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

In the Matter of)
District of Columbia)
Metropolitan Police Department,)
Petitioner,) PERB Case No. 11-A-02
v.) Opinion No. 1365
Fraternal Order of Police/Metropolitan)
Police Department Labor Committee,)
Respondent.)

DECISION AND ORDER

I. Statement of the Case

Petitioner District of Columbia Metropolitan Police Department (“Petitioner” or “MPD”) filed an Arbitration Review Request (“Request”) seeking review of an arbitration award (“Award”) in which Arbitrator Barbara Franklin found that MPD must place Grievant Officer Clifford Simms (“Grievant”) in the next available School Resource Officer (“SRO”) position within the District of Columbia Public Schools. (Award at 13). In its Request, MPD alleges that the Arbitrator was without or exceeded her authority, and that the Award on its face is contrary to law and public policy. (Request at 2). Respondent Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Respondent” or “FOP”) filed an Opposition to the Arbitration Review Request (“Opposition”).

The Arbitrator was presented with the following issues:

1. Whether [MPD] violated D.C. Code § 5-1031(a) by commencing an adverse action against the Grievant more than 90 business days after the date that [MPD] knew or should have known of the act allegedly constituting cause; and
2. Whether [MPD] had just cause for imposing a 15-day suspension, with 5 days held in abeyance, on the Grievant.

(Award at 2). The Arbitrator concluded that MPD violated the “90 day rule” by failing to issue the proposed adverse action against the Grievant within 90 days. (Award at 12). As the adverse action was invalid, the Arbitrator determined that the suspension should be rescinded. (Award at 13). Further, the Arbitrator ordered MPD to place the Grievant in the next SRO position that become available. *Id.* It is this remedy that MPD opposes in its Request.

The issues before the Board are 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).

II. Discussion

A. Arbitration Award

The Arbitrator found that the Grievant had served as an MPD officer for approximately seventeen years, and for seven years he had worked as an SRO. (Award at 2). As an SRO, the Grievant was permanently deployed as a member of a team to provide security at Anacostia Senior High School. *Id.* The Grievant routinely received high performance ratings and had never been the subject of a complaint at the school. *Id.*

On September 13, 2007, the Grievant’s partner, Officer Diaz, told the Grievant that a student had complained about the Grievant, and that the school administration was aware of the complaint. *Id.* Officer Diaz testified that she told Grievant specific details about the student’s complaint; the Grievant testified that Officer Diaz said only that a student wanted to make a complaint and that the school was aware of the situation. (Award at 2-3). Grievant reported the information to his supervisor. (Award at 3).

The student’s complaint was investigated by Lieutenant Vincent Turner. (Award at 3). Lieutenant Turner’s Final Investigative Report (“FIR”) contained a number of inconsistent dates. (Award at 3). In the FIR, Lieutenant Turner states that he was first contacted by the District of Columbia Public Schools on October 10, 2007, and started his investigation on that date. (Award at 3-4). Elsewhere in the FIR, this date is noted as October 3, 2007. (Award at 3). Additionally, multiple witness statements have the date “10-03-07.” (Award at 4). On February 20, 2008, the Grievant received a Notice of Proposed Adverse Action. *Id.* The Grievant was removed from his position as an SRO and returned to duty as a patrol officer. (Award at 5).

The Notice of Proposed Adverse Action contained two charges and recommended a thirty day suspension. Charge Number 1 stated:

Violation of General Order 120.21, Attachment A, Part A-6, which reads: “Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of, any superior officer, or intended for the information of

any superior officer, or making an untruthful statement before any court or hearing.” (Award at 4).

Specification Number 1 stated:

On September 13, 2007, you informed Sergeant Charles Foster that a female student at Anacostia High School wanted to file a complaint against you; but, were unaware of the particulars of the complainant [sic]. However, you were informed of the specific nature of the complaint by Officer Juana Diaz. (Award at 4).

The Arbitrator noted that the second charge of “Conduct Unbecoming an Officer” was dismissed, and she did not discuss it in the Award. *Id.* In appealing the Notice of Proposed Adverse Action, the Grievant argued that MPD violated the 90 day rule, and disputed the charge that he had made inappropriate remarks to the student. (Award at 5).

On April 18, 2008, MPD issued a Final Notice of Adverse Action, sustaining the charge of making a false statement and dismissing the charge of Conduct Unbecoming an Officer. (Award at 5). MPD found no violation of the 90 day rule. *Id.* MPD reduced the suspension to fifteen days, with five days to be held in abeyance for one year. *Id.* The parties advanced to arbitration. *Id.*

Ultimately, the Arbitrator determined that MPD first became aware of the student’s complaint on October 3, 2007, which was 94 days before the Notice of Proposed Adverse Action was issued. (Award at 11-12). The Arbitrator stated that because the adverse action was invalid, the ten day suspension should be rescinded. (Award at 12).

