Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Public Schools	
Petitioner	PERB Case No. 24-A-12
	Opinion No. 1896
v.	
Washington Teachers' Union, Local 6	
Respondent	

DECISION AND ORDER

I. Statement of the Case

On May 16, 2024, District of Columbia Public Schools (DCPS) filed an arbitration review request (Request), seeking review of an arbitration award (Award) dated April 25, 2024, pursuant to the Comprehensive Merit Personnel Act (CMPA).[1] The Award ordered DCPS to reinstate a Speech-Language Pathologist (Grievant) who had resigned to avoid termination.[2] The Award further directed DCPS to fully restore the Grievant's seniority, grant her backpay, and eliminate all record of her termination and resignation.[3] The Arbitrator retained jurisdiction to address the additional remedies which the Washington Teachers' Union, Local 6 (WTU) requested on the Grievant's behalf, including a tax gross-up and attorney fees.[4]

DCPS requests that the Board reverse the Award on the grounds that the Arbitrator exceeded her authority, and the Award is contrary to law and public policy.[5] In the alternative, DCPS requests that the Board remand this matter to the Arbitrator.[6] WTU filed an Opposition to DCPS' Request, which included a request for reasonable costs and attorney fees incurred during the litigation of this appeal.[7]

[1] D.C. Official Code § 1-605.02(6).
[2] Award at 33.
[3] Award at 33-34.
[4] Award at 34.
[5] Request at 7.
[6] Request at 7.
[7] Opposition at 16.

Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Board finds that the Arbitrator did not exceed her authority, and the Award is not contrary to law or public policy. Therefore, the Request is denied in its entirety. Regarding WTU's requests for relief, the Board finds that an award of costs is warranted, while an award of attorney fees is not.

II. Background

The Arbitrator made the following factual findings. The Grievant worked as a Speech-Language Pathologist for the DCPS special education program from August of 1999 until July of 2018 when she resigned to avoid termination.[8] During the 2017-2018 school year, the Grievant worked at two elementary schools.[9] The Grievant provided speech and language therapy services to approximately seventy (70) students, approximately twenty (20) more than the recommended number for an individual in the Grievant's position.[10]

When a student is referred to DCPS for special education services, DCPS must follow a strict assessment timeline to determine whether that student is qualified for the program.[11] Each student's file is assigned to a Case Manager, who is responsible for ensuring that all intake deadlines are met.[12] Within thirty (30) days of referral, DCPS is required to make reasonable efforts to obtain parental consent to conduct an assessment of a student.[13] Consent is obtained by Case Managers, working in conjunction with a team of Related Service Provider (Providers), such as Speech-Language Pathologists.[14] After consent is obtained, the assigned Case Manager has forty-eight (48) hours to record that consent in the Special Education Data System (SEDS),[15] order an assessment, and assign the student to their Provider(s).[16]

Starting from the day that parental consent is obtained, SEDS sets an automatic forty-five (45) day deadline for the Provider to conduct and submit their assessment.[17] A Provider does not begin receiving alerts regarding the due date of an assessment until it is assigned to them in SEDS.[18] For a Speech-Language Pathologist, like the Grievant, the assessment process consists of meeting with the student's parents and teacher; observing the student at school (in and out of the classroom); conducting tests; reviewing documentation; and submitting a comprehensive

[8] Award at 6, 17.
[9] Award at 6.
[10] Award at 6. The Award states that the recommended caseload for Speech-Language Pathologists is established by the American Speech-Language-Hearing Association (ASHA).
[11] Award at 7.
[12] Award at 7.
[13] Award at 7 (citing D.C. Official Code Sec. 38-2561.02(a)(2)(A); 38-256.01(6A)).
[14] Award at 7.
[15] Award at 7-8. SEDS is maintained by the District of Columbia Office of the State Superintendent of Education (OSSE), which is the agency responsible for ensuring that DCPS complies with the Individuals with Disability Education Act (IDEA), 20 U.S.C. Sec. 1400 *et seq*.
[16] Award at 7-8.
[17] Award at 7-8.
[18] Award at 12.

assessment report in SEDS.[19] Assessments must be submitted with individualized fax coversheets to allow the Provider to fax the assessment to the correct student record within SEDS.[20] After all Providers have submitted their assessments for a specific student, an eligibility meeting is held with that student's Providers, Case Manager, and parents, to determine whether the student should be placed in special education and provided with an Individualized Education Plan (IEP).[21]

Every three years, students in the special education program are reevaluated to determine whether they should remain in the program.[22] In the Fall of 2017, one of the students for whom the Grievant was a Provider was due for reevaluation.[23] The student's teacher was designated as his Case Manager.[24] At a November 27, 2017, meeting with the Case Manager and the Grievant, the student's parents provided written consent for their child to be assessed.[25] Under the established timeline, the Case Manager was required to use SEDS to record parental consent, order the assessment, and assign the Grievant as the student's Provider within the next forty-eight (48) hours.[26] However, unbeknownst to the Grievant, the assessment was not ordered, and the assignment did not occur.[27]

