Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department,	PERB Case No. 15-A-06
Agency,	Opinion No. 1517
v.	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Michael Sugg-Edwards),	Decision and Order
Union.	

DECISION AND ORDER

On February 11, 2015, Petitioner District of Columbia Metropolitan Police Department ("MPD") filed an Amended Arbitration Review Request ("Request")[1] seeking to set aside an Arbitration Award[2] ("Award") issued in a grievance arbitration brought by the Respondent Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") on behalf of Michael Sugg-Edwards ("Grievant"). MPD bases its Request upon the Board's authority under D.C. Official Code § 1-605.02(6) to modify, set aside, or remand an award where the award on its face is contrary to law and public policy. For the reasons explained below, the Board finds that the Award in this matter is not on its face contrary to law and public policy, and therefore denies MPD's Request.

I. Statement of the Case

On October 8, 2008, MPD issued Grievant a Notice of Proposed Adverse Action letter proposing termination of his employment after he was criminally convicted of misdemeanor

[1] MPD's original Arbitration Review Request was filed on February 2, 2015.
[2] *See* (Request, Exhibit 1) (hereinafter cited as "Award").

sexual abuse by the D.C. Superior Court.[3] The letter specified three (3) charges.[4] On June 24, 2009, MPD held a departmental hearing before a three-person MPD Adverse Action Panel ("Panel").[5] The Panel found the Grievant guilty of all but one of the charges, but recommended mitigating the proposed termination to an Official Reprimand.[6] Diana Haines-Walton, Director of MPD's Human Resources Management Division, considered the Panel's findings and recommendation, but ultimately decided to terminate Grievant's employment, as initially proposed in the Proposed Adverse Action letter.[7] On September 14, 2009, MPD issued the Grievant a Final Notice of Adverse Action letter terminating his employment.[8] Grievant unsuccessfully appealed the termination to the Chief of Police, and then requested arbitration.[9]

The Arbitrator, relying on PERB's and the D.C. Superior Court's prior interpretations[10] of 6B DCMR §§ 1613.1 and 2,[11] found (1) MPD could not impose a higher level of discipline than what was recommended by the Panel; and (2) mitigated Grievant's termination to an Official Reprimand.[12]

MPD now asks PERB to reverse the Award on grounds that it is contrary to law and public policy.[13] Specifically, MPD asserts that 6B DCMR §§ 1613.1 and 2's prohibition against increasing a penalty applies to the initial level of proposed discipline stated in Grievant's Proposed Adverse Action letter, which proposed termination, and not to the Panel's recommendation that he be given an Official Reprimand.[14]

The issue before the Board is whether the Arbitrator's finding that 6B DCMR §§ 1613.1 and 2 precluded MPD from imposing a penalty higher than the Panel's recommendation was contrary to law and public policy under D.C. Official Code § 1-605.02(6) and PERB Rule 538.3(b).[15]

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[3] (Award at 7). Grievant's sentence included 100-days imprisonment (suspended), 1 year supervised probation, and a $1,000.00 fine.
[4] *Id.* at 3-5.
[5] *Id.* at 7.
[6] *Id.*
[7] *Id.* at 8.
[8] *Id.*
[9] (Request at 6).
[10] *See District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Crystal Dunkins)*, 60 D.C. Reg. 566, Slip Op. No. 1344, PERB Case No. 12-A-05 (2012); *and District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 2012 CA 009192 P(MPA) (D.C. Super. Ct. Jun. 26, 2014).
[11] 6B DCMR § 1613.1: "The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision."
6B DCMR § 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."
[12] (Award at 15-17).
[13] (Request at 12); *see also* D.C. Official Code § 1-605.02(6); *and* PERB Rule 538.3(b).
[14] *Id.* at 6-12.
[15] *Id.* at 6.

II. Analysis

D.C. Official Code § 1-605.02(6) authorizes the Board to modify or set aside an arbitration award in only three limited circumstances: (1) if an 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.