As a remedy, the Union requested that the Grievant be restored to his position as a SRO at Anacostia Senior High School. (Award at 13). The arbitrator notes that “the parties presented no arguments regarding the appropriateness of the remedy requested.” *Id.* at fn 4. The Arbitrator found that this remedy would be inappropriate because: 1) the decision was based on a procedural finding; 2) the remedy would be “disruptive, given the probability that another officer has been serving in that position for an extended period of time”; and 3) Grievant did not suffer a demotion when he was returned to patrol duty. (Award at 13).

Despite these concerns, the Arbitrator wrote that “the circumstances of this case argue strongly in favor of returning the Grievant to an SRO position when one becomes available.” (Award at 13). In support of this conclusion, the Arbitrator noted that:

- 1) the Grievant had seven years of experience in that position, with consistently high performance evaluations; 2) he currently has over 20 years of experience with the force; 3) there have been no other complaints filed against him; 4) Chief Lanier concluded that there were insufficient facts to support a charge based on the student’s complaint that the Grievant had made inappropriate

comments to her; and 5) Commander Willie Dandridge, who formerly oversaw SROs and had handpicked the Grievant for the position, testified that he had “no reservations” about putting him back in the schools. (Award at 13).

The Arbitrator ordered MPD to place the Grievant in the next open SRO position, if the Grievant wished to take that position. *Id.*

B. Position of MPD before the Board

In its Request, MPD first contends the Arbitrator exceeded her authority in issuing the Award by “deciding an issue that was, by her own acknowledgement, not before her.” (Request at 3). MPD states that the discipline proposed against the Grievant was the 15 days suspension, with 5 days held in abeyance for one year. (Request at 3). MPD alleges that “at no point during any of the [adverse action proceedings] was Grievant’s removal from his position as a SRO included as a part of the disciplinary action against Grievant.” *Id.*

Further, MPD contends that in the Award, the Arbitrator did not identify the Grievant’s position as an SRO as an issue over which she was to exercise jurisdiction. (Request at 4). MPD states that “[n]owhere in her recitation of issues did Arbitrator Franklin articulate Officer Simms’s position as a SRO as an issue for her consideration, much less as an issue over which she had authority to address in her award.” *Id.*

Second, MPD alleges that the Arbitrator’s Award is contrary to law and public policy because it violates the management right under Section 1-617.08 of the Comprehensive Merit Personnel Act (“CMPA”) to transfer and assign employees in positions within the agency. (Request at 5). MPD asserts that it exercised a reserved management right when it removed the Grievant from his position as an SRO, “separate and apart from the disciplinary action proposed against the Grievant.” *Id.* MPD states that the Award “exacerbates” the alleged CMPA violation by “prescribing the manner in which management is to act: *i.e.*, by offering him the position regardless of Departmental selection process, qualifications, etc.” *Id.*

C. Position of FOP before the Board

FOP alleges that Article 4 of the parties’ collective bargaining agreement (“CBA”) only recognizes the right of MPD to transfer and assign officers as it deems appropriate when that right is exercised in accordance with applicable rules and regulations. (Opposition at 4-5). According to Article 14 of the CBA, transfers of officers are allowed for efficiency of service, where the officer agrees to the transfer as a part of a settlement, and on appeal of an adverse action by the Chief of Police or the Assistant Chief in lieu of any other penalty imposed. (Opposition at 5).

FOP claims that the Grievant was initially transferred to patrol duty pending the resolution of the adverse action, but when the charge of “Conduct Unbecoming an Officer” was rescinded, the Grievant was not returned to his SRO detail. (Opposition at 5). In support of this

contention, FOP points to a memorandum from an Assistant Chief of Police stating that the Grievant is detailed to patrol duty “pending the outcome of a misconduct investigation,” and that the Grievant’s assignment would be reevaluated based upon the outcome of the investigation. (Opposition Attachment 7). FOP alleges that “as [MPD] has not cited his removal from his assignment as for the efficiency of service...it can only be assumed that the transfer was done in concert with the action taken in relationship to the conduct unbecoming charge, which was later rescinded.” *Id.* FOP states that it “is apparent that MPD improperly used the transfer to remove grievant from his assignment.” *Id.* Further, FOP contends that it has always requested that the Grievant be made whole, which it believes includes a return to an SRO position. (Opposition at 6).

