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**Government of the District of Columbia  
Public Employee Relations Board**

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In the Matter of: )

Metropolitan Police Department, )

Petitioner, )

and )

Fraternal Order of Police/Metropolitan Police )  
Department Labor Committee, )

Respondent. )  
\_\_\_\_\_)

PERB Case No. 05-A-07

Opinion No. 819

**DECISION AND ORDER**

**I. Statement of the Case**

The Metropolitan Police Department (“Agency”, “Department” or “MPD”) filed an Arbitration Review Request (“Request”). MPD seeks review of an Arbitration Award (“Award”) that sustained a grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Union”). FOP opposes the Request.<sup>1</sup> In addition, FOP filed Motions for Expedited Review and a Motion to Dismiss.

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

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<sup>1</sup> See Respondent’s Opposition to Petitioner’s Arbitration Review Request (“Opposition”).

## II. Discussion

As a preliminary matter the Board will address FOP's Motion for Expedited Review and Motion to Dismiss.

On April 21, 2005, FOP filed a Motion for Expedited Review, requesting that the present matter be resolved no later than 90 days from the date of filing. In support of this Motion, FOP indicates that the Stress Protocol, the policy which is the subject of the grievance, has had a continuing impact on bargaining unit members. FOP cites no authority which authorizes this Board to expedite review of the case for the reasons provided by FOP. Moreover, incidents occurring beyond the record in this case are not within this Board's authority to resolve. Therefore, FOP's Motion for Expedited Review is denied.

On July 22, 2005, FOP filed a Motion to Dismiss, based on the assertion that MPD no longer utilizes the aforementioned Stress Protocol. Again, the Board cannot consider events which have occurred outside the record. Consequently, FOP's Motion to Dismiss is denied.

On January 9, 1998, MPD promulgated General Order 1001.1, which established "policy and procedures for sworn members utilizing the services of the Police and Fire Clinic . . . and other medical facilities." Included among these procedures, were the procedures to be followed by bargaining unit members who claimed that they had suffered "performance-of-duty" (POD) illness or injury. Employees making such a claim are required to complete a "PD Form 42" and to advise an official whenever an injury or illness was incurred while on duty. If an employee has suffered a POD injury or illness, the Department pays the employee's salary and medical expenses and the employee is not required to use sick leave for the absence from work. If the Department administratively determines that an illness or injury was not incurred in the performance of duty, the employee may appeal to the Human Resources Officer and to the D.C. Office of Employee Appeals. (Award at pgs. 2-3).

In August of 2003, MPD promulgated a new "Stress Protocol", which provided in pertinent part as follows:

The purpose of this protocol is to identify and define the conditions upon which a member may claim "stress" as a performance of duty injury or illness.

### I. Definitions

The term "critical incident" means:

1. A psychiatric injury or illness incurred while the member is

directly involved in taking police action in the performance of duty and such police action results in death, or injury requiring urgent or emergency medical intervention.

2. A psychiatric injury or illness incurred by a member when he or she has been the victim of an on-duty assault or other violent crime that results in death or serious bodily injury.

A PD-42 stress claim may only be filed when the injuries and illnesses are the direct result of a critical incident as defined in Section I of this protocol.

Members filing a PD-42 must identify the critical incident that forms the basis for the performance of duty claim. Failure of the member to identify the critical incident that forms the basis of the PD-42 claim shall result in the claim being ruled as a non-performance of duty injury or illness.

(Award at pgs. 3-4).

The Stress Protocol went on to state that the Department's Medical Director would "review all PD-42 claims filed between 2000 to date to determine which claims meet the critical incident criterion." This provision would allow for the reopening and reconsideration of old POD leave decisions. The Protocol further provided that new and re-opened decisions by the Medical Director could be appealed to the Director of Human Services, who would issue the Department's final agency action. From there, employees are advised that they may appeal to the District of Columbia Superior Court. (Award at p. 4).

The Union was not consulted prior to the adoption of the new Stress Protocol, and was not aware of its existence until members affected by the new criteria complained to the Union. On October 28, 2003, the Union, in writing, requested from MPD a copy of the Stress Protocol. In November of 2003, MPD replied to the request, indicating that the new protocol was a result of the Department of Human Services' examination of workers' compensation laws. Also, the new protocol was intended to reflect the "current thinking" on stress in the law enforcement environment. Included in the reply was a copy of the new Stress Protocol.

On December 4, 2003, the Union representatives met MPD's Chief Ramsey to discuss the new Stress Protocol. At the meeting, the Union complained that the definition of a critical incident was too narrow in requiring death or physical injury. The Union also complained about the retroactive nature of the Protocol. After the meeting, on January 6, 2004, the Union wrote to Chief Ramsey, reiterating its complaints with the new Stress Protocol. Chief Ramsey did not reply to the January 6<sup>th</sup> letter.

