Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Department of Human Services Labor Committee,	
Petitioner,	
and	PERB Case No. 04-A-02
	Opinion No. 1207
District of Columbia, Department of Human Services,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The Fraternal Order of Police/Department of Human Services Labor Committee ("FOP" or "Union") filed an Arbitration Review Request ("Request"). FOP seeks review of an Arbitration Award ("Award") that denied a grievance of three corrections officers ("Grievants") against the Department of Human Resources ("DHS"), appealing their 30-day suspension from duty. FOP claims the Award: (1) is contrary to law and public policy; and (2) was procured by unlawful means. DHS opposes the Arbitration Review Request.

The issues before the Board are whether "the award on its face is contrary to law and public policy" and whether "the award was procured through fraud". D.C. Code § 1-605.02(6) (2001 ed.).

II. Discussion

On October 24, 2000, Grievants Dante Johnson, Willie Keye, and Gregory Shields, Youth Correctional Officers of the Youth Services Administration, were assigned to escort eight youths from the Oak Hill facility to Superior Court in the District of Columbia. (See Award at p. 2). The youths were searched, shackled, and seated in a van. (See Award at p. 3). In the van, Grievant Shields sat next to the van driver (not a grievant in this matter). Grievant Johnson sat alone in the second row. Grievant Keye sat in the next row beside the door with one youth. The remaining youths occupied the next two rows. (See Award at p. 3). Shortly before 8:00 a.m., while en route to the Court House, at or near 21st and C Streets, N.E. Washington, D.C., one of the youths, identified by the Arbitrator as DH, escaped through the van's rear door, apparently after freeing himself from his restraints. (See Award at p. 4). Two of the officers secured the van while Grievant Johnson gave chase after DH. With the assistance of the Metropolitan Police, DH was recaptured, re-shackled, and returned to the van, which then continued to Court. DH neither injured himself nor anyone else during his escape, and the eight youths were successfully transferred to the Court. (See Award at p. 4).

Following the incident, DHS conducted an investigation. On November 6, 2000, Superintendent Doyle proposed, and the Deputy Administrator for Secured Programs approved, the initiation of action to suspend the Grievants for 30 days. (See Award at p. 6). On November 9, 2000, Doyle sent the Grievants notices of the proposed action based on the charge of Negligence. (See Award at p. 6). DHS concluded: (1) the youth, DH, had not been searched by any of the Grievants; (2) the Grievants had failed to follow procedures regarding the seating positions of themselves in the van, and the seating positions of the youths; and (3) the Grievants had failed to take responsible steps to maintain physical custody and visual contact of DH. As a result, a 30-day suspension was proposed for each of the Grievants.

Grievances were filed at the agency level regarding the proposed 30-day suspension, and Administrator Turner sustained the charges. The Union then invoked arbitration, and hearings were held before Arbitrator Shapiro on June 5, 6, and July 11, 2003.

The issue before Arbitrator Shapiro was:

> Were the Grievants properly disciplined in accordance with Article 24 of the collective bargaining agreement ["CBA"]? If not, what is the proper remedy?

(Award at p. 7).

At arbitration, DHS argued: (1) the Arbitrator did not have procedural jurisdiction, and that any remedy would be non-binding; (2) the Arbitrator's standard for review regarding

discipline was in error because he utilized a "for just cause" standard as opposed to a "for cause" standard; (3) it had presented sufficient evidence to support its contention that the discipline of the Grievants was "for cause"; and (4) it did not violate the Grievants' *Weingarten* rights.[1] (See Award at pgs. 9-13).

The Union argued that DHS: (1) ignored the testimony presented by the Grievants' concerning the incident; (2) failed to provide the Grievants' with a "secure van"; and (3) punished the Grievants' due to political pressure. (See Award at pgs. 13-16). In addition, the Union argued that DHS' punishment of the Grievants did not reflect consideration of the Grievants' prior performance records or the principles of progressive discipline as required by *Douglas v. Veterans Administration*, 5 MSBP 312 (1981).[2] (See Award at p. 23).

The proceedings were bifurcated in order to address: (1) the procedural matter of whether the matter was arbitrable; and (2) the merits of the case. In an award dated April 4, 2003, Arbitrator Shapiro determined that there was a valid CBA between the parties, and therefore, the grievances were arbitrable. (See Award at p. 16). In the Award dated October 27, 2003, the Arbitrator found that the Grievants had received due process. (See Award at p. 18). In addition, the Arbitrator concluded that DHS did not violate the Grievants' *Weingarten* rights, where the Grievants' did not invoke that right during their disciplinary interviews. Moreover, the Arbitrator found that since a *Weingarten* rights violation was not alleged in their grievances, the objection had been waived. (See Award at p. 19). The Arbitrator also concluded that the youths had been searched, but that the seating arrangements of the youths and the Grievants' lack of supervision violated DHS policies and common sense. As to the penalty, the Arbitrator determined that neither the CBA nor the District Personnel Manual ("DPM") required the application of progressive discipline or *Douglas* Factors. (See Award at pgs. 23-24). Consequently, the Arbitrator determined that the suspension for 30-days was "for cause". (See Award at pgs. 19-24). Accordingly, the grievances were denied.

In their Request, FOP claims that the Arbitrator's Award "on its face is contrary to law and public policy . . . [and] was procured by unlawful means." (Request at p. 2). DHS countered the Award is consistent with law and public policy and the Award was not the result of intimidation. (See Reply at p. 5).

