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

In the Matter of:)	
)	
Metropolitan Police Department)	
)	PERB Case No. 18-A-10
Petitioner)	
)	Opinion No. 1691
and)	
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
)	
Respondent)	

DECISION AND ORDER

I. Introduction

On April 30, 2018, the Metropolitan Police Department (“MPD”) filed this Arbitration Review Request (“Request”) pursuant to the Comprehensive Merit Personnel Act, D.C. Official Code § 1-605.02(6). MPD seeks review of an arbitration award (“Award”) served April 9, 2018, granting, in part, five grievances filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) on behalf of Officer Wendell Cunningham,¹ Sergeant Steven Urps, Sergeant Renee Dyson, and Sergeant Daymeoin Harris (“Grievants”). The Arbitrator awarded back pay for the Grievants’ previously-scheduled overtime and for the overtime they would have earned during their suspensions. MPD seeks review of the Arbitrator’s back pay award on the grounds that the Arbitrator exceeded his jurisdiction and that the Award is contrary to law and public policy.²

The Board is permitted to modify, set aside, or remand an arbitration award if: (1) an arbitrator was without, or exceeded his or her jurisdiction; (2) the award on its face is contrary to law and public policy; or (3) the award was procured by fraud, collusion or other similar and

¹ Two grievances were filed on behalf of Officer Cunningham.

² Request at 2; See D.C. Official Code § 1-605.02(6).

unlawful means.³ Having reviewed the Arbitrator's conclusions, the pleadings of the parties, and the applicable law, the Board concludes that the Arbitrator did not exceed his jurisdiction and that the Award on its face is not contrary to law and public policy. Thus, the Request is denied.

II. Statement of the Case

This matter arose from six consolidated grievances that were filed on behalf of five MPD members.⁴ All six grievances relate to the members' suspensions from the Automated Traffic Enforcement Unit ("ATEU"), a unit tasked with managing MPD's automated traffic enforcement.⁵ The Grievants volunteered as certified automated traffic enforcement officers outside of their regularly assigned tour of duty and received overtime compensation.⁶ During the relevant time period, the ATEU program operated under a set of "Photo Radar Speed Enforcement Program Business Rules" ("Business Rules").⁷ The Business Rules called for the members' suspension for the violation of certain rules.⁸ During the time the Grievants took part in the ATEU program, MPD temporarily suspended the Grievants for violating the Business Rules. The Union filed grievances on their behalf. Thereafter, the Union invoked arbitration. Arbitration was conducted on the six consolidated grievances on March 27, 2018.⁹

III. Arbitrator's Award

The Arbitrator considered the following issues:

1. Whether summary suspensions executed under the 2008 business rules of the Automated Traffic Enforcement Unit (ATEU) violated Article 4, Management Rights, of the parties' Labor Agreement effective FY 2004 - FY 2008 because the suspensions were not exercised in accordance with laws, rules, and regulations? If so, what is the remedy?
2. Whether requiring Sergeant Christopher Leary to take retraining after not working in the ATEU program for 1-3 years violated Article 4, Management Rights, of the parties' Labor Agreement, effective FY 2004 - FY 2008 because such request for retraining was not exercised in accordance with laws, rules, and regulations? If so, what is the remedy?¹⁰

Before the Arbitrator, the Union alleged that MPD violated Article 4 of the parties' collective bargaining agreement which states, in pertinent part, that "management rights are to be

³ D.C. Official Code § 1-605.02(6).

⁴ The Arbitrator denied the grievance of Sergeant Leary. Before the Board are five grievances.

⁵ Award at 4.

⁶ Award at 6.

⁷ Award at 5.

⁸ Award at 6.

⁹ Opposition at 1.