MPD only raises arguments that the Award's finding regarding 6B DCMR §§ 1613.1 and 2 was on its face contrary to law and public policy.

A. The Award is Not Contrary to Law

In order for the Board to find that an arbitrator's award is on its face contrary to law, the asserting party bears the burden to specify the "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result."[16] Furthermore, the Board has held that a mere "disagreement with the Arbitrator's interpretation ... does not make the award contrary to law...."[17]

Here, MPD acknowledges in its Request that the Board has already previously ruled on this issue in *MPD v. FOP*, *supra*, Slip Op. No. 1344, PERB Case No. 12-A-05 (hereinafter "Slip Op. No. 1344").[18] In that case, MPD argued that MPD General Order 120.21 expressly empowered MPD to impose the penalty that was originally proposed in the employee's proposed adverse action letter, even if MPD's adverse action panel recommended a lower penalty. General Order 120.21 provided, in pertinent part, that "[a]fter reviewing the Hearing Tribunal's 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." The arbitrator in the case found that 6B DCMR §§ 1613.1 and 2, as well as 6A DCMR § 1001.5[19], superseded MPD's General Order, and did not permit MPD to impose a penalty that was higher than what was recommended by MPD's adverse action panel. In Slip Op. No. 1344, the Board upheld the arbitrator's findings, stating:

> On the question raised by this case[...]: neither § 1001.5 nor the new regulations adopted pursuant to the CMPA permit the

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[16] *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 11329, Slip Op. No. 1295, PERB Case No. 09-A-11 (2012); *see also District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000).

[17] *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008); *see also District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Thomas Pair)*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at ps. 7-8, PERB Case No. 09-A-05 (2014).

[18] (Request at f. 4).

[19] 6A DCMR § 1001.5: "Upon receipt of the trial board's finding and recommendations, and no appeal to the Mayor has been made, the Chief of Police may either 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."

assistant chief to increase the recommended penalty. Section 1613 provides:

> 1613.1 The deciding official, after considering the employee's response and 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. [...] All of these regulations supersede a General Order of the MPD. *See District of Columbia v. Henderson,* 7 l0 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.[20]

On June 26, 2014, the D.C. Superior Court affirmed the Board's findings in Slip Op. No. 1344.[21] The Superior Court's decision is currently on appeal before the D.C. Court of Appeals.[22]

In this case, MPD renews the same argument it made in PERB Case No. 12-A-05—that the Department's "General Order 120.21 authorizes Director Haines-Walton, as the deciding official, to impose the penalty that was originally proposed, *i.e.* termination, even if that penalty is greater than the penalty recommended by the [adverse action panel]."[23] Additionally, MPD

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[20] *MPD v. FOP, supra,* Slip Op. No. 1344 at ps. 5-6, PERB Case No. 12-A-05.
[21] *MPD v. PERB, supra,* 2012 CA 009192 P(MPA).
[22] D.C. Court of Appeals Case No. 14-CV-846. MPD asserts that notwithstanding the Board's and the D.C. Superior Court's findings, it still filed the instant Request "to preserve its rights on this issue" in the event the D.C. Court of Appeals reverses PERB's and the Superior Court's decisions. *See* (Request at f. 6).
[23] (Request at 9-10).

contends that even without its General Order, the plain language of DCMR §§ 1613.1 and 2 still permitted it to terminate Grievant in accordance with the Proposed Adverse Action letter, despite the Panel's recommendation that he only be given an Official Reprimand.[24] MPD draws a distinction in the regulations' uses of the words "proposed" and "recommended." MPD states:

