

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
)	
American Federation of Government)	
Employees, Local 727, AFL-CIO (on)	
behalf of Carlise Clayton),)	
)	PERB Case No. 98-A-01
Petitioner,)	Opinion No. 551
)	
and)	
)	FOR PUBLICATION
District of Columbia)	
Board of Parole,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

On December 9, 1997, the American Federation of Government Employees, Local 727, AFL-CIO (AFGE or Petitioner) filed an Arbitration Review Request seeking review of an arbitration award (Award) issued on November 10, 1997. The Award denied a grievance AFGE filed on behalf of a bargaining unit employee, Carlise Clayton (Grievant). AFGE asserts that grounds exist for finding the Award contrary to law and public policy and requests that the Board set a briefing schedule on the Arbitration Review Request in accordance with Board Rule 538.2.^{1/} The Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of the District of Columbia Board of Parole (DCBP), filed an Opposition to the Arbitration Review Request, denying that AFGE has presented any statutory grounds for review. In addition, on February 18, 1998, OLRCB filed a document styled "Management's Motion to Dismiss Union's Arbitration Review Request. No Response was filed by AFGE.

We turn first to the jurisdictional issue of timeliness.

^{1/} In view of our determination that the Request does not present any statutory grounds for review, we deny AFGE's request to set a briefing schedule pursuant to Board Rule 538.2. D.C. Metropolitan Police Dept. and Fraternal Order of Police, Slip Op. No. 460, PERB Case No. 96-A-03 (1996).

OLRCB asserts that the Arbitration Award was served on the parties by mail on November 10, 1997. As documented proof of the service date, OLRCB attached a copy of the November 10, 1997 service letter issued by the Arbitrator that accompanied the Award. OLRCB states that AFGE's filing date of December 9, 1997, exceeds the "twenty (20) days after service of the [A]ward" that is allowed under Board Rule 538.1, for filing an Arbitration Review Request. Furthermore, OLRCB states, AFGE's Request remains untimely notwithstanding the addition of 5 days permitted under Board Rule 501.4, when service is by mail. We agree.

AFGE attached to its Request an affidavit by its president that states that he did not receive a copy of the Award until November 19, 1997. Board Rule 501.4 provides no exception to the 5 additional days afforded an individual for initiating a cause of action. With respect to weighing the probative value of conflicting evidence under these circumstance, we have observed that "[w]ithout addressing the veracity of [the petitioner's] account concerning actual notice of the Award, nothing in its Response or attached affidavit rebuts the documented evidence, i.e., AAA's certificate of service, that service of the Award was indeed made on [the date indicated on the certificate]." District of Columbia Public School and Washington's Teachers' Union, 42 DCR 5479, Slip Op. No. 335, at p. 2., PERB Case No. 92-A-10 (1992). Nothing in AFGE's affidavit or pleading rebuts the November 10, 1997 service date that is noted in the letter that accompanied the Arbitrator's apparent issuance of the Award.^{2/} Moreover, the date of service of the Award, and not the date of receipt, is the controlling factor in determining when the time period under Board Rule 538.1 commences for purpose of initiating an arbitration review request.

Notwithstanding its untimeliness, the Request does not present a statutory basis for reviewing the Award. Under the Comprehensive Merit Personnel Act, D.C. Code Sec. 1-605.2(6), and Board Rule 538.3, the Board is authorized to "[c]onsider appeals from arbitration awards pursuant to grievance procedures: Provided, however, that such awards may be reviewed only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar means... ."

^{2/} AFGE noted in the Request that the Grievant was represented by separate counsel during the arbitration hearing. However, AFGE's affidavit did not rebut the November 10, 1997 letter accompanying the Arbitrator's Award which was addressed not to Grievant's counsel but rather to AFGE's local president and the agency.

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AFGE challenges the Arbitrator's Award sustaining DCBP's removal of the Grievant as contrary to D.C. Code Sec. 1-617.1(d)(10) and (22). Cause for removal under D.C. Code Sec. 1-617.1(d)(10) and (22) is defined as a conviction, a plea or verdict of guilty, or conviction following a plea of nolo contendere to a felony or misdemeanor. AFGE states that there is no dispute that the Grievant was never convicted or plead guilty to a felony or misdemeanor. Notwithstanding AFGE's assertions, however, its contention that the Award is contrary to law is misplaced.

In the instant Award, the Arbitrator found that DCBP terminated the Grievant for cause as defined under D.C. Personnel Manual (DPM) Section 1618.1, subsection 16, not D.C. Code Sec. 1-617.1(d)(10) or (22), as AFGE asserts. We have held that DPM regulations have the force of law. AFGE and D.C. Dept. Of Public Works, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). DPM Section 1618.1, subsection 16(d), authorizes a "reprimand to removal" for "conduct... [d]uring or outside of duty hours, commission of or participation in criminal, dishonest, or other conduct, of a nature that would affect or has affected adversely the employee's or his or her agency's ability to perform effectively." Under this DPM regulation, there is no requirement that the conduct culminate in a conviction or guilty verdict in order for the criminal offense to constitute the prescribed cause for removal. Therefore, we find no merit to this asserted ground for review.

AFGE also contends that the Award should be reviewed because (1) DCPB "acted in contravention of the emergency provision of the D.C. Personnel Manual when it removed the employee without affording the employee the procedural rights guaranteed her" and (2) the Award permits DCBP to "employ a double standard when dealing (sic) allegations of employee impropriety." (ARR at 3.) With respect to the latter contention, we have held that an award's inconsistency with other awards does not create conflict with law. D.C. Public Schools and International Brotherhood of Teamsters, Local 639, Slip Op. No. 423, PERB Case No. 95-A-06 (1995). The parties contracted for the Arbitrator's interpretation of the contractual and regulatory provisions at issue and the findings of fact upon which his award is based.

The Award does not reflect whether or not the Arbitrator made an explicit finding that the Grievant was afforded the asserted procedural rights guaranteed her notwithstanding the apparent presentation of this issue to the Arbitrator. We have held, however, that "an arbitrator's failure to consider an issue properly presented before him does not necessarily render the award contrary to law and public policy unless law and public policy mandates that the issue be considered to determine, in whole or in

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part, the award." D.C. Public Schools and Washington Teachers Union, Local 6, AFT, 43 DCR 1283, Slip Op. No. 349, at p. 2, PERB Case No. 93-A-01 (1996). AFGE does not cite any law and public policy requiring the consideration of this procedural issue to determine the substantive issue addressed by the Award. To the extent that AFGE suggests that the Award is contrary to law because it turns on findings of fact that ignore the asserted procedural rights of the Grievant, AFGE fails to expressly state in what manner the Award contravenes any of the asserted procedural guarantees.

For the reasons discussed, AFGE's request that we grant review of the Award is denied.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Review Request is dismissed as untimely; or otherwise denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

April 27, 1998