Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Mental Health,	
Petitioner,	PERB Case No. 06-A-17
and	Opinion No. 850
Psychologists Union, Local 3758 of the D.C. Department of Mental Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State, County and Municipal Employees, AFL-CIO (on behalf of John Bruce),	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Department of Mental Health ("DMH" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter. DMH seeks review of an arbitration award ("Award") which rescinded the termination of Dr. John Bruce ("Grievant"), a bargaining unit member. Specifically, the Arbitrator found that DMH failed to submit sufficient evidence to support its position that cause existed for the Grievant's termination. As a result, the Arbitrator ordered DMH to reinstate the Grievant with full back pay and benefits.

DMH contends that the: (1) Arbitrator was without and exceeded his jurisdiction and (2) Award on its face is contrary to law and public policy. The Psychologists Union, Local 3758 of the Distriact of Columbia Department of Mental Health, 1199 National Union of Health Care Employees, American Federation of State, County and Municipat Employees, AFL-CIO ("NUHHCE" or "Union") opposes the request.

The issue before the Board is whether "the arbitrator was without or 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

The Grievant was employed by DMH as a clinical psychologist. "On January 4, 2005, Travis Jones ("Consumer") and his mother, Ms. .Paula Stewart, allegedly entered the Grievant's primary place of employment located at 3861 Alabama Avenue, S.E., Washington, D.C. to file a complaint against the Grievant. Mr. Jones (then approximately 26 years of age) and his mother allegedly spoke to the Grievant's Supervisor, Solomon Lindsey who accepted their complaint and completed an incident . . . report. The DMH conducted an internal investigation with regard to the allegations reported by Travis Jones and his mother." (Award at pgs. 1-2.)

Upon the completion of its internal investigation DMH proposed adverse action against the Grievant. "On March 17, 2005, the Grievant received an Advance Notice of Discipline-Removal from DMH alleging 'malfeasance as the grounds for removal.' The Grievant was then terminated on May 13, 2005 after which the Union filed a grievance against [DMH] on May 31, 2005." (Award at p. 3.) "On June 16, 2005, NUHHCE submitted a request for the production of documents (including the clinical records of Travis Jones, the Consumer who allegedly filed the January 4, 2005 complaint) to the DMH. DMH denied this request. After DMH denied the Union's request for documents, NUHHCE filed an unfair labor practice complaint before the Public Employee Relations Board ("PERB") alleging that DMH failed to provide information in violation of the Comprehensive Merit Personnel Act ("CMPA").[1]

DMH denied the grievance and NUHHCE invoked arbitration on behalf of Dr. Bruce. On January 26, 2006, the Arbitrator issued a subpoena requiring DMH to produce "all clinical records

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[1]On September 9, 2005, the Board issued Slip Opinion No. 809, which concerned NUHHCE's unfair labor practice complaint. In Slip Opinion No. 809 the Board found that DMH violated the Comprehensive Merit Personnel Act ("CMPA"). Specifically, the Board determined that by failing and refusing to produce documents responsive to requests number 1, 2, 3, 4, 5, 6 and 9 contained in NUHHCE's letter dated June 16, 2005, DMH failed to meet their statutory duty of good faith bargaining, thereby violating D.C. Code § 1-617.04(a)(5). (See Slip Op. No. 809 at p. 7) In addition, the Board held that "a violation of [DMH's] statutory duty to bargain [under D.C. Code § 1-617.04(a)(5)] also constitute[d] derivatively a violation of the counterpart duty not to interfere with employees' statutory rights to organize a labor union free from interference, restraint or coercion; to form, join or assist any labor organization or to refrain from such activity; and to bargain collectively through representatives of their own choosing." (Slip Opinion No. 809 at p. 7) Therefore, the Board determined that DMH violated D.C. Code § 1-617.04(a)(1) and (5). As a remedy, the Board ordered DMH to provide NUHHCE with the documents requested by NUHHCE in paragraphs number 1, 2, 3, 4, 5, 6 and 9 of NUHHCE's June 16, 2005 letter. Also, the Board referred the remaining requests for documents to a Hearing Examiner for disposition.

and/or files for the individual, Travis Jones, [against] whom the Department alleges Dr. Bruce took improper actions . . . which . . . [constituted] grounds for terminating Dr. Bruce's employment." (Award at p. 4). The Arbitrator held hearings on February 1-2, 2006 and March 8, 2006. (See Award at p. 1.)

