

**Notice:** This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

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| In the Matter of:   | ) |                       |
|   | ) |                       |
| District of Columbia Water and Sewer Authority,   | ) |                       |
|   | ) |                       |
| Petitioner,   | ) |                       |
|   | ) | PERB Case No. 04-A-11 |
| and   | ) |                       |
|   | ) | Opinion No. 907       |
|   | ) |                       |
| American Federation of Government Employees,<br>Local 872 (on behalf of Christopher Hawthorne), | ) |                       |
|   | ) |                       |
| Respondent.   | ) |                       |
|   | ) |                       |
|   | ) |                       |

**DECISION AND ORDER**

**I. Statement of the Case**

The District of Columbia Water and Sewer Authority ("WASA") filed an Arbitration Review Request ("Request") in the above captioned matter. WASA seeks review of an arbitration award ("Award") which rescinded the termination of Christopher Hawthorne ("Grievant"). The American Federation of Government Employees, Local 872 ("Union" or "Respondent") opposes the Request.

The issue before the Board is whether "the arbitrator exceeded his 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**

On March 21, 2003, a verbal altercation occurred between the Grievant and Charles Kiely, Director of Customer Services for WASA. The altercation was due to a

disagreement between the Grievant and Mr. Kiely as to whether it was appropriate for the Grievant, as President of the Union, to be present as a union representative during a meeting. (See Award at p. 5). Witnesses of the incident submitted written statements to Martin Wallace, the Grievant's Supervisor. On April 18, 2003, Mr. Wallace sent a memo to Mr. Cook, the Labor Relations Manager, citing the Grievant for "insubordination for unwarranted refusal to comply with a reasonable work order or defiance of authority." (Award at p. 10). The memo also recommended the Grievant's removal from service. On May 16, 2003, Mr. Wallace prepared a "Notice of Proposed Disciplinary Action" which was addressed to the Grievant at his work place. On May 21, 2003, Mr. Wallace mailed the Notice to his home address via certified mail. (See Award at p. 11). On May 30, 2003, the Grievant received the Notice and requested a "Neutral Party review of the disciplinary proposal." (Award at p. 11). On June 12, 2003, a meeting was held with Warren McHenry, the Maintenance Systems Administration Manager. During the meeting, in addition to his testimony regarding the incident, the Grievant raised the issue of the timeliness of the proposed disciplinary action. (See Award at p.11). On June 19, 2003, Mr. McHenry issued his report and recommendations sustaining the charges and penalty against the Grievant. (See Award at p. 11). The recommendation was forwarded to Kofi Boateng, the Director of Water and Sewer Services. On June 20, 2003, Mr. Boateng issued a determination that WASA had proven the Grievant's insubordination and that he should be discharged. (See Award at p. 12). A grievance was filed and the matter could not be resolved. Consequently, the Union invoked arbitration.

The issue before the Arbitrator was "whether or not [WASA] had just cause to propose the discharge of Grievant Christopher Hawthorne. If not, what shall the remedy be?" (Award at. p. 1).

At arbitration, the Union argued that WASA had "failed to undertake an investigation and impose discipline at the conclusion of the investigation in an expeditious manner as required by Article 57, Section D of the Agreement. In addition, [the Union contended that WASA] failed to comply with the 45-workday provision of Article 57 for commencing the disciplinary action." (Award at p. 16).<sup>1</sup> Moreover, the Union asserted that the Grievant's actions did not constitute insubordination. (See Award at p. 18). In support of this assertion, the Union claims that: (1) the Grievant was engaged in a protected activity on March 21; and (2) WASA failed to consider the

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<sup>1</sup> The Union refers to Article 57, Section D of the Collective Bargaining Agreement ("CBA"), which states:

After discovery of the incident, an investigation shall be conducted in a timely manner, and discipline shall be imposed upon the conclusion of the investigation or gathering of any required documents.

No corrective or adverse action shall be commenced more than 45 workdays (not including Saturdays, Sundays or legal holidays) after the date the Authority knew or should have known of the act or occurrence allegedly constituting cause.

*Douglas* factors.<sup>2</sup> As a remedy, the Union requested that the discharge action be reversed and that WASA be charged with arbitration costs and attorney fees. The Union also requested that the Arbitrator address arbitration scheduling procedures to ensure that "Management and the Union agree jointly the previous month to cases to be heard the following month in order in which arbitration is invoked." (Award at p. 20).

