Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Public Schools,	
Petitioner,	PERB Case No. 12-A-08
and	Opinion No. 1406
Washington Teachers' Union - Local 6, American Federation of Teachers (on behalf of Lyntrel Smith),	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On September 24, 2012, the District of Columbia Public Schools ("DCPS" or "Agency") filed an Arbitration Review Request ("Request") of an Arbitration Award ("Award") by Arbitrator Salvatore Arrigo ("Arbitrator"). The Agency seeks reversal of the Award on the basis that the Award is contrary to law and public policy. (Request at 4). On October 31, 2012, the Washington Teachers' Union, Local 6 of the American Federation of Teachers ("WTU" or "Union") filed an Opposition to the Agency's Arbitration Review Request ("Opposition").

II. The Award

The matter before the Arbitrator concerned "the termination of the grievant Lyntrel Smith, a teacher at Dunbar High School, Washington D.C., effective September 26, 2011, for alleged grave misconduct in office involving a female student." (Award at 1). The Grievant Lyntrel Smith ("Grievant" or "Mr. Smith") was a teacher at Dunbar High School ("Dunbar"). (Award at 2). On September 9, 2011, the Grievant was sent a Notice of Termination for

violating 5-E DCMR § 1401.2(b) grave misconduct in office clause.[1] (Award at 6). The underlying termination concerned an alleged "inappropriate relationship" between the Grievant and an 18-year old student in his history class. (Award at 2).

The Arbitrator noted that neither the Grievant nor the student appeared before him as a witness, and summarized the record as follows::

> The record of events is taken largely from two sources. One is the investigative report of Geneve Couser, an investigator with the D.C. Public Schools (DCPS), Office of Security since 2004 with substantial prior experience as an officer and detective with the D.C. Metropolitan Police Department. Ms. Couser took written statements from various people, including the grievant and the student, on various dates between May 24, 2011, and August 13, 2011. She conducted her investigation pursuant to a request by the school system concerning an allegation that Mr. Smith had engaged in an inappropriate relationship with a student and she concluded that the allegation of grave misconduct was substantial.
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> The other source is a hearing conducted on December 7, 2011, before a Hearing Officer under Article 6 of the Collective bargaining agreement (CBA) between the Union and the Agency at which testimony was given by the grievant, Investigator Couser and the Principal and Assistant Principal of Dunbar High School. In his decision the Hearing Officer presented the testimony in summary form. The Hearing Officer, found the emails of April 26, 2011, disclosed the existence of an "inappropriate" relationship between teacher and student. After considering various other factors the Hearing Officer rejected termination as a penalty and concluded that the grievant should be given a thirty (30) day suspension without pay and reinstated to his prior employment. The Agency did not adopt the Hearing Officer's disposition of the grievant thus leading to the arbitration herein.

(Award at 2). The April 26, 2011, emails in question were brought to the attention of the Assistant Principal Tameka McKenzie, when they were discovered by another Dunbar teacher, with whom the Grievant had had a personal relationship. (Award at 3).

Before the Arbitrator, the Union presented the issue as "whether DCPS has met its burden for 'just cause' as required by the CBA regarding 'the termination of a permanent employee for the alleged act of grave misconduct.'" (Award at 4). The Agency presented two issues: "One, did Mr. Lyntrel Smith violate DCMR (District of Columbia Municipal Regulations) Section 1401.2(b), Grave Misconduct, by engaging in an inappropriate relationship

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[1] Chapter 5-E DCMR §1401 – Grounds for Adverse Actions provides: "1401.2 For purposes of this 'just cause for adverse action' may include, but is not necessarily limited to one (1) or more of the following grounds: (a) Inefficiency, (b) Grave misconduct in office; ...."

with his student? And two, if Mr. Smith did commit grave misconduct by engaging in this relationship, was termination appropriate?" *Id.*

The Arbitrator found that the teachers at Dunbar were notified at a various meetings that teachers were not to provide email addresses to students, although there was no written prohibition. (Award at 6). The Grievant indicated that he was unaware of this email policy until March 11, 2011, by which time he had posted his email address on a classroom board so that students could contact him after hours about school matters. (Award at 7). The student stated during the investigation that was how she obtained the Grievant's email address. *Id.*

