Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Water and Sewer Authority,	
Petitioner,	
and	PERB Case No. 05-A-05
	Opinion No. 838
American Federation of State, County and Municipal Employees, Local 2091,	
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 reinstated the Grievant, Vincent Thomas, to the position of Civil Engineering Technician, Grade DS 11. The American Federation of State, County and Municipal Employees, Local 2091 ("Union") did not file an opposition to the request.

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

II. Discussion:

In December of 2002 WASA posted a position vacancy announcement indicating there was a Civil Engineering Technician, Grade DS 11 position in the Department of Sewer Services Inspection and Maintenance Branch. (See, Union Exhibit No. 1). In February of 2003, the Grievant applied for, and was selected for, the promotion to DS 11. Cuthbert Braveboy, Director of Sewer Services, initiated the process that led to the posting of the position announcement. Mr. Braveboy testified during the arbitration hearing the job descriptions of DS 9 and DS 11 positions were essentially the same. (See, Award at p. 9). There were also set procedures for establishing various positions throughout WASA based on need, availability of funds, recommendations of WASA officials and department heads, and final approval of the Director of Human Resources. (See, Award at p. 9). All criterion were met, and the Grievant proceeded through the various steps up to, and including, selection to the position of DS 11. (See, Union Exhibit No. 8). In April of 2003, WASA returned the Grievant to a DS 9 position, asserting the promotion had been in error. (See, Union Exhibit No. 4). A grievance was filed and the matter proceeded to arbitration.

The issue before the Arbitrator was "is the Grievant to remain in the position of DS 11 or is the Grievant to be placed in his former pay category of DS 9." (Award at p. 2).

At arbitration, the Union argued WASA did not follow its personnel policy and procedures on recruitment, selection, and hiring of the Grievant. The Union also contended the Grievant was improperly demoted and should be made whole by reinstatement to the position of DS 11 with back pay from the date of the promotion. WASA countered that "they should not be required to create a new position for the Grievant . . . based on the fact that [WASA] mistakenly selected the Grievant for promotion to DS 11. . . ." (Award at p. 9).

Arbitrator Jack I. Lenavitt noted a promotion is generally considered to involve movement to a higher job classification. (See, Award at p. 10). The Arbitrator took note of the promotional policies of the parties' Master Agreement on Compensation and Working Conditions ("Agreement"). The Arbitrator indicated the pertinent contractual provisions are as follows:

> Article 4, Management Rights, Section A, General. D.C. Code [§ 1-617.08] of the CMPA establishes Management's rights as follows:
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> 1. The Authority shall retain the sole right, in accordance with applicable laws and rules regulations:
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> ...

> b. To hire, promote, transfer, assign and retain employees in the positions within the Authority and to suspend, demote, discharge or take other disciplinary action against employees for cause;
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> Section C, Management Duties
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> ...
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> Similarly, no employee shall be deceived or willfully obstructed from competing for any employment position or influenced to withdraw from such competition, or by unauthorized preference or advantages (e.g. nepotism, cronyism), in order to effect the employment prospects of any other employee.

(See, Award at p. 10)

In addition, the Arbitrator found there were no restrictions in regard to Director of Sewer Services requesting a DS 11 position vacancy in his department, and under direct examination, testified there were no significant differences when DS 11's were in his department. (See, Award at p. 10).

In his Award, the Arbitrator found Article 4 of the Collective Bargaining Agreement ("CBA") allows for promotion of employees at the discretion of management. (See, Award at p. 9). In addition the Arbitrator determined it was undisputed a position of DS 11 was posted in accordance with the CBA and all relevant policies and procedures. (See, Award at pgs. 9-10). The Arbitrator also found the Grievant had been selected for this position in accordance with these provisions and performed the duties of a DS 11. (See, Award at pgs. 9-10). The Arbitrator also determined various steps to promotion "were developed over a long period of time and have been mutually agreed upon by both [WASA] and the Union as established past practice." (Award at p. 10). The Arbitrator specifically noted the parties' CBA stated "no employee shall be deceived from competing or denied those advantages provided through [management's] duties to its employees." (Award at p. 10). Based on this language, the Arbitrator concluded WASA violated the parties' Agreement by first promoting the Grievant to the aforesaid position; and then demoting the Grievant to his previous position upon WASA's declaration the position was offered in error. Thus, the Arbitrator reinstated Grievant with back pay to his original date of promotion. (See Award pgs. 10-11).

