GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: The District of Columbia Public Schools, Petitioner, and The American Federation of State, County and Municipal Employees, District Council 20, on behalf of Darnell Johnson, Respondent.	PERB Case No. 86-A-05 Opinion No. 156 ~~File Closed~~

DECISION AND ORDER

On July 8, 1986 the District of Columbia Public Schools (DCPS) filed an "Arbitration Review Request" with the Public Employee Relations Board (Board), arguing inter alia that the Award issued on June 10, 1986 concerning the discharchge of an employee in a unit represented by the American Federation of State, County and Municipal Employees, District Council 20 (Union) should be reversed, for the following reasons:

(1) The arbitrator exceeded his authority;

(2) the Award did not draw its essence from the parties' collective bargaining agreement; and

(3) the Award, on its face, is contrary to law and public policy.

The issues before the Board are whether the Arbitration Review Request is timely and whether a statutory basis exists in this case to grant the review request.

The threshold question which this Board must address is the timeliness of this Arbitration Review Request. Board Rule 107.2 provides:

> Any party to an arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board no later than twenty (20) days after the award is served.

Board Rule 100.26 states:

> "Filing with the Board shall not be complete until the document is received in the office of the Executive Director."

On July 22, 1986, the Board received an "Opposition to Arbitration Review Request" from the American Federation of State, County and Municipal Employees, District Council 20, arguing solely that DCPS's July 7, 1986 Arbitration Review Request should be summarily dismissed as untimely under PERB Rule 107.2. This issue of timeliness was presented to the Board during its meeting on November 19, 1986 at which time the Board concluded unanimously that the Review Request was timely under PERB Rule 100.16 and 100.15 which provide:

> [100.16] Whenever a period of time is measured from the service of a paper, and service is by mail three (3) days shall be added to the prescribed period.
>
> [100.15] In computing any period of time prescribed or allowed by these rules...The last day of the period so computed shall be included, unless it falls on a Saturday, Sunday or legal holiday, in which event the period shall run to the next business day.

According to the record, the American Arbitration Association transmitted the Award to the parties on June 11, 1986. Therefore, the DCPS's July 7, 1986 Arbitration Review Request is timely under PERB Rules 100.16 and 100.15. July 4, 1986 was a legal holiday and the next business day was July 7, 1986, the 20th day and deadline within which period of time the Arbitration Review Request could be timely filed with the Executive Director.

Having determined the Arbitration Review Request to be timely filed the Board must determine if a statutory basis exists in this case to grant the review requested.

D.C. Code Section 1-605.2(6) and Board Rule 107.1 authorizes the Board to consider appeals from arbitration awards pursuant to a grievance procedure, only if the arbitrator was without, or exceeded, his or jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means.

The June 10, 1986 Award that DCPS petitions the Board to review concluded:

> There was just cause for grievant's discharge for failure to follow established leave in accumulating seventy-seven (77) hours of unexcused absence. However, the grievant's discharge is reduced to reflect a suspension consistent with progressive disciplinary steps of the labor agreement. The grievant is ordered reinstated but without back-pay but full restoration of employment.

The facts of this case can be summarized as follows:

An arbitration resulted from a grievance filed by the American Federation of State, County and Municipal Employees (AFSCME), Council 20, on behalf of Darnell Johnson, who was terminated from his employment with the District of Columbia Public Schools (DCPS) on July 15, 1985, for an accumulated total of fifteen hours of absence without leave (AWOL) during the period of May 13, 1985 through May 21, 1985. The grievant was notified of the proposed discharge on June 12, 1985. Prior to the notice of discharge the grievant had established a long history of attendance infractions which concluded with concurrent suspension and discharge. In the opinion of the Arbitrator the discharge was nullified because the suspension notice was not issued within the time prescribed by the labor agreement. The Arbitrator ruled that the essence of progressive discipline is to notify the offender of that conduct which is correctable and the penalty for failing to reform substandard conduct.

A review of the record establishes that on May 21, 1985, the grievant received a letter notifying him of an eight (8) day suspension. The letter stated the reasons for the grievant's suspension as follows:

> "Reason(s): On April 30, 1985, you were reported for being absent without leave during the period of April 25, 1985 through May 9, 1985, for a total of sixty-two (62) hours."