The Grievant initiated her assessment of the student in December of 2017, and completed it on January 10, 2018,[28] forty-three (43) days after parental consent was recorded.[29] During that time, she did not receive any of the usual alerts regarding her impending submission deadline.[30] When the Grievant attempted to submit her assessment on January 10, 2018, the Grievant discovered that she could not access the student's SEDS account because the Case Manager had not ordered the assessment or assigned it to the her.[31] Therefore, she was unable to create an individualized coversheet for the student.[32]

On January 11, 2018, the Grievant approached the school's Special Education Coordinator, who agreed to remind the Case Manager that she needed to assign the Grievant as the student's Provider.[33] Sometime after 4:00 p.m. on that day, the Case Manager ordered the assessment.[34]

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[19] Award at 8-9.
[20] Award at 8-9.
[21] Award at 9.
[22] Award at 14.
[23] Award at 14.
[24] Award at 7.
[25] Award at 17. The record is unclear as to whether the parental consent meeting occurred on November 27, 2017, or November 28, 2017. Award at 14. However, that one-day disparity does not impact the Board's determinations herein.
[26] Award at 7.
[27] Award at 15.
[28] Award at 15. The Grievant was on vacation for the holidays from December 17, 2017, through January 3, 2018. Award at 15. She continued to work on the assessment during that time. Award at 15.
[29] Award at 8.
[30] Award at 16.
[31] Award at 15.
[32] Award at 15-16.
[33] Award at 15-16.
[34] Award at 16.

However, the Case Manager did not assign the student to the Grievant until January 16, 2018.[35] The Grievant printed the individualized coversheet and submitted her assessment on January 16, 2018, forty-nine (49) days after parental consent was recorded in SEDS;[36] five (5) days after the assessment was ordered; and the same day that it was assigned to her.[37]

As a DCPS Provider, the Grievant received a yearly IMPACT[38] performance evaluation.[39] DCPS gives its Providers an annual Guidebook and annual, mandatory IMPACT evaluation training.[40] IMPACT evaluations include an Assessment Timeliness component, which constitutes 10% of an employee's overall score.[41] The Guidebook does not specify the number of days a Provider has to file their assessment.[42] The 2017-2018 IMPACT evaluation training materials regarding Assessment Timeliness state that assessments are due forty-five (45) days from the date Providers are assigned to a student in SEDS. The due date contained in the 2017-2018 IMPACT evaluation training materials is inconsistent with the SEDS automatic deadline, which requires Providers to submit their assessments no later than forty-five (45) days from the date that parental consent is obtained.[43]

In the Grievant's IMPACT evaluation for the 2017-2018 school year, the assessment which she submitted on January 16, 2018, was deemed untimely.[44] The untimeliness determination was due to that assessment being submitted more than forty-five (45) days after parental consent was obtained.[45] DCPS issued the Grievant an overall IMPACT rating of Minimally Effective[46] for the 2017-2018 school year based on the January 16th untimely assessment determination.[47] Combined with the Grievant's previous IMPACT rating of Developing, the Grievant's Minimally Effective Rating rendered her subject to termination.[48] On July 25, 2018, the Grievant received a notice of intent to terminate her (Notice of Termination), effective July 27, 2018.[49] Concerned that

[35] Award at 16.
[36] Award at 8.
[37] Award at 16.
[38] Award at 9. The IMPACT system is the also known as the DCPS Effectiveness Assessment System for School-Based Personnel. Award at 9.
[39] Award at 10.
[40] Award at 9-10.
[41] Award at 10. The other components of the IMPACT evaluation are Related Service Provider Standards (85%) and Individualized Education Program Timeliness (5%). Award at 10. The Grievant's scores in those two categories are not at issue. Award at 10.
[42] Award at 11.
[43] Award at 11.
[44] Award at 14. The other four assessments which the Grievant submitted for the 2017-2018 schoolyear were deemed timely. Award at 14.
[45] Award at 13.
[46] The possible overall IMPACT ratings are Highly Effective; Effective; Developing; Minimally Effective; and Ineffective. Award at 10.
[47] Award at 13, 17. The Record indicates that if the Grievant had timely submitted her assessment for the student in question, she would have received an IMPACT rating of Developing for the 2017-2018 school year and thus, not been subject to termination. Award at 13-14.
[48] Award at 2, 10, 13.
[49] Award at 2, 17.

termination would endanger her license to practice as a Speech-Language Pathologist, the Grievant resigned, effective July 26, 2018.[50]

On August 29, 2018, WTU filed a grievance on the Grievant's behalf, alleging that DCPS had violated the parties' collective bargaining agreement (CBA) by (1) improperly evaluating the Grievant's Assessment Timeliness for the 2017-2018 school year; and (2) terminating the Grievant without just cause.[51] WTU argued that the Grievant's resignation to avoid termination constituted constructive discharge.[52] DCPS denied the grievance on August 19, 2019, reasserting its justification for the rating.[53] On August 29, 2019, WTU notified DCPS that it was moving the grievance to Step 2.[54] On March 16, 2023, DCPS asserted that because the Grievant had resigned, as opposed to being terminated, the matter was non-arbitrable and non-grievable.[55] Therefore, DCPS declined to hold a Step 2 hearing.[56]

