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

_____)	
In the Matter of:)	
)	
District of Columbia Public Schools,)	
)	PERB Case No. 15-A-07
Petitioner,)	
)	Opinion No. 1559
and)	
)	Corrected Copy
Council of School Officers, Local 4,)	
American Federation of School Administrators,)	
)	
Respondent.)	
_____)	

Decision and Order

I. Statement of the Case

On February 23, 2015, the District of Columbia Public Schools (“DCPS” or “Petitioner”) filed a timely Arbitration Review Request (“Request”), pursuant to the Board’s authority in D.C. Official Code § 1-605.02(6) to consider appeals from arbitration awards. DCPS requests that the Board overturn an arbitration award (“Award”) on the grounds that (1) Arbitrator Joseph Sharnoff (“Arbitrator”) exceeded his jurisdiction as arbitrator under the parties’ collective bargaining agreement, and (2) the Award is contrary to law and public policy. The Council of School Officers, Local 4, American Federation of School Administrators (“CSO” or “Respondent”) filed a timely Opposition to DCPS’s Request.

For the following reasons, DCPS’s Request is denied.

II. Background

The grievance before the Arbitrator was filed on behalf of an employee (“Grievant”) by CSO, concerning Grievant’s termination.¹ DCPS removed Grievant from his position of Dean of Students at a DCPS high school for adults for an alleged improper relationship with a student

¹ Award at 2-3.

(“Student”).² The parties presented their cases at a December 14, 2014 hearing before the Arbitrator.³ After DCPS rested its case-in-chief without any testimony from the Student, CSO moved for a “Directed Verdict” (“Motion”) on the grounds that DCPS had failed to meet its burden of proof that DCPS had just cause to terminate Grievant.⁴ DCPS objected to CSO’s motion, arguing that the case involved “a credibility issue that the arbitrator is appropriate to weigh” and that further briefing should take place.⁵ The Arbitrator continued the hearing, and CSO presented its witness.⁶ At the close of the hearing, the parties agreed off the record that DCPS could file a position regarding CSO’s Motion.⁷ The Arbitrator then closed the evidentiary record at the end of the hearing, but instructed that any evidence that needed to be added to the record would require a conference call before admission.⁸

In an email to the Arbitrator, DCPS opposed CSO’s motion and requested a conference call to discuss reopening the record for testimony from the Student who had not testified during the hearing, along with other unnamed witnesses.⁹ The Arbitrator granted DCPS’s request for a conference call, but placed DCPS on notice that the bar for reopening the record would be high for a witness that he believed should have been called during the hearing.¹⁰ On January 28, 2015, the Arbitrator held a conference call with the parties. The Award noted that, during the conference call, DCPS provided for the first time some of the efforts it made to locate the Student in order to have her testify at the December 17, 2014 arbitration hearing. According to the Arbitrator, “No specifics were provided by the DCPS as to dates of telephone calls, e-mails, letters, etc., which assertedly had been made by the DCPS to” the Student.¹¹ The Arbitrator denied DCPS’s request to present the Student as a witness. In denying DCPS’s request, the Arbitrator noted that DCPS made no arguments about its attempts to obtain the Student’s cooperation and attendance before or during the hearing, nor did DCPS request to have the record be held open in order for DCPS to reach the Student as a witness.¹² The Arbitrator found that DCPS’s request at that point in the proceedings was “inappropriate and harmful to the Arbitration process, given that the request was not made until after the DCPS had rested its direct case, after the Union had presented the testimony of the Grievant, and after the evidentiary record at the instant Arbitration hearing was declared closed by the Arbitrator following the full, complete and unreserved agreement of the DCPS and the Union.”¹³

The Arbitrator sustained CSO’s motion, finding that DCPS failed to meet its burden of proof that the Grievant engaged in the alleged misconduct.¹⁴ In finding that DCPS failed to

² Award at 3.

³ *Id.* at 10.

⁴ Transcript at 166, Award at 12.

⁵ *Id.* at 167.

⁶ *Id.* at 168.

⁷ *Id.* at 207.

⁸ *Id.*

⁹ Award at 11.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Award at 11-12.

