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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

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| In the Matter of: |) | |
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| DISTRICT OF COLUMBIA |) | |
| METROPOLITAN POLICE DEPARTMENT, |) | PERB Case No. 01-A-02 |
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| |) | |
| Petitioner, |) | |
| |) | Opinion No. 669 |
| |) | |
| |) | |
| and |) | |
| |) | |
| FRATERNAL ORDER OF POLICE/ METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, |) | |
| |) | |
| |) | |
| Respondent. |) | |

DECISION AND ORDER

On November 27, 2000, the District of Columbia Metropolitan Police Department (MPD) filed an Arbitration Review Request (Request). MPD seeks review of an arbitration award (Award) which rescinded the termination imposed on a bargaining unit employee. MPD contends that the: (1) Award is contrary to law and public policy; and (2) Arbitrator was without authority to grant the Award. (Request at p. 2). The Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) opposes the Request.

The issue before the Board is whether “the award on its face is contrary to law and public policy” or whether “the Arbitrator was without or exceeded his or her jurisdiction...” D.C. Code §1-605.02(6) (2001).¹

MPD terminated the Grievant, a police officer, for negligently firing his weapon and killing

¹Prior codification at D.C. Code §1-605.2(6) (1981).

civilian. (Request at p.3) . The Arbitrator determined that MPD had sufficient cause to take the adverse action against the Grievant. (Award at p.19). Nonetheless, the Arbitrator found that termination was an excessive penalty for the Grievant's actions. (Award at p. 19). Specifically, the Arbitrator concluded that despite "the tragic consequences of the shooting, the *Douglas* factors require a conclusion that the most severe penalty of termination for a first offense would not be reasonable or justified."² (Award at p. 19). As a result, he determined that the Grievant should: (1) serve a 180-day suspension, and (2) be reinstated as a civilian employee with full back pay and benefits. Id.

MPD takes issue with the Arbitrator's Award. MPD asserts that the Arbitrator exceeded his authority by reducing the Grievant's termination to a suspension. Specifically, MPD asserts that although the Arbitrator determined that there was cause for taking disciplinary action, he created his own mitigating circumstances and assessed his own penalty.

As a second basis for review, MPD contends that the Arbitrator exceeded his authority by reinstating the Grievant to a civilian position at MPD. Specifically, MPD claims that the Arbitrator's jurisdiction only extended to the Grievant's employability as a police officer. Therefore, once the Arbitrator determined that the Grievant was unfit to be a police officer, the Arbitrator should have concluded the matter. Furthermore, the issue of alternative employment for the Grievant was not before the Arbitrator.³ Finally, MPD contends that the civilian position awarded to the Grievant, amounts to an employment bonus. (Request at p. 5). MPD suggests that placing the Grievant in the civilian position violates public policy because it rewards a wrongdoer with a new job and a significant back pay award. (Request at p.5).

After reviewing the pleadings, the Board opted not to rule on the matter because it needed additional information. Instead, the Board ordered that the case be held in abeyance for 30 days. In addition, the Board requested that the parties submit briefs concerning the Arbitrator's authority to award this type of remedy (reinstatement to a civilian position) under the parties' collective bargaining agreement. Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee issued on May 4, 2001. ⁴ Slip Op.No. 647, PERB Case No. 01-A-02

²The Arbitrator relied on the mitigating factors enumerated in Douglas v. V.A., 5 MPR 280 (1981).

³The Board notes that this argument lacks merit since FOP requested this relief as an alternative remedy in their arbitration brief. (Union Arbitration Brief at p. 20.)

⁴ In Slip Op. No. 647, the Board requested that the parties brief the following questions:

1. Does the parties' collective bargaining agreement place limitations on the Arbitrator's equitable power? If so, what are those limitations?

(2001).

Neither of the parties' briefs responded to the Board's questions in any great detail; however, a summary of their answers follows below.

In response to the first issue raised by the Board, FOP argues that the language contained in the parties' collective bargaining agreement placed no limitations on the Arbitrator's equitable powers. In support of its position, FOP relied on the Board's Decision in MPD and FOP/MPD Labor Committee (on behalf of Grievant Charles Sims), where the Board held that an Arbitrator does not exceed his authority by exercising his equitable powers, unless that authority is expressly limited by the collective bargaining agreement. 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000).

By contrast, MPD claims that the parties' collective bargaining agreement did place limitations on the Arbitrator's equitable power. Specifically, MPD contends that the Arbitrator's authority was limited to police officers who are members of the union, not civilians. Therefore, since civilians are not in the bargaining unit or parties to the agreement between FOP and MPD, then the Arbitrator had no authority to place the Grievant in a civilian position.

Both FOP and MPD agree that civilians are not covered by the parties' collective bargaining agreement. However, as noted above, they differ on the issue of whether the Arbitrator had authority to place a police officer into a civilian position.

Discussion and Analysis

As stated earlier, MPD claims that the award is contrary to public policy. In addition, MPD asserts that the Arbitrator exceeded his jurisdiction by: (1) reducing the Grievant's termination to a suspension; and (2) assigning the Grievant to a civilian position.

The Board has held that "to set aside an award as contrary to law and public policy, the

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2. Does the parties' collective bargaining agreement cover police officers and civilian employees of the Metropolitan Police Department?
 3. If it is determined that an employee is unfit to serve as a police officer, where does the Arbitrator get the authority to place the employee in a civilian position? Does the Arbitrator have authority over civilian positions? (Slip Op. No. 647, May 4, 2001)

Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000).