WTU demanded arbitration on May 3, 2023, alleging that DCPS had violated, misinterpreted, and misapplied the IMPACT process before wrongfully terminating the Grievant without just cause.[57] On May 24, 2023, DCPS objected to the timeliness of the grievance.[58] The parties selected an arbitrator, who found the instant matter arbitrable, and a hearing was held on November 15, 2023, and February 8, 2024.[59]

III. Arbitrator's Findings

The Arbitrator considered the following issues:

> (1) Whether DCPS violated the IMPACT Evaluation Process when it performed Grievant's School Year 2017-2018 IMPACT Evaluation,
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> (2) and, if so, what shall be the remedy?
>
> (3) [Whether the Grievant was] terminated and/or constructively discharged under the IMPACT Evaluation process without just cause?

[50] Award at 2.
[51] Award at 2.
[52] Award at 23.
[53] Award at 2.
[54] Award at 2.
[55] Award at 3.
[56] Award at 3. DCPS did not allege that WTU's demand for arbitration was untimely. Award at 3.
[57] Award at 3.
[58] Award at 24.
[59] Award at 3. Less than 48 hours before the November 15, 2023, hearing, DCPS filed a Motion to Stay arbitration with the D.C. Superior Court. Award at 4. The Arbitrator proceeded with the hearing, as she was not served with that Motion. Award at 4. On April 4, 2024, the court issued a judge's Order denying the Motion to Stay. Award at 4.

(4) If so, what shall be the remedy?[60]

The Arbitrator reviewed Articles 6, 7, and 15 of the CBA.[61] In relevant part, those provisions read as follows:

> **Article 6 Grievance and Arbitration**
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> 6.4.1.1.1 Any Teacher who wishes to raise a grievance must do so in writing within fourteen (14) school days of the date the Teacher or the WTU first learned of its cause. ….
>
> 6.5.3 If a Teacher or the WTU fails to file a grievance within the time limits specified in these procedures, and DCPS does not object within five (5) school days after receipt of the grievance, its right to object to the late filing is waived. ….
>
> **Article 7 Discipline Procedure**
>
> 7.4 Disciplinary actions shall be subject to the grievance and arbitration process.
>
> **Article 15 Teacher Evaluation**
>
> 15.2 Though not required to do so…, DCPS makes the following commitments:
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> 15.2.3 Copies of the evaluation process shall be made available to each teacher.
>
> 15.2.4 DCPS and the WTU recognize the importance of the evaluation process. To that end, DCPS shall develop and implement professional development for all Teachers on the evaluation process.
>
> 15.3 DCPS's compliance with the evaluation process, and not the evaluation judgment, shall be subject to the grievance and arbitration procedure.
>
> 15.4 The standard for separation under the evaluation process shall be "just cause," which shall be defined as adherence to the evaluation *process* only. (Emphasis in original.)
>
> 15.6 If a Teacher decides to challenge an alleged violation of the evaluation process, s/he has the option to … commence a grievance at Step 2. If the alleged violation occurs in connection with an evaluation that results in termination, the hearing at Step 2 shall receive priority….[62]

[60] Award at 4.
[61] Award at 5.
[62] Award at 5.

The Arbitrator established that DCPS had the burden of demonstrating that there was just cause, as required by the CBA, to constructively discharge the Grievant.[63]

At arbitration, DCPS contended that the instant case was not properly before the Arbitrator because the grievance was untimely filed.[64] DCPS argued that the Grievant received the Notice of Termination on July 25, 2018, and WTU filed the grievance on August 29, 2018, thereby failing to meet the fourteen (14) school day deadline established under CBA Article 6.4.1.1.1.[65] Additionally, DCPS argued that this matter was inappropriate for arbitration because performance evaluation judgments and resignations are not substantively arbitrable, pursuant to the CBA.[66]

Concerning the substantive issues, DCPS asserted that the Grievant's 2017-2018 IMPACT evaluation and her Minimally Effective rating were consistent with the established IMPACT evaluation process.[67] DCPS argued that pursuant to the Guidebook and the confirmation process,[68] the SEDS system grants Providers 45 days in which to conduct and submit their assessments, starting from the date that parental consent is obtained.[69] DCPS argued that the alternative deadline (45 days from assignment) was solely based on a typo found in one PowerPoint slide from the 2017-2018 IMPACT evaluation training.[70] DCPS noted that the Grievant did not attempt to correct any dates during the confirmation process.[71] DCPS also contended that the Grievant was aware of the Guidebook deadline, as evidenced by her initial attempt to submit the assessment on January 10, 2018, forty-three days after parental consent was recorded.[72]

