Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department Petitioner, v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Crystal Dunkins) Respondent.	PERB Case No. 12-A-05 Opinion No. 1344

DECISION AND ORDER

Grievant Crystal Dunkins ("Grievant") was terminated by the D.C. Metropolitan Police Department ("MPD" or "Petitioner") on charges arising out of her arrest for assault, child abuse, and allowing a child to be confined and unattended. Arbitrator Herbert Fishgold set aside the termination and reduced it to a 30-day suspension. The MPD appeals to the Board from that arbitration award ("Award").

I. Statement of the Case

The arbitrator found the following facts:

> The incident at issue occurred in November 2006, at which time Officer Dunkins had been a member of the MPD for over 12 years. She was then a single mother of two girls - Jasmond (age 7) and Diamond (age 9), and lived with them in Waldorf, Maryland. Both Jasmond and Diamond attended Wade Elementary School in Waldorf, and lived close enough to walk to school each morning.
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> On Thursday, November 16, 2006, while at school, Jasmond was sent to see the school nurse because her arms were hurting. Sally Krevey, the school nurse, noticed several lengthy marks on both arms, which she believed to have been inflicted by a long, thin object. At approximately noon Ms. Krevey called Officer Dunkins concerning the marks on Jasmond's arms. During that brief conversation, Grievant stated, "You don't have to go any

further, I beat her." Ms. Krevey then informed Walter Williams, the pupil personnel worker for Charles County Public Schools, about her observation. He then examined Jasmond and determined that the marks were made by a belt.

Detective Scott Fetterolf, from the Special Victims Unit for the Charles County Sheriff's Office and Daniele Kennedy, a child protective service investigator, went to the school the next day to investigate. They spoke with Jasmond, who told them that Grievant beat her with a belt because she and her sister went outside when Grievant had told them to stay inside while she ran an errand. Both Fetterolf and Kennedy, upon examining Jasmond's arms, agreed that the injuries looked like bruises from being beaten by a belt intentionally.

Jasmond further told them that her mother beat Diamond with a belt and regularly left them at home alone; that Grievant is not at home in the mornings when the girls need to go to school, and that they dress and feed themselves, and then walk to school. After school, according to Jasmond, they walk home by themselves, and they are alone until Grievant returns around 5:30pm. Diamond confirmed her sister's story.

On November 20, 2006, following the end of the school day, Detective David Kelly and Ms. Kennedy went to Grievant's home to check on the well-being of Jasmond and Diamond. Jasmond answered the door, and told them that Diamond would be right back, and that they were home alone. When Diamond returned, Kennedy called Grievant and asked her to return home. Shortly thereafter, Grievant returned home and began yelling at the girls for letting Kelly and Kennedy into the house.

They then questioned Grievant about her methods of discipline, and leaving children her daughters' age at home alone, which was against the law. Grievant told them, "Yeah I beat her" and "I'll [probably] beat them again." It was obvious to Kelly and Kennedy that Grievant was very upset by their being there. They then left Grievant's residence and did not place her under arrest at the time.

Thereafter, on November 21, 2006, Detective Fetterolf placed Grievant under arrest, and she was subsequently charged with (1) first degree assault; (2) second degree assault; (3) second degree child abuse; (4) reckless endangerment; and (5) confining an unattended child. In a pre-sentence agreement, the State of Maryland agreed to dismiss all charges in exchange for a guilty plea of confining an unattended child, and agreeing to complete a parental training course in exchange for five years' probation.

The MPD then issued a Notice of Proposed Adverse Action, issued by former MPD Assistant Chief Sharon Cockett, charging Grievant with one charge each of conduct unbecoming an office[r] and committing an act that constitutes a crime. Each charge was supported by specifications and allegations that Grievant failed to properly care for her children. The proposed penalty was termination.

Grievant was served with a copy of the Notice, and on March 9, 2007, she requested a departmental hearing. On April 12, 2007 and May 1, 2007, Grievant appeared before an Adverse Action Panel to contest her proposed removal. The Panel found Grievant guilty of all charges and specifications based on the documentary and testimonial evidence

presented by the Department. The Panel then recommended a total of 30 days suspension without pay.

