Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department,	
Employer,	PERB Case Nos. 10-A-23 and 10-A-24
v.	Opinion No. 1317
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Avis Ray),	
Labor Organization.	

DECISION AND ORDER

I. Statement of the Case

These consolidated arbitration review requests arise out of the Metropolitan Police Department's termination of the employment of Detective Avis Ray ("Ray" or "Grievant") for repeatedly disobeying orders to submit medical records or authorize their release. On Ray's behalf, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Union") submitted a demand for grievance arbitration. The grievance was granted in part and denied in part by the arbitrator's opinion and award ("Award"). The Metropolitan Police Department ("Department") filed an arbitration review request appealing from the partial granting of the grievance (PERB Case No. 10-A-23). The Union filed an arbitration review request appealing from the partial denial of the grievance (PERB Case No. 10-A-24).

II. Background

The Grievant filed with the Department an injury report in which she recounted her attempt to apprehend a fleeing suspect on June 26, 2003. She stated that the suspect knocked her backwards, causing her to fall to the ground. The Grievant claimed that she began to experience severe pain later that evening. The next day she went to the Police and Fire Clinic. She was treated and placed on sick leave. Additionally, at some point, she saw her own physician. (Award at pp. 2-3.)

The Department's Medical Services Division classifies injuries as either occurring in the performance of duty (a POD injury) or not occurring in the performance of duty (a non-POD injury). Police officers with POD injuries do not have to use sick leave during the resulting absence, but police officers with non-POD injuries must use sick leave. In addition, a police officer on POD status draws two-thirds of his salary. (Metropolitan Police Department's Supplemental Statement in Support of Employer's Arbitration Review Request ("Department's ARR") at p. 2.) In a memorandum dated October 3, 2003, the director of the Medical Services Division noted that Ray had not provided requested information from her physician and questioned the truthfulness of Ray's complaint of injury. He concluded that the injury was non-POD. (Award at p. 3.) Ray appealed that determination, but the Superior Court and the Court of Appeals affirmed it. (*Id.* at p. 4.)

After the director's non-POD determination, the Department continued to ask Ray for a report from her physician. The Department's authority for these requests was General Order 1001.1, number 1, part I(F)(1)(b) ("GO 1001.1"), which requires members of the Department "who are being treated by their private physicians for injuries/illnesses not incurred in the performance of duty . . . [to] [p]rovide a report to the Clinic physician from their private physician which gives the diagnosis and prognosis of the medical condition." (Award at p. 8; Department's Opposition to Arbitration Review Request at attachment 9.)

The Department suspended Ray for twenty days in 2004 for failing to give the Police and Fire Clinic her private physician's diagnosis and prognosis. (Award at p. 25; Department's ARR at pp. 3-5; Union's Arbitration Review Request ("Union's ARR") attachment 3 at p. 4.) In 2005, she refused to comply with orders from two sergeants and one captain either to provide medical records or to sign a Request for Medical Reports. (Award at pp. 4-6 & 20.) The Request for Medical Reports form states, "In order to monitor your treatment and progress, and to determine your duty status, the Director of the Medical Services Division requires that you provide the requesting physician with a report from your private treating physician, which gives a diagnosis and prognosis of your medical condition." (*Id.* at 25.)

As a result of the Grievant's continued refusals, the Department prepared two notices of adverse action. The first notice of adverse action, dated August 8, 2005, alleged that the Grievant refused to obey orders from Capt. Michael Eldridge on March 28, 2005, and from Sgt. James Miller on May 16, 2005, either to provide her records or to sign a Request for Medical Reports. She was charged with neglecting duty and willfully disobeying orders or insubordination on both occasions. The second notice of adverse action, dated August 24, 2005, added an additional charge of neglect of duty and an additional charge of willfully disobeying orders or insubordination. The notice recited that on May 31, 2005, Sgt. Eugene Edwards ordered the Grievant to submit her medical records at her next visit to the Medical Services Division. Grievant did not do so at her next visit, which took place June 21, or at any time thereafter. On June 21, Sgt. Edwards ordered the Grievant to sign a Request for Medical Reports. She replied, "What part didn't you understand? I'm not going to sign." (*Id.* at pp. 4-6.)

