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

Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee)	
(on behalf of Grievant, David Blue, et al.,)	
Spring Valley Detail),)	
)	
Petitioner,)	PERB Case No. 03-A-03
)	
and)	Opinion No. 1011
)	
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 argued that Arbitrator Donald Doherty’s decision to dismiss FOP’s grievance was contrary to law and public policy. “Specifically, the Union claim[ed] that its failure to cite the correct and operative section of the parties’ [collective bargaining agreement] was a mere technicality and that public policy favors arbitration where parties have previously agreed to arbitrate matters.¹ In addition, FOP contend[ed] that the officers who prepare the grievances are not lawyers, and should not be held to the higher standard of interpreting the contract in order to cite the correct section. FOP also

¹“FOP relie[d] on *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 377-78 (1974) as authority for its positions. Specifically, it assert[ed] that “[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Fraternal Order of Police/Metropolitan Police Department Labor Committee and District of Columbia Metropolitan Police Department*, 52 DCR 1630, Slip Op. No. 726 at pgs. 2-3, n . 7, PERB Case No. 03-A-03 (2004).

assert[ed] that MPD had an obligation to notify it of the error and provide an opportunity to resubmit the grievance in its corrected form. Finally, FOP argu[ed] that MPD should be required to pay the liquidated damages because it acknowledged responsibility for its duty to pay the overtime in its initial response to the Union's request for overtime." *Fraternal Order of Police/Metropolitan Police Department Labor Committee and District of Columbia Metropolitan Police Department*, 52 DCR 1630, Slip Op. No. 726 at pgs. 2-3, PERB Case No. 03-A-03 (2004).

In *Fraternal Order of Police/Metropolitan Police Department Labor Committee and District of Columbia Metropolitan Police Department*, 52 DCR 1630, Slip Op. No. 726, PERB Case No. 03-A-03 (2004), the Board found that FOP failed to demonstrate that Arbitrator Doherty's award was contrary to law and public policy. Therefore, FOP's Request was denied.

FOP filed a petition for review with the Superior Court of the District of Columbia. The Board opposed FOP's petition. "Judge Alprin concluded, that [under the circumstances] FOP's mistake in citing an inapplicable provision in the grievance . . . was no grounds to refuse arbitration of the dispute, and that such refusal would contravene the strong public policy favoring agreed-to arbitration." *District of Columbia Public Employee Relations Board v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 987 A.2d 1205, 1206 (D.C. 2010). Therefore, Judge Alprin vacated the arbitrator's ruling and remanded for arbitration to proceed on the merits of the grievance filed by the FOP against the MPD. The Board filed an appeal with the District of Columbia Court of Appeals. In a decision issued January 28, 2010, the Court of Appeals affirmed the Superior Court's judgment and remanded this matter to the Board directing that the Board order the arbitrator to set aside his previous ruling and issue a decision on the merits. See *District of Columbia Public Employee Relations Board v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 987 A.2d 1205, 1209 (D.C. 2010).

II. Discussion

"A number of police officers represented by FOP volunteered and were assigned to work a detail which involved overtime, hereinafter referred to as the Spring Valley Detail. The officers assigned to the overtime detail provided security and escort services to assist in the clean-up and detoxification of a World War II-era hazardous waste site. This detail was operated 24-hours a day, 7 days a week and required continuous police oversight. MPD solicited volunteers for the detail with the understanding that overtime would be paid for all qualifying hours of duty performed. From March 24, 2002 until May 14, 2002, MPD paid no overtime to union members working the Spring Valley Detail." Slip Op. No. 726 at p. 2. "In May 2002, the affected police officers filed a grievance with MPD alleging that the parties' CBA had been violated as follows:

The Employer established an on-going overtime detail and solicited Officer Blue [The named grievant] and other members of the Bargaining Unit to volunteer to work overtime for cash payments.

Since a period beginning on or about March 24, 2002, overtime hours, which were worked by the grievants for this detail, have not been paid.

The Fair Labor Standards Act [FLSA] requires timely payments of compensation earned by covered employees. Officer Blue and the other grievants . . . are covered by the [FLSA, which] is enforceable through the [CBA].” *District of Columbia Public Employee Relations Board v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 987 A.2d 1205, 1206 (D.C. 2010).

As remedies, the police officers sought the overtime payments due, “plus liquidated damages for all hours worked which [were] not compensated within two pay periods of the performance of work [for] which overtime payments are due.”² *District of Columbia Public Employee Relations Board v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*. *Id.*

“[U]nder a heading entitled ‘Provision(s) of the Agreement violated, misapplied or misinterpreted,’ the grievance cited:

Article 30, Section 2 of the parties’ CBA, which provides,

To the extent that the Employer’s present policies, procedures and practices equal or exceed the requirements of the [FLSA], those policies, procedures and practices shall remain in effect, except as otherwise provided herein.” *Id.* at 1206-07.

