Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Anthony Brown),	
Petitioner,	PERB Case No. 05-A-04
and	Opinion No. 905
District of Columbia Metropolitan Police Department,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") filed an Arbitration Review request ("Request") in the above captioned matter. FOP seeks review of an Arbitrator's Decision on Remand ("Award"), in which the Arbitrator reversed his prior decision and found that the Metropolitan Police Department had just cause for terminating Officer Anthony Brown. FOP contends that the: (1) Arbitrator exceeded his authority; and (2) Award is contrary to law and public policy. (See Request at pgs. 4 and 7). The District of Columbia Metropolitan Police Department ("MPD") opposes the Request.

The issues before the Board are whether "the award on its face is contrary to law and public policy" and "whether the arbitrator was without or exceeded his or her jurisdiction." D.C. Code § 1-605.02(6) (2001 ed.).

II. Discussion

The underlying arbitration appealed MPD's termination of Officer Anthony Brown ("Grievant" or "Officer Brown"). The alleged misconduct arose out of an incident between Officer Brown and his ex-wife that resulted in a criminal charge for telephone harassment against Officer Brown in the state of Maryland. MPD charged Officer Brown with three offenses. MPD's Adverse Action Panel ("Panel") sustained two of the three charges and terminated the Grievant. Specifically, the Panel sustained Charge No. 1: conduct unbecoming a police officer, and Charge No. 2: commission of any act that would constitute a crime whether or not a court record reflects a crime as determined by the MPD's Adverse Action Panel. The Grievant appealed the termination to the Chief of Police. The Chief denied the appeal and FOP invoked arbitration on behalf of the Grievant.

In his original award, Arbitrator Arrigo found that MPD violated Article 15, Section 7 of the parties' collective bargaining agreement ("CBA").[1] Specifically, the Arbitrator determined that "[t]he Chief of Police's response denying the appeal was not sent until around May 9, 2000, almost five months after Officer Brown's appeal was filed." (March 19, 2001 Award at p. 22, Arb. Salvatore Arrigo). Therefore, he sustained the grievance on procedural grounds; rescinded the termination; and directed that the Grievant be reinstated. (See March 19, 2001 Award at p. 25, Arb. Salvatore Arrigo). MPD filed an Arbitration Review Request asking the Board to reverse the Arbitrator's Award, asserting that the Chief's late response was harmless error. The Board denied the Request. (See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 48 DCR 10985, Slip Op. No.662, PERB Case No. 01-A-05 (2001).

MPD appealed the Board's decision to the Superior Court of the District of Columbia. Judge Abrecht ruled that "[t]he lateness of the Chief's response did not violate any substantive right of Officer Brown and thus constituted harmless error." (*Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct., 01 MPA 19 at p. 10 (September 11, 2002)). Judge Abrecht ordered that "the reinstatement be vacated and the case be remanded to the Board for entry of an order reversing the Arbitrator's award." (*Id.* at p. 11). Consistent with the Judge's Order, the Board remanded the matter to Arbitrator Arrigo to "consider Anthony Brown's grievance and issue a decision on the merits of the case."[2]

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[1]Article 15, Section 7 of the parties' CBA provides that "the Chief of Police shall respond to the employee's appeal within fifteen (15) days."

[2]*Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 50 DCR 6810, Slip Op. No. 719 at pgs. 2-3, PERB Case No. 01-A-05 (2003).

Consistent with the Board's Order, the Arbitrator issued a "Decision on Remand." In his "Decision on Remand" the Arbitrator determined that the Grievant engaged in conduct unbecoming an officer (Charge No. 1) and reduced the termination to a 120-day suspension. (August 12, 2003 Award at pgs. 9-10, Arb. Salvatore Arrigo). The Arbitrator also concluded that "it has not been shown . . . beyond a reasonable doubt that the conduct encompassed in Charge No. 2, Specifications 1 and 2 would have constituted a crime in the State of Maryland. Thus, the Employer lacked just cause for its termination under Charge No. 2." (August 12, 2003 Award at p. 18, Arb. Salvatore Arrigo).

MPD filed a second Arbitration Review Request ("Request") asking the Board to reverse the Arbitrator's Decision on Remand.[3] MPD argued that the: (1) Arbitrator's decision to reduce the termination to a suspension was contrary to law and he unlawfully substituted his own judgment regarding discipline for that of the Agency; and (2) Arbitrator exceeded his authority by concluding that the standard of proof to be applied in an administrative hearing concerning a disciplinary action involving a crime should be the "beyond a reasonable doubt" standard, instead of the "preponderance of evidence" standard, which MPD's administrative rules specify. (See Request at pgs. 8-17).