At the February 1, 2006 arbitration hearing NUHHCE renewed its request for the clinical records of the Travis Jones. "Despite the fact that the Arbitrator's subpoena was duly served on [DMH], the Agency responded to both the Arbitrator and [NUHHCE's information] request by repeating its position that the issue was pending before the PERB and . . . therefore [DMH] should not be ordered to produce documents until the unfair labor practice issue was resolved. . . . Thus, [DMH]. . .continuously refused to provide the subpoenaed information 'until it has either (1) received permission from the patient to release the records, or (2) exhausted all legal recourse in the pending PERB matter'." (Award at p. 4) NUHHCE argued that DMH's failure to provide the documents violated due process, the CMPA and the parties' collective bargaining agreement. (See Award at pgs. 5-9.)

The Union further argued that Dr. Bruce provided over twenty-five (25) years of service to DMH for which "he received excellent ratings, he was the single most productive psychologists at DMH, and DMH supervisors referred to Dr. Bruce as 'a star.' Moreover, Dr. Bruce attempted to assist someone in good faith and termination [was] unjust under the circumstances." (Award at p. 5.) NUHHCE asserted that DMH's termination of Dr. Bruce violated Article 16 §§ 2 and 7 of the parties' collective bargaining agreement. (See Award at pgs. 9-10.) In view of the above, NUHHCE asserted that the Grievant should be reinstated.

DMH countered "that in December 2004, Travis Jones [a DMH consumer] came to the Alabama Street site of the DMH for services and at that time Dr. Bruce performed the intake assessment for Travis Jones. Then on December 18, 2004, Travis Jones' mother called Dr. Bruce at his (Bruce's) home about problems with her son and then she told Dr. Bruce that she was going to put Travis Jones out on the street." (Award at p. 12) DMH claimed that "Dr. Bruce went to Travis Jones' home and picked up the client and took him to his home as opposed to calling Department services and Travis Jones remained at Dr. Bruce's home for a period of ten days." Id. Furthermore, DMH argued that Dr. Bruce was on leave at that time, so he should have at least informed the case manager about the situation. DMH indicated that "Travis Jones did repairs to Dr. Bruce's roof, repaired the roof of neighbors, and therefore, Dr. Bruce had inappropriately used Travis Jones." Id.

DMH asserted that all of this information came from Dr. Bruce's own testimony. Also, during the course of the ten days, Dr. Bruce reported that Travis Jones had stolen a gun, cell phone, and a knife which is why Dr. Bruce had to return Travis Jones to his mother's house. It was then (January 4, 2005) that Travis Jones and his mother, Ms. Paula Stewart, reported to the Alabama Avenue work site to file a complaint against Dr. Bruce with his Supervisor, Mr. Solomon Lindsey. As a result of the allegations made by Travis Jones and his mother, an internal investigation took place. DMH claimed that Dr. Bruce admitted to everything after which the discipline process was

initiated. After reviewing the investigation information, Ms. Juanita Price recommended that Dr. Bruce be terminated.

Also, DMH argued "that since Travis Jones' clinical records [were] not used by [DMH] during the investigation of this matter, nor referred to by either the proposing official or the deciding official during the adverse action proceedings within [DMH], [NUHHCE's] request for [DMH] to disclose Travis Jones' clinical record should be denied."[2] (Award at p. 11.) In addition, DMH contended that consumers have an expectation that their private medical information will remain confidential unless he/she release such information.

Although DMH claimed that it did not dispute the Arbitrator's authority to order the production of records and documents that the Arbitrator deemed relevant in the proceeding, DMH refused to produce the clinical records of Travis Jones based on its position that: (1) the production of the private medical records of Mr. Jones without his consent violates his rights to privacy and the confidentiality expectations that he has with DMH, and (2) DMH should not be required to produce the records and/or documents until the PERB case involving the alleged unfair labor practice is resolved.