¹⁰ Award at 2.

exercised in accordance with applicable laws, rules and regulations.”¹¹ The Union asserted that no official rules were provided for the ATEU program or the summary suspensions, and that when suspended, the Grievants did not have a chance to respond to the discipline except by filing a grievance.¹² MPD claimed that it did not violate Article 4 because it “acted pursuant to management’s rights” in establishing the Business Rules for the program.¹³ MPD contended that the suspensions under the Business Rules were valid, approved by the appropriate officials, and commonly used by MPD.¹⁴ Finally, MPD asserted that a suspension under the Business Rules did not amount to discipline under the parties’ collective bargaining agreement or constitute an adverse action because ATEU was a voluntary program and a violation of the Business Rules was not considered an adverse action or discipline, as there was no investigation of misconduct, or removal or reduction in pay in the members’ regularly assigned duties, responsibilities, or tour of duty.¹⁵

In the Award, the Arbitrator granted five of the six grievances, in part.¹⁶ The Arbitrator agreed that the “management rights established in the Business Rules were not ‘exercised in accordance with applicable laws, rules and regulations’ under Article 4 to the extent that they allowed summary suspensions.”¹⁷ The Arbitrator added, “[t]he Department’s directive system at the relevant time ‘that members were required to comply with and enforce’ did not include ‘business rules.’”¹⁸ Additionally, the Arbitrator determined that MPD’s summary suspension of the Grievants was not “exercised in accordance with applicable laws, rules and regulations” under Article 4 of the parties’ collective bargaining agreement.¹⁹ The Arbitrator concluded that a suspension is an adverse action under the parties’ collective bargaining agreement as well as the General Order Disciplinary Procedures and Processes (“General Order”).²⁰ The Arbitrator stated that the Grievants were not provided with a notice of proposed adverse action, an opportunity to respond, and other procedural steps granted under the collective bargaining agreement and General Order.²¹

Accordingly, the Arbitrator determined that MPD violated Article 4 of the collective bargaining agreement by suspending the Grievants in a manner conflicting with applicable laws, rules, and regulations.²² The Arbitrator awarded back pay for the Grievants’ previously-scheduled overtime and for the overtime they would have earned during their suspensions.²³

¹¹ Award at 7.

¹² Award at 7.

¹³ Award at 7-8.

¹⁴ Award at 8.

¹⁵ Award at 8.

¹⁶ The Arbitrator denied the grievance of Sergeant Leary.

¹⁷ Award at 8.

¹⁸ Award at 8.

¹⁹ Award at 8.

²⁰ Award at 8.

²¹ Award at 8.

²² Award at 7.

²³ Award at 21-23.

I. Discussion

A. The Arbitrator did not exceed his jurisdiction.

MPD first seeks reversal of the Award on the grounds that the Arbitrator exceeded his jurisdiction by (1) granting relief that the Union did not request in its grievance; (2) finding that MPD waived its argument that the grievances by Officer Cunningham, Sergeant Dyson, and Sergeant Urps were untimely filed; (3) finding that MPD violated Article 4 of the parties' collective bargaining agreement by suspending the Grievants from the ATEU program.

When determining if an Arbitrator has exceeded his jurisdiction, the Board looks to whether or not "the Award draws its essence from the collective bargaining agreement."²⁴ The Board has held that by agreeing to submit a grievance to arbitration, it is the Arbitrator's interpretation, not the Board's, for which the parties have bargained.²⁵ Moreover, "[t]he Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator."²⁶ A party's disagreement with an arbitrator's interpretation of a provision in the parties' collective bargaining agreement does not mean that the arbitrator exceeded his jurisdiction.²⁷

First, MPD states that the Arbitrator had no jurisdiction to issue the award because the Union never requested the relief granted by the Arbitrator in its grievances even though the Union was required to do so by the contract.²⁸ MPD states that the Arbitrator awarded back pay even though the Grievants did not request back pay during the grievance process.²⁹ MPD notes that Article 19 of the parties' collective bargaining agreement states that a written grievance must contain "[t]he specific remedy or adjustment sought."³⁰ Further, MPD states that Article 19, Part E, Section 5 states, "the parties to the grievance on appeal shall not be permitted to assert in such arbitration proceeding any ground . . . not previously disclosed to the other party."³¹ In awarding relief that the Union did not request during the grievance process, MPD argues that the Arbitrator also violated Article 19, Part E, Section 5.4, which prohibits an arbitrator from "add[ing] to, subtract[ing] from or modify[ing] the provisions of [the collective bargaining agreement] in arriving at a decision."³² Additionally, MPD asserts that permitting the Union to pursue a remedy not sought in the grievance process was prejudicial to MPD, as MPD was not prepared to rebut

²⁴*UDC v. UDC Faculty Ass'n*, 39 D.C. Reg. 9628, Slip Op. 320, PERB Case No. 92-A-04 (1992) (citing *Michigan Family Resources, Inc. v. SEIU Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007)).