In February 2004, the Union received notice of the first claim in which POD leave was denied under the new Stress Protocol. An appeal of that decision was filed in mid-February. The Union also filed a class grievance on March 29, 2004, alleging that the new POD policy was not consistent with prevailing law and objected to the retroactive nature of the new Stress Protocol. It requested that the New Stress Protocol be rescinded and that any new changes to the POD policy comply with "applicable laws, rules and regulations." (Award at 7).

"Chief Ramsey denied the grievance on April 19, 2004, asserting several grounds: (1) the [new] Stress Protocol is not part of the contract and therefore is not grievable; (2) the grievance is untimely, since the Union learned of the [new] Stress Protocol in either October or November and failed to file a grievance within 30 days (in accordance with Article 19.B Section 2, of the CBA); and (3) on the merits, the cases cited by the Union are inapposite because they apply to stress-related disability for civilians, rather than public safety personnel." (Award at p. 7).

On April 22, 2004, the Union invoked arbitration and an arbitration hearing was held on November 19, 2004. The issues presented to the Arbitrator were:

Is the grievance arbitrable for the reasons stated in Chief Ramsey's letter of April 19, 2004, to Gregory Green, FOP/MPD Labor Committee?

If arbitrable, did [t]he Department's [new] Stress Protocol violate the [CBA]?

If so, what shall the remedy be?

(Award at p. 2).

At arbitration, the Union asserted that the contract permits arbitration of the Union's grievance that Management misapplied applicable District of Columbia law. It also argued that the grievance is not untimely, since it was filed prior to the time that the MPD issued a final agency action under the new Stress Protocol in August 2004.<sup>2</sup> The Union also alleged an ongoing violation of the collective bargaining agreement and that the new Stress Protocol continues to be applied erroneously to employees.

In support of its argument protesting the new Stress Protocol, the Union cited *Spartin v. DOES*, 584 A. 2d 564 (D.C. App. 1990), asserting that the case permits disability claims for emotional distress arising out of employment and does not limit recovery to "critical incidents," as defined in the new Stress Protocol. *Spartin*, the Union claimed, does not make death or physical

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<sup>2</sup>The Union asserts that the new Stress Protocol had not been finalized prior to the submission of its grievance. Thus, there was no occurrence, as required by Article 19.B, Section 2. In addition, the Union argues that if the grievance was premature, MPD waived its right to object. The Arbitrator agreed. (See Award at p. 16).

injury a requirement for recovery of workers' compensation. Since, the new Stress Protocol does not comply with *Spartin*, its promulgation exceeded Management's rights. (See Award at pgs. 9-10).

MPD countered that Article 19 and Article 4, Section 8 of the CBA limits grievances and disputes over the contract and that neither of the Articles authorizes grievances involving Management's statutory rights. MPD also argued that the grievance is untimely, since the Union had notice of the new Stress Protocol by November 2003, when MPD sent a copy to the Union. MPD also asserted that the first individual appeal filed by the Union over the new Stress Protocol was on February 15, 2004 and that the grievance was not filed within 30 days of either of these events.

MPD also argued that the only law governing workers' compensation for D.C. police officers is the Police and Firefighters Retirement and Disability Act, D.C. Code § 5-701, *et seq.* and that the Union's reliance on *Spartin* was in error. MPD asserted that judicial precedent supports the "critical incident" standard of the new Stress Protocol, citing *Neer v. D.C. Police and Firemen's Retirement and Relief Board*, 415 A.2d 523 (D.C. App. 1980).<sup>3</sup>

In an Award issued February 28, 2005, Arbitrator Wolf determined that the grievance was timely under Article 19.<sup>4</sup> (See Award at p. 16). Specifically, he found that the new Stress Protocol, although promulgated in August 2003, existed in a state of uncertainty. In addition, the Arbitrator held that "[t]he Union need not grieve a new policy if its finality is uncertain and if senior Management (in this case the Chief) has indicated a willingness to reconsider the policy." (Award at p. 16). The Arbitrator also stated that "[i]n light of this state of uncertainty, I cannot conclude that the grievance was untimely." (Award at p. 16).

Arbitrator Wolf also determined that the grievance was arbitrable. Article 19.A states:

Only an allegation that there has been a violation, misapplication or misinterpretation of the terms of this Agreement shall constitute a grievance under the provisions of this Grievance Procedure.

(Award at p. 17)

As stated above, MPD asserts that Article 19.A, does not permit grievances which protest the implementation of management rights under Article 4. The Arbitrator concluded that "[o]n the one

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<sup>3</sup>It should be noted, however, that MPD has allowed compensation for injuries from assaults even in the absence of physical injury. See *Melva Spencer*, CCN 110-240 (Award at pgs. 10-13.)

