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

In the Matter of:	)	
	)	
American Federation of Government Employees, Local 872	)	
	)	
Petitioner,	)	PERB Case No. 16-A-10
	)	
and	)	Opinion No. 1588
	)	
District of Columbia	)	
Water and Sewer Authority,	)	
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

On May 24, 2016, Petitioner, American Federation of Government Employees, Local 872, (“Petitioner” or “Union”) filed the above-captioned Arbitration Review Request (“Request”), pursuant to D.C. Official Code §1-605.2(6)<sup>1</sup>, seeking review of an arbitration award (“Award”) issued on May 3, 2016. The Award upheld the Agency’s termination of Leroy Burton (“Burton”) from his employment with the D.C. Water and Sewer Authority (“WASA”). Petitioner seeks review of the Award asserting t the arbitrator exceeded his authority and the Award is contrary to law and public policy. For the reasons stated below, the request for review is denied.

**I. Statement of the Case**

The Arbitrator found the following:

Burton and Daryl Marsh (“Marsh”) had been employed with the Agency for approximately 30 years. They each held the title of Water Service Worker and worked together on the same crew. During each workday they received work orders from their foreman to complete assignments.<sup>2</sup> Typically, they received two work orders per day and took an hour lunch break after completing the first work order.<sup>3</sup>

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<sup>1</sup> D.C. Official Code § 1-605.02(6) states in part, “the Board shall have the power to do the following: Consider appeals from arbitration awards pursuant to a grievance procedure.”

<sup>2</sup> Award at 3

<sup>3</sup> *Id.*

On September 4, 2015 the two men received only one work order because they were assigned to respond to any emergencies that might arise during the day. After completing their single work order, Burton decided the crew should go to the home of a crew member's mother because she was having plumbing issues. This was not assigned work.<sup>4</sup> While at the home, Roy Marshall ("Marshall"), a long-term Agency employee assigned to the Distribution Control Branch, called Burton to arrange pick up of a box of copper pipe. Marshall arrived at the Johnson home in his personal vehicle, and was not dressed for work. Burton directed Marsh to give the box of copper pipe to Marshall. The copper pipe given to Marshall was worth more than \$200.<sup>5</sup> Agency employee Chris Coit observed these events from a nearby restaurant and reported the incident to management officials Margaret Franzen and Jason Hughes. Mr. Hughes notified the Security Director, Stephen Caldwell, who then assigned the case to Senior Investigator, Eric Gainey.<sup>6</sup>

Mr. Gainey interviewed Burton, Marshall, and Marsh. Marshall admitted to receiving the box with copper and putting it into the trunk of his car. Marshall further advised Mr. Gainey he was doing some side work for Burton's family, which he subsequently performed.<sup>7</sup>

On November 10, 2015, the Agency issued a notice of proposed disciplinary action to Burton and Marsh. The notices charged Burton and Marsh with theft in connection with their actions which led to Marshall receiving the Agency's copper pipe.<sup>8</sup> The Union appealed the proposed notices of termination to the Director of Wastewater Treatment, but the decisions were upheld.<sup>9</sup> The Union filed grievances and requested expedited arbitration on behalf of Burton and Marsh.

An arbitration hearing was held on February 9, 2016, and an Award was issued on May 3, 2016. In the Award, Arbitrator Kaufmann noted that because this was a termination action, the Agency carried the burden of establishing by a preponderance of the evidence that discipline should be imposed and that the penalty imposed was appropriate.<sup>10</sup> The arbitrator analyzed two distinct issues.<sup>11</sup>

First, the arbitrator decided whether or not the Agency established a basis for disciplining Burton. Based on witness testimony, the arbitrator found by a preponderance of the evidence that the Agency had met its burden by showing Burton was directly involved with the decision that led to stealing the copper.<sup>12</sup> The arbitrator in large part found the testimony of Burton to be evasive and inconsistent with the events of September 4, 2015. He stated in the Award:

Burton's responses regarding the copper tubing issue were even less believable. He stated he assumed Mr. Marshall was requesting

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 7.

<sup>11</sup> Arbitrator Kaufmann analyzed the termination of both Marsh and Burton. The Union has not requested that the Arbitrator's decision regarding Marsh be reviewed; therefore, the issue pertaining to him has been omitted.

<sup>12</sup> Award at 8.

the tubing to complete an Authority work assignment but he never asked Marshall this nor did Marshall tell him that. He also knew that Marshall worked in inspections and his responsibilities did not involve the use of copper pipe.<sup>13</sup>

The arbitrator found that Burton had a responsibility to protect DC Water property, and his awareness of Marshall's inspection duties should have caused Burton to at least inquire as to the specific purpose for which Marshall needed the copper.<sup>14</sup> The arbitrator further found the version of events as Marshall had explained them to be more consistent with what actually happened.<sup>15</sup> Arbitrator Kaufmann found that Burton's demeanor and his unforthcoming behavior severely undermined his claims and ended up substantiating the less direct evidence from Marshall's claims.<sup>16</sup> Therefore, Arbitrator Kaufmann found the Agency had met its burden of establishing a basis for disciplining Burton.

