Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department,	
Petitioner,	
and	PERB Case No. 9-A-12
Fraternal Order of Police/Metropolitan Police Department Labor Committee, (on behalf of Officer Dennis Baldwin),	Opinion No. 1133
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On August 17, 2009, the District of Columbia Metropolitan Police Department ("MPD", "Department" or Complainant") filed an Arbitration Review Request ("Request") in the above captioned matter. MPD seeks review of an arbitration award ("Award") that sustained the Fraternal Order of Police/Metropolitan Police Department Labor Committee's ("Union", "FOP" or "Respondent") grievance filed on behalf of Officer Dennis Baldwin ("Grievant" or "Officer Baldwin") with MPD.[1] The Arbitrator "found . . . grievance . . . arbitrable, [that] MPD did not timely commence the adverse action in that the MPD violated in the 90-day rule, and sufficient evidence did not exist to support the five (5) charges and five (5) specifications, [and] conclude[d] that all charges and specifications filed against Officer Baldwin should be dismissed. (Award at p. 45).

[1] The Union's grievance concerned the a Final Notice of Adverse Action issued on November 14, 2005, recommending the termination of Officer Baldwin's employment.

The issue before the Board is whether "the arbitrator was without, or exceeded his or her jurisdiction" and whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02(6) (2001 ed). (*See* Request at p. 2).

II. Discussion

A. Factual Background

The Arbitrator made the following pertinent findings of fact:

> MPD charged Fifth District Officer Baldwin with committing acts of misconduct during the period between 2001 and June 8, 2005. He was charged with one specification on each of the following: 1) Conduct Unbecoming an Officer, 2) Willfully and Knowingly Making an Untruthful Statement, 3) Failure to Obey Orders or Directives, 4) Commission of an Act which would Constitute a Crime, and 5) Conduct Prejudicial to the Good Order of the Department. On October 6 and October 7, 2005, the Grievant was afforded an evidentiary hearing before an Adverse Action Panel (Panel) and he pled not guilty to all charges.

(Award at p. 2).

> The Panel unanimously found the Grievant guilty of all five charges and all specifications and recommended that his employment be terminated. Subsequently, Officer Baldwin was served with a Final Notice of Adverse Action on November 14, 2005.

(Award at p. 5).

> In the Final Notice, Assistant Chief Cockett concurred with the Panel's finding and ordered his removal from the Department, effective January 6, 2006.

(Award at p. 6).

> On November 28, 2005, the Grievant appealed to the Chief of Police, Charles H. Ramsey, on the following grounds: 1) Violation of D.C. Code § 5-1502 (2001) ("90-day Rule") with regard to Charges 1 and 4; 2) District Personnel Manual (DPM) and due process violation (evidence of robbery and extortion introduced at hearing over objection); and insufficient evidence as to all charges and specifications. On December 19, 2005, Chief Ramsey denied the appeal, noting, *inter alia*, that [t]here was no

> violation of the Fire and Police Disciplinary Action Procedure Act, inasmuch as the incidents of drug use, drug sales and drug distribution occurred before the effective date of the Act."
>
> On January 10, 2006, the Department received the Grievant's letter, dated January 4, 2006, demanding arbitration, claiming the discipline was "not for cause."

(Award at p. 6).

The Arbitrator framed the issues for consideration as:

> 1) Whether this matter is arbitrable given the MPD's claim that the Grievant failed to submit this matter to the FMCS in a timely matter.
>
> 2) If the grievance is arbitrable, did the MPD timely commence the adverse action?

(Award at p. 7).

Arbitrability

MPD claimed that the grievance was not arbitrable because arbitration had not been invoked within a ten (10) day time frame relative to the parties' final attempt at conciliation of the matter as required by Article 19E of the the parties CBA. The Arbitrator stated that "MPD, which had the burden of proof in its procedural claim of arbitrability, adduced neither evidence that the parties heretofore have strictly adhered to the time limits of Article 19E nor invoked Article 19E, Section 4 while settlement discussions were ongoing to terminate the conciliation process following "any attempt at conciliation." " (Award at p. 17). In other words, the Arbitrator found that for purposes of Article 19E, the request for arbitration was made within the ten days required by the parties CBA.

Having found the grievance arbitrable, the Arbitrator turned to the issue of whether MPD commenced the adverse action in a timely manner.