Lastly, DCPS noted that pursuant to Article 15.4 of the CBA, the standard for separation under the evaluation process shall be "just cause," which is defined as adherence to the evaluation process only.[73] DCPS asserted that its decision to terminate the Grievant was consistent with DCPS' evaluation process, which establishes that Providers who have earned a Minimally Effective rating following a Developing rating shall be terminated.[74] Thus, DCPS contended that

[63] Award at 23.
[64] Award at 18.
[65] Award at 2.
[66] *See* Award at 18, 20.
[67] Award at 18.
[68] The confirmation process gives Providers an opportunity to challenge the data DCPS will use when calculating each Provider's yearly IMPACT evaluation rating. Award at 12. That data includes the dates assessments were submitted. Award at 12-13. Providers do not learn whether DCPS deemed their submissions timely until they receive their IMPACT evaluation ratings for the year. Award at 12.
[69] Award at 18.
[70] Award at 19.
[71] Award at 19.
[72] Award at 18-19. Additionally, DCPS argued that the Grievant's inability to create a personalized fax coversheet should not have delayed her submission of the assessment, as a miscellaneous coversheet would have sufficed. Award at 19.
[73] Award at 19.
[74] Award at 18-20.

there was just cause for terminating the Grievant[75] and requested that the Arbitrator deny the grievance in full.[76]

At arbitration, WTU contended that the grievance was timely filed because school was out for summer break between July 25, 2018, and August 29, 2018, meaning that the intervening time did not count as school days within the meaning of Article 6.4.1.1.1 of the CBA.[77] Additionally, WTU contended that while performance evaluation judgments are not arbitrable, Articles 15.3 and 15.4 of the CBA provide that DCPS' compliance with the IMPACT evaluation process is subject to grievance arbitration procedures.[78] WTU asserted that DCPS committed a process violation by failing to adhere to the IMPACT evaluation protocol, thereby terminating the Grievant without just cause.[79] WTU argued that because the Grievant's only options were resignation or termination without just cause, her resignation amounted to a constructive discharge and was subject to a just cause determination through arbitration.[80]

Additionally, WTU argued that pursuant to the Guidebook, the Assessment Timeliness portions of Providers' IMPACT evaluations must be completed in accordance with the timeframe and rules set by DCPS.[81] WTU asserted that DCPS' 2017-2018 IMPACT evaluation training established that assessments must be submitted within 45 days of assignment.[82] WTU argued that the Grievant did not challenge the dates provided to her during the confirmation process because the dates alone did not reveal any findings of untimeliness.[83] WTU contended that the Grievant's attempt to submit the assessment on January 10, 2024, demonstrated she believed assignment had occurred 43 days earlier.[84] WTU argued that because the Grievant submitted the disputed assessment on January 16, 2018 (the same day it was assigned to her), she was in compliance with the 2017-2018 IMPACT evaluation training.[85]

Concerning relief, WTU did not seek to have the Grievant's Minimally Effective evaluation judgment rescinded, amended, or purged from her file.[86] Rather, WTU sought to "eliminate any negative employment consequences flowing from DCPS's violation of the

[75] Award at 18-19.
[76] Award at 20.
[77] *See* Award at 20.
[78] Award at 20.
[79] Award at 20.
[80] Award at 22-23 (citing *Singletary v. Howard Univ.*, 939 F. 3d 287, 300 (D.C. Cir. 2019); *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 604 F.3d 490, 502 (7th Cir. 2010)).
[81] Award at 20-21.
[82] Award at 21.
[83] Award at 21.
[84] Award at 22.
[85] Award at 20-21. WTU also contended that pursuant to the Grievant's 2017-2018 IMPACT evaluation training, miscellaneous coversheets do not register in SEDS as speech and language reports, and Providers who use them to submit assessments risk being downgraded in the core professionalism component of their evaluations. Award at 22.
[86] Award at 22. An arbitrator may not rescind or amend IMPACT evaluation judgments, but they are free to "craft other remedies." *Washington Teachers' Union v. D.C. Public Schools*, 207 A. 3d 1143, 1153 (D.C. 2019); *Washington Teachers' Local 6 v. D.C. Public Schools*, 77 A. 3d 441, 442 (D.C. 2013).

IMPACT evaluation process."[87] Specifically, WTU requested that the Arbitrator exercise her right to "craft other remedies"[88] by sustaining the grievance; ordering DCPS to reinstate the Grievant and make her whole; and requiring DCPS to pay WTU's costs and attorney fees.[89] DCPS opposed WTU's request for relief, arguing that by urging the Arbitrator to change the Grievant's IMPACT evaluation to No Consequences, WTU was attempting alter an evaluation judgment, in violation of Article 15.4 of the CBA."[90]

As a preliminary matter, the Arbitrator addressed DCPS' assertion that the grievance was untimely.[91] The Arbitrator found that, pursuant to Article 6.5.3 of the CBA, DCPS waived its right to object to the timeliness of the grievance because it did not do so within five school days of the grievance being filed.[92] Thus, the Arbitrator found it unnecessary to determine whether the summer months counted as school days for Providers.[93] The Arbitrator also determined that "the process allegation was clearly arbitrable, and the discharge was inextricably tied to the process allegation."[94] Thus, the Arbitrator turned to the merits of this case.