> When read in conjunction with the other sections of Chapter 16, there can be no doubt that the words "proposed penalty" in § 1613.2 refer to the penalty originally proposed by the proposing official in the advance written notice of proposed discipline and not the penalty recommended by the hearing officer/adverse action panel. [Footnote omitted.] 6B DCMR § 1607 sets forth the duties and responsibilities of the proposing official, specifically, "[t]he proposing official shall issue the advance written notice proposing corrective or adverse action against an employee, as provided for in §§ 1608.1 and 1608.2." 6B DCMR § 1607.1. Section 1608 sets forth the requirements of the advance written notice, specifically, "[t]the advance written notice shall inform the employee of the following: (a) [t]he action that is proposed and the cause of the action; ... (g) [t]he right to an administrative review by a hearing officer appointed by the agency head, as provided in § 1612.1, when the proposed action in a removal; ...". 6B DCMR § 1608.2. Section 1612 sets forth the elements of the administrative review, specifically, "[a]fter conducting the administrative review, the hearing officer shall make a written report and **recommendation** to the deciding official, ...". 6B DCMR § 1612.10 (emphasis added). As set forth above, § 1613 then provides that the deciding official, after considering the **recommendation** of the hearing officer, "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." 6B DCMR § 1613 (emphasis added). Finally, § 1614 sets forth the requirements of the final decision notice, specifically, [t]he employee shall be given a notice of final decision in writing, dated and signed by the deciding official, informing him or her of all of the following: ... (b) whether the **penalty proposed in the notice is sustained**, reduced, or dismissed with or without prejudice; ...". 6B DCMR § 1614.1. (emphasis added).
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> Read together, these regulations clearly allow the deciding official to impose the initially proposed penalty of termination. Initially, the employee is advised of the *proposed* action, i.e. suspension or

[24] *Id.* at 6-9.

> termination. If the *proposed* action is termination, the employee is afforded an administrative review before a hearing officer/adverse action panel. The hearing officer/adverse action panel then makes a *recommendation* to the deciding official that encompasses both cause and the *proposed* penalty. Next, the deciding official reviews the evidence and the hearing officer's *recommendation* and makes a final decision. 6B DCMR § 1613.2 plainly allows the deciding official to impose the originally proposed penalty. It does not restrict the deciding official to the *recommended* penalty of the hearing officer/adverse action panel. Finally, the employee is notified of whether the *penalty proposed in the notice* is sustained, reduced, or dismissed with or without prejudice. Thus, there is no reasonable, logical interpretation of the regulations as a whole that restricts the deciding official to the imposition of a penalty no greater than that recommended by the hearing officer.[25]

The Board disagrees. In Slip Op. No. 1344, the Board unambiguously held that 6B DCMR §§ 1613.1 and 2 prohibit MPD from imposing a higher penalty than what the adverse action panel recommends.[26] The Board also held that the regulations "supersede a General Order of the MPD."[27] When the D.C. Superior Court affirmed Slip Op. No. 1344, those holdings became the governing law on these issues.[28] In this case, MPD terminated Grievant's employment even though the Panel had recommended an Official Reprimand. The Arbitrator, exercising his express authority, accurately applied PERB's and the Court's holdings and mitigated Grievant's termination to the Official Reprimand the Panel recommended.[29]

In its Request, MPD did not cite any "applicable law" that supersedes PERB's or the Court's holdings, nor did it present any authority that "mandates that the Arbitrator arrive at a different result."[30] MPD merely asserted that its reading of the language of the regulations should govern instead of PERB's and the Superior Court's reading of the same language.

The Board finds that MPD's contentions constitute nothing more than mere disagreements with the Arbitrator's application of the currently prevailing law on these issues. Accordingly, the Award's mitigation of Grievant's penalty was not "on its face contrary to law."[31]

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[25] *Id.* at 8-9.
[26] *MPD v. FOP, supra*, Slip Op. No. 1344 at ps. 5-6, PERB Case No. 12-A-05.
[27] *Id.* at 5 (noting that "[i]f a recommended penalty appears insufficient, the regulations give [the deciding official] the option of remanding the case, but they do not give [the official] the option of increasing the penalty on [his or her own]."
[28] *See MPD v. PERB, supra*, 2012 CA 009192 P(MPA) at p. 19.
[29] (Award at 7-11, 14-16).
[30] *MPD v. FOP, supra*, Slip Op. No. 1295, PERB Case No. 09-A-11.
[31] *Id.*; *see also MPD v. FOP, supra*, Slip Op. No. 933, PERB Case No. 07-A-08; *and MPD v. PERB, supra*, 2012 CA 009192 P(MPA).