In light of the above, DMH asserted that termination was appropriate in light of the infractions admitted by the Grievant.

In an Award issued on May 5, 2006, Arbitrator Morton Rosen rejected DMH's argument by noting the following:

> Dr. Bruce, a qualified psychologist, provided over twenty-five (25) years of service to the DMH for which he received excellent ratings. Dr. Bruce's DMH Performance Evaluations dated 10/30/02, 6/27/03, and 6/30/04 all state that his overall performance rating [] was excellent. In addition, on Dr. Bruce's 6/27/03 evaluation it states that:
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> > Dr. Bruce continues to perform his duties in an excellent manner. He is very effective in engaging consumers in services. In addition to his caseload, he provides individual psychotherapy for other consumers at his work site. He also provides quality assessments for consumers assigned to his team. He

[2]Although DMH contended that the clinical records at issue were "irrelevant to its action taken to discharge the Grievant, [DMH did] not dispute the fact that generally, an employer must provide a bargaining unit representative with relevant information necessary in its representation of [a] Grievant." (Award at pgs. 4-5)

> is a conscientious and caring professional. He has shown a willingness to take on new assignments and is a integral member of the team. He has a high ethical standard of practice and professional conduct. He has a positive level of regard in the program. He has an effective way of engaging consumers in services who are resistant to treatment.

Moreover, . . . Dr. Bruce . . . was the single most productive psychologist at DMH, and DMH supervisors referred to Dr. Bruce as "a star." It is hard to imagine that a man of such integrity would ever harm any consumer or be guilty of malfeasance given his documented reports of excellent service.

* * *

[T]he evidence and testimony presented showed that other employed psychologists had a long standing practice of locating employment opportunities for those in need. The DMH never specified to Dr. Bruce or other psychologists who gave consumers employment opportunities that they were subject to discipline. DMH cannot discipline Dr. Bruce for actions that it had condoned in the past.

[T]he Agency based its termination of Dr. Bruce on accusations that he violated various rules and procedures, yet it failed to establish that Dr. Bruce was given actual knowledge of the particular provision and its application. Under established arbitral law, DMH's termination of the grievant for violating a rule or policy cannot be upheld unless the DMH proves that the Grievant was provided actual knowledge of that particular provision and its application. The Agency has the burden to show that Dr. Bruce had actual knowledge of the provision and its application as well as to prove that he actually violated it. *This did not happen here*, thus, such a policy cannot be applied to the Grievant.

The DMH has failed to present sufficient evidence to support its position that cause exists for the termination of Dr. Bruce. . . .[I]t is my decision . . . that the DMH['s] action to terminate Dr. Bruce was unjust and therefore improper. Thus, the [arbitrator found that] DMH must reinstate Dr. Bruce retroactive to the date of his removal to his position in the Community Service Agency ("CSRA"); [and ordered] that Dr. Bruce be made whole, including receiving all pay and

> benefits for the period he was not in work status.[3] (Award at pgs. 26-29, emphasis in original).

DMH takes issue with the Award. Specifically, DMH argues that the: (1) Arbitrator was without authority to grant the Award and (2) Award is contrary to law and public policy.[4]

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, DMH contends that the Arbitrator exceeded his jurisdiction and was without authority to render his award. Specifically, DMH asserts that "[w]hile [DMH] recognizes the strong deference accorded arbitrators in the interpretation of the [collective bargaining agreement], [DMH] contends that the Arbitrator's award in this [case] fails to draw its essence from the [collective bargaining agreement] in that it is without rational support, and is arbitrary and capricious." (Request at p. 9) In support of its argument, DMH notes the following:

> While the Arbitrator referenced several witnesses and exhibits presented by both [DMH] and [the] Grievant, he failed to include and or reference relevant testimony and documents admitted into evidence in this matter. Specifically, [DMH] introduced evidence that [the] Grievant did in fact have knowledge of and was aware of the policies at issue through the introduction of the New Staff Orientation Handbook . . . as well as his attendance at the orientation. . . . In addition, [DMH] introduced evidence of [the] Grievant's attendance at three Town Meetings . . . , wherein policies and

