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

In the Matter of:)	
)	
District of Columbia Department of Corrections,)	
)	
Petitioner,)	
)	PERB Case No. 09-A-04
and)	
)	Opinion No. 996
Fraternal Order of Police/Department of)	
Corrections Labor Committee,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Department of Corrections (“DOC”, “Petitioner” or “Agency”) filed an Arbitration Review Request (“Request”), which seeks review of an Arbitration Award (“Award”) which reversed the termination of Carl Butler and ordered his reinstatement. (See Request at p. 1). DOC asserts that the Arbitrator exceeded his authority and that the Award is contrary to law and public policy. (See Request at p. 2). The Fraternal Order of Police/Department of Corrections Labor Committee (“Union”, “Respondent”, or “FOP”) opposes the Request.

The issue before the Board is whether “the arbitrator was without, or exceeded his or her jurisdiction” or whether “the award on its face is contrary to law and public policy.” D.C. Code § 1-605.02(6) (2001 ed).

II. Discussion

Carl Butler commenced employment as a Correctional Officer with DOC on February 26, 1990. (See Award at p. 3). Due to a reduction in force ("RIF"), Mr. Butler was separated from his employment on March 23, 2002. (See Award at p. 3). On July 13, 2004, Mr. Butler was reinstated to his position at DOC. Mr. Butler was reinstated via letter dated July 13, 2004, which stated that he was hired under a "Term Appointment NTE: 13 Months under which you will be eligible for health and life insurance benefits." (Award at p. 3, Emphasis in original).¹

On December 18, 2004, Mr. Butler was observed at his workplace giving a plastic bag to two inmates in their cell. (See Award at p. 3). During an investigation of the incident, Mr. Butler testified that the bag contained fried fish from his home. (See Award at p. 3). On May 27, 2005, Mr. Butler was discharged because of the December 18, 2004 incident. (See Award at p. 3). The Union filed a grievance concerning Mr. Butler's discharge which proceeded to arbitration. (See Award at p. 3). An arbitration award was issued on December 1, 2005, which reversed the termination and reinstated Mr. Butler with back pay and benefits. In addition, the Arbitrator directed that Mr. Butler be docked 45 days of pay and benefits. (See Award at p. 3). DOC filed an arbitration review request concerning the December 1, 2005 arbitration award. The Board denied the request and Mr. Butler was reinstated to his position on October 29, 2006. (See Award at pgs. 3-4; and see *District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, 54 DCR 2699, Slip Op. 824, PERB Case No. 06-A-01 (2006)).

¹ "Term Appointment" refers to the status of an employee as provided by Chapter 8 of the District Personnel Manual ("DPM"). Chapter 8 provides, in relevant part as follows:

DPM 823 TERM APPOINTMENT

823.1 A personnel authority may make a term appointment for a period of more than one (1) year when the needs of the service so require and the employment need is for a limited period of four (4) years or less.

823.2 Term appointments may be extended beyond the four (4) year limit with the prior approval of the personnel authority.

823.7 An employee serving under a term appointment shall not acquire permanent status on the basis of the term appointment, and shall not be converted to a regular Career Service appointment without further competition, unless eligible for reinstatement.

823.8 Employment under a term appointment shall end automatically on the expiration of the appointment, unless the employee has been separated earlier.

823.10 A term employee may be promoted and reassigned to another term position by new term appointment; provided that the competitive and non-competitive promotion provisions in sections 829 and 830 of this chapter are followed.

On November 27, 2006, DOC issued a letter informing Mr. Butler that his 13-month Term Appointment of July 2004 would expire on November 29, 2006. (See Award at p. 4). The Union asserts that the November 27 letter was authored by DOC Director Brown, and stated:

In light of the forty-five (45) day suspension you received for cause of Malfeasance, I have decided not to retain you. Although your appointment will expire on November 29, 2006, I am setting your expiration date for the close of your shift on December 9, 2006, in order to provide you with reasonable notice that you will not be retained.

(Union's Opposition, Ex. A Post Hearing Brief at p. 6).

Based upon the November 2006 discharge of Mr. Butler, FOP filed a grievance. (See Award at p. 4). The matter was not resolved and proceeded to arbitration. (See Award at 4). At the hearing, DOC argued that:

- A. DOC had full power to designate Mr. Butler as a Term employee[;]
- B. Because the designation of Mr. Butler as a Term employee is correct, the Arbitrator cannot change Mr. Butler's status or order him returned to work or grant him back pay[; and]
- C. The Union cannot support its allegations.