Grievant then appealed the Panel's decision, and Assistant Chief Cockett of the Office of Human Services (ACHS) reviewed the Panel's findings and conclusions, and determined that the recommended penalty, which reduced the original proposed termination, was inconsistent with the misconduct. After weighting all aggravating and mitigating Douglas factors affecting penalty, [Assistant Chief] Cockett decided to affirm the original proposed penalty of termination, and so issued a Final Notice of Adverse Action.

(Award at pp. 2-4).

The arbitrator found that Assistant Chief Cockett did not have authority to increase the Adverse Action Panel's recommended penalty from a 30-day suspension to a termination. Accordingly, the arbitrator reduced the penalty to a 30-day suspension and ordered the Grievant reinstated with back pay and benefits, less 30 days. Petitioner filed an arbitration review request ("Request") contending that the Award is contrary to law and public policy. *See* D.C. Code §1-605.02 (6). The Request is now before the Board for disposition.

I. Discussion

A. The Award

The arbitrator resolved a conflict between part VI(K)(8) of MPD General Order 120.21(formerly 1202.1) ("G.O. 120.1") and title 6A, chapter 10, §1001.5 of the D.C. Municipal Regulations ("§1001.5"). G.O. 120.1 provides in pertinent part that "[a]fter reviewing the Hearing Tribunal's[1] proposed decision, the Assistant Chief, OHS, may . . . issue a decision (Final Notice of Adverse Action) affirming . . . the action, as originally proposed in the Notice of Proposed Adverse Action."

"Thus," the arbitrator wrote, "the plain language of the controlling General Order permits [the assistant chief of the Office of Human Services] to impose the penalty proposed in the Notice even if the Panel recommends a lesser penalty." (Award at p. 6). In contrast, §1001.5 does not give that option: "Upon receipt of the trial board's finding and recommendations, and no appeal to the Mayor has been made, the Chief of Police may confirm the finding and impose the penalty recommended, reduce the penalty, or may declare the board's proceedings void and refer the case to another regularly appointed trial board." The arbitrator held that §1001.5 "is a municipal regulation that the Department must follow because it takes preceden[ce] over internal guidelines." (Award at p. 5).

The MPD argued that §1001.5 had been annulled by the Comprehensive Merit Personnel Act ("CMPA"), which made the law establishing trial boards, D.C. Code §5-133.6, inapplicable to police officers appointed after January 1, 1980. D.C. Code § 1-632.03(a)(1)(Z). Arbitrator Fishgold found that that issue had been well analyzed by Arbitrator Wolf in *FOP/MPD Labor*

[1] G O. 120.21 defines the term "Hearing Tribunal" to include "Trial Boards as defined in D.C. Official Code § 5-133.06 (Trial Boards), Adverse Action Panels, and Departmental Hearing Panels. . . ."

Committee v. MPD (MacDonald), FMCS Case No. 060706-57644-A (M. Wolf 2007), concluding, "as did Arbitrator Wolf, for the reasons articulated in his thoughtful decision, . . . that . . . Section 1001.5 is applicable to this Grievant and this provision of the regulations takes precedence over General Order 1202.1." (Award at p. 9).

B. Contentions of the Petitioner

The Petitioner in its Request objects to Arbitrator Fishgold's reliance on the earlier decision of Arbitrator Wolf: "[T]he other arbitration award is of absolutely no consequence because '[a]rbitration decisions do not create binding precedent even when based on the same collective bargaining agreement.' *D.C. Metro. Police Dep't v. D.C. Public Empl. Relations Bd.*, 901 A.2d 784, 790 (D.C. 2006)(citing *Hotel Ass'n of Washington, D.C. Inc. v. Hotel & Restaurant Employees Union, Local 25*, 963 F.2d 388, 389-91 (D.C. 1992))." (Request at pp. 6-7).

The Petitioner notes that Arbitrator Fishgold and the Grievant acknowledged that the CMPA, D.C. Code 1-632.03(a)(1)(Z), rescinded the statute that established trial boards. Section 1001.5 is a regulation concerning the procedures of trial boards adopted pursuant to that rescinded statute. Therefore, §1001.5 is a nullity. That being the case, nothing prevented Assistant Chief Cockett from imposing the higher penalty proposed in the notice of adverse action, and G.O. 120.21 expressly permitted that choice. Therefore, the MPD concluded, the Award is contrary to law and public policy, namely, the CMPA, which abolished the enabling statute for the regulation upon which the Award relies.

