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-05
v.	
Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO (on behalf of Sharon Wells),	Opinion No. 1540
Respondent.	

DECISION AND ORDER

Petitioner District of Columbia Public Schools ("DCPS") appeals from a "Decision & Award as to Arbitrability" ("Award") finding arbitrable a grievance filed by Respondent Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO, ("Union"). DCPS asserts herein that the arbitrator exceeded his jurisdiction and that his award is contrary to law and public policy.[1] As the Board finds that there may be grounds to modify or set aside the arbitrator's award, the parties will have fifteen days to file briefs concerning the matter.

I. Statement of the Case

In 2011, grievant Sharon Wells ("Wells") was appointed to a one-year term as the principal of a DCPS elementary school. On May 23, 2012, Kaya Henderson, chancellor of DCPS, ("the Chancellor") reappointed Wells to another one-year term.[2] Less than three months later, on August 6, 2012, DCPS gave Wells a "Notice of Termination," which stated, "In accordance [with] 5-E DCMR 520.2, I am hereby providing you with notice of termination of

[1] The Board is empowered to modify, set aside, or remand an arbitration award "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 and unlawful means." D.C. Official Code § 1-605.02(6).
[2] Award pp. 7-8.

your appointment as Principal with the District of Columbia Public Schools (DCPS). Your separation from service will be effective at the close of business August 21, 2012."[3]

The Union challenged the termination in a letter to DCPS, which it styled a grievance. DCPS responded that it did not believe the termination could be grieved and refused to process the grievance.[4] The Union advanced the case to arbitration, asserting that the termination violated the parties' collective bargaining agreement ("CBA").[5] At an arbitration hearing, DCPS took the position that the case was not subject to arbitration. The arbitrator, Homer LaRue, bifurcated the proceedings so that arbitrability could be addressed before any hearing on the merits.[6] Following the submission of briefs by the parties, the arbitrator made the following award:

> 1. The termination of the appointment of Sharon Wells, effective August 21, 2012, as Principal with the District of Columbia Public Schools (DCPS), is subject to arbitration under the parties' CBA.
>
> 2. Sharon Wells and the [Union] may proceed to arbitration on the merits of the grievance.
>
> 3. The Arbitrator retains jurisdiction to determine the merits of the grievance.[7]

DCPS timely filed an arbitration review request ("Request") with the Board. Pursuant to Board Rule 538.2, DCPS requests the Board to determine that there may be grounds to modify or set aside the Award and, if it so finds, to afford DCPS an opportunity to brief the matter. The Union filed an Opposition. Subsequently, DCPS filed a motion for leave to file supplemental authority, namely, *D.C. Public Schools v. D.C. Public Employee Relations Board*, No. 13 CA 7322 (D.C. Super. Ct. Jan. 8, 2015).

DCPS's motion for leave to file supplemental authority is granted. The Request and Opposition are before the Board for disposition.

II. Grounds for Review Asserted by DCPS

In its Request, DCPS contends that the arbitrator exceeded his jurisdiction and that the Award is contrary to law and public policy.

Quoting from the CBA's definition of "grievance," DCPS asserts that "[t]he parties' collective bargaining agreement specifically excludes disputes 'not involving the meaning, application, or interpretation of the terms and provisions of this Agreement' from the grievance and arbitration process under the contract."[8] DCPS contends that by requiring it "to arbitrate a

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[3] Award p. 9. The notice of termination was Joint Exhibit 3 but was not furnished to the Board.
[4] Award p. 10.
[5] Award App. A, Joint Stipulation of Facts ¶ 14.
[6] *Id.* ¶¶ 16, 17.
[7] Award p. 23.
[8] Request ¶ 8 (quoting CBA art. VIII(A)).

dispute specifically excluded from the parties' grievance proceedings and arbitration agreement, the Arbitrator has added terms to the CBA and therefore exceeded his jurisdiction under the contract."[9]

DCPS argues that the Award is contrary to law and then argues separately that the Award is contrary to public policy. For its argument that the Award is contrary to law, DCPS notes that the D.C. Court of Appeals has asserted that "law" is not limited to statutes but includes administrative rules and regulations[10] and relies upon the D.C. Municipal Regulations ("DCMR"), specifically title 5-E, chapter 5-E5, rule 5-E520 of the DCMR. DCPS alleges, "According to Title 5 of the [DCMR] Chapter 5, the retention and reappointment of principals is at the sole discretion of the Chancellor of DCPS. See, Title 5 DCMR § 520.2." Pursuant to this provision, the Chancellor removed Wells from her position as a principal.[11] DCPS states that the CBA does not contain an agreement to arbitrate disputes under 5 DCMR § 520 nor does it refer to 5 DCMR § 520.[12]