Both notices of adverse action were served by leaving them at Ray's house. A final notice of adverse action was left at Ray's house on September 15, 2005. The final notice found

Ray "guilty" of all the charges and informed her that she would be removed from the force. (*Id.* at 7.)

The Union appealed Ray's termination to the chief of police. The Union argued, among other things, that the Grievant had not been given 21 days to respond to the notice of adverse action as required by the Article 12, §4 of the Collective Bargaining Agreement ("CBA"). The Union asserted that the Grievant was not aware of the charges until August 29 but was fired on September 15, less than 21 days later. The chief of police dismissed the two charges arising on March 28, 2005, but otherwise denied the appeal. The Grievant's employment with the Department was terminated October 28, 2005. (Award at p. 7.)

The Union demanded arbitration on behalf of the Grievant. Charles Feigenbaum was selected as the arbitrator. The matter was submitted to him on briefs and exhibits. Arbitrator Feigenbaum determined that the parties' briefs presented the following issues:

> 1. Did the Department violate Article 12, §4, of the Collective Bargaining Agreement (CBA)? If so, what shall be the remedy?
>
> 2. Was there sufficient evidence to support the termination of the Grievant, Detective Avis F. Ray? If not, what shall be the remedy?
>
> 3. Was termination an appropriate penalty? If not, what shall be the remedy?

(Award at pp. 1-2.)

The arbitrator found that the Department had violated Article 12, §4; his remedy for that violation was to move the effective date of termination from October 28, 2005, to the date of the Award, September 10, 2010, and to award back pay for the intervening five years. Further, the arbitrator found that there was sufficient evidence to support the termination and that termination was an appropriate penalty.

Objecting to the award of back pay, the Department filed an arbitration review request, PERB Case No. 10-A-23, petitioning the Board to reverse the Award in part. Objecting to the affirmance of the termination, the Union filed an arbitration review request, PERB Case No. 10-A-24, petitioning the Board to reverse the Award in part. The two arbitration review requests share similar issues, involve the same parties, and are therefore consolidated. *See D.C. Dep't of Human Servs. v. F.O.P./Dep't of Human Servs. Labor Comm.*, 50 D.C. Reg. 5028, Slip Op. No. 691 at p. 3 n.3, PERB Case Nos. 02-A-04 and 02-A-05 (2003).

III. Discussion

The Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to consider appeals from arbitration awards and to modify, set aside, or remand an award "only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means. . . ." D.C. Code § 1-605.02(6); *accord* PERB R. 538.3. Both the Department and the Union

contend that the arbitrator exceeded his jurisdiction. In addition, the Union contends that the award on its face is contrary to law and public policy.

A. Jurisdiction of the Arbitrator

The first issue stated by the arbitrator was "Did the Department violate Article 12, §4, of the Collective Bargaining Agreement (CBA)? If so, what shall be the remedy?" The Union and the Department maintain, on different grounds, that the arbitrator's resolution of this issue exceeded his jurisdiction.

Article 12, §4 provides:

> The Chief of Police or his/her designee shall take adverse action after providing the employee with written notification of the charges and proposed action. . . . In the event the Department proposes termination, the employee shall have twenty-one (21) business days to submit his/her response. In his/her response, the employee shall also indicate whether he/she desires a Departmental hearing.

(Award at p. 2.) The arbitrator found that the Grievant was not given the full 21 business days to submit a response required by this rule before the Department fired her. The Grievant claimed that she never received the first notice of adverse action, which was left at her house August 8, 2005. As the second notice had additional charges, the arbitrator decided that the second notice superseded the first and made irrelevant if and when the Grievant received the first notice. An officer left the second notice at the Grievant's home August 24, 2005. The Grievant did not sign for that notice and asserted that she did not see it until August 29. The arbitrator concluded: "The Final Notice was issued on September 15. That made the Final Notice premature, whether August 24 or August 29 is chosen as the start of the 21 day count period. However, one looks at it, it is plain that the MPD violated Article 12, §4." (*Id.* at 20.)

The Department's argument against this conclusion relies on the date of the alleged service of the first notice and ignores the additional charges in the second notice. The final notice of adverse action issued less than 21 days after the date of the second notice refers to both the first and the second notices and finds the Grievant guilty of the additional charges in the second notice. (Union's ARR attachment 3, exhibit 5 at pp. 1, 6, & 7.) The Department cannot deny that at least as to the additional charges Article 12, §4 was violated.

