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**Government of the District of Columbia  
Public Employee Relations Board**

In the Matter of:	)	
	)	
District of Columbia Public Schools,	)	
Petitioner,	)	PERB Case No. 15-A-07
	)	
and	)	Opinion No. 1571
	)	
Council of School Officers, Local 4,	)	Motion for Reconsideration
American Federation of School Administrators,	)	
	)	
Respondent.	)	
	)	

**MOTION FOR RECONSIDERATION**

**DECISION AND ORDER**

**I. Statement of the Case**

On January 4, 2016, the Board issued Opinion No. 1559 (“Opinion”) in the above-captioned matter, affirming an arbitration award (“Award”), which was before the Board at the request of the District of Columbia Public Schools (“DCPS”).<sup>1</sup>

On January 19, 2016, DCPS filed a Motion for Reconsideration (“Motion”) of Opinion No. 1559. DCPS requests that the Board reverse its Opinion, on the grounds that the Board erred by (1) finding that the Arbitrator did not exceed his jurisdiction when he denied DCPS’s request to introduce a witness after the close of the record, and (2) determining that the Award was not contrary to law and public policy. The Council of School Officers, Local 4 (“CSO”) did not file an Opposition.

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<sup>1</sup> *DCPS v. CSO, Local 4*, 63 D.C. Reg. 2116, Slip Op. No. 1559, PERB Case No. 15-A-07 (2016).

## II. Background

A relevant background summary from the Board's Opinion is as follows:

The grievance before the Arbitrator was filed on behalf of an employee ("Grievant") by CSO, concerning Grievant's termination. DCPS removed Grievant from his position of Dean of Students at a DCPS high school for adults for an alleged improper relationship with a student ("Student"). The parties presented their cases at a December 14, 2014<sup>2</sup> hearing before the Arbitrator. After DCPS rested its case-in-chief without any testimony from the Student, CSO moved for a "Directed Verdict" ("Motion") on the grounds that DCPS had failed to meet its burden of proof that DCPS had just cause to terminate Grievant. DCPS objected to CSO's motion, arguing that the case involved "a credibility issue that the arbitrator is appropriate to weigh" and that further briefing should take place. The Arbitrator continued the hearing, and CSO presented its witness. At the close of the hearing, the parties agreed off the record that DCPS could file a position regarding CSO's Motion. The Arbitrator then closed the evidentiary record at the end of the hearing, but instructed that any evidence that needed to be added to the record would require a conference call before admission.

In an email to the Arbitrator, DCPS opposed CSO's motion and requested a conference call to discuss reopening the record for testimony from the Student who had not testified during the hearing, along with other unnamed witnesses. The Arbitrator granted DCPS's request for a conference call, but placed DCPS on notice that the bar for reopening the record would be high for a witness that he believed should have been called during the hearing. On January 28, 2015, the Arbitrator held a conference call with the parties. The Award noted that, during the conference call, DCPS provided for the first time some of the efforts it made to locate the Student in order to have her testify at the December 17, 2014 arbitration hearing. According to the Arbitrator, "No specifics were provided by the DCPS as to dates of telephone calls, e-mails, letters, etc., which assertedly had been made by the DCPS to" the Student. The Arbitrator denied DCPS's request to present the Student as a witness. In denying DCPS's request, the Arbitrator noted that DCPS made no arguments about its attempts to obtain the Student's cooperation and attendance before or during the hearing, nor did DCPS request to have the record be held open in order for DCPS to reach the Student as a witness. The Arbitrator found that DCPS's request at that point in the proceedings was "inappropriate and harmful to the Arbitration process, given that the request was not made until after the DCPS had rested its direct case, after

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<sup>2</sup> The hearing was held on December 17, 2014. ARR at 10.

the Union had presented the testimony of the Grievant, and after the evidentiary record at the instant Arbitration hearing was declared closed by the Arbitrator following the full, complete and unreserved agreement of the DCPS and the Union.”

The Arbitrator sustained CSO’s motion, finding that DCPS failed to meet its burden of proof that the Grievant engaged in the alleged misconduct. In finding that DCPS failed to prove just cause for the Grievant’s termination, the Arbitrator determined that DCPS improperly based the Grievant’s termination upon a Report of Investigation that was compiled by an investigator. The Arbitrator found that the Report of Investigation yielded no “probative evidence to support the bare allegation” that the Grievant and the Student had an improper relationship. The Arbitrator also found that DCPS failed “to present on its direct case sufficient credible, probative evidence to support” the charge that the Grievant and the Student engaged in an improper relationship. The Arbitrator ordered the Grievant reinstated and made whole for his losses.<sup>3</sup>

DCPS filed an arbitration review request, asserting that (1) the Arbitrator exceeded his jurisdiction under the parties’ collective bargaining agreement (“CBA”) when he denied DCPS’s request to reopen the arbitration record to allow the Student to testify, (2) the Award was contrary to law under the Revised Uniform Arbitration Act, and (3) the Award was contrary to law under the D.C. Court of Appeals’ standard for a directed verdict.<sup>4</sup> The Board rejected DCPS’s arguments, and upheld the Award.

