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

In the Matter of:)	
)	
District of Columbia Child and Family Services Agency,)	
)	
Petitioner,)	
)	
v.)	PERB Case No. 14-A-08
)	
AFSCME, District Council 20, Local 2401 (on behalf of Daniel Goodwin))	Opinion No. 1508
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

This matter comes before the Board upon the request of the Child and Family Services Agency (“Agency”) to review a grievance arbitration award. The grievant Daniel Goodwin (“Goodwin” or “Grievant”) was a vocational specialist at the Agency’s Office of Youth Empowerment. He was terminated June 21, 2013. The Union filed a grievance challenging the removal of the Grievant. After the Agency denied the grievance, the Union invoked arbitration. The arbitrator, Barbara B. Franklin, held a hearing and issued an Award that reduced the penalty to a thirty-day suspension. On June 16, 2014, the Agency filed an arbitration review request (“Request”) with the Board. On November 14, 2014, pursuant to Rule 538.2 the Board requested the parties to file briefs. The parties filed their briefs on December 11, 2014.

The Agency contends that the Arbitrator exceeded her jurisdiction by adding an element to the charge and violated law and public policy by preventing the Agency from fulfilling its legal mandate to protect neglected and vulnerable youth. For the reasons set forth herein, the Board determines the Arbitrator did not exceed her jurisdiction and that the Award is not contrary to law and public policy.

A. Arbitrator’s Factual Findings

The Award states that Goodwin oversaw vocational training programs open to clients of the Agency. One of the Agency’s training programs that he oversaw was a culinary certification

training program. A 19-year-old referred to in the Award as JS for reasons of confidentiality was a participant in that program. He was a ward of the Agency living in an Agency group home. JS and the other participants in the program were to be paid forty dollars for each class they attended. After the program ended, JS repeatedly questioned Goodwin about when his check would arrive.

On May 15, 2013, Goodwin drove JS to a store to exchange a pair of boots that JS would need for another Office of Youth Empowerment program, one in construction, that JS was about to start. According to Goodwin, JS questioned Goodwin in a threatening manner about the check for which he was still waiting.

At the hearing, JS testified (and Goodwin denied) that the following events then occurred. On the ride back from the store, Goodwin asked JS, "Do you like to make money?" JS replied that he did. Goodwin then gave JS his phone number and asked him to call him after 6 p.m. that evening. JS testified he called Goodwin after 7 p.m. Goodwin's telephone records show that at 7:26 p.m. his cell phone received a four-minute call from JS's group home.

JS testified that Goodwin told him he would pick him up at the Anacostia Metro Station around 8 p.m. At 7:39, a staff member at the group drove JS to the station, where Goodwin picked him up. Goodwin then drove JS to Goodwin's home. Once there, Goodwin went upstairs to change clothes. Goodwin returned wearing gym clothes that were, in JS's words, "like cut up." The two watched television for a while. After Goodwin commented on the television program a couple times, JS said that he thought he was there to make some money. The Award relates the rest of the conversation:

The Grievant then asked him questions, such as what JS liked to do for fun, what he did on the weekend, and what he did sexually. When the Grievant asked the last question, JS responded "get me out of here man" and the Grievant immediately drove him back to the group home. The group home log book shows that JS returned home at 10:18 p.m.

(Award 5.) JS testified that upon his return to the group home he told a friend about the incident and was overheard by a staff member, who said he should tell someone about it. The Award continues: "Some days later he reported the incident to a security guard at OYE and Nadya Richberg, the Program Manager for JS's social worker. Ms. Richberg in turn reported the incident to her supervisor, Sara Thankachan, the Administrator of OYE. On May 21, 2013, JS filed a handwritten description of what had occurred." (Award 5.)

After an investigation of JS's allegations, the Agency provided Grievant with an Advanced Written Notice of Removal charging the Grievant with

- 1) engaging in the activity of making unwanted sexual advances to an agency client; and

2) failing to maintain a high level of ethical conduct and to avoid any action that might result in the appearance of adversely affecting the confidence of the public in the integrity of the government.

(Award 7.) On July 31, 2013, the Agency's deputy director accepted the recommendation of the Agency's hearing officer that Goodwin be terminated.

