GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
University of the District of Columbia	
Petitioner,	PERB Case No. 90-A-02
	Opinion No. 248
and	
University of the District of Columbia Faculty Association/NEA,	
Respondent.	

DECISION AND ORDER

On October 5, 1989, the University of the District of Columbia (UDC) filed an Arbitration Review Request with the Public Employee Relations Board (Board) seeking review of an Arbitrator's award issued on September 15, 1989. In the Award, the Arbitrator sustained a grievance filed by the University of the District of Columbia Faculty Association, Local 2087, National Education Association (Union), on behalf of Dr. John L. Slack, Ph.D, (Grievant), a full professor at UDC in the Department of Health, Physical Education, and Leisure Studies. The Award reversed the UDC President's decision to terminate the Grievant, thus reinstating him to his position. UDC contends for reasons addressed below that the Arbitrator was without or exceeded his jurisdiction and the Award is contrary to law and public policy. [1]/ On November 21, 1989, the Union filed a

[1]/ The Office of Labor Relations and Collective Bargaining (OLRCB) filed a Memorandum in Support of Arbitration Review Request. The Board's Interim Rules 107.2 and 107.7, provide that briefs in support of Arbitration Review Request may be filed only by a party to the arbitration proceeding. Therefore, pursuant to Interim Rule 107.9, OLRCB's Memorandum in Support of Arbitration Review Request was not considered in the disposition of this matter.

response [2]/ opposing the Board's review of the Arbitration Review Request.

Following termination of the Grievant, the Union filed a grievance that ultimately went to arbitration. The issue before the Arbitrator in his words, was:

> ... whether there was sufficient cause to terminate Professor Slack for his off-duty misconduct which resulted in his criminal conviction of a felony conspiracy to defraud the United States through participation in the obtaining of federally insured mortgages in the District of Columbia by means of false and fraudulent pretenses.[3]/

In resolving this issue, the Arbitrator determined that the standard established by Article XI, Section B.2 of the parties' collective bargaining agreement was whether the Grievant's misconduct "resulted or may result in irreparable harm to the University." [4]/

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[2]/ The Grievant filed separately a response styled Opposition to Petitioner's Arbitration Review Request on Behalf of Professor John L. Slack, Ph.D.. As noted above, the right to file supporting breifs attaches only to parties to an arbitration proceeding. Here, it is the Union, not the Greivant, who is the opposing party for purposes of filing an opposition and supporting briefs under 107.5 and 107.7 of our Interim Rules. Therefore, the Grievant's response was also not considered in the disposition of this case.

[3]/ An account of the proceedings prior to arbitration, and of the facts there established, is contained in the Arbitrator's Award, a copy of which is attached hereto. Those matters are not germane to the issues before the Board except as discussed herein.

[4]/ Article XI, Section B.2 provided:

B. Progressive Imposition of Sanctions

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2. Further, the parties agree that sanctions, when imposed, will progress from minor to severe for repeated failure to meet professional obligations. However, in some circumstances actions or omissions which have resulted or may result in irreparable harm to this academic community or members thereof, may require the imposition of severe sanctions in the first instance. (emphasis added)

Applying this standard, the Arbitrator found that sufficient cause had not been established, that is, that "the record d[id] not rise to the level of demonstrating 'irreparable harm' necessary to support a decision to terminate." (Award p. 21)

The issue before the Board is whether or not a statutory basis for review exists in this case. D.C. Code Section 1-605.2(6) authorizes the Board to consider appeals from arbitration awards pursuant to a grievance procedure if, and only if, the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means. We are not persuaded by UDC that any of these statutory grounds exists.

1. In support of its first contention, that the Arbitrator exceeded his jurisdiction, UDC cites Article IX, Section E(6) of the parties' collective bargaining agreement which provides: "[t]he decision of the arbitrator shall be final and binding upon all parties but the arbitrator shall have no authority to add to, subtract from, or modify this Agreement" UDC avers that "unless the award is based on the agreement, it is outside the arbitrator's authority and jurisdiction." Based on this contractual jurisdictional provision and the Board's statutory basis for reviewing arbitration awards, UDC contends that the Arbitrator exceeded his authority by altering the terms and thereby, the plain meaning of the parties' collective bargaining agreement. We disagree.

As acknowledged by UDC, by submitting this matter to arbitration, the parties agreed to be bound, not simply by the Arbitrator's decision, but by his interpretation of the agreement. (Respondent's Memorandum at p. 4). The Board articulated its standard of review regarding arbitration awards in Council of School Officers and District of Columbia Public Schools, 33 DCR 2392 (1986), Slip Opinion No. 136, PERB Case No. 85-A-05. There we stated: "disagreement with the Arbitrator's Award, alone, is not a sufficient basis for the Review of Arbitration Award under the CMPA. By agreeing to submit the settlement of the grievance to arbitration, it was the Arbitrator's interpretation, not the Board's, that the parties

bargained for." [5]/

The matter before the Arbitrator in this proceeding concerned the authority of UDC to impose the discipline of termination on the Grievant under the CMPA and the parties' collective bargaining agreement. In reaching his decision, the Arbitrator made a determination of whether the Grievant's conduct "resulted in or may result in irreparable harm" to the University "to warrant termination in the first instance" as expressly set forth under Article XI, Section B.2. Thus, contrary to UDC's assertions, the Award is based on an interpretation of the parties' collective bargaining agreement. As such, the Arbitrator did not exceed his jurisdiction or authority in rendering such an award.