### III. Discussion

The Comprehensive Merit Personnel Act (“CMPA”) authorizes the Board to modify or set aside an arbitration award in three limited circumstances: (1) if the arbitrator was without or exceeded his or her jurisdiction; (2) if the award on its face is contrary to law and public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.<sup>5</sup> The Board has only “limited authority to overturn an arbitral award.”<sup>6</sup> There is a “well defined and dominant” policy favoring arbitration of a dispute where the parties have chosen that course.<sup>7</sup> Just as “Congress [has] declared a national policy favoring arbitration,” so has the District of Columbia.<sup>8</sup> This preference for honoring the parties’ agreement to arbitrate disputes underlies the practical “hands-off” approach to review arbitrators’ decisions, except in certain “restricted”

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<sup>3</sup> Slip Op. No. 1559 at 1-3.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> D.C. Official Code § 1-605.02(6).

<sup>6</sup> *Fraternal Order of Police v. District of Columbia Pub. Employee Relations Bd.*, 973 A.2d 174, 177 (D.C. 2009).

<sup>7</sup> *District of Columbia Metro. Police Dep’t v. Public Employee Relations Bd.*, 901 A. 2d 784, 789 (D.C. 2006).

<sup>8</sup> *District of Columbia v. Greene*, 806 A. 2d 216, 221 (D.C. 2002) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). See, e.g., *Masurovsky v. Green*, 687 A.2d 198, 201 (D.C. 1997) (“Variously called a presumption, preference or policy, the rule favoring arbitration is identical under the D.C. Uniform Arbitration Act and the Federal Arbitration Act.”) (citation omitted).

circumstances.<sup>9</sup> The Board will not substitute its own interpretation of the collective bargaining agreement for that of the parties or of the duly designated arbitrator.<sup>10</sup>

In reviewing a motion for reconsideration, the Board has held that mere disagreement with the Board's decision is not grounds for reversal.<sup>11</sup> A successful motion for reconsideration must demonstrate that the Board's decision was based on an error of law or reasoning, which requires reconsideration of its decision.<sup>12</sup>

DCPS asserts that the Board should reverse and vacate its Opinion, because (1) the Arbitrator exceeded his jurisdiction, and (2) the Award was contrary to law. The Board notes that DCPS's arguments are a repetition of its arguments that the Board considered in its Opinion. DCPS has failed to state in its Motion how the Board erred in rejecting its arguments. For the following reasons, the Board denies DCPS's Motion.

**A. The Arbitrator did not exceed his jurisdiction.**

DCPS asserts that the Arbitrator added terms to the parties' collective bargaining agreement ("CBA") by requiring DCPS to meet a "new standard for witness inavailability [sic]."<sup>13</sup> DCPS challenges the Arbitrator's refusal to allow DCPS to reopen the arbitration record to allow the Student to testify. The Arbitrator found that DCPS had failed to raise the possibility of calling the Student as a witness at any point during the arbitration proceedings until after the close of the arbitration record. DCPS does not assert in its Motion or Request what standard the Arbitrator should have applied.

DCPS asks that the Board adopt its assertion that the Arbitrator erred by denying its witness. DCPS crafts its evidentiary argument as an Arbitrator's jurisdiction argument, arguing that the Arbitrator's denial of evidence modified the parties' CBA outside the Arbitrator's jurisdiction.<sup>14</sup> DCPS concludes that the Arbitrator exceeded his jurisdiction and that the Award did not draw its essence from the CBA.<sup>15</sup> DCPS without any analysis or reasoning repeats the same argument that was considered and rejected by the Board in its Opinion.

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<sup>9</sup> *D.C. Metro. Police Dep't*, 901 A.2d at 787. See *Fraternal Order of Police*, 973 A.2d at 177, n.2.

<sup>10</sup> *D.C. Dep't of Corrections and International Brotherhood of Teamsters, Local Union 246*, 34 D.C. Reg. 3616, Slip Op. No. 157, PERB Case No. 87-A-02 (1987).

<sup>11</sup> *Dep't of Human Serv. and FOP/Dep't of Human Serv. Labor Committee*, 52 D.C. Reg. 1623, Slip Op. No. 71, PERB Case Nos. 02-A-04 & 02-A-05 (2005).

<sup>12</sup> *FOP/MPD Labor Committee and MPD*, 59 D.C. Reg. 9817, Slip Op. No. 1283 at 2, PERB Case No. 07-U-10 (2008). See, e.g., *Dep't of Human Servs.*, 52 D.C. Reg. 1623, Slip Op. No. 717, PERB Case No. 02-A-04 (2005) (denying on the basis that the Board's decision was well-reasoned and not contrary to law); and *MPD and FOP/MPD Labor Committee*, 49 D.C. Reg. 8960, Slip Op. No. 680, PERB Case No. 01-A-02 (2002)(denying on basis that Petitioner failed to cite any legal authority contrary to the Board's decision).