The Arbitrator considered various factors in his determination of an appropriate disciplinary action. (Award at 7-8). The Arbitrator determined that the emails sent between the Grievant and the student were "highly inappropriate for a teacher-student relationship." (Award at 7). Notwithstanding, the Arbitrator found that the Grievant was regarded as a "good teacher" by Principal Jackson, and that the Grievant was involved in extracurricular activities for the students. (Award at 8). The Grievant had no disciplinary history at Dunbar prior to his termination. *Id.*

The Arbitrator stated he "considered...the contractual requirements of progressive discipline and that discipline should be corrective and not punitive." (Award at 9). The Arbitrator determined the issue to be "whether, on balance a lesser penalty than discharge might be more appropriate and be more in accord with the requirement of just cause for discipline." *Id.* As stated by the Arbitrator, "the gravity of the punishment must be equated with the gravity of the offensive conduct." *Id.* The Arbitrator noted that "just cause" was not defined in the CBA. *Id.* Both Parties had argued various points concerning Arbitrator Caroll Daugherty's seven-prong test ("Daugherty test") in *Enterprise Wireless Co.*, 46 LA 359 (1966); the Arbitrator noted that "such a mechanistic test has been widely criticized and just cause is generally conceded to be regarded as a flexible concept, taking specific shape on the facts and circumstances of the particular case." *Id.*

The Arbitrator then considered "the three prior cases of a termination of a teacher cited by the Agency...." (Award at 9). The Arbitrator found: "All three of these cases were significantly more detrimental to the student's well-being than the situation herein where no express statement of sexual liaison occurred. Nor was the language particularly graphic." (Award at 10). The Arbitrator reached the following decision:

> Considering all the relevant factors herein, including the nature of the inappropriate conduct of Mr. Smith, the lack of any evidence of personal, non-classroom contact between the grievant and the student, the grievant's employment history, the facts concerning the other teacher terminations, and all the attendant circumstances herein, I conclude that the discipline of termination for Mr. Smith's inappropriate conduct was excessive. However, the discipline should be a sufficiently substantial one in order to assure it is corrective for this conduct. Accordingly, I am of the view that the termination should be reduced to a disciplinary suspension without pay

> from the time of his initial termination until ten (10) days from the date of issuance of this decision and award, at which time Mr. Smith should be reinstated to his former or a substantially equivalent position of employment.

Id. The Arbitrator ordered that the "Agency shall rescind the disciplinary termination" of the Grievant; that the "Agency shall replace the disciplinary termination of Mr. Lyntrel Smith with a disciplinary suspension for inappropriate conduct as found;" that the "disciplinary suspension will be without pay from the time of Mr. Smith's termination in September 2011, until ten (10) days from the date" of the Award; and that the Agency within "ten (10) days from the date of this decision and Award ... will offer Mr. Smith reemployment to his former position or a substantially equivalent position of employment, employment to being no later than ten (10) days form the date of this decision and award." (Award at 10-11).

III. Discussion

The CMPA authorizes the Board to modify or set aside an arbitration award in three limited circumstances: (1) if an 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. D.C. Code § 1-605.02(6) (2001 ed.).

The Agency requests reversal of the Award on the basis that the Award is contrary to law and public policy. (Request at 3). The Agency argues that the Arbitrator ignored "prior precedent [of other terminations] and public policy and reduced Mr. Smith's termination to a disciplinary suspension despite finding that Mr. Smith had committed a grave misconduct in office." (Request at 4). The Agency argues: "District law – in the form of the DCMR – particularly 5-E DCMR 1401.2(b), prohibits such conduct as grave misconduct." *Id.* Underlying the Agency's argument that the Grievant's conduct required termination is its public policy argument that "[t]he conduct exhibited by Mr. Smith goes beyond the normal teacher-student relationship thus creating a negative effect on the teaching environment for all students and can pose a danger to the particular student involved. Public policy would dictate that DCPS must ensure that such relationships will not, and do not exist within its schools." *Id.*

The Union opposes the Agency's request on the grounds that the "Agency has failed to show where the arbitrator's decision is contrary to District law or public policy." (Opposition at 3).

A. Contrary to law argument

The Agency argues that the Award is contrary to law and public policy, because "[j]ust cause for adverse action may include grave misconduct in office." (Request at 4). Therefore, the Agency argues that the Arbitrator was required to uphold the termination of the grievant, pursuant to 5-E DCMR § 1401.2(b). *Id.*

Chapter 5-E DCMR §1401 – Grounds for Adverse Actions provides: "1401.2 For

purposes of this 'just cause for adverse action' may include, but is not necessarily limited to one (1) or more of the following grounds: (a) Inefficiency, (b) Grave misconduct in office; ...."