With regard to its argument that the Award is contrary to public policy, DCPS states that an award that is contrary to law *ipso facto* may be said to be contrary to the public policy that the law embodies.[13] Additionally, DCPS claims a right under D.C. Official Code § 1-617.08 and article IV of the CBA to direct its employees and to determine its organization. "This policy," DCPS argues, "is found in the Chancellor's authority to retain and reappoint principals, as established by Title 5 of the DCMR. Insofar as separate provisions of Title 5 DCMR 520 individually and separately address retention and reappointment, they must mean separate things."[14]

The Union filed an Opposition that did not address the import of section 520.2. The Union merely recites that DCPS disagreed with the arbitrator's interpretation of the CBA and asserts that the arbitrator's exercise of his authority to determine arbitrability does not raise a statutory ground for review.

III. Discussion

A. Jurisdiction

While an award finding a grievance to be arbitrable might not be a final award, appealing such an award to the Board, as was done here, is proper procedure under the Comprehensive Merit Personnel Act.[15] As in other arbitration appeals, the Board determines whether an

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[9] Request ¶ 10.
[10] Request ¶ 11 n.4 (citing *J.C. & Assocs. v. D.C. Bd. of Appeals & Review*, 778 A.2d 296, 303 (D.C. 2001) (construing the District of Columbia Administrative Procedure Act)).
[11] Request ¶¶ 11- 12.
[12] Request ¶ 13.
[13] Request ¶ 15 (citing *F.O.P./Dep't of Corr. Labor Comm. v. D.C. Pub. Emp. Relations Bd.*, 973 A.2d 174, 179 (D.C. 2009)).
[14] Request ¶ 15.
[15] *AFGE, Local 2725 v. D.C. Dep't of Consumer & Regulatory Affairs*, 59 D.C. Reg. 5347, Slip Op. No. 930 at p. 6, PERB Case No. 06-U-43 (2008). The Board has taken appeals from awards that decided only the issue of arbitrability. *D.C. Dep't of Human Servs. v. F.O.P./Dep't of Human Servs. Labor Comm.*, 50 D.C. Reg. 5028, Slip

arbitrator exceeded his or her jurisdiction in rendering an award on arbitrability by evaluating whether the award draws its essence from the collective bargaining agreement.[16] The pertinent test regarding the arbitrator's jurisdiction is whether in resolving any legal or factual disputes the arbitrator was arguably construing or applying the contract.[17]

The Award satisfies that test. The CBA defines a grievance "as an unsettled complaint of any alleged violation, misinterpretation, or misapplication of any of the provisions of this Agreement." The definition goes on to state that a "difference or dispute not involving the meaning, application or interpretation of the terms and provisions of this Agreement shall not constitute a grievance for the purpose of this Article."[18] The CBA also provides that "[n]o disciplinary action shall be taken against an officer except for just cause."[19] The unsettled complaint in this case concerns an alleged violation of the "just cause" provision and involves the meaning, application, and interpretation of the terms of that provision. The Arbitrator arguably (1) construed that provision and determined it applied to the instant case in which the Chancellor did not retain a principal during a term of appointment[20] and (2) construed "disciplinary action" to include "the action of DCPS, in not retaining Grievant during the term of her one-year appointment."[21]

DCPS states that the CBA contains neither an agreement to arbitrate disputes concerning an exercise of the Chancellor's discretion under section 520 nor any reference to section 520.[22] It appears DCPS presumes that if a collective bargaining agreement does not specify that a type of grievance is arbitrable, then it is excluded from the grievance arbitration process. To the contrary, the presumption is the reverse. If an agreement contains an arbitration clause, there is a presumption that any given grievance is arbitrable. Only an express provision excluding a particular type of grievance from arbitration can overcome that presumption.[23] Citing no specific exclusion, DCPS takes the position that the arbitrator required it "to arbitrate a dispute specifically excluded from the parties' grievance proceedings and arbitration agreement."[24] The arbitrator determined that the CBA contains no language exempting from its coverage principals who hold a one-year appointment and are not retained during their term, and he determined that it contains no limitation on the application of the just-cause provision.[25] In making those

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Op. No. 691 at p. 1 n.1, PERB Case No. 02-A-04 (2002); *D.C. Pub. Schs. and AFSCME Dist. Council 20, Local 2093(on behalf of Hemsley)*, 31 D.C. Reg. 3020, Slip Op. No. 79, PERB Case No. 84-A-02 (1984).

[16] *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm.*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at p. 9, PERB Case No. 09-A-05 (2014).

[17] *See id.* (citing *Mich. Family Resources, Inc. v. SEIU, Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007)); *D.C. Dep't of Fire & Emergency Med. Servs. v. AFGE. Local 3721*, 59 D.C. Reg. 9757, Slip Op. No. 1258 at pp. 3-4, PERB Case No. 10-A-09 (2012).