The Arbitrator considered whether DCPS applied the correct rule when it scored the Grievant's Assessment Timeliness.[95] The Arbitrator determined the Guidebook merely provides that Assessment Timeliness is "[a] measure of the extent to which [a Provider] complete[s] the assessments assigned to [them] within the timeframe and in accordance with the rules established by the DCPS Central Office."[96] The Arbitrator found that, pursuant to the IMPACT evaluation training administered to Providers under Article 15.2.4 of the CBA, assignments are unequivocally due 45 days from the date a Provider is assigned to a student in SEDS.[97] Thus, the Arbitrator concluded that, because the Grievant's assessment complied with the timeframe and rules provided to her, DCPS lacked just cause, under Article 15.4 of the CBA, to terminate the Grievant.[98]

The Arbitrator addressed the issue of whether the Grievant's resignation to avoid termination constituted a constructive discharge.[99] The Arbitrator determined that, but for DCPS' process error, the Grievant would have achieved a perfect 2017-2018 Assessment Timeliness IMPACT score, thereby earning an overall yearly IMPACT rating of Developing, and avoiding

[87] Award at 23 (citing *Singletary*, 939 F. 3d at 300; *Kodish*, 604 F.3d at 502).
[88] Award at 23 (citing *Washington Teachers' Union*, 207 A. 3d at 1153; *Washington Teachers' Union v. D.C. Public Schools* (O'Rourke), AAA Case No. 16-20-1300-0499 at 32 (April 4, 2016) (Feigenbaum, Arb.)).
[89] Award at 20.
[90] Award at 19-20.
[91] Award at 23-24.
[92] Award at 24.
[93] Award at 24.
[94] Award at 31.
[95] Award at 24-30.
[96] Award at 25.
[97] Award at 25. The Arbitrator determined that this was the only assignment submission deadline provided to the Grievant. Award at 27. Additionally, the Arbitrator found that DCPS had instructed the Grievant to always use a custom fax coversheet when submitting assessments. Award at 27-29.
[98] *See* Award at 23-30
[99] Award at 30-32.

the Notice of Termination.[100] The Arbitrator further determined that, but for the Notice of Termination and the apprehension of its consequences, the Grievant would not have resigned from her Speech-Language Pathologist position of 19 years.[101] The Arbitrator found that constructive discharge includes cases, like this one, in which a reasonable employee quits to avoid imminent discharge for protected conduct.[102] Based on these findings, the Arbitrator concluded that the Grievant was constructively discharged.[103] The Arbitrator further concluded that the Grievant's constructive discharge was arbitrable under Article 15.3, because it concerned the evaluation process, not merely the evaluation judgment.[104]

Lastly, the Arbitrator discussed the issue of remedy.[105] The Arbitrator determined that a designation of No Consequences for the Grievant's 2017-2018 IMPACT evaluation was an appropriate remedy which would cure the negative consequences of DCPS' process violation, while avoiding interference with DCPS' evaluation judgment of Minimally Effective.[106] Thus, the Arbitrator ordered DCPS to reinstate the Grievant with full seniority; make her whole for lost earnings and benefits; provide her with 4% interest for the backpay period; and remove all references to the termination and resignation from DCPS' records.[107] The Arbitrator retained jurisdiction to resolve WTU's additional requests for relief, which included a tax gross-up and attorney fees.[108] DCPS seeks review of the Award.

IV. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an arbitrator was without, or exceeded his or her authority; (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.[109] DCPS requests review on the grounds that the Arbitrator exceeded her authority, and the Award is contrary to law and public policy.[110]

A. The Arbitrator did not exceed her authority.

When determining whether an arbitrator exceeded her authority in rendering an award, the Board analyzes whether the award "draws its essence from the parties[']collective bargaining agreement."[111] The relevant questions in this analysis are whether the arbitrator acted outside her

[100] Award at 30-31.
[101] Award at 31.
[102] Award at 32 (citing *Kodish*, 604 F. 3d at 502; *Fischer v. Avanade, Inc.*, 519 F. 3d 393, 409 (7th Cir. 2008)).
[103] Award at 31.
[104] Award at 31.
[105] Award at 32-34.
[106] Award at 33 (citing *Washington Teachers' Local 6*, 77 A. 3d at 442; *Washington Teachers' Union* (O'Rourke), AAA Case No. 16-20-1300-0499 (April 4, 2016) (Feigenbaum, Arb.) at 32)).
[107] Award at 34.
[108] Award at 34.
[109] D.C. Official Code § 1-605.02(6).
[110] Request at 2-4, 7-8, 14.
[111] *AFGE, Local 2725 v. DCHA.*, 61 D.C. Reg. 9062, Slip Op. 1480 at 5, PERB Case No. 14-A-01 (2014).