The Union argued in its arbitration brief that the violation of the time limit in Article 12, §4 required the reversal of the Grievant's termination and cited as instructive arbitration awards rescinding terminations as a result of violations of a different time limit, the 55-day rule of Article 12, §6 of the CBA. (Award at pp. 15-16.) Noting that the consequences of violating Article 12, §4 was an issue of first impression, Arbitrator Feigenbaum examined the chain of arbitration awards regarding violations of Article 12, §6 back to its first link, an award by Arbitrator Strongin in 1984. In that award, Arbitrator Strongin found that a violation of Article 12, §6 had to be viewed as harmful error. Arbitrator Strongin's conclusion regarding harmful

error, Arbitrator Feigenbaum wrote, was based on the interpretation of a federal statute[1] having no counterpart in the CMPA by a case that was later overruled by the U.S. Supreme Court.[2] "Thus," Arbitrator Feigenbaum concluded, "there is nothing in law (or the CBA) to mandate that a violation of Article 12, §4, is to be regarded as a *per se* basis for overturning an otherwise valid disciplinary action." (Award at pp. 23-34.)

The arbitrator resolved that issue of first impression by deciding that on the facts of the case before him there was no harmful error because nothing in the record showed that the Department would have made a different decision if Article 12, §4 had not been violated. The chief of police had the Grievant's opposition before him when decided the Union's appeal from the final notice of adverse action on October 12, 2005. (*Id.* at p. 27.) Nonetheless, the arbitrator rejected the Department's position that because there was no harmful error there should be no penalty for the violation of the contract. Balancing the seriousness of the contractual violation against the seriousness of the Grievant's repeated misconduct, the arbitrator penalized the Department by moving the date of the Grievant's termination to the date of the Award and awarding her back pay for the five years in the interim.

The Union agrees with the arbitrator that Article 12, §4 was violated but argues that the arbitrator exceeded his jurisdiction by delaying rather than rescinding the termination as a result of that violation. The Union points out that the CBA limits the authority of the arbitrator in the following words: "The Arbitrator shall not have the power to add to, or subtract from or modify the provisions of the Agreement in arriving at a decision of the issue presented. . . ." (Union's ARR at p. 10)(quoting CBA art. 19, § 5.4(E)). The Union asserts that the arbitrator's determination that the Department would not have come to a different decision absent a violation of Article 12, §4 is "pure speculation" and "adds an element of presumed harm into Article 12, Section 4 that is not present." (Union's ARR at pp. 10 & 11.)

The Union's assertion that the arbitrator added "an element of presumed harm" is perplexing because the Union's real objection seems to be that the arbitrator did *not* establish a principle of presumed harm for Article 12, §4, that is, he did not hold that a violation of Article 12, §4 creates an irrebuttable presumption of harmful error. Instead he rejected the Union's position that "a violation of Article 12, §4 is to be regarded as a *per se* basis for overturning an otherwise valid disciplinary action." (Award at pp. 23-24.) The Union disputes the arbitrator's determination that nothing in the record shows that the Department would have come to a different decision absent the violation. The Union's assertion that this determination added an element to Article 12, §4 is nothing more than a disagreement with the arbitrator's factual determination. A disagreement with an arbitrator's factual determination is not a basis for overturning an award. *F.O.P./Dep't of Corrections Labor Comm. v. D.C. Dep't of Corrections*, Slip Op. No. 1271 at p. 6, PERB Case No. 10-A-20 (May 12, 2012). The Union has not identified anything that the arbitrator added to Article 12, §4.

According to the Department, what the arbitrator added to Article 12, §4 was a remedy: "there is no language in the CBA that expressly grants authority to the Arbitrator to issue a

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[1] 5 U.S.C. § 7701(c)(2)(A).