[18] CBA art. VIII(A), pp. 6-7.

[19] CBA art. X(A).

[20] Award p. 20.

[21] Award p. 22.

[22] Request ¶ 13.

[23] *D.C. Dep't of Fire & Emergency Med. Servs. v. AFGE. Local 3721*, 59 D.C. Reg. 9757, Slip Op. No. 1258 at p. 3, PERB Case No. 10-A-09 (2012).

[24] Request ¶ 10.

[25] Award p. 20.

determinations and the others discussed above, the arbitrator construed and applied the CBA. Therefore, the Award draws its essence from the contract and the arbitrator did not exceed his jurisdiction.

B. Law and Public Policy

DCPS contends that the arbitrator's finding of arbitrability is contrary to a provision in the DCMR. Rule 5-E520 of the DCMR is entitled "One Year Appointments of Principals and Assistant Principals." Within that rule, section 520.2 provides, "Retention and reappointment shall be at the discretion of the Superintendent."[26] DCPS's argument turns upon the meaning of "retention" and "discretion" in that provision.

1. Retention

Whether the word retention as used in section 520.2 applies to the removal of a principal in the midst of a term is an issue of first impression.[27] That issue was presented in neither of the cases of non-reappointment of principals that DCPS has raised, *Gray v. D.C. Public Schools*[28] and *D.C. Public Schools v. D.C. Public Employee Relations Board*.[29] What the arbitrator said about *Gray* applies equally to *D.C. Public Schools v. D.C. Public Employee Relations Board*. The case concerned "the situation in which the Chancellor, pursuant to Section 520 of the DCMR, elects not to retain or to reappoint a principal at the end of that employee's one-year term of appointment . . . [and] does not address the fact situation presented by this dispute—that is, that Grievant was still in the status of a reappointed principal with a one-year term of appointment."[30]

DCPS contends that because section 520.2 addresses retention separately from reappointment, the words must mean separate things.[31] To be specific, their meanings are "separate and distinct avenues for the Chancellor's exercise of her discretion."[32]

The arbitrator stated that DCPS's argument "tends to be negated" by its practice of citing section 520.3 in all letters since 2009 notifying principals that they have not been reappointed.[33] The arbitrator cited no evidence to the contrary. Section 520.3 establishes the reversion rights of a "person who is not retained in the position of Principal or Assistant Principal." In the arbitrator's view, describing those principals who have not been reappointed as not retained

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[26] The Public Education Reform Amendment Act of 2007, D.C. Law 17-9, converted the position of superintendent to that of chancellor. National Resource Council of the National Academies, *A Plan for Evaluating the District of Columbia's Schools* 43 (2011). Where a provision of the DCMR refers to the superintendent, the D.C. Court of Appeals has read the provision to refer to the chancellor. *See Thompson v. District of Columbia*, 978 A.2d 1240, 1242-44 (D.C. 2009).
[27] *See* Award App. A, Joint Stipulation of Facts ¶ 17.
[28] OEA Matter No. 1601-0122-08 (Oct. 23, 2009).
[29] No. 13 CA 7322 (D.C. Super. Ct. Jan. 8, 2015).
[30] Award p. 16.
[31] Request ¶ 15.
[32] Award p. 11 (quoting DCPS Brief p. 10).
[33] Award p. 18.

"tends to lend credence to the interpretation that the terms 'retention' and 'reappointment' have been used interchangeably by DCPS rather than as separate bases for removal of a principal."[34]

Generally, an interpretation that renders two words in a law interchangeable is not favored because it makes one of the two superfluous, thereby contravening a basic rule of statutory construction.[35] That rule is "to avoid conclusions that effectively read language out of a statute whenever a reasonable interpretation is available that can give meaning to each word in the statute."[36] As noted, DCPS's interpretation is that "the use of both words in the Regulation is intended to '. . . describe separate and distinct avenues for the Chancellor's exercise of her discretion.'"[37] Neither party explains why section 520.2 uses both words but section 520.3 uses only the word "retained."