authority by resolving a dispute not committed to arbitration and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.[112] "[S]o long as the arbitrator does not offend any of these requirements, the request for [Board] intervention should be resisted even though the arbitrator made serious, improvident, or silly errors in resolving the merits of the dispute."[113]

In its Request, DCPS argues that the Arbitrator exceeded her authority by allowing WTU to allege a violation of the IMPACT evaluation process in its May 3, 2023, demand for arbitration, as that allegation was not included in WTU's original August 29, 2018, grievance.[114] DCPS asserts that, although Article 15 of the CBA allows teachers to grieve IMPACT process violations, Article 6.5.4 of the CBA establishes that "[o]nce a grievance has been filed, it may not be altered, except that the Grievant may delete items from the grievance."[115]

The Arbitrator observed that, under Article 15.3 of the CBA, "DCPS's compliance with the evaluation process, and not the evaluation judgment, shall be subject to the grievance and arbitration procedure."[116] The Arbitrator construed the term, "evaluation process" to mean the criteria DCPS uses to determine which yearly IMPACT rating each employee receives.[117] The Arbitrator construed the term "evaluation judgment" to refer to the yearly IMPACT rating (Developing, Minimally Effective, etc.) that each employee receives.[118] The Arbitrator found that both WTU's initial grievance and its subsequent demand for arbitration alleged that DCPS failed to adhere to the proper evaluation criteria when it determined the Grievant's 2017-2018 IMPACT rating.[119] Therefore, the Arbitrator concluded that the parties' dispute was substantively arbitrable.[120]

DCPS disagrees with that arbitrability determination.[121] The Board has held that mere disagreement with an arbitrator's interpretation of a CBA cannot form the basis for modifying or overturning an arbitration award.[122] The Board has established that this principle extends to mere disagreement with an arbitrator's conclusion regarding arbitrability.[123] Under Article 15.3 of the CBA, DCPS has agreed to engage in arbitration to resolve disputes concerning its compliance with the evaluation process. The Arbitrator interpreted that provision to encompass the instant dispute, as "the discharge was inextricably linked to the process violation."[124] Therefore, the Board finds

[112] *Mich. Family Resources, Inc. v. SEIU, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. 1271 at 7, PERB Case No. 10-A-20 (2012), and *DCFMS v. AFGE, Local 3721*, 59 D.C. Reg. 9757, Slip Op. 1258 at 4, PERB Case No. 10-A-09 (2012).
[113] *FOP/DOC Labor Comm.*, Slip Op. No. 1271 at 7 (citing *Mich. Family Resources, Inc.*, 475 F.3d at 753).
[114] Request at 5-6.
[115] Request at 5-6. The Arbitrator did not discuss Article 6.5.4 of the CBA in the Award.
[116] Award at 5.
[117] Award at 9-10.
[118] *See* Award at 23.
[119] *See* Opposition, Exhibit 4 at 18-19.
[120] Opposition, Exhibit 4 at 18-20.
[121] Request at 5-7.
[122] *FOP/FOP/MPD Labor Comm.*, 59 D.C. Reg. 2997, Slip Op. No. 788 at 3, PERB Case No. 04-A-22 (2012).
[123] *See WTU v. DCPS*, 45 D.C. Reg. 4019, PERB Case No. 98-A-02, Slip Op. No. 543, at 3 (Mar. 11, 1998).
[124] Award at 31.

that DCPS merely disagrees with the Arbitrator's interpretation of the CBA and provides no justification for overturning it.

DCPS also argues that the Arbitrator exceeded her authority by ordering DCPS to change the Grievant's 2017-2018 IMPACT evaluation to No Consequences, as Article 15.3 of the parties' CBA dictates that evaluation judgments must not be disturbed.[125] This argument is based on a misinterpretation of the relief ordered. The designation of "No Consequences" merely removes the consequences of the Grievant's Minimally Effective IMPACT evaluation judgment and does not remove the Minimally Effective evaluation judgment.[126]

Lastly, DCPS argues that the Arbitrator exceeded her authority by conducting an arbitration hearing based on an involuntary resignation.[127] DCPS asserts that, under the CMPA, the Office of Employee Appeals (OEA) has exclusive jurisdiction over involuntary resignation cases, as the CBA does not contain an article regarding involuntary resignation.[128] DCPS contends that "[t]eachers may only demand arbitration for separation from DCPS through the disciplinary process found in Article 7 or the performance evaluation process found in Article 15."[129] This argument is inconsistent with D.C. Official Code § 1-616.52(e) of the CMPA, which provides that "[m]atters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to § 1-606.03 [permitting appeals to OEA], or the negotiated grievance procedure, but not both." WTU chose to engage in the negotiated grievance process and invoked arbitration, which was one of the options available under the CMPA.

The Board finds that DCPS' arguments are unpersuasive, as the record shows that the parties committed the instant dispute to arbitration, and the Arbitrator construed the CBA in resolving the parties' legal and factual disputes.

For the reasons stated, the Board finds that the Arbitrator did not exceed her jurisdiction.