The Board rejected MPD's claim that the Arbitrator's decision to reduce Officer Brown's termination to a suspension was contrary to law.[4] However, the Board granted MPD's request stating that "MPD's . . . regulations and procedures specifically state that the preponderance of the evidence standard is to be used, even where the charge involves acts that would constitute the commission of a crime." (See *MPD and FOP/MPD Labor Committee*, __DCR__, Slip Op. No. 757 at p. 8, PERB Case No. 03-A-06 (2004). Therefore, the Board remanded the case to the Arbitrator directing him to use the preponderance of the evidence standard of proof specified in MPD's Hearing Procedures.

The Arbitrator issued a third award styled "Remand Decision on Grant of Request for Review." In this award, the Arbitrator determined that "the Adverse Action Panel could reasonably have concluded that a preponderance of the evidence supported a finding that Officer Brown engaged in a criminal act by his repeated telephone calls to his estranged wife. As such, the Panel had 'just cause' for its finding regarding Charge 2. In the circumstances herein [the Arbitrator] withdraws [his] award of August 12, 2003." (December 29, 2004 Award at p. 5, Arb. Salvatore Arrigo - "Remand Decision on Grant of Request for Review"). Thus, the Arbitrator reversed his prior decision concerning Charge No. 2, sustained MPD's penalty of termination and denied the grievance.

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[3]This second case was designated as PERB Case No. 03-A-06.

[4]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. 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).

FOP then filed an Arbitration Review Request ("Request") challenging the December 29, 2004 arbitration award.[5] In the present Arbitration Review Request, FOP asserts that: (a) "the Arbitrator exceeded his authority on remand by " rejecting the Union's challenge to Officer Brown's termination in its entirety" (Request at p. 4); (b) reversing his prior penalty on remand violates law and public policy (See Request at p.7); (c) "the Arbitrator failed to provide analysis and reasoning for reversing his entire decision" (Request at p. 7); and (d) "the Arbitrator exceeded his authority *and* his decision violated law and public policy based on a lack of jurisdiction to decide the matter". (Request at p. 7). MPD opposes the Request. FOP's Request and MPD's Opposition are before the Board for disposition.

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

FOP claims that the Arbitrator was without authority to change the penalty that he previously imposed. In support of its position that the Arbitrator exceeded his authority by denying the grievance in its entirety, FOP asserts that "the issue on remand was limited to applying the proper standard of proof to Charge No. 2." (Request at p. 4). FOP claims that the Board's decision had expressly provided that reduction of the penalty to a 120-suspension was within the Arbitrator's authority and this finding is not subject to review. (See Request at p. 5). However, on remand, the Arbitrator increased the penalty from a suspension to a termination. FOP asserts that in "*Dr. Brahma S. Kaushiva v. University of the District of Columbia and University of the District of Columbia Faculty Association NEA*, 48 DCR 8526, Slip Op. No. 408, PERB Case No. 94-U-25 (1994)",[6] the

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[5]This is the current case which was designated as PERB Case No. 05-A-04.

[6]We believe the Union is referring to the following case: *University of the District of Columbia Faculty Association NEA and Dr. Brahma S. Kaushiva v. University of the District of Columbia*, 41 DCR 3830, Slip Op. No. 321 at pgs. 4-6, PERB Case No. 92-A-05 (1994), which concerns an arbitration review request by the Agency challenging, among other things, the arbitrator's findings on sabbatical leave. The Board found that the arbitrator's findings on sabbatical leave were outside his retained jurisdiction. The

Board concluded that "the Arbitrator exceeded his authority by considering an issue wherein the Board expressly denied review in its initial decision." (Request at p. 5). FOP contends that consistent with the Board's holding in *Kaushiva*, in the present case Arbitrator Arrigo cannot revisit the issue of remedy on remand because that issue was previously decided. FOP argues that the Arbitrator had no jurisdiction over the penalty portion of the award on remand and exceeded his jurisdiction by changing the penalty. (See Request at pgs. 4-6).

