective bargaining agreement. We have held that a "disagreement with the Arbitrator's interpretation of the parties' contract . . . does not render the Award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995).

We find 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; the Request is therefore, denied.

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[3]See, MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing *AFGE, Local 631 and Dep't of Public Works*, 45 DCR 6617, Slip Op. 365 at p. 4, n. 4, PERB Case No. 93-A-03 (1998); District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987) (same).

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 872'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.

September 29, 2006

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.04-A-25 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of September 2006.

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