(Award at p. 16).

The Union countered:

- A. The DOC unlawfully reinstated Mr. Butler in Term status upon his return to service following the RIF, in violation of D.C. personnel regulations and the DOC's internal policies[; and]
- B. Even if the DOC had the authority to reinstate him as Term, Mr. Butler should have been converted to Permanent status long before he was disciplined for the fried fish incident.

(Award at p. 17).

In an Award issued on February 17, 2009, Arbitrator Gary T. Kendellen determined that the issue before him was whether "the reasons relied upon by the Agency in its November 27, 2006 letter to Carl Butler [were] valid bases for the Agency not to retain him? If not, what shall be the remedy?" (Award at p. 14). The Arbitrator found that "the evidence demonstrates that

the Agency and the Union had developed a practice of (1) employing returning RIFed employees as Term and (2) converting them to Permanent as positions became available.” (Award at p. 16). In addition, the Arbitrator determined that the “Permanent positions were likely to become quickly and regularly available.” (Award at p. 16). Furthermore, the Arbitrator noted that DOC was “entitled to hire Mr. Butler as a Term employee in 2004.” (Award at p. 17). The Arbitrator also determined that “the record does not contain sufficient evidence to support the Union’s argument that Mr. Butler should have been converted to Permanent status long before being disciplined for the [December 2004] fried fish incident.” (Award at p. 18).

After making the above-noted findings, the Arbitrator considered the issue of whether the November 27, 2006 termination letter to Mr. Butler presented valid bases for his separation from employment. To resolve the issue, the Arbitrator posed two questions: (1) did the Agency’s November 27, 2006 letter accurately describe Mr. Butler’s status at reinstatement: an employee who would serve out the remainder of his Term Appointment, which would have expired on August 12, 2005?; and (2) “was the Agency, in deciding whether to retain Mr. Butler, permitted to consider the disciplinary penalty issued by the arbitrator in the December 2004 fried fish/plastic bag incident.” (Award at p. 19).

The Arbitrator considered the first question regarding whether the Agency’s November 27, 2006 letter accurately described Mr. Butler’s status at reinstatement. The Arbitrator reviewed the December 1, 2005 arbitration award, and the District of Columbia Superior Court’s decision granting enforcement of the award. (See Award at p. 19). The Arbitrator determined that Mr. Butler did not receive a 45-day suspension, but was docked forty-five days of pay as a penalty for the fried fish incident. (See Award at p. 19). Based on this finding, the Arbitrator concluded that: (1) there was no interruption in Mr. Butler’s employment; (2) Mr. Butler’s 13-month Term employment had been extended by DOC to 27.5 months; and (3) when Mr. Butler was reinstated pursuant to the December 1, 2005 arbitration award, “he was entitled to return not only as a Term employee with 27.5 months service, he was also, in accord with the parties’ practice, a previously RIFed Correctional Officer with an expectation of being converted from Term to Permanent when an opening occurred, based upon his service since July 2004.” (Award at p. 23). In view of the above, the Arbitrator concluded that “when Mr. Butler was reinstated, his employment status was not as the Agency described in its letter. Rather, his status was materially different . . . [and] that the Agency was not entitled in its letter to rely upon the status it attributed to Mr. Butler, that of an employee who would serve out the remainder of his Term Appointment, which would have expired on August 12, 2005.” (Award at p. 23).

The second question considered by the Arbitrator examined whether the Agency, in deciding whether to retain Mr. Butler, was permitted to consider the disciplinary penalty issued by the arbitrator in the December 2004 fried fish/plastic bag incident. (See Award at p. 19). The Arbitrator found that the subject of Mr. Butler’s Term employment status had not been raised in the disciplinary arbitration, and was not at issue in the Agency’s request for review of that award before the Board. (See Award at p. 24). The Arbitrator also found that the reason the issue was not raised during the arbitration of the December 2004 fried fish/plastic bag incident was because the Agency “mistakenly did not realize Mr. Butler’s Term status.” (Award at p. 24). Furthermore, the Arbitrator found that because the issue of Mr. Butler’s term status had not