Additionally, FOP alleges that the Arbitrator “exercised her judicial power to correct the violation properly before her in this matter.” (Opposition at 6). FOP states that “MPD attempted to circumvent the negotiated procedures of the CBA by not including [the Grievant’s] transfer in the discipline imposed knowing full well that by not doing so he could never address his due process rights afforded him under the contract.” *Id.*

D. Analysis

The CMPA authorizes the Board to modify or set aside an arbitration award in three limited circumstances: (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.).

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 D.C. Reg. 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). An arbitrator’s decision must be affirmed by a reviewing body “as long as the arbitrator is even arguably construing or applying the contract.” *United Paperworkers Int’l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). By submitting the grievance 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 on which the decision is based.” *District of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 47 DC Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metro. Police Dep’t and Fraternal of Police, Metro. Police Dep’t Labor Comm. (Grievance of Angela Fisher)*, 51 DC Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

In the instant case, MPD contends that the Arbitrator exceeded her authority because the Grievant’s removal from his position as an SRO was not properly before her. (Request at 3). We have held that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties’ collective bargaining agreement.¹ See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor*

¹ 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.

Committee, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). The Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), that arbitrators bring their “informed judgment” to bear on the interpretation of collective bargaining agreements, and that is “especially true when it comes to formulating remedies.” Courts have followed the Supreme Court’s lead in holding that arbitrators have implicit authority to fashion appropriate remedies for violations of collective bargaining agreements. See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at 6 (May 13, 2005).

In the present case, the Arbitrator found that MPD violated D.C. Code § 5-1031, and therefore the parties’ CBA, when it issued the Notice of Proposed Action later than 90 days from the date it knew or should have known of the incident that gave rise to the charges against the Grievant. (Award at 7). The Arbitrator exercised her equitable power to remedy the violation by returning the Grievant to the position he would have been in had the invalid action not occurred. MPD alleged that the Grievant’s transfer to patrol duty was not part of the discipline imposed through the adverse action proceedings, but Opposition Attachment 7 shows that the Grievant was transferred due to the investigation into the student’s complaint. To remedy the effects of the invalid adverse action proceeding, the Arbitrator used her equitable authority to fashion an appropriate remedy. MPD has not shown that any provision of the parties’ CBA limited the Arbitrator’s equitable powers. Therefore, the Board will not overturn the Award as beyond the scope of the Arbitrator’s authority.

The Board’s scope of review, particularly concerning the public policy exception, is extremely narrow. 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 *Misco*, 484 U.S. 29. Absent a clear violation of law evident on the face of the arbitrator’s award, the Board lacks authority to substitute its judgment for the arbitrator’s. *FOP/DOC Labor Committee v. PERB*, 973 A.2d 174, 177 (D.C. 2009). Disagreement with the arbitrator’s findings is not a sufficient basis for concluding that an award is contrary to law or public policy. *Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 31 DC Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984).

In its Request, MPD cites to D.C. Code § 1-617.08(a)(2), which gives D.C. Government agencies the sole right to, among other things, transfer and assign employees. (Request at 5). According to MPD, the Arbitrator’s instruction to offer the Grievant the next available SRO position infringes on its management right to assign and transfer employees. *Id.*

The only limitation to an arbitrator’s equitable power that is recognized by the Board is where the arbitrator’s equitable power is explicitly curtailed by the parties’ CBA. See *District of Columbia Metropolitan Police Department*, Slip Op. No. 282. Arbitration is addressed in Article 19(E) of the parties’ CBA. (Request Attachment 6 at p. 24). Section 6 of Article 19(E) places two limitations on the arbitration award: (1) that the arbitrator may not “add to, subtract from, or modify the provisions of [the CBA] in arriving at a decision of the issue presented and shall confine his decision solely to the precise issue submitted for arbitration; and (2) that arbitration awards “shall not be made retroactive beyond the date of the occurrence of the event upon which

the grievance or appeal is based.” (Request Attachment 6 at p. 25). Neither of these requirements specifically restricts an arbitrator’s right to fashion an equitable remedy.

The Board has never held that D.C. Code § 1-617.08 acts as a limitation on an arbitrator’s equitable power, and the Board will not do so now. MPD disagrees with the remedy ordered by the Arbitrator, and this disagreement is not a sufficient basis to modify or overturn the Award. *Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, Slip Op. No. 85.

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

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia 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.

February 21, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-A-02 was transmitted to the following parties on this the 21st day of February, 2013.

Mr. William Sarvis, Jr.
FOP/MPD Labor Committee
1524 Pennsylvania Ave, SE
Washington, D.C. 20003

U.S. MAIL

Mr. Mark Viehmeyer
D.C. Metropolitan Police Dept.
300 Indiana Ave., NW
Room 4126
Washington, D.C. 20001
mark.viehmeyer@dc.gov

U.S. MAIL and E-MAIL

E. E. Wilcox
Erin E. Wilcox, Esq.
Attorney-Advisor