The arbitrator noted that JS's account matched records of the group home as well as Goodwin's telephone records and noted that JS accurately described the interior of Goodwin's house. The arbitrator credited JS's testimony over Goodwin's, which involved inconsistent versions of the telephone call and of an alibi that he was at a church on the evening in question. The arbitrator found "that the Grievant spoke with JS during a phone call initiated at 7:26 p.m.; that the Grievant met JS at a previously-designated metro station and drove him to his home; and that the Grievant did not give JS any work to perform while JS was at the Grievant's home." (Award 12.) The arbitrator also stated that Goodwin engaged "in inappropriate conversation with the client." (Award 15-16.)

In addition, the arbitrator observed,

JS waited six days to report the incident—until after he had met with the Grievant on two different days to ask about the delayed check. . . . It was only after the Grievant and his supervisor told JS on May 21 that the checks still had not arrived that JS asked to speak with Ms. Richberg, at which time he reported his version of the events of May 15. The timing of his accusation suggests that if the Grievant had been able to produce the check, JS might never have made the report. It seems obvious that JS was far more concerned about obtaining the money owed to him than he was disturbed by the Grievant's question on May 15.

(Award 15.)

The arbitrator also found that no prior allegations against Goodwin resulted in discipline beyond alleged oral warnings and that the alleged oral warnings could not serve as the basis for enhanced discipline in this matter. (Award 11.)

B. Arbitrator's Conclusions

The arbitrator found that the Agency did not meet "its burden in establishing that what occurred at the Grievant's home provided cause for terminating his employment." (Award 14.) The arbitrator stated her finding on the charge of making unwanted sexual advances as follows.

[E]ven accepting the entire account of the incident by JS, whom I have credited, it does not provide sufficient support for the Agency's decision to terminate the Grievant's employment for making "unwanted sexual advances." Accordingly, I find that the Agency did not meet its burden of establishing cause for the termination and thereby violated Article 7 of the parties' bargaining agreement.

(Award 15.)

Regarding the second charge, "failing to maintain a high level of ethical conduct," the arbitrator concluded that Goodwin "engaged in a serious ethical breach by driving a client in his personal vehicle to his home under the guise of providing the client with work that never materialized, and instead watching television and engaging in inappropriate conversation with the client." (Award 15-16.) The arbitrator determined that this offense justified a thirty-day suspension rather than termination:

[A]lthough the Agency did not meet its burden of establishing that the conduct with which the Grievant was charged supported termination of his employment, I conclude that it was a breach of ethical conduct that justifies the penalty under the Table of Appropriate Penalties of a 30-day suspension.

(Award 16.)

II. Position of the Agency

Article 7 of the parties' collective bargaining agreement says, "Discipline shall be imposed for cause, as provided in the D.C. Official Code § 1-616.51 (2001 ed)." The Agency contends that review of discipline under the collective bargaining agreement is limited to whether the agency established cause. The Agency claims that the arbitrator exceeded her jurisdiction by overturning the penalty on other grounds.

The Agency notes that the arbitrator credited JS's account and discredited Goodwin's conflicting account. She found that "Goodwin made an inappropriate sexual comment to a foster youth who immediately rejected the comment." (Request 14.) Yet the arbitrator found that the Agency did not meet its burden. In the Agency's view, the arbitrator did so by adding an element that is not part of the charge. The Agency contends that the elements of the charge were (a) a sexual advance or proposition (b) that was unwanted. To those elements the arbitrator added, according to the Agency, the requirement of injury, i.e., a requirement that the sexual advance offended JS. The arbitrator recited at length facts (the money owed to JS and the timing of JS's complaint) that do not relate to whether the incident occurred but instead relate to the degree to which the incident disturbed JS. The Agency concludes that it "met its burden

factually as set forth by the Arbitrator. However, the Arbitrator exceeded her jurisdiction by demanding additional proof not required by law or regulation.” (Request 15.)

The Agency further contends that the Award is contrary to law and public policy because it prevents the Agency from fulfilling its mandate of protecting neglected and vulnerable youth. For this mandate the Agency cites title IV, chapter 13 of the D.C. Official Code and the Agency’s policy manual. Reinstating Goodwin, who “lured a foster child to his home” on the pretext of offering work and who then inquired about what he liked to do sexually, is contrary to that mandate and violates the trust youth place in the Agency to provide them with care and safety. (Request 16-17.) The Agency also contends that this policy was violated by the Arbitrator’s decision not to apply the maximum penalty for Goodwin’s alleged sexual advance or proposition.

