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

In the Matter of:)	
)	
Metropolitan Police Department,)	
)	
Petitioner,)	
)	
and)	PERB Case No. 03-A-08
)	Opinion No. 785
National Association of Government Employees,)	
Local R3-5 (on behalf of Grievant Angela Burrell),)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the case

The Metropolitan Police Department ("MPD" or "Agency"), filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an arbitration award ("Award") which rescinded the termination imposed on a bargaining unit employee. MPD contends that the Award is contrary to law and public policy and the Arbitrator's decision regarding the selected penalty is inconsistent with applicable law. (See Request at p. 6). The National Association of Government Employees, Local R3-5 ("NAGE" or "Union") opposes the request.

The issue before the Board is whether "the award on its face is contrary to law and public policy." D.C. Code Sec. 1-605.02(6) (2001 ed).

II. Discussion

Angela Burrell, ("Grievant" or "Ms. Burrell"), had been employed by the District government for thirteen (13) years, of which 2½ years were with MPD. (See Award at p. 7). At the time of the incident giving rise to the grievance, Ms. Burrell was a Police Communications Operator (DS-392-06) for MPD, Public Safety Communications Division. (See Request at p. 3). LeJuane D. Ribbon, Acting Supervisor, claimed that at roll call on the morning of August 18, 2002 she told all the communications operators that MPD's "policy was [that] there were to be no cell phone[s] on the operation floor." (Award at pgs. 2-3) On that same date, Ms. Burrell was on duty as a Police Communications Operator for both the emergency 911 and the non-emergency 311 calls. At approximately 9:53 a.m., Ms. Ribbon claimed that she observed Ms. Burrell using her personal cell phone. Also, Ms. Ribbon asserted that she had asked Ms. Burrell to hang up her cell phone and attend to the incoming 911 and 311 calls on four other occasions. (See Award at p. 2) Ms. Ribbon asserted that on the fourth occasion, she observed Ms. Burrell immediately hang up an incoming call. MPD contended that Ms. Ribbon reviewed the transcript of the Grievant's incoming calls and determined that there had been a caller on the line when the Grievant hung up. Therefore, MPD claimed that Ms. Ribbon asked Ms. Burrell to write a statement (PD 119) concerning this incident. (See Award pgs. 2-3).

Ms. Burrell claimed on her PD 119 that she was ordering food when Ms. Ribbon asked her to hang up. Specifically, Ms. Burrell stated in the PD 119 that "[a]t that time a call came in from a constant caller who is a MO that calls frequently and I terminated the call."¹ (Award at p. 3). Also, the Grievant claimed that she apologized to Ms. Ribbon and that she informed Ms. Ribbon that she was on her cell phone because she was getting ready to go on break.

On August 18, 2002, Ms. Ribbon prepared a memorandum in which she charged Ms. Burrell with "failure to follow a Directive, Violation of Policy by Utilizing a cell phone on the operations floor and *Discourteous treatment to the Public.*" (Award at p. 3) In her memorandum Ms. Ribbon recommended that Ms. Burrell receive a ten (10) day suspension. (See Award at p. 4) The memorandum was addressed to Inspector Ira Grossman, Director of the Communications Division, (See Award p. 4). The charging memorandum and proposed penalty were reviewed by several intermediate levels of supervisors. Specifically, the memorandum and the proposed penalty were reviewed by Robert Sutton, Acting Watch Commander Section B; the Operations Lieutenant; the Deputy Director and Inspector Ira Grossman. All but one of the reviewing officials concurred with Ms. Ribbon that a 10 day suspension was appropriate. The lone dissenter was Inspector Grossman who recommended that Ms. Burrell's employment be terminated. In support of his position, Mr. Grossman informed the Director of the Disciplinary Review Division, that "[t]hough Ms. Burrell

¹ The acronym MO is applied to a caller that is recognized as "an individual with mental illnesses who calls several times a day. MO calls are terminated quickly. . . . [O]perators are trained not to waste time with MO's so that they can respond to other incoming calls." (Award p. 5).

termination, February 21, 2003. (Award at p. 8).

MPD asserts that the Award is contrary to law and public policy regarding the selected penalty. MPD argues that in the present case, "the Arbitrator sustained the misconduct for which [the] Grievant was charged; however, she determined the penalty of removal was excessive." (Request at p. 6). Furthermore, MPD asserts that the Arbitrator's decision regarding the selected penalty is inconsistent with applicable law. (Request at p. 6). Specifically, MPD asserts that under Stokes v. District of Columbia, 502 A.2d 1006 (D.C. 1985)

an arbitrator is precluded from substituting her judgment regarding a penalty for misconduct for that of the Department where the Department engaged in responsible balancing of the relevant factors and that the penalty did not exceed the limits of reasonableness. (Request at p. 6).