Next, the arbitrator analyzed whether or not Burton's penalty was appropriate. Based on the table of penalties encompassed within the parties' collective bargaining agreement, he found that the record supported the Agency's decision to terminate Burton.<sup>17</sup> Arbitrator Kaufmann noted the penalty table provided that employees who engage in theft of items of greater than twenty-five dollars in value could receive a penalty range up to removal.<sup>18</sup> He concluded by giving his reasoning for finding that the removal was appropriate by stating:

In this regard, Burton's record of not receiving previous discipline could be viewed as a mitigating factor in favoring a lesser penalty. However, his involvement in the theft and his overall deceitful behavior, in my view, negatively impacts any trust the Authority would have if he was retained as an employee. Therefore, the record supports DC Water's decision to terminate Burton.<sup>19</sup>

## II. Analysis

D.C. Official Code § 1-605.02(6) authorizes the Board to modify or set aside an arbitration award in only three limited circumstances: (1) if an 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.<sup>20</sup> In recognizing the policy favoring arbitration, PERB has held that the standard to justify vacating an arbitration award is extremely high.<sup>21</sup> Specifically, the "petitioning party has the burden to specify

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<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See PERB Rule 538.3.

<sup>21</sup> See *University of the District of Columbia v. American Federation of State, County, and Municipal Employees, Council 20, Local 2087*, 59 D.C. Reg. 15167, Slip Op No. 1333, PERB Case No. 12-A-01.

applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.”<sup>22</sup> Furthermore, the Board will not substitute its own interpretation of the collective bargaining agreement for that of the parties or of the duly designated arbitrator.<sup>23</sup>

A. The Arbitrator Did Not Exceed His Jurisdiction

The first issue before the Board is whether the Arbitrator exceeded his jurisdiction when he found the Agency had established a basis for disciplining Burton. In determining whether an Arbitrator exceeded his jurisdiction the Board evaluates “whether the award draws its essence from the collective bargaining agreement.”<sup>24</sup> Petitioner begins by contending that the Arbitrator exceeded his authority by resolving an issue not presented for arbitration.<sup>25</sup> Petitioner states:

[t]he Arbitrator exceeded his jurisdiction by resolving an issue not submitted to arbitration. The issue at hearing was whether the Agency had just cause to discipline the grievants for the charges that were alleged against them. The sole charge alleged against the grievants was theft. As it was impossible, based on the Award’s reasoning, to find that Burton engaged in theft, the Award is contrary to law and exceeds the jurisdiction granted to the Arbitrator.<sup>26</sup>

The Board finds that the argument presented by Petitioner is flawed in that the Arbitrator stayed within his authority by addressing the issue presented to him, and drawing his conclusion based on the facts as they were presented. In reviewing the transcript from the hearing, Petitioner presented the issues stating, “So issue A is was the Grievant, Leroy Burton, removed for just cause as required by the parties agreement, if not, what shall be the remedy.”<sup>27</sup> This issue was resolved by the Arbitrator in favor of the Agency, finding they had established that Burton was guilty of theft. It is well established that once parties have submitted a grievance 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 on which the decision is based.”<sup>28</sup> The parties’ collective bargaining agreement states, “the award of the Arbitrator shall be final and binding.”<sup>29</sup> This provision agreed upon by the parties makes clear the risk and benefits associated with submitting a case to arbitration. PERB will not substitute its own understanding of the CBA for that of the Arbitrator. Petitioner argues against the “reasoning” the Arbitrator used to find

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<sup>22</sup> *D.C. Metro. Police Dep’t v. FOP/Metro Police Dept. Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000).

<sup>23</sup> *D.C. Dep’t 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).

<sup>24</sup> *MPD v. FOP/MPD Labor Comm. (on Behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (quoting *D.C. Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip. Op. No. 156 PERB Case No. 86-A-06 (1987)).

<sup>25</sup> Request at 6.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> Exhibit C titled, “Arbitration Proceeding” at 9.

<sup>28</sup> *D.C. Metro. Police Dep’t v. FOP/Metro Police Dept. Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000).

<sup>29</sup> Exhibit B titled, “Collective Bargaining Agreement” at 123.

theft. This argument amounts to nothing more than a mere disagreement with the Arbitrator's decision.<sup>30</sup> PERB has consistently held that a mere disagreement with the arbitrator's award does not constitute a statutory basis for setting aside the Award.<sup>31</sup>

Based on the foregoing reasons, the Board finds the Arbitrator did not exceed his jurisdiction when he found the Agency had a basis for disciplining Burton.