C. Analysis

The MPD is correct that Arbitrator Wolf's decision is not binding precedent, but the MPD as well as Arbitrator Fishgold should have noted that this Board affirmed that decision, albeit summarily, in *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee(on behalf of Maurice MacDonald)*, 59 D.C. Reg. 3974, Slip Op. No. 928, PERB Case No. 07-A-04 (2008). An analysis of the statutes and regulations in question confirms the result in *MacDonald.*

The statute establishing trial boards for the purpose of hearing charges preferred against members of the MPD was enacted by Congress in 1906, 34 Stat. 221 (1906), in amendments to an earlier act.[2] The statute is presently codified in the District of Columbia Official Code at §5-133.06 ("Trial Boards"). Rules of procedure before trial boards, including §1001.5, were adopted in 1972. D.C. Mun. Regs. Subdiv. 6-A, §§ 1000.1-1001.7; 18 D.C. Reg. 417 (Feb. 7, 1972).

As the Petitioner stresses, the CMPA, enacted in 1979, made a number of statutes, including the statute establishing trial boards (D.C. Code § 5-133.06), inapplicable to "to police officers and firefighters appointed after" January 1, 1980. D.C. Code §1-632.03(a)(1). At the same time, the CMPA also directed the mayor to issue rules and regulations to establish a disciplinary system. D.C. Code §1-616.51. The mayor delegated his rulemaking authority under

[2] An Act Relating to the Metropolitan police of the District of Columbia, 31 Stat. 819 (1901).

the CMPA to the director of the Office of Personnel and the chief of police. Mayor's Order 2000-83.

Pursuant to those authorities, the director of the Office of Personnel and the chief of police adopted chapter 16 of the D.C. Municipal Regulations. ("General Discipline and Grievances"), 47 D.C. Reg. 7024 (Sept. 1, 2000). The new regulations included §1601.5(a), which provides:

> Any procedures for handling corrective or adverse actions involving uniformed members of the Metropolitan Police Department, or the Fire and Emergency Medical Services Department (FEMSD) at the rank of Captain or below provided by law, or by regulations of the respective departments in effect on the effective date of these regulations, including but not limited to procedures involving trial boards, shall take precedence over the provisions of this chapter to the extent there is a difference.

This provision reflects that, contrary to Petitioner's assertions, the older regulations involving procedures of trial boards were still "in effect" after 1980. Even if §1001.5 were adopted pursuant to a repealed statute, it is incorporated by reference by §1601.5(a), which was adopted pursuant to statute that has not been repealed. Moreover, under §1601.5(a) the trial board regulations are not only still in effect, but also they take precedence over the new regulations to the extent there is a difference between the two. On the question raised by this case there is no difference: neither § 1001.5 nor the new regulations adopted pursuant to the CMPA permit the assistant chief to increase the recommended penalty. Section 1613 provides:

> 1613.1 The deciding official, after considering the employee's response in the report and recommendation of the hearing officer pursuant to section 1612, when applicable, shall issue a final decision.
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> 1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty.

Thus, § 1613.2 precludes a deciding official from increasing the penalty recommended by a hearing officer by whatever name. If § 1613.2 did not preclude increasing the penalty, then § 1001.5 would supersede it and still preclude the assistant chief from increasing the penalty. Arbitrator Wolf correctly determined in *MacDonald* that "if 6A DCMR Section 1001.5 did not apply to this case, then 6 DCMR Section 1613.2 prevails." *MacDonald*, Slip Op. No. 928 at p. 4, PERB Case No. 07-A-04. All of these regulations supersede a General Order of the MPD. *See District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998).

If a recommended penalty appears insufficient, the regulations give the assistant chief the option of remanding the case, but they do not give her the option of increasing the penalty on her own. Accordingly, the Award's reduction of the penalty imposed on the Grievant is consistent

with the CMPA as well as the D.C. Municipal Regulations and is not contrary to law or public policy. Therefore, the Award is sustained.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Award is sustained. Therefore, the arbitration review request of the Metropolitan Police Department is dismissed.

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.

November 8, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-A-05 is being transmitted via U.S. Mail to the following parties on this the 13th day of November, 2012.

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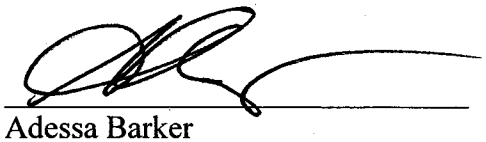

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