B. The Award is not contrary to law.

DCPS bears the burden of demonstrating that the Award itself violates established law or compels an explicit violation of "well defined public policy grounded in law and or legal precedent."[130] Furthermore, DCPS has the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result."[131] The D.C. Court of Appeals has

[125] Request at 6 (citing *Washington Teachers' Union*, 207 A.3d at 1153).
[126] See Award at 33 (citing *Washington Teachers' Local 6*, 77 A. 3d at 442).
[127] Request at 6-7.
[128] Request at 6-7 (citing D.*C. Metro. Police Dep't v. Stanley*, 942 A.2d 1172 (D.C. 2008); *Bagenstose v. D.C. OEA*, 888 A.2d 1155 (D.C. 2005)).
[129] Request at 7.
[130] *FEMS v. AFGE, Local 3721*, 51 D.C. Reg. 4158, Slip Op. No. 728, PERB Case No. 02-A-08 (2004).
[131] *MPD v. FOP/MPD Labor Comm*., 47 D.C. Reg. 717, Slip Op. No. 633 at 2, PERB Case No. 00-A-04 (2000).

reasoned, "Absent a clear violation of law[,] one evident on the face of the arbitrator's award, the [Board] lacks authority to substitute its judgment for the arbitrator's."[132]

In its Request, DCPS argues that the Award should be set aside because it "violates law and public policy in its application of arbitrability based on constructive discharge."[133] Specifically, DCPS contends that no constructive discharge occurred in this case.[134] DCPS asserts that "[t]he constructive discharge doctrine exists as a legal recourse for situations where employers force employees to resign, usually through intolerable working conditions."[135] DCPS argues that WTU failed to meet its burden to demonstrate intentional discrimination; deliberately intolerable working conditions;[136] and harassment beyond the minimum required to prove a hostile working environment.[137]

DCPS is correct that "constructive discharge" is a term of art usually reserved for cases alleging discrimination.[138] Here, the Arbitrator found that the Grievant was constructively discharged because she involuntarily resigned to avoid the severe consequences of termination, a termination which violated the just cause requirement in Article 15.3 of the CBA.[139] On these facts, the Arbitrator's use of the term "constructive discharge" does not warrant overturning the Award, as the parties bargained for the Arbitrator's interpretation of the CBA.

DCPS contends that, where an employee resigns, there is a presumption that she did so voluntarily.[140] DCPS argues that even if an employee's choices are resignation or removal for cause, those restricted options do not render her subsequent resignation involuntary.[141] DCPS also argues that an employee who does not "take advantage of opportunities to mitigate their choices to resign or be let go will not be considered as being constructively discharged."[142] DCPS asserts that in this case, the Grievant received notice of the avenues for appealing her Minimally Effective rating, but did not use them.[143]

DCPS' arguments are unavailing. DCPS asserts that a choice between resignation or removal for cause does not render an employee's subsequent resignation involuntary. Yet in this case, the Arbitrator established that the severe consequences of termination compelled the Grievant to involuntarily resign because DCPS lacked just cause to terminate the Grievant. During the confirmation process, the Grievant had the opportunity to appeal the recorded dates of her

[132] *Fraternal Order of Police/Dep't of Corr. Labor Comm. v. District of Columbia Pub. Emp. Relations Bd*., 973 A.2d 174, 177 (D.C.2009).
[133] Request at 4-5.
[134] Request at 4-5.
[135] Request at 4 (citing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 ABA.CBA(2004)).
[136] Request at 4-5 (citing *Stewart v. Gates*, 786 F. Supp. 2d 155, 168 (D.D.C. 2011)).
[137] Request at 5 (citing *Brown v. District of Columbia*, 768 F.Supp.2d 94, 101 (D.D.C. 2011)).
[138] *See e.g.*, *Pennsylvania State Police*, 542 U.S. at 141.
[139] Award at 31.
[140] Request at 5 (citing *Stewart*, 786 F. Supp. 2d at 167; *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975)).
[141] Request at 5 (citing *Keyes v. D.C.*, 372 F.3d 434, 439 (D.C. Cir. 2004); *Christie*, 518 F.2d at 587).
[142] Request at 5 (citing *Bagenstose*, 888 A.2d 1155).
[143] Request at 5.

assessment submissions.[144] However, relying on the deadline from her training, the Grievant had no reason to avail herself of that opportunity.[145] Moreover, the Arbitrator determined that the subsequent Notice of Termination provided the Grievant with several options to appeal the evaluation process, one of which was grievance arbitration.[146]

The Board finds that DCPS has not demonstrated that the Award violates established law or shown that applicable law mandates a different result. For the reasons stated, the Board finds that the Award is not contrary to law.

C. The Award is not contrary to public policy.

Section 1-605.02(6) of the D.C. Official Code authorizes the Board to set aside an arbitration award if the award "on its face is contrary to law and public policy." However, the D.C. Court of Appeals has held that the word "and" should be read as "or" in this statutory context.[147] As a result, the Board has adopted the court's interpretation.