<sup>4</sup>Article 19.B Section 2, of the CBA provides that a class grievance must be initiated by the Union "not later than thirty (30) days from the date of the occurrence giving rise to the grievance or within thirty (30) days of the Union's knowledge of its occurrence . . . ." (Award at p. 13)

hand, Article 4.8 permits MPD to modify its rules, regulations and procedures, while the preamble to Article 4 requires such action to be consistent with applicable laws, rules and regulations.” (Award at p. 18). He concluded that “the plain language of Article 4 should be read to mean, at a minimum, that Departmental changes to rules, regulations and procedures be permitted without Union interference, so long as the changes are consistent with applicable laws. By placing this restriction on Management rights into the contract, the parties must have intended that arbitrators selected pursuant to Article 19 would be empowered to interpret this restriction.” (Award at p. 19). Furthermore, the Arbitrator determined that “[n]othing in Article 19 precludes the Union from grieving Management actions that allegedly exceed the statutory limitation in Article 4 and nothing precludes an arbitrator from ruling on that grievance. In sum, I conclude that the Union’s grievance in this case, premised on alleged violations of both Article 4 and public law, is arbitrable.” (Award at p. 19).

The Arbitrator addressed the merits of the case. Specifically, he examined whether the new Stress Protocol violated the CBA. The question before the Arbitrator was whether the new Stress Protocol’s definition of “critical incident”, requiring death or serious bodily injury, violated the D.C. law. The Arbitrator found that D.C. law does not support a “critical incident” standard, stating that “[w]hile Management is free to change its policies, it may do so under Article 4 only if it is consistent with prevailing law. Since the new Stress Protocol’s definition of “critical incident” is not consistent with prevailing law<sup>5</sup>, it constitutes an action in violation of Article 4 of the collective bargaining agreement.” (Award at p. 26).

As a remedy, the Arbitrator directed MPD “to rescind the [new] Stress Protocol to the extent it requires employees to satisfy the critical incident definition.” The Arbitrator also “directed [MPD] to decide POD leave applications on a case-by-case basis, consistent with governing law, as interpreted by the D.C. Courts. [MPD] may not reject POD leave applications solely because they do not meet the current definition of a ‘critical incident.’ [MPD] should also rescind any decisions already rendered under the [new] Stress Protocol if a POD claim was rejected because of a failure to satisfy the definition of ‘critical incident.’” (Award at p. 26).

In their Arbitration Review Request (“Request”), MPD claims that: (1) “Arbitrator Wolf exceeded his authority when he ruled that the occurrence had to be “final” before the 30 days to file the grievance would be triggered” (Request at p. 4); (2) “Arbitrator Wolf exceeded the jurisdiction granted to him” (Request at p. 8); and (3) “the award is contrary to law and public policy.” (Request at p. 9).

The Union counters that the Arbitrator did not exceed his authority regarding the timeliness of the grievance, and that the Arbitrator interpreted the CBA to mean that a policy change such as the new Stress Protocol does not become an “occurrence” subject to the grievance/arbitration process

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<sup>5</sup> The law considered by the Arbitrator consisted of the *Spartin* and *Neer* cases.

until such time as the Union reasonably perceives that the policy is in final form and will be implemented "(in other words, when there is no longer any reasonable possibility that the policy may be voluntarily modified or rescinded by the Agency)." (Opposition at p. 4).

The Union also argues that the Arbitrator interpreted the contractual definition of a grievance to mean that "Departmental changes to rules, regulations and procedures be permitted without Union interference, so long as the changes are consistent with applicable laws." (Opposition at pgs. 4-5, citing the Award at p. 19). The Union asserts that the Agency's disagreement with this contractual interpretation and finding does not give rise to the Board's arbitration review jurisdiction. (See Opposition at p. 5).

Lastly, the Union argues that "the Agency fails to present any clearly applicable legal precedent or point to any well-defined public policy to refute the Arbitrator's well-reasoned conclusion (i.e., that application of the [new] Stress Protocol 'redefine[s] POD leave in a way that erects a barrier to employees asserting rights created by D.C. law.')." (Opposition at p. 5). Rather, the Agency merely argues its disagreement with the Arbitrator's legal analysis and asserts that because the Award is "contrary to the governing exclusive law" it is also "contrary to [public] policy." (Opposition at p. 5, citing Request at p. 11). In light of the above, the Union asserts that the Board should deny MPD's Request.

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.).