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:

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[1] See *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975), which holds that is a constitutional violation to deprive unions from providing assistance to members who are being subjected to disciplinary interviews.

[2] The *Douglas* case sets forth factors to be considered in mitigating discipline.

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, FOP argues the Arbitrator's Award is contrary to law and public policy. (See Request at p. 2). Specifically, FOP argues the Arbitrator erred in finding the seating arrangements in the van and the level of observation used by the Grievants justified the discipline. (See Request at pgs. 2-5). In support of this argument, FOP claims the Arbitrator's findings regarding the seating arrangements were contradictory to Agency guidance. FOP points to a memorandum which instructs corrections officers to seat youths in the rear of the vehicle and requires officers to sit between the youths and the doors of the vehicle. (See Request at p. 3). In addition, FOP argues the Arbitrator ignored the principle of progressive discipline as set forth in the *Douglas* case.

DHS counters that FOP has failed to present any specific law or public policy which would mandate a different result. (Reply at pgs. 3-5).

"[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 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). Furthermore, 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). Also see, *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). As the Court of Appeals 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, FOP asserts the Award is on its face contrary to law and public policy. However, FOP does not specify any "applicable law" and "definite public policy" that mandates the Arbitrator arrive at a different result. Instead, the FOP alleges that the Arbitrator's decision was contrary to law because he found the Grievants' conduct was negligent. Also, FOP has not indicated how the Arbitrator's rejection of its argument concerning the *Douglas* case

rendered his Award contrary to law and public policy. As the Arbitrator stated in his Award, there is no language in the CBA or the DPM that *mandates* application of the *Douglas* factors or progressive discipline. FOP's arguments are a repetition of the arguments considered and rejected by the Arbitrator. Therefore, we believe that FOP's ground for review only involves a disagreement with the Arbitrator's findings and conclusions. FOP merely requests that we adopt its interpretation of the evidence presented.

We have held a disagreement with the Arbitrator's interpretation does not render an award contrary to law. See, *DCS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 49 DCR 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. FOP's disagreement with the Arbitrator's findings and conclusions is not a grounds for reversing the Arbitrator's Award. See *University of the District of Columbia and UDC Faculty Association*, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991). We also find FOP's disagreement with the Arbitrator's findings and evaluation of the evidence does not present a statutory basis for review. See *DCS and Washington Teachers' Union Local 6, American Federation of Teachers*, 43 DCR 1203, Slip Op. No. 349, PERB Case No. 93-A-01 (1996). In conclusion, FOP has 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, FOP has failed to do so.

Lastly, the Union contends the Award must be reversed because it was procured through unlawful means. (See Request at p. 6). It alleges DHS placed undue pressure on the Arbitrator by filing a lawsuit in the District of Columbia Superior Court in an attempt to prevent the Arbitrator from hearing cases.[3]

The District of Columbia Code, D.C. Code § 1-605.02(6), provides that the Board may consider an appeal from an arbitration award when it finds that the award was procured by fraud, collusion, or similar and unlawful means. *University of the District of Columbia and the University of the District of Columbia Faculty Association/NEA*, 38 DCR 1580, Slip Op. No. 262, PERB Case No. 90-A-08 (1991).

Here, FOP must have been aware of the lawsuit filed against the Arbitrator at the time it voluntarily selected him for arbitration of the grievances. Consequently, it cannot now object to his having heard the arbitration. In addition, despite the lawsuit, the Arbitrator determined he did have authority to hear this case, and found in favor of FOP by hearing the arbitration. Moreover, the D.C. Superior Court granted FOP's Motion to Dismiss the lawsuit against the Arbitrator on October 2, 2003; fifteen days prior to the issuance of the Award on October 27, 2003. Thus, no

[3] See *District of Columbia v. Barry Shapiro*, Civ. No. 030004579

such pressure could have existed by the time he issued his Award. Lastly, FOP alleged that DHS' lawsuit had no basis in law, but it has not alleged the lawsuit was unlawful. The Board finds that FOP provided no basis for finding that the DHS' lawsuit resulted in an Award procured by unlawful means similar to fraud or collusion. Therefore, the Board concludes that FOP failed to present a statutory basis for review and cannot grant the Request on this ground.

In view of the above, we find DHS has not met the requirements for reversing Arbitrator Shapiro's Award. In addition, we find the Arbitrator's conclusions are supported by the record, are based on a thorough analysis, and cannot be said to be clearly erroneous, contrary to law and public policy, or the Award was procured by fraud, collusion or other similar and unlawful means. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Fraternal Order of Police Department of Human Services Labor Committee'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
Washington, D.C.

October 11, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 04-A-02 was transmitted via Fax and U.S. Mail to the following parties on this the 11th day of October 2011.

Reuben Guttman, Esq.
Suggs, Kelly & Middleton
1920 L Street, N.W.
Suite 400
Washington, D.C. 20036

FAX & U.S. MAIL

James T. Langford, Esq.
Attorney Advisor
Office of Labor Relations and
Collective Bargaining
441 4th Street, N.W.
820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copies:

Natasha Campbell, Esq.
D.C. Office of Labor Relations and
Collective Bargaining
441 4th Street, N.W.
Suite 820N
Washington, D.C. 20001

FAX & U.S. MAIL

Barry E. Shaprio, Arbitrator
8404 Queen Annes Drive
Silver Spring, Maryland 20910

MAIL

Sheryl V. Harrington