In addition, MPD claims that it engaged in a responsible balancing of the relevant factors and that the Grievant's termination did not exceed the limits of reasonableness. (Request at p. 6). Moreover, MPD contends that the reasonableness of the penalty imposed by Inspector Grossman was documented in his *Douglas* factors analysis. In light of the above, MPD argues that the Arbitrator committed error when she applied a rationale based on her personal opinion on the appropriateness of the termination penalty and substituted her judgment for that of MPD. In support of this position, MPD quotes the following language contained in the Award:

The 10-day suspension, while harsh even to this Arbitrator, was upheld by layers of supervision until being reviewed by the Inspector. Understandably, the Inspector, new to the job and several layers away from the actual incident, believed that the offenses were more severe than they actually were. The Arbitrator surmises that this new person wanted to tighten discipline and made Ms. Burrell the object lesson. (Request at p. 8).

Despite its initial claim that the award was contrary to law and public policy, MPD did not specifically identify any public policy that the Award contravenes.

In conclusion, MPD asserts that the Arbitrator is not free to substitute her judgment for that of the MPD when it legitimately invoked and exercised its managerial discretion. (See Request at p. 9). For the reasons noted above, MPD requests that the Arbitrator's Award be reviewed and reversed. (See Request at p. 9).

The gravamen of MPD's Request is based on its interpretation and applicability of *Stokes* to this Award. In *Stokes*, an Administrative Law Judge ("ALJ") of the District of Columbia Office of Employee Appeals ("OEA") mitigated the disciplinary termination of an electrical foreman at the District of Columbia Department of Corrections Youth Center ("DOC") to a 60-day suspension.

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[had] been cited for similar transgressions in the past ... [and] previous management ... failed to ensure progressive discipline . . . [T]he transgressions in the instant case are so egregious that this case stands on its own as a serious breach of public trust that must be seriously addressed.” (Award at p. 4). “Mr. Grossman cited the factors relevant to penalties determined in *Douglas v. Veterans Administration*” as the basis for increasing the Grievant’s penalty from a 10-day suspension to termination.² (Award at p. 4).

In a February 14, 2003 memorandum from the Director of Human Resources, Ms. Burrell was notified that effective February 26, 2003, her employment with MPD would be terminated. (See Award at p. 5) On February 26, 2003, the Union timely grieved Ms. Burrell’s termination in accordance with the parties’ collective bargaining agreement (“CBA”). (Parties’ Stipulations of Fact, July 30, 2003, “Stipulations” ¶ 7.). On March 11, 2003, Charles Ramsey, Chief of Police, denied the grievance. (Stipulations ¶ 8.). Subsequently on March 20, 2003, the Union timely invoked arbitration in accordance with the parties’ collective bargaining agreement. (Stipulations ¶ 9.).

In an Award issued on August 20, 2003, Arbitrator Lucretia Dewey Tanner found that the appropriate discipline in this case should be a 10-day suspension. As a result, the Arbitrator upheld a 10-day suspension and rescinded the termination.

In reaching this conclusion, the Arbitrator observed that Ms. Burrell’s performance appraisals had been excellent or satisfactory. In addition, the Arbitrator noted that Ms. Burrell had received a recommendation that she attend the dispatcher training class, which if successfully completed would lead to a promotion. Also, the Arbitrator noted that by memorandum dated October 9, 2003 an MPD official (Windmon Butler) indicated to Dean AQUI, MPD’s Supervisory Labor Relations Specialist the following:

It is the reviewer’s opinion that . . . Ms. Burrell’s Official Personnel Folder does not show progressive discipline, the Agency provided no follow up training since the January 2002 counseling and that the proposed termination is too harsh a penalty to mete out where the MPD has yet to recoup its cost outlay for training the employee. (Award at p. 8).

In light of the above, the Arbitrator concluded as follows:

After a full review of the matter of termination before this Arbitrator, including extensive testimony and documentation, it appears that the 10 day suspension should stand and that the Grievant should be immediately returned to her former job with the full rights of seniority that would accrue during her being on the job and that she receive back pay from the date of her

² *Douglas v. Veterans Administration*, 5 MSPR 280, 303-308 (1981).

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DOC appealed OEA's decision to the Superior Court of the District of Columbia. The Superior Court reversed the OEA's decision and concluded that the DOC's discharge of the employee was reasonable. The employee appealed to the District of Columbia Court of Appeals. The Court of Appeals concluded, based on D.C. Code §§ 1-606.1 and 1-606.3 (1981), that:

[a]lthough the Act does not define the standards by which the OEA is to review these decisions, it is self-evident from both the statute and its legislative history that the OEA is not to substitute its judgment for that of the agency and its role . . . is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." . . . Although the OEA has a "marginally greater latitude of review" than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. The "primary discretion" in selecting a penalty has been entrusted to agency management, not the [OEA]. (Citations omitted). *Stokes*, 1009-1010 and 1011).

Thus, the Court of Appeals' analysis in *Stokes* is based on the court's interpretation and application of D.C. Code §§ 1-606.1 and 1-606.3 (1981) which created the OEA as "a quasi-judicial body empowered to review final agency decisions affecting, *inter alia*, performance ratings, adverse actions, and employee grievances." (*Stokes*, 1009).