been raised at arbitration, the arbitrator was unaware that a penalty docking 45-days of Mr. Butler's pay, could jeopardize Mr. Butler's chances for continuing employment with DOC (i.e. the conversion of term employment to permanent employment). (See Award at p. 24). Therefore, the Arbitrator concluded that "the Agency waived as an issue the penalty aspect of the arbitrator's award, which the arbitrator imposed without being made aware of Mr. Butler's Term status or its ramifications, solely because of the Agency's mistake. As a consequence, [the Arbitrator concluded] following Mr. Butler's reinstatement under the arbitration award, the Agency could not consider the waived disciplinary penalty as a factor when reviewing his employment status, including, for example, as a factor in deciding whether to extend his Term status or to convert him to Permanent." (Award at p. 24). Thus, the Arbitrator answered the second question in the negative, namely that "the Agency is not entitled to rely therein upon the arbitrator's disciplinary penalty when it considered whether to retain Mr. Butler." (Award at p. 25).

Based on these findings and conclusions, the Arbitrator determined that the "Agency's reasons not to retain Mr. Butler were not valid." In addition, he determined that the "Agency's position that Mr. Butler had a Term Appointment that would have expired on August 12, 2005[,] ignores and is in direct conflict with the plain meaning of the arbitrator's reinstatement award fully restoring Mr. Butler to his former position." (Award at p. 25). As a result, the Arbitrator directed that the Agency "withdraw the [November 27, 2006] letter and reinstate Mr. Butler to his former position with back pay, as well as holiday and vacation pay and other benefits to which he is entitled, less interim earnings." (Award at p. 26).

As a remedy, the Arbitrator also directed that DOC make a determination of Mr. Butler's employment status upon the reinstatement. (See Award at p. 26). In making this determination, the Arbitrator instructed DOC to:

base its determination upon his status as a Term employee with uninterrupted service since July 13, 2004, who had returned to work from a Reduction-In-Force and who had been subject upon his return to the practice of the Agency and the Union of such Term employees being converted to Permanent when openings occurred. The Agency, when making its determination, may not consider the disciplinary penalty issued to Mr. Butler in the December 1, 2005 arbitration award. As part of the Agency's determination, it shall also determine whether Mr. Butler at any time prior to his reinstatement herein would have been converted or offered an opportunity to convert from Term status to Permanent, compared to similarly situated employees.

If the Agency's determination of Mr. Butler's employment status demonstrates that he would have been converted or offered an opportunity to convert to Permanent status prior to his reinstatement herein, it shall convert him or offer him an opportunity to convert to Permanent status. The Agency shall also

determine at what point Mr. Butler's conversion or offer of an opportunity to convert would have taken place and make any conversion that results effective in his employment record as of the date the conversion would have occurred.

If the Agency's determination of Mr. Butler's employment status demonstrates that he would not have been converted or been offered an opportunity to convert to Permanent status prior to his reinstatement herein, it shall inform him of the status it has determined for his employment upon his reinstatement herein.

(Award at pgs. 26-27).

Lastly, the Arbitrator directed DOC to provide Mr. Butler with a letter describing the outcome of its determination and the steps taken to reach that outcome. (See Award at p. 27).

In its Request, DOC states that the "reasons for its appeal are that (a) the arbitrator was without authority or exceeded his jurisdiction granted and (b) the award on its face is contrary to law and public policy." (Request at p. 2). The Union opposes the Request, denying that the Arbitrator's Award is unlawful or that the Arbitrator exceeded his authority. (See Opposition at pgs. 6-8).

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.).

In the present case, DOC states that the Arbitrator was without authority or exceeded his jurisdiction. (See Request at p. 2). However, DOC has not provided any argument in support of this contention. Therefore, there is no legal argument for the Board to consider. As a result, the Board turns to DOC's other claim that the Award is contrary to law and public policy because the Arbitrator: (1) "illegally ignored the law"; and (2) "ignored binding law to craft an illegal decision and order." (Request at p. 3) Specifically, the Request asserts that the Award is in violation of D.C. Code § 1-103, which provides that the Mayor and the members of City Council shall be deemed and taken as officers of the municipal corporation of District of Columbia. (See Request at p. 3). DOC contends that the authority granted under D.C. Code § 1-103: (a) provided the District the authority to promulgate rules and regulations through the District Personnel Manual (DPM); and (b) that Chapter 8 of the DPM, relating to Term Employees was ignored by the Arbitrator. (See Request at pgs. 4-5).