¹⁴ *Id.* at 13.

prove just cause for the Grievant's termination, the Arbitrator determined that DCPS improperly based the Grievant's termination upon a Report of Investigation that was compiled by an investigator. The Arbitrator found that the Report of Investigation yielded no "probative evidence to support the bare allegation" that the Grievant and the Student had an improper relationship.¹⁵ The Arbitrator also found that DCPS failed "to present on its direct case sufficient credible, probative evidence to support" the charge that the Grievant and the Student engaged in an improper relationship.¹⁶ The Arbitrator ordered the Grievant reinstated and made whole for his losses.¹⁷

III. Discussion

DCPS requests the Board overturn the Arbitrator's Award on the grounds that the Arbitrator exceeded his jurisdiction under the parties' collective bargaining agreement, and that the Award is contrary to law and public policy because the Arbitrator did not allow DCPS to present evidence material to its case and the Arbitrator incorrectly applied the D.C. Court of Appeals' standard for a directed verdict.¹⁸

The Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in three limited circumstances: (1) if the 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.¹⁹ The Board has only "limited authority to overturn an arbitral award."²⁰ There is a "well defined and dominant" policy favoring arbitration of a dispute where the parties have chosen that course.²¹ Just as "Congress [has] declared a national policy favoring arbitration," so has the District of Columbia.²² This preference for honoring the parties' agreement to arbitrate disputes underlies the practical "hands-off" approach to review arbitrators' decisions, except in certain "restricted" circumstances.²³ The Board will not substitute its own interpretation of the collective bargaining agreement for that of the parties or the interpretation of the duly designated arbitrator.²⁴

A. Arbitrator's jurisdiction

¹⁵ *Id.*

¹⁶ *Id.* at 15.

¹⁷ *Id.* at 20.

¹⁸ Request at 5-6.

¹⁹ D.C. Official Code § 1-605.02(6).

²⁰ *Fraternal Order of Police v. District of Columbia Pub. Employee Relations Bd.*, 973 A.2d 174, 177 (D.C. 2009).

²¹ *District of Columbia Metro. Police Dep't v. Public Employee Relations Bd.*, 901 A. 2d 784, 789 (D.C. 2006).

²² *District of Columbia v. Greene*, 806 A. 2d 216, 221 (D.C. 2002) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). *See, e.g., Masurovsky v. Green*, 687 A.2d 198, 201 (D.C. 1997) ("Variously called a presumption, preference or policy, the rule favoring arbitration is identical under the D.C. Uniform Arbitration Act and the Federal Arbitration Act.") (citation omitted)

²³ *District of Columbia Metro. Police Dep't*, *supra*, 901 A.2d at 787; *see Fraternal Order of Police*, *supra*, 973 A.2d at 177 n.2.

²⁴ *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 jurisdiction of an arbitrator is derived “from the parties' agreement and any applicable statutory and regulatory provisions.”²⁵ When submitting an issue 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.”²⁶

One of the tests used by the Board to determine whether an arbitrator has exceeded his jurisdiction is “whether the Award draws its essence from the collective bargaining agreement.”²⁷ The Board adopted the Sixth Circuit's analysis of “essence of the agreement” issues:

Did the arbitrator act “outside his authority” by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator “arguably construing or applying the contract?” So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made “serious,” “improvident,” or “silly” errors in resolving the merits of the dispute.²⁸

DCPS asserts that the Arbitrator exceeded his jurisdiction when he denied DCPS’s request to reopen the arbitration record for the Student’s testimony.²⁹ DCPS argues that the collective bargaining agreement requires that “both parties are to be given a full opportunity to present evidence and to examine and cross-examine witnesses,” and that the “arbitrator shall have no power to delete or modify in any way any of the provisions of this Agreement.”³⁰ DCPS argues that the Arbitrator modified the contract by creating a new standard that DCPS needed to meet in order to reopen the record.³¹ DCPS argues that the Arbitrator did not have the authority under the parties’ CBA to deny DCPS’s witness, because the CBA’s contains a provision that each side have a “full opportunity to present evidence and to examine and cross-examine witnesses.”³²

²⁵ *D.C. Dep't of Public Works v. AFSCME Local 2091*, 35 D.C. Reg. 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988).

²⁶ *MPD v. FOP/MPD Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000);

²⁷ *Mich. Family Resources, Inc. v. Serv. Employees Int'l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *F.O.P./Dep't of Corrs. Labor Comm. v. D.C. Dep't of Corrs.*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. No. 10-A-09 (2012).

²⁸ *Nat'l Ass'n of Government Employees, Local R3-07 v. D.C. Office of Communications*, 59 D.C. Reg. 6832, Slip Op. No. 1203, PERB Case No. 10-A-08 (2011) (citing *Michigan Family Resources, Inc. v. SEIU Local 517M*, 475 F.3d 746, 753 (2007)).

²⁹ Request at 5.

³⁰ *Id.* (citing Article VIII, Sections B and C(2)(c)(3), respectively, of the parties’ collective bargaining agreement).

³¹ Request at 5.

³² Request at 4-5.