90 Day Rule

The Arbitrator found that: (1) based upon his interpretation of recent precedent concerning the application of the requirement that adverse action against an officer be commenced within 90 days; (2) his findings in the present matter; and (3)

> [c]onsidering the respective positions of the parties, the Arbitrator is persuaded that the Department violated D.C. Code § 5-10351 or the 90-day rule when it failed to provide its Notice of Proposed

> Adverse Action to Officer Baldwin within 90 business days after the enactment of the statute for acts of misconduct that allegedly occurred before the statute was enacted. In serving the Notice of Adverse Action on September 13, 2005,3 approximately two hundred and thirty-seven (237) business days after the 90-day rule became effective on September 30, 2004, the MPD failed to timely serve Officer Baldwin with its Notice of Adverse Action.

(Award at pgs. 23-24).

. . .

> Accordingly, the Arbitrator finds that the MPD violated the 90-day rule with respect to Charges 1 and 4; therefore these charges and specifications are dismissed.

(Award at p. 27).

MPD's Charges

In addition, the Arbitrator, after considering the evidence relied upon by the Panel to find Officer Baldwin guilty of Charges 1 through 5, found that the Panel's decision was not supported by sufficient evidence in the record. (*See* Award at pgs. 38-45). As noted above:

> because MPD did not timely commence the adverse action in that the MPD violated in the 90-day rule, and sufficient evidence did not exist to support the five (5) charges and five (5) specifications, concludes that all charges and specifications filed against Officer Baldwin should be dismissed. The Department's findings of guilt and penalty determination are rescinded. Officer Baldwin shall be reinstated, effective immediately, to the Metropolitan Police Department, with full back pay and commensurate fringe benefits, including seniority.

(Award at p. 45).

MPD filed the instant review of the Award, contending that: "(1) the award is contrary to law and public policy; and (2) the arbitrator was without authority to grant the award." (Request at p. 2).

When a party files an arbitration review request, the Board's scope of review is extremely narrow.[2] Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

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[2] In addition, Board Rule 538.3 - Basis For Appeal - provides:

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.).

As an initial matter, Respondent asserts that the request for arbitration was untimely and, therefore, not arbitrable.

This Board has previously held that arbitrability is an initial question for the arbitrator to decide, if the parties challenge jurisdiction on this ground. *District of Columbia Department of Public Works and American Federation of Government Employees*, Local 872, 38 DCR 5072, Slip Op. No. 280 at p. 3, PERB Case No. 90-A-10 (1991) (citing *American Federation of State, County and Municipal Employees, Local 20, AFL-CIO v. District of Columbia General Hospital and District of Columbia Office of Labor Relations and Collective Bargaining*, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989)).

In addition, 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. Super 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. 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."

In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:

(a) The arbitrator was without authority or exceeded the jurisdiction granted;
(b) The award on its face is contrary to law and public policy; or
(c) The award was procured by fraud, collusion or other similar and unlawful means.

District of Columbia Metropolitan Police Department v. 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); *D. C. 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).

"This jurisdictional authority applies equally to issues of arbitrability." *Fraternal Order of Police/Metropolitan Police Department Labor Committee and District of Columbia Metropolitan Police Department*, 49 DCR 821, Slip Op. No. 670, PERB Case No. 01-A-09 (2001). "Moreover, the Board will not substitute its own interpretation for that of the duly designated Arbitrator." *Id.*

In the present case, the question of arbitrability was previously raised by MPD to the Arbitrator. The Arbitrator found the grievance arbitrable. MPD's argument merely represents a disagreement with the Arbitrator's interpretation of the CBA and his finding that the matter was arbitrable. Such grounds do not present a statutory ground for modifying or setting aside the Award. *See, e.g., D.C. Dept of Public Works and American Federation of State, County and Municipal Employees, District Council 20, Local 2091*, 39 DCR 3344, Slip Op. No. 219, PERB Case No. 88-A-02 (1989). Based on the foregoing Board precedent, the Board finds that MPD has not presented a statutory basis for review. Therefore, the Board cannot reverse the Award on this ground.

As to MPD's claim that the Award is on its face contrary to law and public policy, we disagree for the reasons discussed below.