WASA countered that the disciplinary action was commenced in a timely manner because it mailed the Notice of Proposed Disciplinary Action on May 21, 2003 - which was 43 days after the incident. WASA also alleged that Mr. Wallace had attempted to personally deliver the Notice to the Grievant, but that the Grievant had evaded service. (See Award at p. 13). In addition, WASA contended that a technical violation of the CBA does not "negate its right to discipline the Grievant for misconduct." (Award at p. 13). WASA also asserted that the Grievant's previous insubordinate conduct was a factor in its decision to discharge the Grievant. Lastly, WASA claimed that the Grievant was not involved in any protected activity because he had not requested permission from his manager to attend the meeting on March 21, 2003.

In her Award, the Arbitrator initially addressed whether the discharge proposal should be overturned as untimely under the terms of the CBA. Article 57, Section D of the CBA provides in part that:

After discovery of the incident, the Authority is required to undertake an investigation in a timely manner, and discipline shall be imposed upon the conclusion of any investigation or the gathering of any documents.

Examining this language, the Arbitrator determined that "after reviewing all of the evidence and testimony presented by the parties in this case, that [WASA] failed to comply with the requirements of Article 57, Section D by conducting an adequate and timely investigation into the events of March 21." (Award at p. 21). The Arbitrator found that the investigation of the incident was "cursory at best, and insufficient to meet the due process requirements of the Agreement." (Award at p. 21). Specifically, the Arbitrator noted that Management gave no compelling reason for the delay between the conclusion of the investigation, the issuance of the recommendation and the issuance of the proposal (April 3 to May 16). The Arbitrator also found that during this time period Mr. Wallace did not interview any of the witnesses to the March 21 incident. The Arbitrator concluded that WASA's untimely action did not comport with the requirements of Article 57, Section D for a timely investigation and imposition of discipline at the conclusion of the investigation or gathering of any required documents. (See Award at p. 22).

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<sup>2</sup>The *Douglas v. Veterans Administration*, 5 MSBP 312 (1981) case sets forth factors to be considered in mitigating discipline.

The Arbitrator also concluded that WASA had "failed to comply with the requirements of the second paragraph of Article 57, Section D, relating to the requirement that disciplinary action be commenced within 45 workdays after [WASA] knew or should have known of the occurrence." (Award at p. 23). Noting that the Grievant did not receive notice of the disciplinary proposal until May 30, the Arbitrator found 50 days had passed since the incident and two weeks after the notice had been prepared. In addition, the Arbitrator found that WASA's delivery of the notice by certified mail was insufficient to meet the requirements of the CBA. Based on the WASA's failure to meet the requirements of Article 57, Section D, the Arbitrator rescinded WASA's disciplinary action and sustained the grievance. (See Award at p. 24).

WASA takes issue with the Award. Specifically, WASA asserts that the Arbitrator "exceeded the jurisdiction granted to her under the [CBA] by expanding [WASA's] obligations under the contract and that the Award by its terms is inconsistent with law and public policy because it tramples management's right to discipline its employees." (Request at p. 2). The Union opposes the Request.

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. 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."

D.C. Code § 1-605.02(6) (2001 ed.).

In the present case, WASA argues that the Arbitrator exceeded her jurisdiction because the Arbitrator's Award did not "derive its essence from the contract." (Request at p. 3).<sup>4</sup> In addition, it argues that an "award does not derive its essence from the contract where it 'imposes additional requirements that are not expressly provided in the agreement.'" (Request at p. 3); (Citing *WASA and AFGE, Local 631*, 49 DCR 11123, Slip Op. No. 687, PERB Case No. 02-A-02 (2002)). Specifically, WASA claims that the Arbitrator expanded the scope of WASA's duty to investigate prior to issuing discipline. (See Request at p. 3). In the present case, Article 57, Section D, of the parties' CBA requires WASA to investigate an incident in a timely manner. However, WASA argues that the CBA does not require a "specific manner of investigation . . . [nor] does it require the type of extensive investigation mandated by the Arbitrator's Award." (Request at p. 4).

