



## **II. Background**

### **A. Arbitrator's Findings of Fact**

Before coming to work for the Department, the Grievant was an experienced and certified elevator inspector in Maryland. He had a corporation that he had formed in the 1990's to engage in elevator consulting, education, and inspection. The Department recruited and hired him in 2001 to be an elevator inspector. Payne informed his supervisor about his corporation and his intent to do business only in Maryland and Virginia. Grievant sought official guidance in this regard and apparently received rather little (Arbitration Award, Exhibit 1 to Request, ("Award") pp. 17-19).

In 2006 the vice-president and general counsel of the Apartment and Office Building Association complained to the Department that Payne was soliciting private elevator inspection business from property owners and managers in the District. The Department referred the complaint to the Office of the Inspector General. After an investigation, the Inspector General confirmed the accusation (Award at pp. 22-24).

### **B. Notices of Removal**

On the basis of the Inspector General's report, the director of the Department issued a summary removal notice asserting that Payne had solicited work and thereby had violated section 1803.1 of the District Personnel Manual and section 1-618.02 of the District of Columbia Official Code (Award at pp. 26-27).

A hearing officer found much of the evidence against Payne not credible and recommended that Payne be reinstated and his penalty reduced to a suspension (Award at p. 29). The Department rescinded the summary removal and subsequently issued an advance notice of proposed removal with additional citations to the District Personnel Manual and additional formulations of the ethical charge against Payne. Also at that time the Department imposed a suspension for an unrelated act of disobedience and recited that suspension in the advance notice of proposed removal (Award at pp. 30-31).

### **C. Arbitration Award**

As did the first hearing officer, the arbitrator found much of the testimony offered by the Department not credible, but the arbitrator did find that the Department had proved that Payne gave his private business cards to four or five people and talked about his business with clients in the District (Award p. 52). By doing so, the arbitrator concluded, Payne "improperly mingled his personal affairs and his official duties and created a conflict of interest or at least the appearance of one in violation of Section 1800.3 as well as Section 1-618.01 of the D.C. Code." (Award p. 53.)

Although Payne's conduct was unethical, the Department had not been given him any progressive discipline before his removal nor sufficient notice "that his conduct was so impermissible that it justified immediate removal." (Award at p. 56.) Accordingly, the arbitrator concluded: "Since it is clear that the Agency, as required, never considered either progressive discipline or mitigating circumstances, it violated the collective bargaining agreement and lacked

cause to remove Grievant. The grievance is sustained to the extent that the removal is overturned.” (Award pp. 56-57.)

#### **D. Remedy**

The arbitrator ordered the Union and the Department to negotiate remedial issues including back pay, reinstatement, forward pay, a letter of reference, the suspension imposed at the same time as the removal, and attorney’s fees. Further, the arbitrator ordered the parties to report to him on their progress within thirty days. The arbitrator added that he would retain jurisdiction and, in the event the parties could not agree on one or more issues, he would “inform the parties what additional evidence and argument is required for him to resolve them.” (Award at p. 59.)

### **III. Discussion**

#### **A. Prematurity**

As a threshold matter, the Union contends that the Board should dismiss the Request as premature because the arbitrator retained jurisdiction and ordered the parties to negotiate over some remedial issues.

Although the Union cites no rules or opinions of this Board in support of its contention, it does call our attention to the jurisprudence of the Federal Labor Relations Authority (“FLRA”). As the Union correctly points out, where exceptions are brought to the FLRA from an arbitration in which the arbitrator sustains a grievance but orders the parties to negotiate a remedy while retaining jurisdiction, the FLRA will find the exceptions interlocutory and will dismiss them unless extraordinary circumstances warrant review. *See, e.g., U.S. Dep’t of the Army, Army Corps of Eng’rs, Norfolk Dist. and Nat’l Fed’n of Fed. Employees Local 1028*, 60 F.L.R.A. 247, 248-49 (2004); *U.S. Dep’t of the Interior, Bureau of Indian Affairs*, 55 F.L.R.A. 1230, 1231 (2000).

The FLRA observes that procedure because one of its rules provides that “the Authority and the General Counsel ordinarily will not consider interlocutory appeals.” 5 C.F.R. § 2429.11. This Board does not follow FLRA procedures having no counterpart in the Comprehensive Merit Protection Act (“CMPA”). *See In the Matter of: Teamsters, Local Union No. 639 v. D.C. Pub. Sch.*, 38 D.C. Reg. 6698, Slip Op. No. 267, PERB Case No. 90-U-05 (1991). Neither the CMPA nor the rules of this Board preclude review of interlocutory arbitration awards. Board Rule 554.1 does prohibit “interlocutory appeals to the Board of rulings by the Executive Director, Hearing Examiner or other Board agents,” but an arbitrator is not an agent of the Board.

The provisions that do govern arbitration appeals to this Board are the CMPA, which empowers the Board to “[c]onsider appeals from arbitration awards pursuant to a grievance procedure,” D.C. Code § 1-605.02(6), and Rule 538.1, which provides that a “party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board. . . .”