The key word in the CBA is “opportunity.” The Arbitrator determined that DCPS had the opportunity to present the testimony of the Student as part of its case in chief and never attempted to do so or to present any explanation for its failure to do so or to keep the record open for such a presentation. The Arbitrator noted numerous opportunities in which DCPS failed to even mention the possibility of the Student testifying. For instance, DCPS requested a postponement of the arbitration due to DCPS’s counsel’s “heavy schedule” but did not request a postponement because it was having problems locating the Student as a witness.³³ Further, DCPS did not raise its intention of calling the Student as a witness at any time prior to the hearing or at the hearing.³⁴ DCPS failed to explain to the Arbitration its problems of securing the Student as a witness when it rested its case-in-chief. Lastly, at the close of the hearing, the Arbitrator specifically asked the parties if there was any additional evidence, and DCPS failed to request that the record be held open while it located the Student.³⁵ DCPS only raised the issue of the Student as a potential witness when submitting its brief in opposition to CSO’s motion.³⁶ Additionally, at the time of the conference call concerning reopening the record to hear the Student as a witness, DCPS did not provide any dates, emails, or other evidence of its efforts prior to the hearing to find the Student to testify.³⁷

DCPS does not dispute that it submitted to the Arbitrator the matter underlying the arbitration, and does not argue that the Arbitrator resolved an issue not submitted to arbitration. In making his determinations regarding the misconduct charge, the Arbitrator was applying the collective bargaining agreement’s requirement that discipline shall be imposed for just cause.³⁸ DCPS does not dispute that this issue was presented to the Arbitrator to resolve. The Award must be upheld because it was arguably construing or applying that requirement of the collective bargaining agreement.³⁹

As has often been noted in the Boards decisions, “[I]n most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that. . . This view of the ‘arguably construing’ inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties’ decision to hire their own judge to resolve their disputes.”⁴⁰ DCPS’s argument that the Arbitrator modified the contract because of his criteria for admitting evidence is not a jurisdictional argument. The Board finds DCPS’s jurisdiction argument is in fact an argument concerning the admissibility of evidence. By submitting the matter to arbitration, DCPS agreed to be bound by the evidentiary rulings of the Arbitrator. By

³³ Award at 12.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 11.

³⁸ Award at 10, Transcript at 5.

³⁹ *See D.C. Hous. Auth. v. AFGE (on behalf of Hendrix-Smith) Local 2725*, 60 D.C. Reg. 13706, Slip Op. No. 1415 at p. 5, PERB Case No. 13-A-07 (2013).

⁴⁰ *Mich. Family Resources, Inc. v. Serv. Employees Int’l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *F.O.P./Dep’t of Corrs. Labor Comm. v. D.C. Dep’t of Corrs.*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. No. 1258 at 4, PERB Case No. 10-A-09 (2012).

agreeing to submit a matter to arbitration the parties also agreed to be bound by the Arbitrators interpretation of the parties' agreement and related rules concerning substantive as well as procedural matters.⁴¹

DCPS's argument that the Arbitrator exceeded his jurisdiction by refusing to reopen the record amounts to an objection to the Arbitrator's evaluation of certain evidence. A dispute over the weight and significance of evidence leading an arbitrator to conclude that a termination was not for cause does not state a statutory basis for review.⁴² Even if the denial of a witness was a serious error, this did not divest the Arbitrator of jurisdiction to resolve the issues presented to him. Furthermore, the Board has held on numerous occasions that such evidentiary objections do not rise to the asserted statutory basis for review.⁴³ The Board denies DCPS's Request to overturn the Award on grounds that the Arbitrator exceeded his jurisdiction.⁴⁴

B. Contrary to law and public policy

To overturn an arbitrator's award as a violation of law and public policy, a petitioner must demonstrate that the award "compels" the violation of an explicit, well-defined public policy grounded in law or legal precedent.⁴⁵ Absent a clear violation of law evident on the face of the arbitrator's award, the Board lacks authority to substitute its own judgment for that of the arbitrator.⁴⁶ A party's disagreement with an arbitrator's findings is not a sufficient basis for concluding that an award is contrary to law and public policy.⁴⁷

1. Revised Uniform Arbitration Act

DCPS asserts that the Award is contrary to public policy, as found in the D.C. Revised Uniform Arbitration Act ("RUAA").⁴⁸ DCPS argues that an "award that is contrary to a specific law *ipso facto* may be said to be contrary to the public policy that the law embodies."⁴⁹ DCPS asserts that the RUAA requires an arbitration award be vacated for "failure to consider material evidence."⁵⁰ DCPS claims that the Student's prospective testimony would have been evidence material to the underlying matter of the case and that the Arbitrator erred by denying the Student

⁴¹ *Washington Teachers' Union, Local 6, AFT, v. D.C. Public Schs.*, Slip Op. No. 432, PERB Case No. 95-A-07. See, e.g., *D.C. Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, Slip Op. No. 412, PERB Case No. 95-A-01 (1995).

⁴² *Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm.*, 61 D.C. Reg. 7380, Slip Op. No. 1473 at p. 5, PERB Case No. 14-A-05 (2014).