[2] *Devine v. White*, 697 F.2d 421 (D.C. Cir. 1983), *overruled by Cornelius v. Nutt*, 472 U.S. 648, 656 n.7 (1985).

remedy for a violation of Article 12, §4." (Department's ARR at p. 12.) The Department alludes to the same provision cited by the Union barring arbitrators from adding to or subtracting from the provisions of the CBA. (*Id.*)

The Supreme Court addressed the remedial authority of arbitrators in the seminal case of *United Steelworkers v. Enterprise Wheel and Car Corp.*, where the Court said,

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

363 U.S. 593, 597 (1960). In accordance with these principles, we have held that an arbitrator does not exceed his authority by exercising his equitable power to formulate a remedy unless the collective bargaining agreement expressly restricts his equitable power. The CBA's prohibition against awards that add to, subtract from, or modify the CBA does not expressly limit the arbitrator's equitable power. *See Metropolitan Police Dep't and F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Dennis Baldwin)*, Slip Op. No. 1133 at p. 8, PERB Case No. 9-A-12 (Sept. 15, 2011).

Therefore, once the arbitrator concluded that the Department had violated Article 12, §4, he had authority to determine the appropriate remedy. Contrary to the contentions of the Union and the Department, 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 involved advancing the date of the termination and awarding back pay. Thus, the arbitrator acted within his jurisdiction. *See D.C. Metro. Police Dep't v. F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Andre Powell)*, Slip Op. No. 886 at p. 5, PERB Case No. 06-A-03 (Apr. 20, 2007); *D.C. Metro. Police Dep't v. F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Celeste Santana)*, Slip Op. No. 878 at p. 6, PERB Case No. 06-A-15 (Mar 21, 2007).

Neither this decision regarding Article 12, §4, nor the many other decisions involving these same parties in which the Board sustained remedies that rescinded discipline where similar time limits were violated[3] and sustained remedies that did not rescind discipline for such violations[4] establishes a preference for any particular remedy for a violation of one of the time

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[3] *F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Dan James) and D.C. Metropolitan Police Dep't*, Slip Op. No. 1293, PERB Case No. 10-A-10 (July 11, 2012); *D.C. Metro. Police Dep't v. F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Joseph Stimmell)*, Slip Op. No. 1206, PERB Case No. 05-A-11 (Oct. 11, 2011); *D.C. Metro. Police Dep't v. F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Celeste Santana)*, Slip Op. No. 878, PERB Case No. 06-A-15 (Mar 21, 2007).

[4] *F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Timothy Harris) and D.C. Metropolitan Police Dep't*, Slip Op. No. 1295, PERB Case No. 09-A-11 (July 23, 2012); *F.O.P./Metropolitan Police Dep't Labor Comm. (on behalf of Christopher Micciche) and D.C. Metropolitan Police Dep't*, Slip Op. No. 913, PERB Case No. 04-A-19 (Oct. 31, 2007).

limits in the CBA or implies that a different remedy is outside the jurisdiction of an arbitrator. Rather, these decisions reaffirm that when parties include an arbitration provision in a contract, part of what they bargain for is the "informed judgment" of the arbitrator, especially as to the formulation of remedies. *See D.C. Metro. Police Dep't v. F.O.P./Metropolitan Police Dep't Labor Comm.*, 54 D.C. Reg. 2683, Slip Op. No. 819 at p. 9, PERB Case No. 05-A-07 (2006)(quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597).

B. Law and Public Policy

The CMPA, as previously noted, authorizes the Board to modify, set aside, or remand an award that "on its face is contrary to law and public policy. . . ." D.C. Code § 1-605.02(6). "As we ourselves have previously reasoned," the Court of Appeals averred, "the statutory reference to an award that 'on its face is contrary to law and public policy' may include an award that was premised on 'a misinterpretation of law by the arbitrator that was apparent 'on its face'"" *F.O.P./Dep't of Corrections Labor Comm. v. D.C. Pub. Employee Relations Bd.*, 973 A.2d 174, 178 (D.C. 2009)(quoting *D.C. Metropolitan Police Dep't v. D.C. Pub. Employee Relations Bd.*, 901 A.2d 784, 787-88 (D.C. 2006)). The petitioner "has the burden to specify 'applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.'" *D.C. Water & Sewer Auth. and Am. Fed'n of Gov't Employees, Local 872*, 52 D.C. Reg. 5163, Slip Op. No. 779 at p. 6, PERB Case No. 04-A-05 (2005)(quoting *D.C. Metropolitan Police Dep't and F.O.P./ Metropolitan Police Dep't Labor Comm. (on behalf of Charles Sims)*, 47 D.C. Reg. 7217, Slip Op. 633 at p. 2, PERB Case No. 00-A-04 (2000). In this regard, the Union asserts that a regulation adopted by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act, 42 U.S.C. §§ 1320d-1320d-9, ("HIPAA") mandates that the arbitrator arrive at a different result than he did.