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[3]The Arbitrator also found that DMH's actions violated due process to the extent that Dr. Bruce was denied his right to confront his accusers. In addition, the Arbitrator concluded that DMH's refusal to produce the information requested by NUHHCE violated D.C. Code § 1-617.04(a)(1) and (5). (See Award at p. 29)

[4]DMH claims in its "Statement of Reasons" that the Award is contrary to law and public policy. (See Request at p. 2) However, later in its Request, DMH asserts that "the decision of Arbitrator Rosen was without authority and exceeded his jurisdiction and is contrary to law and public policy and should be reversed." (Request at p. 6)

> procedures relative to DMH Policies and Procedures, Consumer rights etc, were presented to and discussed with [the] Grievant. By [the] Grievant's own admission he attended these meetings. See testimony of [the] Grievant, and Juanita Price.
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> The repeated reference by the Arbitrator to [DMH's] reliance upon the statements of Ms. Stewart and Mr. Jones to support its finding of cause ignores the testimony and exhibits presented in this matter and is an arbitrary and capricious assessment of the facts by the Arbitrator. [The] Grievant's **admission** of the facts in support of this matter, clearly established cause. Inasmuch as [the] Grievant admitted to each material fact, [and] there was substantial evidence in the record to support each finding, [DMH's] conclusion that the facts as admitted constituted malfeasance flowed rationally from the admitted facts. (Request at pgs. 7-8, emphasis in original.)

Based on the above and the Board's statutory basis for reviewing arbitration awards, DMH contends that the Arbitrator was without authority to grant the Award and exceeded his jurisdiction. We disagree.

DMH's arguments are a repetition of the position it presented to the Arbitrator. As a result, we believe that DMH's ground for review only involves a disagreement with the arbitrator's findings and conclusions. Moreover, DMH merely requests that we adopt its arguments and conclusions.

We have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op No. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement . . . as well as his evidentiary findings and conclusions . . ." Id. Moreover, "[this] Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). In the present case, the parties submitted their dispute to an Arbitrator and DMH's claim that the Arbitrator exceeded his authority only involves a disagreement with the Arbitrator's findings and conclusions. This does not present a statutory basis for review. Therefore, we cannot reverse the Award on this ground.

As a second basis for review, DMH claims that the Award is on its face contrary to law and public policy. (Request at pgs. 2, 8 and 9). For the reasons discussed below, we disagree.

The 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). Also, a petitioner must demonstrate that 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). Furthermore, as the Court of Appeals has stated, we must "not be lead astray by our own (or anyone else's) concepts 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, 554 A.2d 319, 325 (D.C. 1989).

In the present case, DMH asserts that the Award is on its face contrary to law and public policy. Specifically, DMH argues that the Award violates "law and public policy because it is premised upon [DMH's] failure to present evidence of cause when in fact, [the] Grievant's very admission is sufficient to support a finding of cause. [Moreover, DMH's] decision to terminate [the] Grievant was based upon the facts as admitted by him and which were substantial evidence of misconduct." (Request at p. 8).

We find that DMH has not cited any specific law or public policy that was violated by the Arbitrator's Award. Thus, DMH has failed to point to any clear public policy or law that the Award contravenes. Instead, DMH merely requests that we adopt its interpretation of the evidence presented. Therefore, it is clear that MPD's argument involves a disagreement with the Arbitrator's ruling. We have held that a "disagreement with the Arbitrator's interpretation does not make the award contrary to law and definite public policy." AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995). In conclusion, DMH 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, DMH failed to do so.

In view of the above, we find that there is no merit to either of DMH's arguments. Also, we believe that the Arbitrator's conclusions 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' collective bargaining agreement. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Mental Health'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.

January 4, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-17 was transmitted via Fax and U.S. Mail to the following parties on this the 4th day of January 2007.

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