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Government of the District of Columbia Public Employee Relations Board

In the Matter of)	
)	
American Federation of)	
Government Employees, Local 2725)	
)	PERB Case No. 19-A-10
Petitioner)	
)	Opinion No. 1735
v.)	
)	
District of Columbia Housing Authority)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On August 30, 2019, American Federation of Government Employees, Local 2725 (Union) filed an Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-605.02(6), seeking review of an arbitration award (Award) dated August 12, 2019.¹ The Union seeks review of the Award on the grounds that the Arbitrator exceeded his jurisdiction and that the Award on its face is contrary to law and public policy.

Having reviewed the Arbitrator's findings and conclusions, the pleadings of the parties, and applicable law, the Board concludes that the Arbitrator did not exceed his jurisdiction and that the Award is not contrary to law and public policy. Therefore, the Board denies the Request.

II. Arbitration Award

A. Background

Grievant worked for the District of Columbia Housing Authority (Agency) as a Maintenance Mechanic from September 28, 2009, until his discharge on May 30, 2018.²

¹ The Agency filed an arbitration review request of the same Award. See PERB Case No. 19-A-11.

² Award at 1, 3.

Grievant received two suspensions prior to his removal.³ In April 2018, Grievant missed seven scheduled workdays and one holiday.⁴ On May 30, 2018, the Agency issued Grievant a Notice of Removal for: “(1) inexcusable absence without leave (AWOL) between April 16, 2018 through April 25, 2018; and (2) other conduct during and outside of duty hours adversely affecting the employee’s or agency’s ability to perform effectively.”⁵

The Union invoked arbitration on behalf of Grievant and sought immediate rescission of the removal notice. However, the Union did not request back pay or benefits.⁶

B. Arbitrator’s findings and conclusions

On August 12, 2019, the Arbitrator issued an Award which: (1) sustained the AWOL charges for the scheduled workdays of April 17 through April 25, 2018; and (2) dismissed all other charges because the Agency failed to provide evidence that Grievant’s conduct impacted his ability to perform his job.⁷ The Arbitrator assessed what would be the appropriate remedy for the proven misconduct in light of the relevant mitigating and aggravating circumstances.⁸ Accordingly, the Arbitrator directed the Agency to “reinstate the Grievant forthwith, with full uninterrupted seniority, but no award is made of back pay or benefits, and the period between his improper removal and his return to work should be treated as a time-served disciplinary suspension.”⁹

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify or set aside a grievance arbitration award only under three circumstances: (1) if the arbitrator was without, or exceeded his or her jurisdiction; (2) if the award on its face is contrary to law or public policy; or (3) if the award was procured by fraud, collusion or other similar or unlawful means.¹⁰ The Union argues that the Arbitrator exceeded his jurisdiction and that the Award on its face is contrary to law or public policy.¹¹ Hence, the Union requests that the Board vacate the Award’s imposition of a time-served suspension and remand the matter to the Arbitrator.¹²

³ Award at 3.

⁴ Award at 4.

⁵ Award at 2.

⁶ Award at 7.

⁷ Award at 15.

⁸ Award at 15.

⁹ Award at 17.

¹⁰ D.C. Official Code § 1-605.02(6) (2001).

¹¹ Request at 5, 7.

¹² Request at 4.

A. The Arbitrator did not exceed his jurisdiction.

The Union argues that the Arbitrator exceeded his jurisdiction by imposing a time-served suspension.¹³ An arbitrator derives his or her jurisdiction from the consent of the parties.¹⁴ This consent is expressed by the parties through their collective bargaining agreement (CBA).¹⁵ One of the tests the Board uses in determining if an arbitrator has exceeded his jurisdiction and was without authority to render an award is “whether the Award draws its essence from the collective bargaining agreement.”¹⁶ To determine if an award “draws its essence” from a CBA, the Board will look to whether the arbitrator (1) resolved a dispute not committed to arbitration, (2) committed fraud, had a conflict of interest or acted dishonestly in issuing the award; or (3) arguably construed or applied the contract.¹⁷ If these errors were not committed, the award has “drawn its essence” from the CBA.¹⁸

The Union argues that such time-served suspensions are not contemplated in the Table of Appropriate Penalties (Table) of the parties’ CBA because “the definition of ‘suspension’ as being temporary requires suspensions to have a fixed length.”¹⁹ However, the Board notes that the time-served suspension was not “indefinite” as argued by the Union.²⁰ Rather, the Arbitrator ordered the Agency to reinstate Grievant on August 19, 2019, which provided a date-certain end to the suspension.²¹

Further, the Union’s argument that the Arbitrator did not construe nor apply the contract is without merit.²² The Board has previously stated, “an arbitrator does not exceed his authority by exercising his equitable powers, unless these powers are expressly restricted by the parties’ collective bargaining agreement.”²³ Article 9, Section E (12) of the parties’ CBA provides that the “arbitrator shall have full authority to award appropriate remedies.”²⁴ Additionally, Article 10, Section C of the parties’ CBA describes the Table of Appropriate Penalties (Table) as a non-exhaustive list of available penalties. The CBA does not restrict the Arbitrator’s powers to determine an appropriate remedy, and therefore, the Arbitrator was within his jurisdiction to award a time-served suspension after determining that termination was an inappropriate penalty.

¹³ Request at 3.

¹⁴ *Wash. Teachers’ Union v. D.C. Pub. Schools*, 77 A.3d 441, 446 (D.C. 2013).