B. The Award is Not Contrary to Public Policy

PERB's review of an arbitration award on grounds that it is contrary to public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to the arbitrator's ruling.[32] Indeed, "the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy."[33] A petitioner must therefore demonstrate that the award "compels" the violation of an explicit, well defined public policy grounded in law and/or legal precedent.[34] Further, the violation must be so significant that the law or public policy "mandates that the arbitrator arrive at a different result."[35] Finally, mere "disagreement with the arbitrator's interpretation ... does not make the award contrary to ... public policy."[36]

In this case, MPD argues that in *Hutchinson v. District of Columbia Office of Employee Appeals*,[37] the D.C. Court of Appeals found that § 1614—a 1990 regulation that was later superseded by 6B DCMR § 1613—did not prohibit an agency's deciding official from imposing the penalty that was initially proposed in the employee's proposed adverse action letter even if the agency's reviewing official recommended a lower penalty.[38] MPD asserts:

> [In *Hutchinson*,] the District of Columbia Court of Appeals addressed the interpretation of a regulation nearly identical to Section 1613.2. [...] In *Hutchinson*, the District of Columbia Fire Department ("Fire Department") issued a notice to an employee (a fire communications operator) proposing that he be removed for charges of misconduct. *Id.* at 229. The Fire Department appointed a deputy fire chief as a "disinterested designee" [which MPD argues acted in the same capacity as the hearing officer referenced in § 1613] to review the proposed action and make a recommendation to the deciding official. *Id.* The deputy fire chief recommended a ninety-day suspension. *Id.* However, the Fire Chief, as the deciding official, after reviewing the recommendation and the record, issued a final decision imposing the originally proposed penalty of removal. *Id.* The employee appealed, and a subsequent hearing was held before the District of Columbia Office of Employee Appeals ("OEA"), where the administrative judge ("AJ") upheld the removal. *Id.* at 230. The employee then

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[32] *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on Behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012).
[33] *Id.* (quoting *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986)).
[34] *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).
[35] *MPD v. FOP, supra*, Slip Op. No. 633, PERB Case No. 00-A-04.
[36] *MPD v. FOP, supra*, Slip Op. No. 933, PERB Case No. 07-A-08.
[37] 710 A.2d 227 (D.C. 1998).
[38] (Request at 10-12).

> appealed OEA's decision up to the Court of Appeals arguing that, among other reasons, OEA erred because the Fire Chief, as the deciding official, "was limited to imposing a penalty no greater than that recommended by the disinterested designee, i.e., a ninety-day suspension." *Id.*
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> The employee based his argument on the former § 1614 [from the 1990 edition of the DCMR], nearly identical to the current Section 1613 [contained in the current DCMR issued in 2008], which stated that: "The deciding official shall either sustain the penalty proposed, reduce it, or dismiss the action with or without prejudice, but shall not increase the penalty." *Id.* at 233. While the employee argued that "penalty proposed" in the regulation referred to the penalty *recommended* by the deputy fire chief, *i.e.*, the ninety-day suspension, the OEA AJ interpreted "penalty proposed" as referring to the initial penalty proposed, *i.e.*, termination. *Id.* at 233-34.
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> Recognizing that Courts "defer to an agency's interpretation of the statute that it administers unless the interpretation conflicts with the plain meaning of the statute or its legislative history," the Court agreed with OEA's interpretation. *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227, 234 (D.C. 1998). Accordingly, the Court found that "[u]nder the prevailing interpretation of the regulations, the deciding official acted within his authority by firing [the employee]." *Id.* at 234. Specifically, the Court concluded that "[t]here is nothing in the current regulations to prevent a deciding official from imposing a penalty greater than what was recommended by the disinterested designee, provided, of course, that the penalty does not exceed what was proposed by the proposing official." *Id.* at 234-35.[39]