After reviewing MPD’s public policy argument, we find that MPD failed to cite any specific public policy or law that was violated by the Arbitrator’s Award. Instead, MPD bases its public policy argument on its assertion that the Arbitrator wrongfully rewards a police officer, who has been found to have “committed serious misconduct”, with a new job and a significant back pay award.⁵ (Request at p. 5). In view of the above, we find no merit in MPD’s public policy argument. Therefore, we cannot reverse the Arbitrator’s Award on this ground.

MPD also claims that the Arbitrator exceeded his authority by reducing the Grievant’s termination to a suspension. We disagree. The Board has held that 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.” MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). Moreover, the Board will not substitute its own interpretation or that of the Agency, in place of the duly designated Arbitrator’s interpretation. *Id.* After applying the *Douglas* factors, the Arbitrator determined that there was cause for the adverse action imposed; however, he determined that the penalty was excessive. Douglas v. V.A., 5 MSPR 280 (1981). The Board has held that an Arbitrator does not exceed his authority by reducing a penalty, particularly where the collective bargaining agreement (CBA) does not restrict the Arbitrator’s exercise of equitable powers in fashioning a remedy. See, MPD v. 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 that the Arbitrator did not exceed his authority by reducing the Grievant’s termination to a suspension.

The final issue raised by MPD is one of first impression for the Board. Specifically, the Board is being asked to decide *whether an Arbitrator, in a dispute between a police officers’ union and a police department, is authorized to place a police officer in a position outside the bargaining unit covered by the contract, as a remedy for discipline found to be excessive.*

One of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is “whether the Award draws its essence from the collective bargaining agreement.” D.C. Public Schools v. AFSCME, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987); See also,

⁵Specifically, MPD asserts that the Arbitrator’s inquiry should have been limited to whether MPD had cause to discipline the Grievant and whether the Grievant was fit to continue serving as a police officer.

Dobbs, Inc. v. Local No. 1614, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 813 F. 2d 85 (6th Cir. 1987). In our decisions, we have not expounded on what is meant by “deriving its essence from the terms of the collective bargaining agreement.” However, the U.S. Court of Appeals for the Sixth Circuit in Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135, explained the standard by stating the following:

An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765 (6th Cir. 1986).

We believe that the portion of the Award which assigns the Grievant to a civilian position fails to derive its essence from the parties’ collective bargaining agreement and, therefore, does not meet the Cement Division standard.

We believe that the portion of the Award assigning the Grievant to a civilian position conflicts with the express terms of the agreement because it impacts a class of workers and current positions that are not covered by the parties’ agreement.⁶ As a result, we conclude that this portion of the Award cannot be rationally derived from the terms of the agreement. Moreover, the Board cannot find evidence which identifies the source of the Arbitrator’s authority to place a police officer (bargaining unit member) into a civilian position (non-bargaining unit member), particularly where the civilian position may either belong to another bargaining unit covered by a separate collective

⁶The Preamble of the parties’ collective bargaining agreement states that “this agreement is entered into between the Metropolitan Police Department and the FOP/MPD Labor Committee.” Article 1 §1.

In addition, the Recognition Clause of the parties’ agreement states that FOP/MPD Labor Committee is the exclusive representative for the following employees:

All police privates, including investigators and desk sergeants, detectives, detective sergeants and police sergeants employees in the uniformed and plainclothes forces of the Metropolitan Police Department, unless assigned to the Internal Affairs Division, excluding management executives, confidential employees, supervisors, and employees engaged in personnel work in other than a purely clerical capacity. Article 2.

bargaining agreement or is a non-bargaining unit position.⁷

While the parties' agreement does not explicitly limit the Arbitrator's equitable powers, the Board believes that the Arbitrator's powers should, at the very least, be limited to the scope of the agreement. Here, the parties are the FOP, who represent unionized police officers and the Metropolitan Police Department. Since the Recognition clause of the parties' agreement does not mention civilian positions, it logically follows that the collective bargaining agreement between FOP and MPD does not apply to civilian positions.

In addition, we find that the Arbitrator's decision to assign the Grievant to a civilian position, is without rational support and cannot be rationally derived from the terms of the agreement. The Arbitrator did not provide an explanation for why he did not order the Grievant to serve his suspension and then return to his original position as a police officer. Furthermore, the Arbitrator provided no explanation for his decision to place the Grievant in a totally different position. In light of the above, the Board believes that the only reasonable conclusion that can be drawn from the Arbitrator's Award is that the Arbitrator determined that the Grievant was unfit to serve as a police officer. For the above noted-reasons, we find that the Arbitrator's Award which rescinds the termination and reinstates the Grievant to a civilian position cannot stand.

Pursuant to D.C. Code §1-605.02(6) (2001),⁸ the Board finds that the Arbitrator exceeded his jurisdiction and was without authority to direct that the Grievant be placed in a civilian position. As a result, we grant MPD's Arbitration Review Request. Therefore, pursuant to Board Rule 538.4, the Board orders that the Arbitrator's Award be set aside in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department's Arbitration Review Request is hereby granted.
2. Pursuant to D.C. Code §1-605.02(6) and Board Rule 538.4, the Arbitration Award which

⁷The Board also notes that FOP failed to cite any authority in the collective bargaining agreement or otherwise, to support the Arbitrator's authority to place the Grievant in a civilian position. This is the case despite the fact that the parties were given an opportunity to address the issue concerning the origin of the Arbitrator's authority to make this Award.

⁸Prior codification at D.C. Code §1-605.2(6) (1981).

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rescinded Officer Shepherd's termination and reinstated him to a civilian position is set aside in its entirety.

3. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

December 4, 2001

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 01-A-02 was transmitted via Fax and/or U.S. Mail to the following parties on this 4th day of December 2001.

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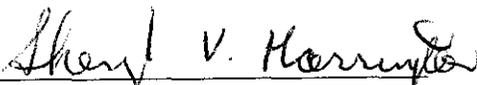
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