In the present case, the Arbitrator's review of the MPD's termination of Burrell arises out of the parties' CBA and not D.C. Code §§ 1-606.1 and 1-606.3 (1981 ed.). In this regard, this Board has found that by submitting a matter to arbitration, "the parties also agree to be bound by the Arbitrator's decision which necessarily includes the Arbitrator's interpretation of the parties' agreement and related rules and/or regulations as well as his evidentiary findings and conclusions upon which the decision is based." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). Also, "the Board will not substitute its own interpretation or that of the Agency for that of the duly designated Arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). Furthermore, with respect to the Arbitrator's findings and conclusions, we have stated that resolution of "disputes over credibility determinations" and "assessing what weight and significance such evidence should be afforded" is within the jurisdictional authority of the Arbitrator. American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO and District of Columbia General Hospital, 37 DCR 6172, Slip Op. No. 253 at p. 2, PERB Case No. 90-A-04 (1990) and University of the District of Columbia and District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248 at n. 8, PERB Case No. 90-A-02 (1990).

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Moreover, the Arbitrator's power to review the actions of MPD in the instant grievance constitutes an exercise of her equitable powers arising out of the parties' CBA. This Board has held that an arbitrator does not exceed her authority by exercising her equitable powers, unless these powers are expressly restricted by the CBA. See, D.C. Metropolitan Police Department and FOP/MPD Labor Committee, Slip Op. No 633, PERB Case No. 00-A-04 (2000). Absent such an express restriction in the parties' CBA, this Board has also held that "an arbitrator does not exceed [her] authority by exercising [her] equitable powers . . . to decide what mitigating factors warrant a lesser discipline than that imposed." D.C. Metropolitan Police Department and FOP/MPD Labor Committee, 39 DCR 6232, Slip Op. No 282 at pgs. 3-4, PERB Case No. 97-A-02 (1998).

In the present case, MPD does not cite to any provision of the parties' CBA that limits the Arbitrator's equitable power. Instead, MPD contends that the reasonableness of the penalty imposed by Inspector Grossman was documented in his *Douglas* factors analysis. In addition, MPD argues that the Arbitrator committed error when she applied a rationale based on her personal opinion on the appropriateness of the termination penalty and substituted her judgment for that of MPD. We believe that MPD's claim represents only a disagreement with the Arbitrator's award. This Board has previously stated that a "disagreement with the Arbitrator's interpretation . . . does not make the award contrary to law and public policy." AFGE, Local 1975 and Dept. Of Public Works, Slip Op. No. 413, PERB Case No. 95-A-02 (1995). Moreover, the parties stated the issue to be determined by the Arbitrator as follows:

- I. Whether the government of the District of Columbia, Metropolitan Police Department has just cause to terminate Angela Burrell based on a charge of "any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations"?
- II. *If not, what is the appropriate remedy?* (Emphasis added)
(Stipulation of the Issues).

The plain language of the parties' Stipulation of the Issues establishes that the parties bilaterally agreed and intended that the Arbitrator would have the power to determine the appropriate remedy for Ms. Burrell's grievance. We find that the absence of language in the CBA establishing express limits on the Arbitrator's equitable power and the parties' Stipulation of the Issues establish that the Arbitrator did not exceed her authority by exercising her powers to mitigate the Grievant's termination to a 10-day suspension.

For the reasons discussed above, we find that MPD's claim that the Award is contrary to law lacks merit. Therefore, we can not reverse the Award on this ground.

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Also, MPD asserts, without legal argument or supporting case precedent, that the Award is contrary to public policy. Specifically, MPD argues that the Arbitrator's rationale was based on her surmise that Inspector Grossman: (1) was a "new person" who wanted to tighten discipline; (2) believed that the Grievant's offenses were more severe than they actually were; and (3) terminated the Grievant as an object lesson. (See Award at p. 8). However, the possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of the contract." American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F.2d 1, 8 (D.C. Cir. 1986). "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy.'" Id. at 8. Also, a petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well-defined, public policy grounded in law or legal precedent. See United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29 at 43 (1987); Washington- Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971). Moreover, the violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing AFGE, Local 631 and Dep't of Public Works, 45 D.C. Reg. 6617, Slip Op. 365 at p. 4 n, PERB Case No. 93-A-03 (1998); also see District of Columbia Public Schools and the American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p.6, PERB Case No 86-A-05 (1987)). In the present case, MPD has failed to specify any definite public policy that the Award contravenes. Also, we believe that the Arbitrator's discussion with regard to Mr. Grossman is mere *dicta* and is unrelated to her conclusion that the 10-day suspension recommended by every other reviewing official, was the appropriate penalty. Therefore, we conclude that MPD has failed to present a grounds for review as to this claim.

For the reasons discussed above, MPD's Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Arbitration Review Request is hereby denied.
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.

April 12, 2006