FOP later conceded that this provision did not govern its grievance - because the provision was not in effect during the time of the events in dispute. (See Slip Op. No.726 at p.2, n.6). Furthermore, FOP acknowledged “that the provision that should have been cited was Article 30, Section 1, namely that (as relevant here) ‘(c)ompensatory time and overtime shall be governed strictly by the [FLSA] for the term of this Agreement.’” *Id.* at 1207.

“In response to the written grievance, the Executive Assistant Chief of Police wrote to the Chairman of the FOP on May 29, 2002, ‘agree[ing] that members [of MPD] who volunteer to work overtime for cash payments shall be compensated in a timely manner and in accordance with the [FLSA],’ and pointing out that the non-payment in this case was the result of an administrative

²The Court of Appeals noted that “[i]t appears to be undisputed that the overtime was eventually paid; thus, only the claims for liquidated damages covering the period of undue delay in payment remains to be arbitrated.” 987 A.2d 1205, 1206, n. 2 (D.C. 2010).

mishap but that steps were being taken 'to compensate [the affected officers] properly.' And on June 7, 2002, FOP wrote to Chief Ramsey demanding arbitration under the CBA, again explaining that its 'Group Grievance demanded timely payment for overtime hours worked, plus liquidated damages, in accordance with the Fair Labor Standards Act.' In succeeding correspondence, however, MPD pointed out supposed defects in the grievance, including, 'most importantly, [that] the [CBA] language you cite as having been violated by [MPD] is not currently in effect.' ” *Id.*

“When MPD continued to ignore or reject the claim for liquidated damages attributable to the delayed payment, FOP sought arbitration under the terms of the parties’ CBA. It acknowledged that ‘technical deficiency’ in the grievance’s mis-citation to an inoperative (and inapplicable) provision, but argued that this did not justify MPD’s refusal to compensate the officers for the delay in payment of overtime concededly earned. MPD, however, adhered to its view that it could ‘not be found to be in violation of a non-provision of the [CBA],’ namely, Article 30, Section 2.”³ *Id.* at 1207.

In his award, arbitrator Donald Doherty agreed with MPD’s position and he did not reach the merits of the dispute over delayed overtime compensation: instead, he ruled that the “FOP had not filed a proper grievance because it ‘had incorrectly cited terms that were not terms of the [CBA], nor had they been terms of the [CBA] at any time during its lifetime,’ and that this mis-citation to an inoperative provision ‘does not appear to be a mere technicality’ but rather ‘has every appearance of a substantive reality.’” *Id.* FOP filed an arbitration review request with the Board. FOP alleged that Arbitrator Doherty’s decision was contrary to law and public policy. In Slip Op. No. 726, the Board determined that Arbitrator Doherty’s decision was not “contrary to law and public policy.” Slip Op. No. 726 at p. 4. Specifically, the Board noted:

FOP merely disagrees with the Arbitrator’s conclusion of non-arbitrability. This is *not* a sufficient basis for concluding that the Arbitrator’s Award is contrary to law and public policy. Slip Op. No. 726 at p. 4.

Therefore, the Board denied FOP’s request. FOP filed a petition for review with the Superior Court. “Judge Alprin concluded, that FOP’s mistake in citing an inapplicable provision in the grievance - when MPD had no misapprehension from the grievance about what the claimed violation actually concerned (and the claimed violation was covered by another CBA provision that was in effect) - was no grounds to refuse arbitration of the dispute, and that such refusal would contravene the strong public policy favoring agreed-to arbitration.” *District of Columbia Public Employee Relations Board v. Fraternal Order of Police/Metropolitan Police Labor Committee*, 987 A.2d

³The Court of Appeals noted that “Article 30 of the CBA actually contains a second Section 2 which continued in effect. But, as Judge Alprin noted, that provision had nothing to do with application of the FLSA to the payment of compensation - it related only to the assignment of officers to staff certain pre-planned events.” 2010 WL 304597, *2, fn 3 (D.C. 2010).

1205, 1206 (D.C. 2010). The Board appealed Judge Alprin's decision. In a decision issued January 28, 2010, the Court of Appeals affirmed Judge Alprin's decision. In affirming Judge Alprin's decision, the Court of Appeals stated the following:

We agree with Judge Alprin that PERB's ruling (and the underlying decision of the arbitrator) may not stand. Although the arbitrator recognized that MPD's assertion that "there [was] no grievance to deal with" because of the mis-citation might appear to be a "merely technical" argument, he nonetheless concluded - without further explanation - that the error was "substantive" and thus deprived the grievance of legal validity. That conclusion is not substantiated by the Agreement itself and, equally important, elevates form over substance contrary to the public policy favoring arbitration where the parties have agreed to it. PERB's failure likewise to let this matter proceed to arbitration despite MPD's full awareness of the nature of FOP's grievance requires us to set aside its decision.