MPD counters that "[o]nce the Arbitrator applied the proper standard [of review], and determined that the Panel did have substantial evidence to find Officer Brown guilty of Charge 2, the Arbitrator rightfully determined that the circumstances (i.e., finding of 'just cause') required him to withdraw his August 13, 2003 decision in its entirety and, in lieu thereof, issue the December 29, 2004 decision supporting MPD's termination of Officer Brown from his employment." (Opposition at p. 7). Further, MPD asserts that FOP's ground for review only involves a disagreement with Arbitrator Arrigo's December 19, 2004 decision. MPD contends that this is not a sufficient basis for concluding that the Arbitrator exceeded his authority. (Citing *FOP/MPDLC (On behalf of Gregory Powell) and MPD*, 50 DCR 6813, Slip Op. No. 720, PERB Case No. 03-A-01 (2003)). (See Opposition at pgs. 7-8).

The Board finds that the Union's argument that Arbitrator Arrigo cannot revisit the issue of penalty on remand based on the *Kaushiva* case lacks merit. The facts in *Kaushiva v. UDC*, Slip Op. No. 321, are distinguishable from the facts in this matter. In *Kaushiva*, after holding a grievance hearing, the arbitrator issued a decision on the merits and retained jurisdiction over the remedy aspect of the case.[7] When he issued a decision on the remedy aspect of the case, the arbitrator included a finding on the additional issue of sabbatical leave and then granted sabbatical leave as an additional remedy. (See *University of the District of Columbia Faculty Association NEA and Dr. Brahma S. Kaushiva v. University of the District of Columbia*, 41 DCR 3830, Slip Op. No. 321 at p. 3, PERB Case No. 92-A-05 (1994). The agency filed a request for review alleging that the arbitrator exceeded his jurisdiction by making a determination on the merits concerning the issue of sabbatical leave. The Board ruled that considering the merits of the sabbatical leave issue was outside the retained jurisdiction of the arbitrator. Specifically, the arbitrator had retained jurisdiction only concerning the proper remedy for matters which he had already decided.

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case cited above by the Petitioner pertains to an unfair labor practice charge by the employee who was unable to benefit from the arbitrator's finding on the sabbatical leave issue in Slip Op. No. 321 (because the Board found it was outside of the arbitrator's jurisdiction), where the employee alleged that the union and the agency had committed an unfair labor practice by not raising the issue of sabbatical leave in the initial arbitration hearing.

[7]In that case, the parties agreed to authorize the arbitrator to retain jurisdiction only over the remedial issues in the case.

Here, Arbitrator Arrigo granted FOP's grievance on procedural grounds. The Superior Court ordered that the case be remanded to the arbitrator and he issued another decision addressing the merits of the case. Acting on the Agency's request for review of Arbitrator Arrigo's decision on remand, the Board again remanded the case to Arbitrator Arrigo instructing him to use the correct standard of proof when considering whether MPD met its burden of proof with regard to Charge No. 2. Thus, unlike the facts in *Kaushiva*, Arbitrator Arrigo's jurisdiction was not limited to what was the appropriate remedy. Instead, Arbitrator Arrigo was directed by the Board to use the preponderance of evidence standard in determining whether MPD had met its burden of proof with respect to Charge No. 2. In his decision on (the second) remand, Arbitrator Arrigo applied the preponderance of the evidence standard of proof with respect to Charge No. 2, found that there was just cause for issuing discipline, and reversed the penalty. The Board's remand did not limit the Arbitrator's jurisdiction concerning his reconsideration of Charge No. 2. As a result, upon using the proper standard of proof and concluding that MPD had cause with respect to Charge No. 2, Arbitrator Arrigo could use his equitable power to fashion the penalty he deemed appropriate. 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.[8] Here, there is no evidence or argument that the parties' collective bargaining agreement or MPD's procedures preclude the Arbitrator from reinstating the remedy of termination of the Grievant based on a finding of just cause.

Furthermore, we have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." *University of the District of Columbia and University of the District of Columbia Faculty Association*, 39 DCR 9628, Slip Op No. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement . . . as well as his evidentiary findings and conclusions . . ." *Id.* Moreover, "[this] 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 246*, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). In the present case, the parties submitted their dispute to an Arbitrator and FOP's claim that the Arbitrator exceeded his authority only involves a disagreement with the Arbitrator's findings and conclusions. This does not present a statutory basis for review. Therefore, we cannot reverse the Award on this ground.

As a second basis for review, FOP claims that the award is contrary to law and public policy. For the reasons discussed below we disagree.

"[T]he possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's

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[8]We note that if FOP had cited a provision of the parties' CBA that limits the Arbitrator's equitable power, that limitation would be enforced. (See n. 4, above).

interpretation of the contract. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of Public Policy." See *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 43 (1987). The violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result." *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633, PERB Case No. 00-A-04 (2000) citing *AFGE, Local 631 and Dept. of Public Works*, 45 DCR 6617, Slip Op. No. 365 at p. 4, n. 4, PERB Case No. 93-A-03 (1993); 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) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." *District of Columbia Dep't of Corrections v. Teamsters Local 246*, 54 A.2d 319, 325 (D.C. 1989).