2. UDC next contends on several grounds that the Award on its face is contrary to law and public policy. Specifically, UDC argues that the Arbitrator erred by (1) requiring it to show a nexus between the Grievant's "off-duty, off-premises misconduct" and the University's business; (2) requiring it to prove irreparable harm to the University to justify imposition of the penalty of termination; (3) applying an incorrect standard of review; and (4) allowing a convicted felon to return to the classroom. The basis for overturning an arbitrator's award on the ground that it is contrary to law and public policy is, as noted by the Union, "extremely narrow". See Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 808 F.2d 67, 83 (D.C. Cir. 1987) (quoting American Postal Workers Union v. U.S. Postal Service, 789 F.2d 1, 8 (D.C. Cir. 1986)) (emphasis in original), cert. denied, 486 U.S. 1014 (1988).

With respect to the first of UDC's objections, the "nexus" discussion employed by the Arbitrator was a vehicle for analysis to determine whether the Grievant's "off-duty, off-premises misconduct" resulted in "irreparable harm" to the University's

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[5]/ We note the similar treatment of this standard of review by other jurisdictions and forums noted in Petitioner's Memorandum. See, Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200 (9th Cir. 1989) (en banc) ("Since the labor arbitrator is designed to function in essence as the parties' surrogate, he cannot 'misinterpret a collective bargaining agreement.'") United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("[A] court should not reject an award on the ground that the arbitrator misread the contract."); National Railroad Passenger Corp. v. Chesapeake and Ohio Railway Co., 551 F.2d 136, 142 (7th Cir. 1977) ("The courts are in agreement that arbitrators do not exceed their powers by misconstruing a contract.")

academic community so as to justify termination of the Grievant by UDC for a first offense. [6]/ Thus, the matter here involves only an interpretation of the terms of the collective bargaining agreement wholly unaffected by any law or public policy (much less the law and public policy that would allow our review).

The same conclusion applies with respect to UDC's second ground, that the Arbitrator erred by requiring it to prove irreparable harm "to justify imposition of the penalty of termination." Whether imposition of termination in the first instance under Article XI, Section B.2 requires that "irreparable harm" be proven with respect to both "persistent dereliction of duties and/or responsibilities" and "gross professional misconduct" or only the former, as UDC contends, represents no more than alternative interpretations of the agreement and does not implicate law and public policy. [7]/

UDC next contends that by employing a "clear and convincing evidence standard" the Arbitrator applied an incorrect standard of review. We find no factual basis for this assertion. While the Award describes the Union's argument "that the University [ ] failed to cite clear and convincing evidence, as required by the

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[6]/ As the Union observed in its Opposition to Arbitration Review Request, it was UDC, in its brief to the Arbitrator, who first advanced "a logical nexus" approach between a teacher's conduct and his or her fitness to teach. (Petitioner's Exhibit No. 3, p.6). In fact, the Arbitrator employed the 6 factors set forth in Morrison v. State Board of Education, 1 Cal. 3d 214. (1969), cited in Petitioner's brief, to determine whether there was " a logical nexus" between the Grievant's misconduct and the business of the University. (Award, p.17). This in turn, served as the Arbitrator's basis for determining whether the misconduct constituted "irreparable harm" as provided under the collective bargaining agreement.

[7]/ Article XI, Section A.3, defines cause for purposes of the imposition of disciplinary action as "(a) persistent dereliction of duties and/or responsibilities, or (b) gross professional misconduct." This section goes on to provide that cause, as defined in the contract, shall be synonymous with that set forth in Section 1-617.1 of the Comprehensive Merit Personnel Act (CMPA). Although Section 1-617.1 of the CMPA includes within its definition of cause a plea of guilty to a felony charge, it neither requires removal nor mandates this particular sanction. Thus, UDC's contention that Section 1-617.1 allows the removal of an employee in the first instance for such conduct represents at most an alternative interpretation of the contract provision that the Arbitrator might have, but was not required to adopt.

Agreement" (emphasis added, Award, p.9), a review of the Award reveals no indication that the Arbitrator subjected UDC's evidence to this standard of review. The Arbitrator concluded that "with the exception of a series of general statements of alleged impact, the record d[id] not rise to the level of demonstrating 'irreparable harm' necessary to support a decision [to] terminate". [8]/ We do not find such evidentiary conclusions to be a violation of law and public policy.

Finally, UDC asserts that the Arbitrator's Award violates law and public policy in that it "returns an unrehabilitated convicted felon to the classroom as a role model for District of Columbia young adults." However, UDC fails to cite any specific law and public policy that has been violated. As was cogently stated by the U.S. Supreme Court in United Paperworkers International Union v. Misco, 484 U.S. 29, 38 (1987) (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983), review on this basis is "limited to situations where the contract as interpreted would violate 'some explicit public policy' that is '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.'" UDC's contention in this regard represents "general considerations of supposed public interests" and we therefore cannot find the Award to be repugnant to law and public policy.

In sum, we conclude that the Arbitrator's Award is not on its face contrary to law and public policy, nor did the Arbitrator exceed the jurisdiction granted.

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[8]/ Award p. 21. As for UDC's contention that the Arbitrator relied upon inadmissible hearsay evidence, we concur with the view presented by the Union in its memorandum that UDC would have the Board substitute its judgment for that of the Arbitrator with respect to the weight and thereby the significance of certain evidence presented. UDC neither cites nor are we aware of any law or public policy which forbids the admission of hearsay evidence in this context. And, assessing what weight and significance such evidence should be afforded is surely within the domain of the arbitrator.

ORDER

IT IS HEREBY ORDERED THAT:

The Request For Review of the Arbitration Award is denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

July 23, 1990