PERB, it is true, has only "limited authority to overturn an arbitral award." *Fraternal Order of Police v. District of Columbia Pub. Employee Relations Bd.*, 973 A.2d 174, 177 (D.C. 2009). As relevant here, its authority to do so was "restricted . . . to determining whether 'the award on its face [was] contrary to law and public policy.'" *District of Columbia Metro. Police Dep't v. District of Columbia Pub. Employee Relations Bd.*, 901 A.2d 784, 787 (D.C. 2006) (citing D.C. Code § 1-605.02(6)) (italics omitted). And, we have emphasized that "a public policy alleged to be contravened 'must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.'" *Id.* at 789 (quoting *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983)). These limitations flow, in considerable part, from the fact that when parties have agreed to submit disputes to arbitration, they have "bargained for [the arbitrator's] construction of the contract [here the CBA]," not some other tribunal's. *Id.* (Quoting *United Steelworkers v. Enter, Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)).

MPD persuaded the arbitrator to find that no grievance was alleged because, under the CBA itself, "[o]nly an allegation that there has been a violation, misapplication, or misinterpretation of the terms of this Agreement shall constitute a grievance," Article 19(A), and FOP's

grievance cited an inoperative or irrelevant (see note 3, *supra*) provision as having been violated. But, as we have seen, MPD from the start - through the Executive Assistant Chief of Police - recognized the actual nature of the grievance: "that members of [FOP] volunteered to work overtime . . . and have not been paid . . . in accordance with the [FLSA]." At no time since then has MPD denied that it knew FOP was in fact claiming violation of the FLSA's timely compensation requirement for overtime work,⁴ incorporated into the CBA by Article 30, Section 1. By its terms, the CBA was meant "to establish a mechanism for the fair, expeditious and orderly adjustment of grievances," Article 19(A), and to that end, it specifies that "[t]he required information" to be stated in a written grievance - including what provision of the Agreement is claimed to have been violated - must be furnished in sufficient detail to identify and clarify the material issue which forms the basis for the grievance." Article 19(C), Step 2, Subsection 2 (g). MPD has not denied that the basis for FOP's grievance was set forth with enough "clari[ty]" to identify unpaid overtime as the matter at issue and enable MPD to respond.

In these circumstances, the arbitrator's refusal to reach the merits of the dispute both frustrates the purpose reflected in the CBA to make "arbitration . . . the method of resolving grievances which have not been satisfactorily resolved" internally, Article 19(E), Section 1, and contravenes the "well defined and dominant" policy, *District of Columbia Metro. Police Dep't, supra*, 901 A.2d at 789, favoring arbitration of a dispute where the parties have chosen that course. Just as "Congress [has] declared a national policy favoring arbitration," *District of Columbia v. Greene*, 806 A.2d 216, 221 (D.C. 2002) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)), so has the District of Columbia. See, e.g., *Masurovsky v. Green*, 687 A.2d 198, 201 (D.C. 1997) ("Variously called a presumption, preference or policy, the rule favoring arbitration is identical under the D.C. Uniform Arbitration Act and the Federal Arbitration Act.") (citation omitted); see also *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656, 668 (Md. 2003) (noting Federal and Maryland policies favoring enforcement of agreements to arbitrate); *Mission Residential, LLC v. Triple Net Props., LLC*, 654 S.E. 2d 888, 890 (Va. 2008) (noting Virginia's

⁴See, e.g., 29 C.F.R. § 778.106 ("[T]he requirements of [the FLSA] will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.").

public policy favoring arbitration). Indeed, this preference for honoring parties' agreement to arbitrate disputes underlies the practical hands-off approach to review arbitrators' decisions, except in certain "restricted" circumstances. *District of Columbia Metro. Police Dep't, supra*, 901 A.2d at 787; see *Fraternal Order of Police, supra*, 973 A.2d at 177 n.2 (arbitrator's interpretation merits deference "because it is the interpretation that the parties 'bargained for'" (emphasis added)). We do not read the arbitrator's refusal to reach the merits of FOP's claim as an interpretation of the CBA. Instead, his refusal to reach the merits because of a hyper technical defect that did not disguise the actual grievance and misled no one as to its nature, far from promoting the parties' bargain, erects an artificial barrier to resolution of the dispute in the manner they have chosen. This, PERB should have recognized, violates the clear policy in favor of enforcing arbitration agreements. *Id.*

In light of the above, the Court of Appeals: (1) affirmed the Superior Court's order setting aside the arbitrator's ruling and the Board's decision in Slip Op. No. 726; and (2) remanded the case to the Board directing that the Board order Arbitrator Doherty to set aside his previous award and rule on the merits of FOP's grievance.

ORDER

IT IS HEREBY ORDERED THAT:

1. Consistent with the District of Columbia Court of Appeals decision, Slip Op. No. 726 is set aside. Therefore, the Fraternal Order of Police/Metropolitan Police Department Labor Committee's ("FOP") Arbitration Review Request is granted. As a result, this matter is remanded to Arbitrator Donald Doherty with instructions to rule on the merits of FOP's grievance.
2. Pursuant to board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

May 5, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 03-A-03 was transmitted via Fax and U.S. Mail to the following parties on this the 5th day of May 2010.

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