Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Human Services,	
Petitioner,	
and	PERB Case No. 04-A-06
Fraternal Order of Police/ Department of Human Services Labor Committee, (on behalf of McCloud and Akinrinmade),	Opinion No. 912
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Department of Human Services ("DHS") filed an Arbitration Review Request ("Request"). DHS seeks review of an Arbitration Award ("Award") which rescinded the summary removal of David K. McCloud and Ambrose Akinrinmade ("Grievants"). DHS is seeking review of the Award on the ground that the Arbitrator "exceeded his authority." (Request at p. 3). The Fraternal Order of Police/Department of Human Services Labor Committee ("FOP") opposes the Request.

The issue before the Board is whether "the arbitrator was without, or exceeded, his or her jurisdiction." D.C. Code § 1-605.02(6) (2001 ed).

II. Discussion

David K. McCloud and Ambrose Akinrinmade served as Youth Correctional Officers (YCO) in the Youth Services Administration (YSA) of the DHS. The afternoon

of May 28, 2001, the Grievants were collectively supervising twenty-four residents at the Oak Hill facility in Laurel, Maryland, on a basketball court located outdoors, between Units 8-A and 8-B and within the perimeter fence. (See Award at p. 3). While outside, two residents became involved in a verbal and physical altercation. (See Award at p. 4). During the altercation, several of the youths managed to escape the facility through a hole which had been cut in the perimeter fence. (See Award at p. 4). The Grievants were able to contain the altercation and Control was notified of the escape. (See Award at p. 4). After a head count of the residents, it was determined that seven residents had escaped. (See Award at pgs. 4-5). Five of the residents were recaptured between May 28 and May 29, 2007. (See Award at p. 5).

An investigation was conducted on the evening of May 28, 2001. The Grievants, among other witnesses, were interviewed. (See Award at p. 5). Grievants requested union representation, but their requests were denied. (See Award at p. 5). On May 29, 2001, the Grievants were placed on administrative leave. (See Award at pgs. 5-6). Clinton Pollard, the Chief of Security at Oak Hill, issued a memorandum on June 1, 2001, to YSA Deputy Administrator, George Perkins, presenting his investigative findings. (See Award at p. 6). The June 1, 2001, memorandum alleged the Grievants were at fault for the residents escape, violated YSA policy regarding Resident Supervision and Movement and did not exercise proper procedures regarding the incident on May 28th. On June 1, 2001, YSA Administrator Gayle Turner authorized Jesse Doyle, Superintendent of Oak Hill, to initiate disciplinary action – summary removal – against Grievants. (See Award at p. 7). Doyle issued letters to each of the Grievants on June 6, 2001, informing them they were summarily removed from their positions, effective June 7, 2001. (See Award at p. 7). The summary removals were based on a charge of "Inexcusable Neglect of Duty". (See Award at p. 7). Specifically, Doyle indicated the Grievants' actions "[were] detrimental to public safety and welfare and threatened the integrity of government operations." (Award at p. 7).

The Grievants submitted their cases to administrative review. No hearings were held. Separate hearing examiners reviewed the documentary evidence, including Pollard's June 1, 2001, memorandum, Doyle's letters to the Grievants, and the Grievants' responses. Both hearing examiners recommended the summary removal be reversed on the basis that the evidence did not support summary removal of the Grievants. (See Award at pgs. 9-11). YSA Administrator Turner overruled the hearing examiners' recommendations and sustained the Grievants' summary removal. Turner disagreed with the Hearing Examiners' evidentiary findings regarding the events of May 28, 2001, and issued letters to the Grievants sustaining the charge of "Inexcusable Neglect of Duty" by violating YSA policy and "threaten[ing] the integrity of government operations." (See Award at p. 12).

The Grievants exercised their appeal rights, and on October 15, 2001, William Howland, DHS' Deputy Director for Administration, issued letters to the Grievants' Union representative, stating that he was denying the grievances and the letters were to serve as a final notice. (See Award at pgs 12-13). The Union invoked arbitration.

The issue before the Arbitrator was:

> Were the Grievants summarily removed for cause, in accordance with the requirements of the collective bargaining agreement and the District of Columbia personnel regulations?

(Award at p. 13).[1]

At arbitration, DHS argued: (1) the Arbitrator was without jurisdiction because the collective bargaining agreement had expired; (2) the evidence supported the summary removal of the Grievants; and (3) the Grievant's removal protects citizens. (See Award at pgs. 16-17). The Union countered: (1) the May 28th incident was not the Grievants' fault; (2) the criteria for summary removal had not been met; (3) management mishandled the evidence concerning the May 28th incident; (4) management violated the Grievants' *Weingarten*[2] rights; and (5) DHS presented conflicting evidence. (See Award at pgs. 18-19).

The Arbitrator found the grievance was arbitrable. (See Award at p. 21). In addition, the Arbitrator determined that DHS had violated the Grievants' *Weingarten*

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[1] District Personnel Manual [("DPM")], Part I: D.C. Personnel Regulations, Chapter 16: General Discipline and Grievances

1617 Summary Removal: General Discipline

1617.1 An agency head may remove an employee summarily when the employee's conduct:
(a) Threatens the integrity of government operations;
(b) Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or
(c) Is detrimental to public health, safety, or welfare.