Nothing in the plain reading of 5-E DCMR § 1401.2(b) states that termination is required in the Grievant's case. The Agency had the opportunity and, in fact, asserted its argument that 5-E DCMR § 1401.2(b) and arbitration precedent supported the Grievant's termination before the Arbitrator. (Award at 9-10). Notwithstanding, the Arbitrator distinguished the Grievant's case from the cases presented by the Agency, and interpreted 5-E DCMR § 1401.2(b) and the Parties' CBA, to reach the conclusion that the Grievant's termination was inappropriate. *Id.*

The Board has long held that by agreeing to submit the settlement of a grievance to arbitration, it is the arbitrator's interpretation, not the Board's, for which the parties have bargained. *See University of the District of Columbia and University of the District of Columbia Faculty Association*, 39 D.C. Reg. 9628, Slip Op. No. 320, PERB Case No. 92-A-04 (1992). The Board has found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings on which the decision is based." *District of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metro. Police Dep't and Fraternal of Police, Metro. Police Dep't Labor Comm. (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004). The "Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." *District of Columbia Department 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).

The Agency's argument that the Award is contrary to District law based on 5-E DCMR § 1401.2(b) is not persuasive. The Agency's Request constitutes only a disagreement with the Arbitrator's evidentiary findings and application of relevant law. "The Board will not second guess credibility determinations, nor will it overturn an arbitrator's findings on the basis of a disagreement with the arbitrator's determination." *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, 59 D.C. Reg. 9798, Slip Op. No. 1271, PERB Case No. 10-A-20 (2012). *See also Metro. Police Dep't and Fraternal Order of Police/Metro, Police Dep't Labor Comm.*, 31 D.C. Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984); *FOP/DOC Labor Comm. v. Dep't of Corrections*, 52 D.C. Reg. 2496, Slip Op. No. 722, PERB Case Nos. 01-U-21, 01-U-28, 01-U-32 (2005).

The Agency's disagreement with the Arbitrator's penalty reduction does not contravene any District law. The Board has held that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement. *See District of Columbia Metropolitan and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). *See also Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (upholding an arbitrator's award when the arbitrator concluded that MPD had just cause to discipline grievant, but mitigating the penalty, because it

was excessive). Furthermore, the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, that arbitrators bring their "informed judgment" to bear on the interpretation of collective bargaining agreements, and that is "especially true when it comes to formulating remedies." 363 U.S. 593, 597 (1960). No argument has been asserted that there was a contractual prohibition on the Arbitrator to assert his equitable powers.

The Board finds that the Agency's argument is merely a disagreement with the Arbitrator's findings and conclusions. Therefore, the Agency's Request that the Award is contrary to law is denied.

B. Contrary to public policy argument

The Board's review of an arbitration award on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy." *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 3959, Slip Op. No. 925. PERB Case No. 08-A-01 (2012) (quoting *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F. 2d 1, 8 (D.C. Cir. 1986)). A petitioner must demonstrate that an arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. *See United Paperworks Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Moreover, the violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result." *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 47 D.C. Reg. 717, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). Further, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *Id. See, e.g., D.C. Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 1015, PERB Case No. 09-A-06 (2010).

The Agency has not provided any public policy that the Award contravenes. The Board finds that the Agency's Request is merely a disagreement with the Arbitrator's findings and conclusions. Therefore, the Agency's Request on the basis the Award is contrary to public policy is denied.

IV. Conclusion

The Board finds that the Agency's Arbitration Review Request is based on the Agency's mere disagreement with the Arbitrator's findings and conclusions. The Board has previously stated that a "disagreement with the Arbitrator's interpretation . . . does not make the award contrary to law and public policy." *District of Columbia Metropolitan and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008) (quoting *AFGE, Local 1975 and Dept. of Public Works*, 48 D.C. Reg. 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995)).

DCPS submitted itself to arbitration and to the Arbitrator's interpretation of the contract and relevant laws, as well as the Arbitrator's factual findings. DCPS has not asserted any law or public policy that would require the Arbitrator to have arrived at a different result. Therefore, the Board denies DCPS's Arbitration Review Request.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Public Schools' 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.

July 29, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order for PERB Case No. 12-A-08 was transmitted to the following Parties on this the 30th day of July, 2013.

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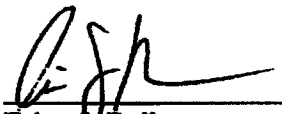

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