III. Position of the Union

The Union filed an Opposition to the Request (“Opposition”) in which it contends that the Request should be dismissed for insufficient service. The Union attaches to its Opposition e-mails between its counsel and the Executive Director of the Public Employee Relations Board in which counsel for the Union states that she had received a notice from the Executive Director that the Union’s response to the Request was due July 1, 2014, but that the Union had never been served with the Request. The Executive Director replied that after receiving that e-mail she obtained the Office of Labor Relations and Collective Bargaining’s Request and its June 16, 2014 e-mail to counsel for the Union. The Executive Director forwarded that e-mail to counsel for the Union. (Opp’n Ex. 3.) The Union argues that the only type of electronic service permitted by the Board’s rules is service by File & ServeXpress. Citing *AFSCME District Council 20 and Local 2091 v. D.C. Department of Public Works*,¹ the Union asserts that because a party who has not entered an appearance in a case cannot be served through File & ServeXpress, the Board requires initial pleadings to be served by U.S. Mail. (Opp’n 3.)

The Union characterizes the Agency’s argument that the arbitrator exceeded her jurisdiction by adding an element to be “nothing more than a basic disagreement with the Arbitrator’s reasoning and evidentiary conclusions.” (Opp’n 4.) The Union stresses that the Agency refers to the charge as making an unwanted sexual advance or proposition whereas Goodwin was charged with making an unwanted sexual advance. The arbitrator, the Union contends, found that Goodwin’s conduct did not constitute a sexual advance, a determination that was “squarely within the confines of the issue presented to her and her charge under the collective bargaining agreement.” (Opp’n 6.)

As the arbitrator found that “the Agency did not prove Goodwin made any sexual advance” (Opp’n 7), none of the alleged public policies cited by the Agency were transgressed by the reversal of Goodwin’s termination. The Union adds that the Agency’s claim that the

¹ 61 D.C. Reg. 1561, Slip Op. No. 1450 at p. 3, 3 n.2, PERB Case No. 14-U-03 (2014).

Award is contrary to law because the arbitrator neglected to impose the maximum penalty is not supported by law and is inconsistent with the Board's precedent.

IV. Discussion

A. Service

The Union misrepresents *AFSCME District Council 20 and Local 2091 v. D.C. Department of Public Works*² as requiring service of any initial pleading to be by U.S. Mail. In contrast, the case twice states that the Board *permits* service of an initial pleading by U.S. Mail³ and makes clear that service by mail is only one of the alternative methods of service.⁴ Service by e-mail is another permissible alternative method of service. *See NAGE, Local R3-07 v. D.C. Office of Unified Commc'ns*, 60 D.C. Reg. 12123, Slip Op. No. 1409, PERB Case No. 12-U-37 (2013).

The Union does not deny that it was served by e-mail. Accordingly, there is no basis upon which to conclude that service of the Request was insufficient.

B. Jurisdiction of the Arbitrator

The Agency and the Union disagree on whether the arbitrator found that the Agency proved that Goodwin made a sexual advance. The Agency contends that the arbitrator found that Goodwin made a sexual advance but found him not guilty of offending JS, which was not part of the charge. The Union contends that the arbitrator found that the Agency did not prove a sexual advance.⁵

The Union's contention is not supported by what the Arbitrator wrote. Each time the Arbitrator stated her finding on what the Agency failed to prove, she stated the finding with regard to proof of cause *for termination*.

The remaining question is whether the Agency has also met its burden in establishing that what occurred at the Grievant's home

² *Id.*

³ *Id.* at 3, 3 n.2.

⁴ *Id.* at 3 n.2. ("[T]he Board permits alternative methods of service of the initial pleading only, including via U.S. Mail.")

⁵ The Union points out that the Request uses the phrase sexual advance or proposition whereas the charge used the phrase sexual advance. However, it was Counsel for the Union who introduced the word proposition into the discussion. In cross-examining JS, Counsel for the Union asked, "Now you testified that Mr. Goodwin took you to his house and propositioned you . . . ?" (Tr. 71.) JS answered yes. (Tr. 72.) The Agency cites this exchange as evidence that there was a proposition. (Request 15.) The Union argues that the Agency's use of advance and proposition interchangeably in its Request is just word play. (Opp'n 6.) If, as seems to be the case, the Agency is using the terms interchangeably, it is using the terms as if they have the same meaning and not as if a proposition were easier to prove.

provided cause for *terminating* his employment. I conclude that the Agency has not met its burden.