MPD asserts that the policy the Court created in *Hutchinson* authorized MPD's Human Resources Director in this case to terminate Grievant's employment in accordance with the Proposed Adverse Action letter even though the Panel only recommended an Official Reprimand.[40] MPD argues:

> There is no logical basis to conclude that OEA may interpret the regulation to mean one thing while an arbitrator may interpret the regulation to mean something entirely different. Such a conclusion would nullify one of the express purposes of the CMPA,

[39] *Id.* at 10-11.
[40] *Id.* at 11-12.

> specifically, to "[c]reate uniform systems for personnel administration among the executive departments and agencies reporting directly to the Mayor of the District of Columbia ...". D.C. Code § 1-601.02. Hence, the arbitrator's conclusion that 6B DCMR § 1613.2 prohibited the Department from imposing the originally proposed penalty of termination is contrary to law.[41]

The Board disagrees. As MPD recognized in its Request, *Hutchinson* only applied to the 1990 regulation, § 1614, which was later superseded by the current § 1613. While the two sections are similar, in *MPD v. PERB*, the D.C Superior Court expressly found that PERB's current unequivocal interpretation of the current § 1613 takes precedence over *Hutchinson*'s interpretation of the now inoperative § 1614.[42] The Court stated:

> PERB and [FOP argue] that MPD inappropriately relies on *Hutchinson* because it involved a different agency and a different regulation with a unique legislative history. [Citations omitted].
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> The argument by PERB and [FOP] is persuasive. Perhaps the most important takeaway from *Hutchinson* is the Court of Appeals' observation that "we defer to the OEA's interpretation of the personnel regulations to the same extent that we would defer to any agency's interpretation of the statute it administers." *Hutchinson*, 710 A.2d at 234. PERB is charged with administering 6B DCMR § 1613.2; therefore, the agency is entitled to deference, just as the OEA was in *Hutchinson*. The fact that PERB accepted a contrary interpretation of a "virtually identical" regulation does not establish that either the Arbitrator's interpretation was contrary to law or that PERB's decision was clearly erroneous.[43]

Hutchinson does not constitute an "explicit well defined public policy" that "compels" an invocation of the "extremely narrow" public policy exception in D.C. Official Code § 1-605.02(6); nor does it "mandate[] that the [A]rbitrator arrive at a different result."[44] On the contrary, the "explicit well defined public policy" governing the instant case is that established and accepted by the Superior Court in *MPD v. PERB*.[45] Accordingly, the Board finds that the Arbitrator did not act contrary to public policy when he applied PERB's and the Court's interpretations of 6B DCMR §§ 1613.1 and 2 to mitigate Grievant's penalty to an Official Reprimand.[46]

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[41] *Id.* at 12.
[42] *See MPD v. PERB, supra*, 2012 CA 009192 P(MPA) at ps. 18-19.
[43] *Id* at 19.
[44] *Id.*; *see also MPD v. FOP, supra*, Slip Op. No. 925, PERB Case No. 08-A-01; *American Postal Workers Union, supra; and United Paperworkers, supra.*
[45] *Id.*
[46] *Id.*

C. Conclusion

Based on the foregoing, the Board finds that the Award's mitigation of Grievant's termination to Official Reprimand was not on its face contrary to law or public policy.[47] Accordingly, MPD's Request is denied and the matter is dismissed in its entirety with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. MPD's Request is denied and the matter is dismissed in its entirety with prejudice.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, and Members Donald Wasserman, Keith Washington, and Ann Hoffman. Member Yvonne Dixon was not present.

April 24, 2015

Washington, D.C.

[47] *MPD v. FOP, supra*, Slip Op. No. 1295, PERB Case No. 09-A-11.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-A-06, Opinion No. 1517, was transmitted through File & ServeXpress to the following parties on this the 30th day of April, 2015.

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