We have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for [this Board] or a reviewing court...to substitute their view for the proper interpretation of the terms used in the [CBA]." *District of Columbia General Hospital v.*

*Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract." *Misco, Inc.*, 484 U.S. at 38. Also, 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 addition, this Board has held that an arbitrator's authority is derived from "the parties' agreement and any applicable statutory or regulatory provision." *D.C. Department of Public Works and AFSCME, Local 2091*, 35 DCR 8186, Slip Op. No. 194 at p. 2, PERB Case No. 87-A-08 (1988). Furthermore, "[o]ne of the tests that the Board has used when determining whether 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.'" *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee*, 49 DCR 810, Slip Op. No. 669 at p. 4, PERB Case No. 01-A-02 (2002) (citing *D.C. Public Schools v. AFSCME, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at 5, PERB Case No. 86-A-05 (1987)). See also, *Dobbs, Inc. v. Local No. 1614, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6<sup>th</sup> Cir. 1987). The Board has adopted what is meant by "deriving its essence from the terms and conditions of the collective bargaining agreement" from the U.S. Court of Appeals for the Sixth Circuit in *Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135*, where the Court explained the standard by stating the following:

An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general

considerations of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765 (6<sup>th</sup> Cir. 1986).<sup>5</sup>

Consistent with the *Cement Division* case, the Board finds that the Arbitrator's Award: (1) does not conflict with any of the terms of the CBA; (2) does not impose any additional requirements upon WASA; (3) has rational support from the terms of the CBA; and (4) is based on the precise terms of the CBA. In light of the above, we find that WASA's argument represents a disagreement with the Arbitrator's interpretation of Article 57, Section D of the CBA, and does not provide a sufficient basis for concluding that the Arbitrator exceeded her jurisdiction. Moreover, we find that WASA merely disagrees with the Arbitrator's factual finding that WASA failed to conduct an adequate investigation. As stated above, the parties are bound by the Arbitrator's evidentiary findings. Consequently, the Board finds that WASA has not established a statutory basis for review.

WASA also contends that the Award is on its face contrary to law and public policy. Specifically, WASA argues that the "expansion of [WASA's] obligations and the limitations imposed upon [WASA] with respect to its disciplinary process violates the Management Rights Clause of the D.C. Code . . . § 1-617.08(a)[(2)] [which] gives [WASA] the right '[t]o hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take any other disciplinary action against employees for cause.'" (Request at p. 5). Specifically, WASA claims that the Award imposes a "higher burden" on WASA to investigate disciplinary incidents. (See Request at p. 5). In addition, WASA asserts that the Arbitrator's ruling on the propriety of mailing disciplinary notices and the timeliness of the Grievant's discipline also undermines WASA's right to discipline. (See Request at pgs. 5-6).

"[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 interpretation of the contract. [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). Furthermore, to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the arbitrator arrive at a different result. *AFGE, Local 631 and Dept. Of Public Works*, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). Also, a petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law or legal precedent. See *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 43 (1987). Lastly, the petitioning party has the burden to specify applicable law and definite public policy that mandates that the Arbitrator reach a different result. *MPD v. FOP/MPD*

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<sup>5</sup>*MPD and FOP/MPD Labor Committee*, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001).

*Labor Committee*, 47 DCR 717, Slip Op. No. 633, 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).

We find that WASA has not cited any specific law or public policy that was violated by the Arbitrator's Award. WASA 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, WASA failed to do so. Instead, WASA merely disagrees with the Arbitrator's interpretation of the CBA. We have held that a disagreement with the Arbitrator's interpretation of the agreement does not render an award contrary to law. *DCHA and AFGE, Local 2725, AFL-CIO*, 46 DCR 10006, Slip Op. No. 598, PERB Case No. 99-A-06 (1998). Consequently, WASA has not presented a statutory basis for review. As a result, the Board cannot reverse the Award on this ground.

In view of the above, we find that WASA has not met the requirements for reversing Arbitrator Spilker's Award. In addition, we find that 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 or public policy, or in excess of her authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

- (1) The District of Columbia Water and Sewer Authority'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.

**June 27, 2007**

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 04-A-11 was transmitted via Fax and U.S. Mail to the following parties on this the 27<sup>th</sup> day of June, 2007.

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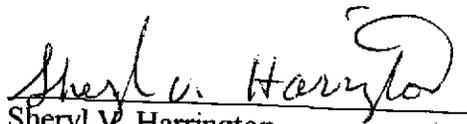
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