(Award 14) (emphasis added.)

But, even accepting the entire account of the incident by JS, whom I have credited, it does not provide sufficient support for the Agency's decision to *terminate* the Grievant's employment for making "unwanted sexual advances." Accordingly, I find that the Agency did not meet its burden of establishing cause for the *termination* and thereby violated Article 7 of the parties' collective bargaining agreement.

(Award 15) (emphasis added.) The Arbitrator credited JS's testimony regarding the conduct alleged including Goodwin's ultimate question to JS.⁶

The Agency's interpretation of the Award is also incorrect. The arbitrator did not add an element to the charge, as the Agency argues, but rather found that the charge, though proven, was not cause for termination. That determination was within the arbitrator's discretion. A dispute over the weight and significance of evidence leading an arbitrator to conclude that a termination was not for cause does not state a statutory basis for review. *Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm.*, 61 D.C. Reg. 7380, Slip Op. No. 1473 at p. 5, PERB Case No. 14-A-05 (2014). The arbitrator moved on to the charge of failing to maintain a high level of ethical conduct. The arbitrator found that charge to be proven but found that the penalty imposed was excessive. The arbitrator determined that the appropriate penalty for the ethical misconduct was a thirty-day suspension. Determining the appropriate penalty for that misconduct was within her authority. *Id.*

In making her determinations regarding the two charges, the arbitrator was applying the collective bargaining agreement's requirement that discipline shall be imposed for cause. The Award must be upheld because it was arguably construing or applying that requirement of the collective bargaining agreement. *See D.C. Hous. Auth. v. AFGE (on behalf of Hendrix-Smith) Local 2725*, 60 D.C. Reg. 13706, Slip Op. No. 1415 at p. 5, PERB Case No. 13-A-07 (2013). As has often been noted in the Board's decisions, "[I]n most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that. . . This view of the 'arguably construing' inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes." *Mich. Family Resources, Inc. v. Serv. Employees Int'l Union, Local 517M*, 475 F.3d 746, 753 (2007), *quoted in F.O.P./Dep't of Corrs. Labor Comm. v. D.C. Dep't of Corrs.*, 59 D.C. Reg. 9798, Slip Op. No.

⁶ "This is not to say that the question ascribed to the Grievant was acceptable conduct by an OYE staff member toward a client of that Agency—it most certainly was not." (Award 15.)

1271 at p. 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGF Local 3721*, 59 D.C. Reg. 9757, Slip Op. No. 1258 at 4, PERB Case No. 10-A-09 (2012).

C. Law and Public Policy

The Agency cites its governing law, title IV, chapter 13 of the D.C. Official Code, and its policy manual as standing for the policy that the Agency “and its employees are obligated to protect abused and neglected youth and children from further harm and to provide them with services and treatment to promote their health growth and development.” (Award 16.) The cited chapter of the D.C. Official Code sets forth the functions and purposes of the Agency. These include

Encouraging the reporting of child abuse and neglect; . . .

Safeguarding the rights and protecting the welfare of children whose parents, guardians, or custodians are unable to do so; . . .

Ensuring the protection of children who have been abused or neglected from further experiences and conditions detrimental to their healthy growth and development; . . .

D.C. Official Code § 4-1303.01a(b)(2), (6), (8). In addition, the law requires the Agency to “[d]evelop and implement, as soon as possible, standards that provide for quality services that protect the safety and health of children. . . .” D.C. Official Code § 4-1303.03(b)(8).

While these policies are important, nothing in the foregoing statutes expressly or specifically makes reducing the penalty imposed in this case or failing to impose the maximum penalty contrary to law and public policy. *Cf. Univ. of the Dist. of Columbia and AFSCME, Local 2087*, 46 D.C. Reg. 8121, Slip Op. No. 481 at 4 n.3, PERB Case No. 96-A-06 (1996). Accordingly, the Award is sustained.

ORDER

IT IS HEREBY ORDERED THAT:

1. The 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

By vote of Board Chairperson Charles Murphy and Members Donald Wasserman, Ann Hoffman, and Yvonne Dixon. Member Keith Washington dissents.

Washington, D.C.
January 15, 2015

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order was served upon the following parties via File and ServeXpress on this the 16th day of January 2015.

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