The next issue before the Board is whether the Arbitrator exceeded his jurisdiction by failing to assess the weight to be given to hearsay witness statements. PERB has previously held that "disputes over the weight and the significance to be afforded the evidence is within the domain of the arbitrator and does not state a statutory basis for review."<sup>32</sup> Arbitration hearings are not conducted under the same rules of evidence as courts of law. Rather, Arbitrators are bound by the agreed upon CBA provisions, or law mandating a standard for an arbitration proceeding.<sup>33</sup>

Petitioner cites no law or CBA provision that restricts the Arbitrator's authority to render a decision based on the weight of evidence as he sees it. Petitioner simply asserts the Arbitrator exceeded his jurisdiction by failing to sufficiently assess the weight of hearsay evidence.<sup>34</sup> Assuming, arguendo, the Board was to entertain the argument presented by Petitioner, the Award issued by Arbitrator Kaufmann makes clear the weight given to the written statements by Roy Marshall versus the weight given to the direct testimony of Burton. Arbitrator Kaufmann states, "Burton's demeanor during the testimony and his unforthcoming behavior severely undermined his claims and ended up substantiating the less direct evidence regarding Marshall's claims."<sup>35</sup> The Board finds Petitioner is again merely in disagreement with the determination made by the Arbitrator. This difference of opinion does not constitute a statutory basis for setting aside the Arbitrator's award.

The Board finds that the Arbitrator did not exceed his jurisdiction in allowing hearsay statements in as evidence.

**B. The Award is Not Contrary to Law and Public Policy**

The final issue before the Board is whether "the Award is contrary to law and public policy because the definition of "theft" could not be, and was not, established in the Arbitrator's Award."<sup>36</sup> To set aside an Arbitrator's Award on this basis, the Board has held the petitioner must show that the Award compels the violation of an explicit, well-defined public policy

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<sup>30</sup> Opposition at 8.

<sup>31</sup> See *FEMS and IAF, Local 36, supra*, Slip Op. No. 895 at p. 5, PERB Case No. 06-A-20.

<sup>32</sup> *DCHA v. AFGE, Local 2725 (on Behalf of Grievant Kevin Jhingory)*, 46 D.C. Reg. 10006, Slip Op. No. 598 at p. 3, PERB Case No. 99-A-06.

<sup>33</sup> See *MPD v. FOP/MPD Labor Comm.*, 46 D.C. Reg. 7601, Slip Op. No. 378, PERB Case No. 93-A-04 (where the Board found that the Arbitrator's use of beyond-a-reasonable-doubt standard rather than the lower preponderance-of-the-evidence standard was within the Arbitrator's domain where the agency cited no law or CBA provision mandating standard of proof for an arbitration proceeding).

<sup>34</sup> Request at 9.

<sup>35</sup> Award at 8.

<sup>36</sup> Request at 7.

grounded in law or legal precedent.<sup>37</sup> Further, the violation must be so significant that the law or public policy mandates that the arbitrator arrive at a different result.<sup>38</sup>

Petitioner begins by citing to FLRA case law, asserting that under the “contrary to law” exception, PERB is required to conduct a *de novo* review for legal sufficiency.<sup>39</sup> The CMPA and PERB precedent contain no such requirement. Petitioner argues the definition of theft was not established by the Arbitrator resulting in an award that was contrary to law.<sup>40</sup> Petitioner cites the common law and D.C. statutory definitions of “theft”, and argues that the Arbitrator failed to make findings of fact that would allow a conclusion that Burton engaged in theft.<sup>41</sup> This argument does not satisfy the standard needed to vacate an arbitrator’s decision based on it being contrary to law and public policy. In our view, it appears that the Petitioner merely disagrees with the Arbitrator’s decision. As stated above, a mere disagreement with the arbitrator’s award does not constitute a statutory basis ground for setting aside the Award.<sup>42</sup>

By submitting a matter to arbitration, “the parties agree to be bound by the Arbitrator’s interpretation of the agreement, related rules and regulations, as well as the evidentiary findings on which the decision is based.”<sup>43</sup>

Based on the record, the Board finds that the Petitioner merely disagrees with the Arbitrator’s decision, and does not present a statutory basis upon which PERB can set aside the Award.

### III. Conclusion

Based on the foregoing, Petitioner’s Arbitration Review Request is denied and the matter is dismissed in its entirety with prejudice.

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<sup>37</sup> See *D.C. Office of the Attorney General v. American Federation of State, County, and Municipal Employees District Council 20*, 59 DC Reg. 15167 (2012), Slip Op. No. 1459, PERB Case No. 14-A-02.

<sup>38</sup> *Id.*

<sup>39</sup> Request at 6.

<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Id.*

<sup>42</sup> See *FEMS and IAF, Local 36, supra*, Slip Op. No. 895 at p. 5, PERB Case No. 06-A-20.

<sup>43</sup> *D.C. Metro. Police Dep’t v. FOP/Metro Police Dept. Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The arbitration review request is hereby 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, and Members Ann Hoffman, Barbara Somson, and Douglas Warshof. Member Yvonne Dixon was not present.

July 27, 2016

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 16-A-10, Op. No. 1588 was sent by File and ServeXpress to the following parties on this the 3<sup>rd</sup> day of August, 2016.

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PERB