¹⁵ *Id.*

¹⁶ *MPD v. FOP/MPD Labor Comm. (on behalf of Jacobs)*, 60 D.C. Reg. 3060, Slip Op. No. 1366 at 5-6, PERB Case No. 12-A-04 (2013) (citing *D.C. Pub. Schools v. AFSCME, Dist. Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at 5, PERB Case No. 86-A-05 (1987)); see also *Dobbs, Inc. v. Local No. 1614, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 813 F.2d 85 (6th Cir. 1987).

¹⁷ *DOC v. FOP/DOC Labor Comm.*, 66 D.C. Reg. 443, Slip Op. No. 1715 at 3, PERB Case No. 19-A-05 (2019) (quoting *Mich. Family Res., Inc. v. SEIU Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007)).

¹⁸ *Id.*

¹⁹ Request at 6.

²⁰ Request at 6.

²¹ Request at 6.

²² The Union did not raise challenges to whether the Arbitrator resolved a dispute not committed to arbitration nor to whether the Arbitrator committed fraud, had a conflict of interest, or acted dishonestly in issuing the Award.

²³ *MPD v. FOP/MPD Labor Comm.*, - D.C. Reg. -, Slip Op. No. 933 at 8, PERB Case No. 07-A-08 (2008).

²⁴ Agreement at 21.

Accordingly, the Arbitrator's issuance of a time-served suspension from May 30, 2018 until August 19, 2019, was consistent with the CBA and "drew its essence from it."

B. The Award is not contrary to law and public policy.

The Union argues that the Arbitrator's award of a time-served suspension for Grievant is contrary to law and public policy. To overturn an arbitration decision on the basis of public policy represents a narrow exception to the rule that a reviewing body must defer to an arbitrator's interpretation of the contract.²⁵ A petitioner must demonstrate that an award violates established law or compels the violation of an explicit, well-defined, public policy grounded in law and legal precedent.²⁶ As explained by the D.C. Circuit Court of Appeals, "the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy."²⁷ Thus, the Union has the burden to specify applicable law and explicit, well-defined public policy that mandates a different result from arbitration.²⁸

In its Request, the Union argues that the Board's previous decision in *AFGE, Local 2725 v. DCHA (Fahn)*,²⁹ regarding time-served suspensions was erroneous due to recent precedent and the need for "a more robust analysis."³⁰ However, the Union failed to cite or reference any recent cases supporting this claim and, in fact, merely cited to the same cases that the Board already considered in *Fahn*.³¹ Specifically, the Union argues that time-served suspensions are inherently arbitrary because they are based solely on the length of time elapsed between removal and the date of an arbitrator's decision.³² However, time-served suspensions are only inherently arbitrary when the arbitrator merely "mitigat[es] a termination to a 'time served' suspension without articulating a basis for the length of the suspension."³³

Here, the Arbitrator considered multiple factors in determining the appropriate remedy.³⁴ After determining that Grievant's termination was inappropriate, the Arbitrator weighed various

²⁵ *MPD v. FOP/MPD Labor Comm.*, 65 D.C. Reg. 12884, Slip Op. No. 1684 at 5, PERB Case No. 18-A-09 (2018) (citing *Am. Postal Workers Union v. U.S. Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

²⁶ *MPD v. FOP/MPD Labor Comm.*, 60 D.C. Reg. 5326, Slip Op. No. 1373 at 8, PERB Case No. 11-A-05 (2013); see also *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

²⁷ *American Postal*, 789 F.2d at 8.

²⁸ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No. 1705 at 6, PERB Case No. 19-A-02 (2018) (citing *MPD v. FOP/MPD Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at 2, PERB Case No. 00-A-04 (2000)).

²⁹ 61 D.C. Reg. 9062, Slip Op. No. 1480, PERB Case No. 14-A-01 (2014) (*Fahn*).

³⁰ Request at 8.

³¹ See *Fahn*, 61 D.C. Reg. 9062, Slip Op. No. 1480 at 4-5.

³² Request at 7; see *Cuiffo v. United States*, 131 Ct. Cl. 60, 65 (1955) (finding a suspension arbitrary because it was "determined by accident, and not by a process of logical deliberation and decision"); see also *Savage-Bey v. La Petite Acad.*, 50 A.3d 1055, 1060 (D.C. 2012) (holding that an arbitrary and capricious decision issued by an administrative agency may be overturned).

³³ *Greenstreet v. Soc. Sec. Admin.*, 542 F.3d 705, 708 (Fed. Cir. 2008) (clarifying the decision in *Cuiffo* regarding when suspensions are inherently arbitrary).

³⁴ Award at 15-17.

mitigating factors while referring to the Table of Penalties.³⁵ Grievant's failure to provide evidence that he was taking proactive steps in controlling his behavior, combined with the presence of previous disciplinary actions, led the Arbitrator to conclude that a time-served suspension was the appropriate remedy.³⁶

The Board finds that the Arbitrator's decision was not arbitrary because he articulated a basis for the length of Grievant's suspension. The Award is consistent with the Board's decision in *Fahn*. The Union fails to demonstrate that a well-defined public policy mandates overturning the Award. Therefore, the time-served suspension will not be disturbed.

IV. Conclusion

The Board rejects the Union's arguments and finds no grounds to modify, set aside, or remand the Award. Therefore, the Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Review Request is hereby denied.
2. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Douglas Warshof and Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Peter Winkler.

February 20, 2020

Washington, D.C.

³⁵ Award at 16.

³⁶ Award at 17.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 19-A-10, Opinion No. 1735 was sent by File and ServeXpress to the following parties on this the 25th day of February, 2020.

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