The Union argues that this regulation, 45 C.F.R. § 164.508, "jealously protect[s] medical records" (Union's ARR at p. 4) and "requires that medical service providers jealously guard an individual's protected health information unless there is explicit consent to disclose said documentation." (*Id.* at p. 8.) The orders the Department issued pursuant to GO 1001.1 contravened this regulation, the Union maintains, and consequently were unlawful. Therefore, the arbitrator's resolution of the second and third issues, in which he found on the basis of Ray's violation of those orders that there was sufficient evidence to support the termination and that termination was an appropriate remedy, was contrary to law and public policy. The Union requests that the Board remand the matter to the arbitrator for the purpose of granting the Grievant an appropriate remedy for being charged with violating an unlawful order. (*Id.* at pp. 8-9.)

The arbitrator was not persuaded by the Union's HIPAA argument:

> It is the Union's burden to show that GO 1001.1 is illegal. Illegality is not proven by a general argument that HIPAA and D.C. law protect an individual's privacy rights. Before GO 1001.1 can be deemed illegal, the FOP would have to show specifically

> how it was in conflict with HIPAA and/or D.C. law. There has been no such showing.[5]

Although the Union objects to this conclusion of the arbitrator, the arbitrator was correct. The Union does not quote any part of the regulation. It seems to rely on subsection (a)(1) of the regulation, which provides that "a covered entity may not use or disclose protected health information without an authorization that is valid under this section." 45 C.F.R. § 164.508(a)(1). A "covered entity" is a health plan, a health care clearinghouse, or a health care provider who transmits health information in electronic form. 42 U.S.C. § 1320d-1(a). The Metropolitan Police Department is not a health plan or health care clearinghouse. The Police and Fire Clinic might be a health care provider who transmits information in electronic form, but there is no allegation that the Police and Fire Clinic used or disclosed any of Ray's protected health information without authorization, nor is there any allegation that the Police and Fire Clinic conditioned treatment on the provision of an authorization in violation of § 164.508(b)(4).

While the Union has not shown nor even alleged a violation of the terms of § 164.508, it nonetheless insists that the regulation is "all encompassing" (Union's ARR at p. 9) and renders the Department's orders unlawful:

> [T]he "privacy rule" . . . requires that medical service providers jealously guard an individual's protected health information unless there is explicit consent to disclose said documentation. *See 45 C.F.R. 164.508 (Authorization – General Rule").* As such, Detective Ray could not be ordered to waive her privacy interests; therefore, she was neither neglectful in her duties nor disobedient to a lawful order.

(*Id.* at p. 8.) The phrase "as such"—whatever it may mean in this context—does not lead from the regulation's prohibition against covered entities disclosing health information without authorization to the distinctly different prohibition desired by the Union against employers requiring their employees to authorize disclosure of health information by covered entities. As §164.508 does not contain a prohibition against a requirement of that kind by employers, it is not an "applicable law" and it does not mandate that the arbitrator arrive at a different result in this arbitration. Therefore, the Union has failed to provide a statutory basis for reversing the Award based on a violation of law or public policy.

We find the arbitrator's conclusions are based on a thorough analysis and cannot be said to be contrary to law or public policy or in excess of his authority under the parties' CBA. Therefore, no statutory basis exists for setting aside or remanding the Award.

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[5] Award at p. 25. At the arbitration the Union alleged that there was a doctor-patient confidentiality privilege in the D.C. Code supporting its position. *Id.* at 17. It does not do so in its ARR.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review requests in PERB Case Nos. 10-A-23 and 10-A-24 are consolidated.

2. The arbitration award is sustained. Therefore, the arbitration review requests of the Metropolitan Police Department and the Fraternal Order of Police/Metropolitan Police Department Labor Committee are dismissed.

3. 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.

August 23, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 10-A-23 and 10-A-24 is being transmitted via U.S. Mail to the following parties on this the 24th day of August, 2012.

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