We find that FOP has cited no law or public policy that mandates that the Arbitrator arrive at a different result. Instead, FOP argues that the Arbitrator may not change the penalty because the Board had already determined that the Arbitrator had the authority to reduce the penalty from termination to a suspension. Specifically, FOP asserts that "by reversing his prior penalty determination on remand, the Arbitrator's decision violated law and sound public policy." (Request at p. 7). In support of its argument, FOP cites *Kritsidimas v. Sheskin*, 411 A.2d 370 (D.C. 1980) for the "law of the case" doctrine. (See Request at p. 7). In *Kritsidimas* a judge denied a motion to dismiss for failure to prosecute a case in 1978 and set the case for further proceedings. Subsequently, a motions judge dismissed the case, ruling on an identical motion to dismiss which was based on the identical facts of the 1978 motion. On appeal, the court stated that the 1978 ruling constituted the "law of the case", reversed the dismissal and remanded the case for further proceedings. *Kristidimas* involved two judges reaching different conclusions on the same facts, applying the same standard of proof. In the present case, the same Arbitrator was instructed by the Board to review Charge No. 2 under a different standard of proof. Inherent in his equitable authority is the authority to provide an appropriate remedy based on his findings of fact and conclusions of law.

"The essence of [FOP's] request for review is its disagreement with the Arbitrator's findings and conclusions. . . . We have determined that such disagreement is not a sufficient basis for concluding that an award is contrary to law or public policy." *WASA and AFGE, Locals 631, 2553, AFSCME Local 2091, NAGE Locals R3-05 and 06*, 48 DCR 8137, Slip Op. No. 652 at pgs. 2-3, PERB Case No. 01-A-03 (2001). Thus, FOP has not presented a statutory basis for review. As a result, the Board cannot reverse the Award as being contrary to law and public policy.

In its request, FOP also complains that Arbitrator Arrigo failed to provide analysis and reasoning for reversal of his prior finding that the "termination was too severe a penalty" for Officer Brown's conduct. (Request at p. 6). We note that "[a]n Arbitrator need not explain the reason for his or her decision. See *Lopata v. Coyne*, 735 A.2d 931, 940 (D.C. 1999), (citing *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 280 U.S. App. D.C. 7, 10 (1990) where the Court held that "an

explanation requirement would unjustifiably undermine the speed and thrift sought to be obtained by the 'federal policy favoring arbitration.'"). Furthermore, an Arbitrator's decision is not unenforceable merely because he or she fails to explain a certain basis for his or her decision. See *Chicago Typographical Union 16 v. Chicago Sun Times Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991).

Finally, FOP claims that the Board's November 24, 2004 Order remanding the case to the Arbitrator was beyond the 120-day statutory period allowed for the Board to issue a decision.[9] FOP maintains that as a result, the Arbitrator was without jurisdiction to decide the matter therefore the Arbitrator exceeded his authority and his decision violated law and public policy. (See Request at p. 7). This issue was not raised before the Arbitrator and as a result may not now be raised. The Board has held that a party may not base its arbitration review request on issues not presented to the arbitrator. See *District of Columbia Fire and Emergency Medical Services Department and American Federation of Government Employees, Local 3721*, ___ DCR ___, Slip Op. No. 756, PERB Case No. 02-A-08 (2004). Assuming *arguendo* that the Board's ruling was untimely, "There has been general recognition that an overly literal interpretation of [D.C. Code § 1-617.14][10] could lead to impractical conclusions." *American Federation of Government Employees, Local 3721 and District of Columbia Fire Department*, 29 DCR 4373, Slip Op. No. 46 at p. 3, PERB Case No. 82-U-01 (1982).

The Board finds that FOP has not met the requirements for reversing the Arbitrator's award. We find that the Arbitrator's conclusions are supported by the record, 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.

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[9]Although FOP neglected to cite any statutory provision, we believe that it is referring to D.C. Code § 1-617.14 which states as follows: "All decisions of the Board shall be rendered within a reasonable period of time, and in no event later than 120 days after the matter is submitted or referred to it for a decision."

[10]Previously cited as D.C. Code §1-618.14 (1981).

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Fraternal Order of Police/Metropolitan Police Department Labor Committee'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 21, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-A-04 was transmitted via Fax and U.S. Mail to the following parties on this the 21st day of September 2007.

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