<sup>13</sup> Motion at 2.

<sup>14</sup> The parties' CBA states, "arbitrator shall have no power to delete or modify in any way any of the provisions of this Agreement." Article VIII, Section C(2)(c)(3).

<sup>15</sup> Motion at 2.

Rejecting DCPS's arguments, the Board stated:

DCPS's argument that the Arbitrator exceeded his jurisdiction by refusing to reopen the record amounts to an objection to the Arbitrator's evaluation of certain evidence....Even if the denial of a witness was a serious error, this did not divest the Arbitrator of jurisdiction to resolve the issues presented to him. Furthermore, the Board has held on numerous occasions that such evidentiary objections do not rise to the asserted statutory basis for review.<sup>16</sup>

Further, an arbitrator has the power to procedurally control an arbitration hearing, as the Board has stated that "the CMPA does not give us [PERB] general supervisory power over grievance arbitrators...."<sup>17</sup> As a result, the Board has held that an arbitrator has jurisdiction to determine admissibility of evidence.<sup>18</sup> The Arbitrator's decision that DCPS in essence waived adding more witnesses at the close of the record was within the general power of the Arbitrator and did not require being included expressly in the CBA.

The Board has held, with respect to an arbitrator's findings and conclusion, that the resolution of disputes over credibility determinations and assessing what weight and significance such evidence should be afforded is within the jurisdictional authority of an arbitrator.<sup>19</sup> The Board concludes that the Arbitrator acted within his jurisdictional authority to deny DCPS's witness after the close of the record and that the Arbitrator did not modify or add to the parties' CBA. The Board denies DCPS's Motion for Reconsideration on the grounds that the Arbitrator did not exceed his jurisdiction.

#### **B. The Award is not contrary to law.**

DCPS asserts that the Award is contrary to law, because the Arbitrator did not apply the standard used by the D.C. Court of Appeals for granting a Motion for a Directed Verdict.<sup>20</sup> As was true with respect to the argument that the Arbitrator exceeded his jurisdiction, DCPS provides no argument or analysis of how the Board erred in determining that the Award was not contrary to law.

In its Motion, DCPS asks that the Board require the Arbitrator be held to the D.C. Court of Appeals standard for granting a motion for a directed verdict.<sup>21</sup> DCPS argues that a directed

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<sup>16</sup> Slip Op. No.1559 at 6 (citing *see, e.g., University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 39 D.C. Reg. 9628, Slip Op. No. 320, PERB Case No. 92-A-04 (1992)).

<sup>17</sup> *University of the District of Columbia and University of the District of Columbia Faculty Association/NEA*, 38 D.C. Reg. 1580, Slip Op. No. 262 at 4, PERB Case No. 90-A-08 (1991)..

<sup>18</sup> *NAGE, Local R3-05, SEIU and MPD*, Slip Op. No. 732, PERB Case No. 02-A-01. *See, e.g., DOC and FOP/DOC Labor Committee*, 48 D.C. Reg. 10951, Slip Op. No. 412 at fn.3, PERB Case No. 95-A-01 (2000)(noting that the Arbitrator was proper in denying evidence after the Agency rested its case-in-chief).

<sup>19</sup> *D.C. Water & Sewer Authority and AFGE, local 872*, 54 D.C. Reg. 2582, Slip Op. No. 798, PERB Case No. 04-A-10 (2007).

<sup>20</sup> Motion at 3.

<sup>21</sup> *Id.*

verdict should not be granted “as long as there is some evidence from which jurors could find that the [non-moving] party has met its burden.”<sup>22</sup> In its Opinion, the Board rejected DCPS’s argument that the Award was contrary to law, and found that the Arbitrator was not required to apply the standard applied by the Court of Appeals. DCPS overlooks the fact that the Union’s counsel called CSO’s motion a Motion for a Directed Verdict, as he noted, “for lack of a better ter.”<sup>23</sup> In fact, the Arbitrator rendered a decision on the merits of the case based on the evidence presented at the hearing and the arguments of the parties. The Board denies DCPS’s Motion for Reconsideration, as DCPS fails to demonstrate that the Board erred in its conclusion that the Award was not contrary to law and public policy.

#### **IV. Conclusion**

The Board finds that DCPS has not asserted a legal basis for overturning the Board’s decision in Opinion No. 1559. As a result, the Board denies DCPS’s Motion for Reconsideration.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. DCPS’s Motion for Reconsideration is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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<sup>22</sup> *Id.*

<sup>23</sup> Tr. at. 166-167.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-A-07 (MFR) was served to the following parties via File & ServeXpress on this the 25th day of March 2016:

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