Specifically DOC states that Sections 823.1 and 823.2 of the DPM provide that “[a]n employee may be in a term position for up to four years.” In addition, DOC points to Sections 823.7 and 823.8 of the DPM as providing that a term employee “shall not acquire permanent status on the basis of the term appointment and shall not be converted to a regular Career Service appointment without further competition, unless eligible for reinstatement”; and that “[e]mployment under a term appointment shall end automatically on the expiration of the appointment. . .” (Request at p. 5).

In support of its contention that the Award is contrary to these provisions of the DPM, DOC argues that:

The arbitrator did not go so far as to order Mr. Butler reinstated as a permanent employee; the arbitrator clearly understands that to be an illegal act. Rather DOC is ordered to return Mr. Butler to a term appointment the length of which he served approximately four years ago. Under this decision, the DPM would now have the Arbitrator’s gloss on it. He has functionally written a new regulation into the DPM – “The Butler exception to the classification system in the DPM.” Under the Arbitrator’s reasoning, Butler is now a perpetual term employee – a result forbidden by statute. Under the DPM, a person is “term” or “permanent” and not a mixture of the two classifications.

(Request at p. 6).

Further, DOC claims that pursuant to the DPM:

Mr. Butler never achieved permanent status. The law also states that, as Mr. Butler’s term of employment has expired, he cannot remain an employee of the District without further agency action. The Agency did not take this action. The Arbitrator cannot push aside the law on his belief that the District was unfair to Mr. Butler. The Arbitrator was constrained to follow the [the cited provision of the DPM]. Failing to do so, he rendered an illegal decision.

(Request at pgs. 7-8).

In reviewing whether an arbitration award is contrary to law and public policy, the Board has held:

[T]he possibility of overturning an arbitration decision 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. *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 the arbitration award “compels” the violation of an explicit, well defined, public policy grounded in law and or legal precedent. *See, United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). The petitioning party has the burden to specify applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.

MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). *See also District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987).

Furthermore, the Court of Appeals has stated, we must “not be led astray by our own (or anyone else’s) concept of ‘public policy’ no matter how tempting such a course might be in any particular factual setting.” *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A2d 319, 325 (D.C. 1989).

In the present case, DOC alleges that the Award is contrary to law and public policy. DOC alleges that the Award violates the DPM. Although DOC refers to specific provisions of the DPM concerning Term employment, DOC’s argument fails to specify how the DPM was violated. Here, the Arbitrator directed DOC to reinstate Mr. Butler. The Award does not return Mr. Butler as a permanent employee or as a “perpetual” employee as alleged in the Request. In fact, DOC clearly concedes that the Award does not require an illegal act by reinstating Mr. Butler as a permanent employee. (See Request at p. 6). The Award only requires that Mr. Butler be reinstated and that DOC make a determination as to his employment status. (See Award at p. 26). In addition, the Arbitrator noted that Mr. Butler’s May 27, 2005 termination was reversed pursuant to the December 1, 2005 arbitration award. (See Award at p. 26). As a result, the Arbitrator directed that this determination not take into account the reversal of Mr. Butler’s May 27, 2005 termination for the fried fish/plastic bag incident, or the 45 days of docked pay imposed by the December 1, 2005 arbitration award. Instead, the Arbitrator directed that DOC take into account the procedure agreed upon between the Agency and the Union concerning the conversion of RIFed employees, reinstated as term appointments, to permanent status. (See Award at p. 27).

DOC had the burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at a different result.” *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, DOC has failed to specify any applicable law or definite public policy that mandates that the Arbitrator arrive at a different result. Instead, DOC merely disagrees with the Arbitrator’s findings that: (1) the November 27, 2006 letter, terminating Mr. Butler, inaccurately states that Mr. Butler’s term appointment had expired and that his employment could be terminated because of previous

disciplinary action; and (2) the letter's inaccuracies could not serve as valid bases for Mr. Butler's termination. (See Award at. p. 26).

We have explained 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 and conclusions on which the decision is based."

District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

In light of the above, Board finds that DOC's disagreement with the Arbitrator's findings is not an appropriate ground for review. Moreover, we find no merit to DOC's arguments. The Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy or in excess of his authority. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The District of Columbia Department of Corrections' 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.**

December 3, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-A-04 was transmitted via Fax and U.S. Mail to the following parties on this the 3rd day of December 2009.

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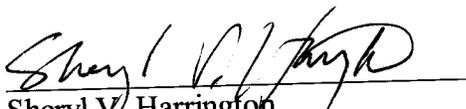
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