2. Discretion

If "retention" is used in section 520.2 to mean something other than reappointment and a principal's retention during a term of appointment and his retention once his appointment expires are both at the discretion of the Chancellor, then the next questions are whether the Chancellor's discretion is reviewable by an arbitrator and to what degree. In *D.C. Public Schools v. D.C. Public Employee Relations Board*, the D.C. Superior Court referred to the section 520.2 discretion of the Chancellor as "the sole discretion of the Chancellor."[38] Where a contract provides that discharge or discipline is within the sole discretion of the employer, the discharge or discipline has usually been found to be not subject to arbitration.[39]

Here, the Chancellor's discretion is conferred by a regulation rather than a contract. The Federal Labor Relations Authority has held that, because civil service laws and regulations give federal agencies discretion to summarily terminate probationary employees, the termination of a probationary employee is not arbitrable, but the threshold question of whether a terminated employee was probationary is arbitrable.[40] In the present case there is no analogous threshold

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[34] Award p. 18. The arbitrator disclaimed making a definitive interpretation of "retention" and "reappointment" but concluded that "DCPS has not used 'retention' as an independent and separate basis for the removal of a principal during the term of the principal's one-year appointment." Award pp. 18-19.

[35] *See State ex rel. Winkleman v. Ariz. Navigable Stream Comm'n*, 229 P.3d 242, 254 (Ariz. App. 2010).

[36] *Sch. St. Assocs. Ltd. P'ship v. District of Columbia*, 764 A.2d 798, 807 (D.C. 2001).

[37] Award p. 11 (quoting DCPS Brief p. 10).

[38] No. 13 CA 7322, slip op. at 8 (D.C. Super. Ct. Jan. 8, 2015), *on remand, D.C. Pub. Sch. v. Council of Sch. Officers, Local 4 (on behalf of Williams)*, Slip Op. No. 1525 at p. 6, PERB Case No. 13-A-09 (June 25, 2015).

[39] *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 41 (1987) (dictum); *Int'l Bhd. of Teamsters, Local Union No. 371 v. Logistics Support Group*, 999 F.2d 227, 229-30 (7th Cir. 1993); *Boston Mut. Life Ins. Co. and Ins. Workers Int'l Union*, 170 N.L.R.B. 1672, 1672 (1968). Conversely, an arbitrator interpreted a contractual grant of discretion with regard to retention as permitting limited review in *Major League Umpires Association v. American League of Professional Baseball Clubs*, 357 F.3d 272 (3d Cir. 2004). In that case, the arbitrator interpreted a collective bargaining agreement providing that "[a]ll umpires shall be selected or retained in the discretion of League Presidents on the basis of the merit and skill of the umpire" as leaving subject to arbitration the issue of whether terminations of umpires were an abuse of discretion or were performed in a discriminatory or arbitrary manner. *Id.* at 277, 282. With one judge dissenting, the court held that the arbitrator's finding of arbitrability drew its essence from the contract. *Id.* at 283-84.

[40] *U.S. Dep't of Labor and AFGE, Local 12*, 61 F.L.R.A. 825, 832(2006). *Cf. Sheriff of Middlesex County v. Int'l Bhd. of Corr. Officers, Local R1-193*, 821 N.E.2d 512, 514 (Mass. App. 2005) ("In labor disputes between public

question on the status of Wells for the arbitrator to decide because the parties stipulated that Wells was hired as a principal.[41]

IV. Conclusion

If the Chancellor exercised her discretion regarding retention of principals in this case, an application to this case of the precedents discussed arguably suggests that the Chancellor's action is not arbitrable or that the arbitrator's authority is limited or eliminated. On the other hand, the inconsistent terminology of sections 520.2 and 520.3 may suggest that the Chancellor's discretion can be exercised only at the end of a principal's term, leaving a termination at any other time subject to the contract's just cause provision. DCPS has not expressly asserted that section 520.2 supersedes the just cause provision of the CBA, and conversely the Union has not expressly asserted that a chancellor's decision not to retain a principal during a term is subject to the just cause provision of the CBA notwithstanding section 520.2.

In view of the foregoing, the Board finds pursuant to Rule 538.2 that there may be grounds to modify or set aside the Award. In accordance with that rule, the parties will have fifteen days from service of this decision and order to file briefs regarding the petitioner's arbitration review request.

ORDER

It is hereby ordered that:

1. The Board notifies the parties that it finds that there may be grounds to modify or set aside the Award.

2. The Board requests that the parties fully brief their position regarding Rule 5-E520 of the D.C. Municipal Regulations, particularly sections 520.2 and 520.3, whether either of those sections supersedes the just cause provision of the CBA, and the effect of those sections on the arbitrability of this matter.

3. Please address in your briefs the issues discussed in this decision and order and any other argument, issue, and federal or District laws or policies which you deem relevant.

3. The parties' briefs are due on September 25, 2015.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

August 20, 2015

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employers and employees, however, where a statute confers upon the public employer a particular managerial power, an arbitrator is not permitted to direct the employer to exercise that power in a way that interferes with the discretion granted to the employer by statute.")

[41] Award App. A, Joint Stipulation of Facts ¶ 3.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-A-05 was transmitted via File & ServeXpress to the following parties on this the 10th day of September 2015.

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