⁴³ See, e.g., *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, Slip Op. No. 320, PERB Case No. 92-A-04 (1992).

⁴⁴ See, e.g., *DOC and FOP/DOC Labor Committee*, Slip Op. No. 412 at 2-3, fn 3, PERB Case No. 95-A-01 (finding that an arbitrator did not exceed his jurisdiction by excluding proffered evidence after the agency presented its case-in-chief and the union moved for a summary decision).

⁴⁵ See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

⁴⁶ *Fraternal Order of Police/Dep't of Corrections Labor Committee v. Public Employee Relations Board*, 973 A.2d 174, 177 (D.C. 2009).

⁴⁷ *MPD v. FOP/MPD Labor Committee*, 31 D.C. Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A-05 (1984).

⁴⁸ Request at 5.

⁴⁹ *Id.*

⁵⁰ *Id.*

as DCPS's witness. DCPS asserts that the alleged error violated the RUAA and is *ipso facto* contrary to public policy.

The Board notes that it derives its power to consider the present arbitration appeal from the CMPA, D.C. Official Code § 1-605.02(6), and not the RUAA.⁵¹ The Board does not find that there is a clear, well-defined public policy applicable to this case.

The RUAA requires a court to vacate an arbitration award if “[a]n arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to § 16-4415, so as to prejudice substantially the rights of a party to the arbitration proceeding.”⁵² Section 16-4415 sets the parameters for acceptable arbitration proceedings. In particular, § 16-4415(a) states, in relevant part, “An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.”

The D.C. Court of Appeals has considered this statutory provision. The Court stated,

Under D.C. Code § 16-4423(a)(3) we are neither required nor authorized to comb the record for technical errors in the receipt or rejection of evidence by arbitrators. The court's review is restricted to determining whether the procedure was fundamentally unfair. We only evaluate whether the arbitrator gave each of the parties to the dispute an adequate opportunity to present its evidence and argument.⁵³

The Board does not find an explicit, well-defined public policy that compels the Board to overturn the Award under the RUAA and the legal precedent of the D.C. Court of Appeals.

The Board notes, in reaching his decision to deny DCPS's request to reopen the hearing, the Arbitrator considered that DCPS had multiple opportunities throughout the proceedings to raise the possibility of the Student as a witness. DCPS failed to mention the Student as a potential witness prior to the close of the record, and only raised the Student as a potential witness when responding to CSO's Motion. The Arbitrator gave each side a fair opportunity to litigate their case. The Board finds that there is no clear violation of law and public policy evident on the face of the Award, and denies DCPS's Request.

2. Directed Verdict Standard

DCPS asserts that the Award is contrary to law, because it is contrary to the D.C. Court of Appeals' standard for granting a directed verdict.

⁵¹ See *MPD v. FOP*, 997 A.2d 65 (D.C. 2013)(finding that D.C. Official Code § 1-605.02(6) designates PERB as the forum for appeals after a labor-relations arbitration award has been rendered).

⁵² D.C. Official Code § 16-4423(a)(3).

⁵³ *Zegeye v. Liss*, 70 A.3d 1208, 1211 (D.C. 2013)(internal quotation marks, brackets and citations omitted).

As stated in the transcript and the Award, CSO requested the Arbitrator to find in favor of the CSO after DCPS rested its case-in-chief. CSO and the Arbitrator both noted that the motion would be called a “Directed Verdict” for lack of a better term.⁵⁴ DCPS asserts that the Arbitrator in making his decision applied the incorrect standard for a Directed Verdict in the D.C. Court of Appeals, which renders the Award contrary to law.

The Board rejects DCPS’s argument. DCPS does not contend that the Arbitrator was contractually bound to apply the D.C. Court of Appeals’ rules nor does the Board find grounds that the D.C. Court of Appeals’ rules are applicable. DCPS does not dispute that the Arbitrator made his decision based on the record presented. The Arbitrator reviewed the evidence presented during the hearing and concluded that DCPS had not proved its case. DCPS does not cite any law that mandates a contrary decision, and therefore, the Board denies DCPS’s Request.

IV. Conclusion

The Board finds that the Arbitrator did not exceed his jurisdiction and the Award is not clearly erroneous or contrary to law and public policy. For the reasons discussed above, no statutory basis exists for setting aside the Award. The Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. DCPS’s 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

By unanimous vote of Board Chairperson Charles Murphy, Member Yvonne Dixon, and Member Ann Hoffman. Member Keith Washington was not present.

Washington, D.C.

December 17, 2015

⁵⁴ Transcript at 165-166.

CERTIFICATE OF SERVICE

This is to certify that the attached Corrected Copy of the Decision and Order in PERB Case No. 15-A-07 was served to the following parties via File & ServeXpress on this the 4th day of January 2016:

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