

## **SECOND TUESDAYS at PERB**

**March 14, 2017 Session**

### **Topic: PERB and Arbitration**

#### **Grievance Arbitration Review Requests**

##### **Section 1-605.02 Powers of the Board**

The Board shall have the power to do the following:

- (A) Consider appeals from arbitration awards pursuant to a grievance procedure; provide however, that such awards may be modified or set aside or remanded, in whole or in part, only if
    - 1) the arbitrator was without, or exceeded, his or her jurisdiction;
    - 2) the award on its face is contrary to law and public policy; or
    - 3) was procured by fraud, collusion or other similar and unlawful means...
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PERB Rules 538.1 to 538.4 provide the procedures for filing Grievance Arbitration Review Request

##### **Important Elements of a Arbitration Review Request**

- 1) Aggrieved party must file request not later than 20 days after service of the arbitrator's award
- 2) Arbitration Review Requests must contain the following information "set forth in numbered paragraphs"
  - a) Name, address and telephone number of the agency including the name of the person to contact;
  - b) Name, address and telephone number of the labor organization including name of person to contact;
  - c) Name, address and telephone number of the arbitrator;
  - d) Statement of reasons for appealing the award;
  - e) Copy of the award and proof of date of service;
  - f) Any other portion of the arbitration record upon which the parties intend to rely in the arbitration review request.

Note – Any party involved in an arbitration review request should review the complete text of PERB Rule 538 as the above is only intended to highlight important provisions of the Rule.

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**March 14, 2017 Session**

### **Topic: PERB and ARBITRATION**

#### **Hypothetical Problems – 03/14/2017**

The problems this month are built around the continuing saga of the relations between the Professional Sports Agency (PSA) and the union representing its employees, the Professional Sports Union (PSU).

In Chapter one of this story, we looked at and analyzed the bargaining for the first contact between PSA and PSU. Chapter Two dealt with three incidents in which PSU requested information from PSA. The story of PSA and PSU now continues.

Since we discussed Chapter Two, the parties have reached an agreement and have signed a collective bargaining agreement. For our purposes today, the following provisions are applicable to the Incidents you are dealing with.

The provisions are:

#### **Article 3 – Discipline**

- (1) No discipline shall be invoked against any bargaining unit employee except for cause.
- (2) Article 10 provides for a three step grievance procedure with final and binding arbitration as the fourth step. The provisions (Article 10 D Section dealing with arbitration end with the following statement:
- (3) The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision of the issue presented and shall confine his or her decision solely to the precise issue submitted for arbitration.

## Incident One

- (1) In early 2016, PSA hired 10 new employees who were to work on PSA efforts to bring major sporting events to the District of Columbia.
- (2) The 10 employees passed their probationary periods (60 days) but three months later, 3 of them were called to the office of Agency Administrator Smith and told they were being discharged. No reasons were given.
- (3) PSU filed a grievance and during its processing the requested explanations for the discharges but no reasons were given. At the arbitration Smith finally said that he was unhappy with the work of the three employees. He said he had considered the Douglas Factors in making his decisions. When the union cross-examined him, he admitted that he didn't consider all 12 Factors. The union's examination of Smith revealed that he had considered only 6 of the 12 Factors.
- (4) The arbitrator issued her decision and found that Smith's failure to consider all the Factors indicated an absence of "cause" as that term is used in Article 3 of the contract. She ordered the three employees reinstated with back pay. She found that because of Smith's failure to consider all of the Douglas Factors, she was under no obligation to give any deference to Smith's decision to discharge.
- (5) Smith has come to you to ask if he can appeal this decision to PERB and the chances of success. What would you tell him and why?

## Incident Two

- (1) PSU filed a grievance against PSA concerning what it said was an unfair application of work rules. The case went to arbitration on January 15, 2016 and briefs were filed on February 15.
- (2) When the parties heard nothing from the arbitrator after 6 months, PSU wrote him a letter asking about the decision. It received no response. It then wrote a second letter to him complaining about the delay and advising him that if a decision wasn't issued by October 15, PSU would fire him.
- (3) The arbitrator wrote back a letter that in rather strong terms told PSU that PSU couldn't fire him because he was appointed by both parties. PSU wrote back saying that they didn't agree and that he should consider himself fired. There was no response to this letter except that the arbitrator finally issued his decision on December 15 finding for PSA in all respects.
- (4) PSU is angry. They think the arbitrator has stuck it to them in his decision because they tried to fire him. They come to you and ask if they can appeal the decision to PERB and if they can, what are their chances of winning.
- (5) What would you tell them?

### Incident Three

- (1) Mr. Smith has allowed a number of PSA employees to work more than 40 hours a week without paying them overtime. He said that the work of PSA is vital to the city, that the employees should be glad they have a job and that they should be willing to help out the District of Columbia. He says that is how he feels about his job and he wants a staff that feels like he does.
- (2) The contract between PSA and PSU provides for, "Overtime pay or compensatory time at the rate of time and one half in accordance with the Fair Labor Standards Act." NOTE: The Fair Labor Standards Act provides... "As a remedy for wage and hour violations, an additional equal amount as liquidated damages."
- (3) The union took its claim to arbitration and the arbitrator found for the union. The arbitrator found that although an award of time and a half "seems to be a reasonable remedy for the violation, the imposition of liquidated damages as an additional remedy based merely on the reference to the FLSA in the contract is a reach beyond the agreement and will not be awarded."
- (4) The arbitrator went on to say that he did "not think that the record was at all clear on this point and that if the parties wanted liquidated damages as a penalty there were far less obscure ways of doing so."
- (5) The union is really upset by this decision and wants to appeal it to PERB. They come to you for advice. What would you tell them?