In the present case, MPD contends that Arbitrator Wolf exceeded his authority when he ruled that the occurrence had to be "final" before the 30 days to file the grievance would be triggered. (See Request at p. 4). In support of its argument, MPD cites Article 19 of the CBA, regarding the grievance procedure. Article 19 provides as follows:

#### B. Presentation of Grievances

##### Section 2

A grievance shall not be accepted by the Department or recognized as

a grievance under the terms of this Agreement unless it is presented by the employee to management at the Oral Step of this procedure not later than ten (10) days from the date of the occurrence giving rise to the grievance or within ten (10) days of the employee's knowledge of its occurrence, or in the case of class grievances, by the Union not later than thirty (30) days from the date of the occurrence giving rise to the grievance or within thirty (30) days of the Union's knowledge of its occurrence at Step 2 of the grievance.

Section 4

The time limits prescribed herein may be waived by mutual agreement, in writing, by the parties thereto, but if not so waived must be strictly adhered to.

E. Arbitration

Section 5

2. The parties to the grievance or appeal shall not be permitted to assert in such arbitration proceedings any ground or to rely on any evidence not previously disclosed to the other party.
4. 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 decision solely to the precise issue submitted for arbitration."

MPD asserts that Arbitrator Wolf exceeded his authority by adding to or modifying the CBA when he held that an occurrence, in this case a policy change, had to be final before the thirty-day time period began to run. In addition, MPD argues that the Arbitrator's ruling on timeliness fails to draw its essence from the CBA, and conflicts with the "unambiguous language [of the CBA] concerning when a grievance is untimely." (Request at pgs. 5-6).

Based on the above and the Board's statutory basis for reviewing arbitration awards, MPD contends that the Arbitrator exceeded his authority by modifying the time frame for filing a grievance under the CBA. For the reasons discussed below, we disagree.

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. Sup. 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 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.

*District of Columbia Metropolitan Police Department and 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); *District of Columbia 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 addition, we have found that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." *D.C. Department of Public Works and AFSCME, Local 2091*, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). Also we have held that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' [CBA]. See, *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Furthermore, the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960), that "part of what the parties bargain for when they include an arbitration provision in a labor agreement is the 'informed judgment' that the arbitrator can bring to bear on a grievance, especially as to the formulation of remedies." See also, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6 (May 13, 2005).

MPD has cited authority limiting the Arbitrator's equitable powers. As stated above, that limitation is expressed in the Agreement as limiting the arbitrator's power to add to, modify or subtract from the agreement. Furthermore, "[o]ne 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. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee*, 49 DCR 810, Slip Op. No. 669 PERB Case No. 01-A-02 (2002) (citing *D.C. Public Schools v. AFSCME, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at 5, PERB Case No. 86-A-05 (1987)). See also, *Dobbs, Inc. V. Local No. 1614, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6<sup>th</sup> Cir. 1987). The Board has adopted what is meant by "deriving its essence from the terms and conditions of the collective bargaining agreement" from 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*, where the Court 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 (6<sup>th</sup> Cir. 1986).<sup>6</sup>

In the present case, Arbitrator Wolf made a factual determination that the Union was unaware as to whether the new policy had become final and was in effect. As a result, we believe that MPD's assertion that the Arbitrator exceeded his authority by finding that the Union did not have notice that the new policy change had become final, only involves a disagreement with the Arbitrator's interpretation of Article 19 of the CBA, and his findings of fact. Moreover, MPD merely requests that we adopt its interpretation of the above referenced provision of the CBA. In addition, we believe that the portion of the Award requiring an occurrence to be final does not: (1) conflict with the express terms of the CBA; (2) impose an additional requirement not expressly contained by Article 19; and (3) can be rationally derived from the terms of the CBA. We also believe that the portion of the Award which requires that an occurrence be final derives its essence from the parties CBA and therefore, meets the *Cement Division* standard. Therefore, the Board cannot reverse the Award on the ground that the Arbitrator exceeded his authority.

As a second basis for review, MPD asserts that Arbitrator Wolf exceeded his jurisdiction by finding the present matter arbitrable. MPD argues that the Arbitrator overlooked Article 4 of the CBA, which provides that "management rights shall not be subject to the negotiated grievance procedure or arbitration." (Request at p. 8).

FOP counters that MPD's objection to the Arbitrator's ruling amounts to a disagreement with his contractual interpretation and findings and does not present a basis for statutory review. We agree.

In any agreement containing an arbitration clause, there is a presumption of arbitrability. *Beatrice/Hunt Wesson, Inc.* 16 LAIS 1060 (1989). A grievance, therefore, is considered arbitrable in the absence of any express provision excluding a particular grievance from arbitration *Id.*; See also

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<sup>6</sup>*MPD and FOP/MPD Labor Committee*, 49 DCR 810, Slip Op. No. 669 at p. 5, PERB Case No. 01-A-02 (2001).

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 05-A-07 was transmitted via Fax and U.S. Mail to the following parties on this the 24<sup>th</sup> day of August 2006.

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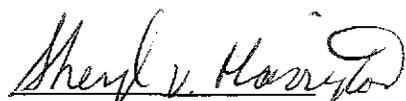
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