Nonetheless, the public policy exception is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of a contract.[148] For the Board to overturn an award as on its face contrary to public policy, the "public policy alleged to be contravened must be well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[149] "[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.'"[150]

In its Request, DCPS argues that the Award should be set aside because it "violates law and public policy in its application of arbitrability based on constructive discharge."[151] However, DCPS does not present any public policy-based arguments for overturning the Award. The Board finds that DCPS has not demonstrated that the Award compels an explicit violation of well-defined public policy grounded in law and or legal precedent or shown that applicable public policy mandates a different result. Therefore, the Board finds that the Award is not contrary to public policy.

DCPS' Request includes an alternative request for relief, urging the Board to remand this matter to the Arbitrator with instructions to "issue an award based on the original grievance only,

[144] Award at 29.
[145] Award at 29.
[146] Award at 29-30.
[147] *MPD v. PERB*, No. 19-CV-1115, Mem. Op. & J. at 10-11 (D.C. Sept. 15, 2022).
[148] *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No. 1702 at 4, PERB Case No. 18-A-17 (2019) (citing *Am. Postal Workers Union v. USPS*, 789 F.2d 1, 8 (D.C. Cir. 1986), *accord MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 8, PERB Case No. 09-A-05 (2014); *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. No. 925 at 11-12, PERB Case No. 08-A-01 (2012)).
[149] *MPD v. PERB*, No. 19-CV-1115, Mem. Op. & J. at 10-11 (D.C. Sept. 15, 2022) (quoting *MPD v. PERB*, 901 A.2d 784, 789 (D.C. 2006)).
[150] *MPD*, Slip Op. No. 1702 at 4.
[151] Request at 4-5.

and not the grievance included in the demand to arbitrate."[152] The Board declines to grant the requested alternative relief, as the Arbitrator found that the initial grievance and the demand for arbitration were both arbitrable because they both properly alleged violations of the evaluation process. DCPS has not provided a basis for overturning that finding.

D. The costs WTU requests are warranted, but the attorney fees WTU requests are not.

WTU argues that DCPS' Request is "both meritless and frivolous" and therefore, pursuant to D.C. Official Code § 1-617.13(d), the Board should award WTU its reasonable costs, including but not limited to the attorney fees WTU incurred while litigating the instant appeal.[153] The Board has established that it has authority to grant reasonable costs in the interest of justice.[154] The Board has held that "among the situations in which such an award is appropriate are those in which the losing party's claim or position [i]s wholly without merit…."[155] The Board has indicated that a respondent's position is wholly without merit where the complainant prevails on all of its claims.[156] In the present case, the Board's holding is exclusively in favor of WTU. DCPS' Request is based on mere disagreement with the Arbitrator's contractual interpretation. It relies on a misunderstanding of the relief ordered in the Award, as well as a misreading of the CMPA. The Request presents arguments based on semantics, rather than pertinent law or public policy. Thus, the Board finds that DCPS' claims are wholly without merit and determines that the requested award of reasonable costs is appropriate.

Turning to the issue of attorney fees, the Board has established that the Federal Back Pay Act[157]; the D.C. Court of Appeals' holding in *Zenian v. OEA*;[158] and the "jump back" provision in D.C. Official Code § 1-611.04(e) grant the Board discretionary authority to award reasonable attorney fees in the interest of justice where the Board awards back pay.[159] In this case, the Board has not awarded back pay. Therefore, an award of attorney fees, beyond what was already granted by the Arbitrator, would be inappropriate.[160]

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[152] Request at 7.
[153] Opposition at 16.
[154] *Cunningham v. FOP/MPD Labor Comm.*, 50 D.C. Reg. 2403, Slip Op. No. 693 at 2, PERB Case Nos. 01-U-04 & 01-S-01 (2003) (citing *AFSCME, Local 2776 v. D.C. Dept. of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990)).
[155] *Id*. (quoting *AFSCME, Local 2776*, Slip Op. No. 245 at 5).
[156] *See id*.
[157] 5 U.S.C.A. § 5596.
[158] 598 A.2d 1161, 1166 (D.C. 1991).
[159] *See FOP/PSD Labr Comm. v. DGS*, 70 D.C. Reg. 8302, Slip Op. No. 1839 at 3, 12, PERB Case No. 18-U-01 (2023) (awarding attorney fees to complainants where respondent was required to provide back pay after violating D.C. Official Code § 1-617.04(a)(1) and (5)).
[160] *DCPS v. WTU, Local #6*, Slip Op. No. 1844 at 8, PERB Case No. 23-A-03 (2023) (declining to award attorney fees to cover litigation of an arbitration appeal).

V. Conclusion

The Board rejects DCPS' arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, DCPS' Request is denied, and this matter is dismissed in its entirety. The Board also finds that DCPS' Request is wholly without merit, and orders DCPS to reimburse WTU for reasonable costs incurred while litigating this appeal.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is denied.
2. DCPS must pay WTU the reasonable costs incurred while litigating this appeal.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Mary Anne Gibbons and Peter Winkler.

December 19, 2024
Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.