WASA takes issue with the Award. Specifically, WASA asserts the Arbitrator "was without authority to hear [the] matter and exceeded his jurisdiction granted under the Agreement, because he failed to confine his Award solely to the grounds set forth in Step 2 of the grievance procedure, as required by Article 58 of the Agreement." (Request at p. 4). In addition, WASA contends the Arbitrator was without authority to direct WASA to create a new position and

exceeded his jurisdiction because such an award conflicts with the express terms of the Agreement. Also, WASA asserts the Award: (1) imposes additional requirements that are not expressly provided in the Agreement; (2) is not rationally derived from the terms of the Agreement; and (3) is based on general considerations of fairness and equity instead of the precise terms of the Agreement. (See, Request at p. 4). Lastly, WASA argues the Award is contrary to law and public policy because it conflicts with District of Columbia regulations regarding the creation and deletion of job positions and counter to applicable case law concerning promotion and compensation. (See, Request at p. 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.).

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:

> [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 the present case, WASA contends the Arbitrator was without authority to hear the matter and exceeded his jurisdiction granted under the Agreement. (See, Request at p. 4). In support of this argument, WASA asserts the Arbitrator improperly allowed the Union to introduce additional

charges of violations of the CBA.[1] (See, Request at pgs. 4-5). WASA argues that by not confining his award solely to the grounds set forth in Step 2 of the grievance procedure, as required by Article 58 of the Agreement[2], the Arbitrator improperly allowed the grievance to be amended, where the grounds for the grievance were originally based on Article 4, Section C, Management Rights and WASA Personnel Policy and Procedure - Recruitment, Selection and Hiring. (See, Request at p. 5).

The Board finds this argument is a repetition of the arguments considered and rejected by the Arbitrator. WASA requests the Board adopt its interpretation of Article 58 of the CBA and merely represents a disagreement with the Arbitrator's interpretation and decision. As stated above, the Board will not substitute its, or a party's interpretation, of a CBA for that of the arbitrator. Therefore, the Board finds this ground does not present a statutory basis for review.

WASA also asserts the Arbitrator's Award does not derive its essence from the CBA by reinstating the Grievant to the position of DS 11. (See, Request at p. 6). In support of this assertion, WASA contends the Arbitrator was without authority to direct WASA to create a new position and exceeded the jurisdiction granted under the parties' CBA[3] (See Request at p. 6). WASA argues that the direction to create a DS 11 position for the Grievant: (1) conflicts with the express terms of the CBA; (2) imposes additional requirements that are not expressly provided in the CBA; (3) is not rationally derived from the terms of the CBA; and (4) is based on general considerations of fairness and equity instead of the precise terms of the CBA. (See, Request at p. 6). WASA points to Article 58, Section H.8 of the CBA, which provides that the arbitrator shall not have the power to add to, subtract from or modify the provisions of the CBA or WASA's regulations or policies through the award. (See, Request at p. 6). WASA claims the Arbitrator's Award fails to derive its essence from the CBA because WASA, under Article 4 - management rights, has the sole authority to create a new position.

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[1]At the hearing, the Union alleged additional violations of the CBA. Specifically, the Union alleged violations of Article 21, Job Placement Changes and Article 57, Discipline.

[2]Amendment of the grievance is prohibited by Article 58, Section G, stating that at Step 2, after a grievance has been put in writing, the grievance shall not be amended.

[3] The Board notes that WASA's reliance on *MPD and FOP/MPD Labor Committee*, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2002), is misplaced. In *MPD and FOP/MPD Labor Committee*, the Board found the Arbitrator had exceeded his authority by creating a new position for the grievant. However, its reasoning was not based on the mere fact a new position would be created, but because assignment of the grievant to a civilian position within the police department would conflict with the express terms of the agreement where such a placement would impact workers and current employees not covered by the agreement. In other words, the arbitrator did not have the authority to place a police officer in a position outside the bargaining unit.

WASA claims the Arbitrator exceeded his authority by returning the Grievant to the position of DS 11. We disagree. The Board has held [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*, *supra* at p. 3. Moreover, the Board will not substitute its own interpretation or that of the Agency, in place of the duly designated Arbitrator's interpretation. *Id.* In addition, the Board has held, as has the Court of Appeals for the Sixth Circuit:

> we will consider the questions of 'procedural aberration'.... [and ask]: [D]id the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract"? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made 'serious,' 'improvident' or 'silly' errors in resolving the merits of the dispute.
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> The Court's repeated insistence that the federal courts must tolerate "serious" arbitral errors suggests that judicial consideration of the merits of a dispute is the rare exception not the rule. At the same time we cannot ignore the specter that an arbitration decision could be so "ignor[ant]" of the contract's "plain language," [citation omitted] ... as to make implausible any contention that the arbitrator was construing the contract.... Such exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that.... [Citation omitted.]
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> This view of the "arguably construing" inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes....

Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M, 475 F. 3d 746, 753 (2007) (overruling *Cement Divisions, Nat. Gypsum Co. (Huron) v. United Steelworkers of America, AFL-CIO-CLC*, Local 135, 793 F.2d 759).