Under section 1-605.02(6) and Rule 538.1, the only question upon which depend the right of an aggrieved party to an appeal and the Board’s power to consider an appeal is whether the

appeal is taken from an “arbitration award.” The Union does not argue that the arbitrator’s decision in this matter was not an award, although curiously the Petitioner does (“The award he issued is no award at all. It is a collection of suggestions.” Request at p. 14). The decision in question was an award because it sustained in part the grievance, overturned the action that was the subject of the grievance, and issued orders to the parties. The arbitrator denominated the document “Arbitration Award” in its caption (Award at p. 1) and referred to it as an arbitration award in his notice to the parties (Request at Exhibit 2), as does the Union in its brief.

In *Matter of: District of Columbia, Department of Consumer and Regulatory Affairs and American Federation of Government Employees, Local 2725*, the Board rejected the argument that an arbitration award was not final—and thus did not trigger the time period under Rule 538.1—where the arbitrator retained jurisdiction to consider any requests for clarification of the remedy or for attorney’s fees. Slip Op. No. 978, PERB Case No. 09-A-01 (Sept. 30, 2009). We held that the “Award is final as to the merits of the case and the remedy granted.” *Id.* at 4.

Likewise, in the instant matter the Award is appealable as to the merits of the case and the remedy granted even though further remedial orders are forthcoming. Accordingly, we decline to dismiss the Request on grounds of prematurity.

#### **B. Petitioner’s Arbitration Review Request**

The Petitioner states that its “reasons for appeal are that (a) the arbitrator was without authority or exceeded the jurisdiction granted and (b) the award is on its face contrary to law and public policy.”<sup>1</sup> With regard to the former, the Petitioner wrote that the Board has looked to the standard established in *Cement Divisions, National Gypsum Co. v. United Steelworkers of America, AFL-CIO-CLC, Local 135*, 793 F.2d 759 (6th Cir. 1986), when determining whether an arbitrator exceeded his jurisdiction under a collective bargaining agreement.

Although that was once true, *Cement Division* was overruled by *Michigan Family Resources, Inc. v. SEIU Local 517M*, 475 F.3d 746 (6th Cir. 2007), whose more narrow standard of review has been adopted by this Board. In *the Matter of: D.C. Metro. Police Dep’t and F.O.P./Metro. Police Dep’t Labor Comm.*, Slip Op. No. 925 at p. 7, PERB Case No. 08-A-01 (July 12, 2010) (“[I]n resolving any legal or factual disputes in a case, was the arbitrator arguably construing or applying the contract?”) (quoting *Michigan Family Resources, Inc.*, 475 F.3d at 753). By any standard, however, the Department has failed to show a conflict between the Award and the collective bargaining agreement because its brief never even discusses the collective bargaining agreement.

The brief does discuss the second of the two reasons for the appeal, violations of law or public policy. The Department’s brief relies upon the provisions of the District of Columbia Official Code and the District Personnel Manual that Payne was charged with violating. But the question is not whether Payne violated any laws or policies; the question is whether the arbitrator’s decision violated any laws or policies. The Petitioner’s burden is to “present applicable law and definite public policy that mandates that the arbitrator arrive at a different

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<sup>1</sup> Request at p. 2. Additionally, the Department argues that the remedy is “flawed,” but the flaw the Department alleges is unrelated to its two asserted grounds for appeal or to any other permissible ground for appeal.

result.” *In the Matter of: D.C. Metro. Police Dep’t and F.O.P., Metro. Police Dep’t Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). The Petitioner directs us to no law or policy mandating removal as the only penalty for any ethics violation. To the contrary, “No law or policy is transgressed by requiring a party to follow progressive discipline as required by the collective bargaining agreement by which it is bound.” *In the Matter of: D.C. Pub. Sch. and Am. Fed’n of State, County & Mun. Employees, Council 20*, Slip Op. No. 155 at p. 5, PERB Case No. 86-A-03 (May 7, 1987).

The Board concludes that the asserted grounds for the arbitration review request are without merit as the Arbitrator did not exceed his jurisdiction and the Arbitration Award is not contrary to law or public policy. Therefore, pursuant to Board Rule 538.4 the Board sustains the Arbitration Award and dismisses the arbitration review request.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The Arbitration Award is sustained. Therefore, the Department of Consumer and Regulatory Affairs’ arbitration review request is dismissed.
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.

March 27, 2012

**CERTIFICATE OF SERVICE**

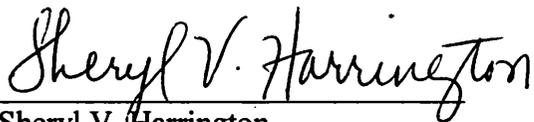
This is to certify that the attached Decision and Order in PERB Case No. 10-A-06 is being transmitted via U.S. Mail to the following parties on this the 29th day of March 2012.

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