Article 24 of the parties' collective bargaining agreement ("CBA"), Corrective and Adverse Actions, Section 1, states in part:

1. Corrective and Adverse Actions, as defined in Personnel regulations, may be imposed on employees only for cause, in accordance with the provisions of the Comprehensive Merit Personnel Act (CMPA) D.C. Law 2-139, as amended and the [DPM].

2. Corrective and Adverse Actions will be appropriate to the circumstances, with due regard to the principles of progressive discipline in accordance with the Chapter 16 of the DPM.

[2] See *National Labor Relations Board v. Weingarten*, 95 S. Ct. 959 (1975), in which the United States Supreme Court held that it is an unfair labor practice under the National Labor Relations Act to deny an employee's request for union representation at an investigatory interview that the employee reasonably believes will lead to discipline. See also, *District of Columbia Nurses Association v. Mayor of the District of Columbia and District of Columbia Health and Hospitals Public Benefit Corporation, District of Columbia General Hospital*, 45 DCR 6736, Slip Op. No. 558, PERB Case No. 97-U-16 (1998).

rights by denying them Union representation during the interviews. (See Award at pgs. 22). With regard to the charge of "Neglect of Duty", the Arbitrator found the evidence presented did not support the summary removal of the Grievants.[3]

DHS filed a Request for Review, contending the Arbitrator exceeded his authority. In its Opposition, the Union claims DHS' Request is untimely.

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. the arbitrator was without, or exceeded his or her jurisdiction;
2. the award on its face is contrary to law and public policy; or
3. the award was procured by fraud, collusion or other similar and unlawful means.

D.C. Code § 1-605.02 (2001 ed.).

DHS alleges, at the hearing, the parties did not stipulate to the issue of whether the Grievants' *Weingarten* rights were violated and the Arbitrator added the issue *sua sponte*. In doing so, DHS argues the Arbitrator exceeded his authority. (See Request at pgs. 3-4).

In its Opposition, the Union claims DHS' Request is untimely because it was not filed within the time period (25 days) required by Board Rules. The Union argues, because the Award was issued on December 23, 2003, the Request should have been filed within twenty days, plus an additional five days because the Award was issued by mail. Specifically, the Union asserts the Request had to be filed by January 17, 2004. However, the Request was not filed until January 20. Therefore, the Union asks for the Request be dismissed as untimely.

Board Rules 538.1, 501.4 and 501.5 provide in relevant part as follows:

> **538.1 – Filing**
> A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for

[3] Specifically, the Arbitrator determined that: (1) DHS violated the Grievants' due process rights under the DPM by asserting charges in the final notice that were not previously charged to the Grievants; (2) he disagreed with DHS' finding that no fight had occurred on May 28; (3) he disagreed with DHS' contention regarding the condition of the fence through which the residents escaped on May 28; (4) the Grievant's did not violate YSA policy by their response to the fight and to the escape; (5) he credited the Grievants' account of the incidents of May 28; and that Akinrinmade did have permission to be outside with his assigned residents. (See Award at pgs 22-33). Consequently, the Arbitrator sustained the grievances and determined that the summary removals were not "for cause." (See Award at p. 35).

> review with the Board **not later than twenty (20) days after service of the award** . . . .
> (emphasis added).
>
> **501.4 – Computation – Mail Service**
> Whenever a period of time is **measured from the date of service of a pleading and service is by mail, five (5) days shall be added to the prescribed period**. (emphasis added).
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> **501.5 – Computation – Weekends and Holidays**
> In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included. **If the last day of a prescribed period falls on a Saturday, Sunday, or District of Columbia holiday, the period shall extend to the next business day**. . . . Whenever a prescribed time period is eleven (11) days or more, such days shall be included in the computation. (emphasis added).

In the present case, DHS acknowledges Arbitrator Shapiro issued his Award on December 23, 2003. (See Request at p. 3). The Board assumes the Award was issued by United States mail.[4] Board Rule 538.1 states an arbitration review request must be filed "not later than twenty (20) days after service of the award." Pursuant to Board Rule 501.4, five days must be added to the prescribed twenty-days if service is by mail. In addition, Board Rule 501.5, provides if the last day of a prescribed period falls on a Saturday, the period shall extend to the next business day. In view of the above, DHS was required to file their Request not later than twenty-five (25) days after the service date. Assuming the Award was mailed on December 23, 2003, and the prescribed twenty-five day period ended on Saturday, January 17, 2004, DHS was required to submit their pleading no later than Monday, January 19, 2004. Therefore, we find that DHS' January 20, 2004, filing was untimely.

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. See *Hoggard v. Public Employee Relations Board*, 655 A. 2d 320, 323 (D.C. 1995). Therefore, the Board cannot extend the time for filing an Arbitration Review Request. As a result, we dismiss DHS' Arbitration Review Request because it is untimely.[5]

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[4] Neither party has alleged that the Award was issued by any other means than U.S. mail.

[5] In light of this determination, it is not necessary for the Board to consider whether "the arbitrator was without, or exceeded, his or her jurisdiction."

ORDER

IT IS HEREBY ORDERED THAT:

(1) The District of Columbia Department of Human Services' 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.

October 11, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 04-A-06 was transmitted via Fax and U.S. Mail to the following parties on this the 11th day of October 2011.

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