The Board finds nothing in the record that suggests fraud, a conflict of interest, or dishonesty infected the Arbitrator's decision or the arbitral process. No one disputes the collective bargaining agreement committed this grievance to arbitration and the Arbitrator was mutually selected by the parties to resolve the dispute. (See, *Michigan*, at p. 754). Therefore, the Board rejects the argument that the Arbitrator exceeded his authority.

After the Arbitrator concluded WASA violated the parties' CBA by removing the Grievant from his DS 11 position, the Arbitrator determined the remedy was to reinstate the Grievant. The Board has held an Arbitrator does not exceed his authority by reversing an Agency action, particularly where the CBA does not restrict the Arbitrator's exercise of equitable powers in fashioning a remedy. See, *D.C. Metropolitan Police Department and FOP/MPD Labor Committee*, 36 DCR 3339, Slip Op. No. 218, PERB Case No. 89-A-01 (1989). In the present case, the parties' have failed to cite any language in the parties' CBA which limits the Arbitrator's equitable powers. Therefore, we conclude the Arbitrator did not exceed his authority by reinstating the Grievant to his former position of DS 11.[4]

Lastly, WASA contends the Award is contrary to law and public policy because it directly conflicts with District of Columbia regulations on creation and deletion of job positions and is counter to applicable law regarding promotion and compensation. Specifically, WASA cites 21 D.C. Code §§ 5201.1, 5201.4 and 5201.10, which provide WASA with the authority to establish policies, procedures, and guidelines relating to personnel and grants WASA sole control over management rights. WASA also cites *Foster Transformer Co.*, 212 NLRB 936 (1974), for the proposition that an employer may adjust an employee's pay to the correct rate once a mistake is discovered. In addition, WASA cites *United States v. Testan*, 424 U.S. 392 (1976), where the Supreme Court found the Federal government's decision to promote is discretionary and back pay cannot be awarded unless a failure to promote the public employee violated some mandatory duty. WASA also cites *Whitt v. District of Columbia*, 413 A. 2d 1301 (D.C. 1980), where the Court of Appeals denied retroactive promotion and back pay to an employee performing the duties of a higher grade to which he or she had not actually been promoted. Lastly, WASA cited *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 46 DCR 7217, Slip Op. No. 479, PERB Case No. 96-A-07 (1996), where the Board upheld the Arbitrator's decision to temporarily promote an employee with retroactive pay for the period of time the Arbitrator determined the employee had performed the duties of a higher position.

"[T]he possibility of overturning an arbitration decision on the basis of public policy is an 'extremely narrow' exception to the rule that reviewing bodies must defer to an arbitrator's ruling.

[4] If MPD had cited a provision that limited the Arbitrator's equitable powers, that limitation would be enforced.

[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F. 2d 1, 8 (D.C. Cir. 1986). A petitioner must demonstrate the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See, *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A2d 319, 325 (D.C. 1989).

In the present case, WASA asserts the Award is on its face contrary to law and public policy. However, WASA does not specify any "applicable law" and "definite public policy" that mandates the Arbitrator arrive at a different result. Instead, the Board finds that the cases cited by WASA, as well as the applicable District of Columbia regulations, do not mandate that the Arbitrator reach a different result (i.e. not reinstate the Grievant to the position of DS 11). WASA's arguments are a repetition of the arguments considered and rejected by the Arbitrator. Therefore, we believe WASA's ground for review only involves a disagreement with the Arbitrator's findings and conclusions, and merely requests the Board adopt its interpretation of the evidence presented. Also, we find WASA's argument represents a disagreement with the Arbitrator's remedy.

The Board has held a disagreement with the Arbitrator's remedy does not render an award contrary to law. See, *MPD and FOP/MPD Labor Committee*, __ DCR __, Slip Op. No. 770, PERB Case No. 03-A-09 (2004). Here, the Arbitrator's remedy, in our view, appears reasonable. WASA's ground for review is merely an argument as to why its interpretation of the D.C. Code and aforementioned case law should be accepted over that of the Arbitrator's decision to reinstate the Grievant. However, it is not a party's or the Board's judgment for which the parties bargained, but that of the Arbitrator. See, *University of the District of Columbia and UDC Faculty Association*, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991). We also find that WASA's disagreement with the Arbitrator's findings and evaluation of the evidence does not present a statutory basis for review. See *DCS and Washington Teachers' Union Local 6, American Federation of Teachers*, 43 DCR 1203, Slip Op. No. 349, PERB Case No. 93-A-01 (1996).

In view of the above, we find no merit to WASA's arguments. We find 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 his authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

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.

October 11, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-A-05 was transmitted via Fax and U.S. Mail to the following parties on this the 11th day of October 2011.

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