After the grievant's suspension had been implemented, his employment was terminated for repeated absence without leave (AWOL) for a total of fifteen (15) hours covering the period of May 13, 1985 through May 21, 1985. The grievant, however, was not given notice of his impending discharge until June 12, 1985.

The Arbitrator found that the suspension letter of May 21 could only be viewed in one of two ways:

> Either it is a deliberate attempt to demonstrate compliance with contractually mandated disciplinary steps with the intent to conceal the grievant's impending discharge, or it is calculated to avoid the appearance of undue delay. As to the former, the [School] Board's own rules provide that adverse actions may not be arbitrary or capricious. 5 DCMR Section 1401.1 (1983). In the case of the latter, Article 10-Section B of the labor agreement requires disciplinary action be received by an employee not later than fifteen (15) work days of the alleged violation. This "Statute of limitations" or "amnesty" provision, if you will, invalidates disciplinary action that is untimely. It is the Arbitrator's opinion that a letter dated May 21, 1985, received by the grievant on May 23, 1985, alleging attendance violations known by the [School] Board to have occurred on April 30, 1985, assuredly falls within this proscription.

It is well established that a discharge may be set aside where there is a corrective disciplinary system but officials fail to abide by it. See Arbitrator Belshaw in 49 LA 573, 576-577; Morgan in 45 LA 280, 283; Kates in 43 LA 1031, 1034-1035, and in 39 LA 286, 290-292 (the established sequence should be adhered to in the absence of compelling circumstances otherwise); Dworkin in 41 LA 862, 866.

The Arbitrator concluded that this rule was particularly apt here:

> When it is apparent, such as here, that discipline is the only recourse available to bring about the necessary change in an employee's conduct, then it becomes even more imperative that there be strict adherence to the progressive steps mandated by the labor agreement. ...The Arbitrator, therefore, holds that the eight (8) day suspension imposed on the grievant is invalid, since it was received by the grievant more than fifteen (15) work days beyond April 30, 1985, as well as any attendance infractions that reasonably could have been known on that date. It is the Arbitrator's belief that this result follows from the clear language of Article 10 Section B of the labor agreement.

DCPS's contention that the Arbitrator's decision is contrary to law is not supported by citation of any law which mandated that the Arbitrator arrive at a contrary decision. With respect to the argument that the Arbitrator exceeded his jurisdiction and was without authority to render the Award, this argument has been addressed in Steel Workers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960), wherein the court stated that the test is whether the Award draws its essence from the collective bargaining agreement.

Here the Award is squarely based on the Arbitrator's interpretation of the disciplinary steps outlined in the parties' collective bargaining agreement. Accordingly, this Board is not convinced that the Arbitrator exceeded his jurisdiction because his interpretation of the collective bargaining agreement differs from DCPS's. Nor has the Board authority to substitute its own interpretation for that of the duly appointed arbitrator.

DCPS argues that the Award is contrary to the public policy expressed by Comprehensive Merit Promotion Act (CMPA) Sections 1-601.2(a)(4) and (b)(4). However, these regulations are inapplicable to the facts of this case.

CMPA Section 1-601.2(a)(4) in pertinent part aims at insuring an efficient administration of personnel, and Section 1-601.2(b)(4) aims at retaining employees on the basis of their performance, correcting inadequate performance and separating employees whose inadequate performance cannot be corrected. As discussed earlier, DCPS was obligated by its own collective barbaining agreement to deliver the suspension notice in question within fifteen (15) days of the alleged infraction. This did not occur. Section 1-617.1 "adverse actions" provides:

> "Adverse action procedures shall not be in conflict with these corrective measures."

Obviously, the objective of corrective procedures is to put an employee on notice of the next step to follow if the substandard conduct is not corrected. DCPS's partial compliance with the progressive disciplinary steps did require the Arbitrator to relieve it of its responsibility to complay fully with the procedures outlined in the parties' collective bargaining agreement. Neither CMPA section cited by DCPS mandates discharge.

The Award does not require DCPS to engage in activity which is contrary to law and public policy nor does it sustain or approve conduct which is inconsistent with these sections of the CMPA.

For the foregoing reasons the Board finds that there is insufficient basis on which to conclude that the Arbitrator's Award is contrary to law and public policy or exceeded the scope of the authority granted. Accordingly, the Arbitration Review Request is denied.

O R D E R

IT IS ORDERED THAT:

The Request for Review of the Arbitration Award is hereby denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
May 7, 1987