The Board's scope of review, particularly concerning the public policy exception, is extremely narrow. Furthermore, the U.S. Court of Appeals, District of Columbia Circuit, observed that "[i]n *W.R. Grace*, the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" Obviously, the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of "public policy." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F. 2d 1, 8 (D.C. Cir. 1986).[3] A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). *See also, District of Columbia Public Schools and 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). As the Court of Appeals has stated, we must "not be led astray by our own (or anyone else's)

[3] See *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 2176, 76 L. Ed. 2d 298 (1983).

concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A2d 319, 325 (D.C. 1989).

In the instant matter, MPD contends that Arbitrator's Award is contrary to law and public policy because of the Arbitrator's findings of fact regarding issue of whether arbitration was invoked in a timely manner. (*See* Request at p. 6). Additionally, MPD claims that the Arbitrator "changed" the standard of review regarding the evidence necessary to substantiate the charges against the Grievant. (See Award at p. 6).

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. We decline MPD's request that we substitute the Board's judgment for the arbitrator's decision for which the parties bargained. MPD had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Instead MPD repeats the same arguments considered and rejected by the Arbitrator; this time asserting that the Arbitrator misinterpreted the parties' CBA.

We have held that a disagreement with the Arbitrator's interpretation does not render an award contrary to law. *See DCPS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 49 DCR 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. MPD's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. *See University of the District of Columbia and UDC Faculty Association*, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991).

In addition, MPD argues that the Arbitrator exceeded his jurisdiction by purportedly modifying Article 19 E., Section 4 of the parties' CBA (concerning the 10-day period for invoking arbitration), "by changing the triggering date for submission to arbitration within ten days from "any attempt at conciliation" to "the point at which the parties' efforts at conciliation ended" and/or any attempt that "unequivocally precludes future conciliation." (Request at p. 8). Moreover, MPD claims that the Arbitrator exceeded his jurisdiction under the parties' CBA by failing to defer to the Hearing Panel's credibility determinations.

MPD alleges that the Arbitrator exceeded his authority by reducing the Grievant's penalty. The Board has held, as has the Court of Appeals for the Sixth Circuit, that:

> we will consider the questions of 'procedural aberration'.... [And ask] [d]id the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator 'arguably construing or applying the contract'? So long as the arbitrator does not offend any of these

> requirements, the request for judicial intervention should be resisted even though the arbitrator made 'serious,' 'improvident' or 'silly' errors in resolving the merits of the dispute.
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> * * *
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> The Court's repeated insistence that the federal courts must tolerate "serious" arbitral errors suggests that judicial consideration of the merits of a dispute is the rare exception not the rule. At the same time we cannot ignore the specter that an arbitration decision could be so "ignor[ant]" of the contract's "plain language," [citation omitted] ... as to make implausible any contention that the arbitrator was construing the contract.... Such exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that.... [Citation omitted.]
>
> This view of the "arguably construing" inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes....

Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M, 475 F. 3d 746, 753 (2007) (overruling *Cement Divisions, Nat. Gypsum Co. (Huron) v. United Steelworkers of America, AFL-CIO-CLC, Local 135*, 793 F.2d 759).

The Board finds nothing in the record that suggests that fraud, a conflict of interest or dishonesty infected the Arbitrator's decision or the arbitral process. No one disputes that the collective bargaining agreement committed this grievance to arbitration and the Arbitrator was mutually selected by the parties to resolve the dispute. (*See Michigan*, at p. 754). Therefore, the Board rejects the argument that the Arbitrator exceeded his authority.

In addition, we have found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.[4] See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Here, MPD states that the Arbitrator is prohibited from issuing an award that would modify, or add to, the CBA. However, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that MPD violated the parties' CBA, and found the evidence insufficient to support the charges against the Grievant, he also had the authority to determine the appropriate remedy. Contrary to MPD's

[4] We note that if MPD had cited a provision of the parties' CBA that limits the Arbitrator's equitable power, that limitation would be enforced.

contention, the Arbitrator did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, the Arbitrator acted within his authority. The Board finds that MPD's argument asks that this Board adopt its interpretation of the CBA and merely represents a disagreement with the Arbitrator's interpretation. As stated above, the Board will not substitute its, or MPD's, interpretation of the CBA for that of the Arbitrator. Thus, MPD has not presented a ground establishing a statutory basis for review.

In view of the above, we find no merit to MPD's argument. We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

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

September 15, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in the Board's Decision and Order in PERB Case No. 09-A-12 is being transmitted via Fax and U.S. Mail to the following parties on this the 15th day of September, 2011.

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