²⁵ *UDC v. UDC Faculty Ass'n*, 39 D.C. Reg. 9628, Slip Op. 320, PERB Case No. 92-A-04 (1992).

²⁶ *D.C. Dep't of Corr. and Int'l Bhd. of Teamsters, Local Union No. 246*, 34 D.C. Reg. 3616, Slip Op. 157 at 3, PERB Case No. 87-A-02 (1987).

²⁷ *D.C. Dept. Pub. Works v. AFSCME Local 2091*, Slip Op. 194, PERB Case No. 87-A-08 (1988).

²⁸ Request at 4.

²⁹ As a remedy, all five Grievants requested, *inter alia*, that they be allowed to sign up and work immediately in ATEU overtime and that the Department follow its own rules and District law when changing or creating new policies, rules, or regulations. The Arbitrator determined that the ATEU program ended in May 2015. Award at 7.

³⁰ Request at 8.

³¹ Request at 8.

³² Request at 9.

the Union's requested remedy. Finally, MPD argues that the Arbitrator did not mention in the Award that MPD made this argument at arbitration.³³

The Board finds no merit to MPD's argument that the Arbitrator exceeded his authority in determining a remedy not included in the initial grievance. The Arbitrator's authority to devise a remedy in the instant case constitutes an exercise of his equitable powers arising out of the parties' collective bargaining agreement.³⁴ The Board has held that an arbitrator does not exceed his authority by exercising his equitable powers, unless these powers are expressly restricted by the parties' collective bargaining agreements.³⁵ Here, none of the provisions of the collective bargaining agreement cited by MPD restrict the Arbitrator's authority to determine an appropriate remedy in this case. Further, the issue of an appropriate remedy was explicitly presented to the Arbitrator.³⁶ The Board has repeatedly held that it will not overturn an arbitration award based simply upon the petitioning party's disagreement with the arbitrator's findings.³⁷ It is well settled that "[b]y agreeing to submit a matter to arbitration, the parties also agree to be bound by the Arbitrator's decision, which necessarily includes the . . . evidentiary findings and conclusions upon which his decision is based."³⁸ Therefore, MPD's disagreement with the Arbitrator's Award does not present a statutory ground for review.

Second, MPD contends that the Arbitrator exceeded his jurisdiction by finding that MPD waived its argument that the grievances by Officer Cunningham, Sergeant Dyson, and Sergeant Urps were untimely filed.³⁹ MPD states that during arbitration, the Arbitrator ruled that MPD waived the untimeliness argument because MPD did not raise this argument in response to the grievances, pursuant to Article 19, Section E, Part 5.2.⁴⁰ MPD contends that it should have been permitted to argue that the grievances were untimely since the Union was permitted to request remedies during arbitration that were not requested during the initial grievance.⁴¹

The Board finds that MPD's contentions here are merely disagreements with the Arbitrator's findings. At the hearing, the Arbitrator found no merit to MPD's contentions that the grievances were untimely filed.⁴² The Arbitrator further stated that Article 19, Section E, Part 5.2

³³ Request at 9.

³⁴ *Metro. Police Dep't v. Nat'l Ass'n of Gov't Emps., Local R3-5*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2006).

³⁵ *E.g., Univ. of D.C. v. AFSCME, Council 20, Local 2087*, 59 D.C. Reg. 15167, Slip Op. 1333 at 6, PERB Case No. 12-A-01 (2012); *MPD v. FOP/MPDLC*, 59 D.C. Reg. 12709, Slip Op. 1327 at 4-5, PERB Case No. 06-A-05 (2012); *D.C. Metro. Police Dep't and FOP/MPD Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633, PERB Case No. 00-A-04 (2000).

³⁶ Award at 2.

³⁷ *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 64 D.C. Reg. 10138, Slip Op. No. 1637 at 2, PERB Case No. 17-A-07 (2017).

³⁸ *Id.*

³⁹ Request at 10.

⁴⁰ Request at 10.

⁴¹ Request at 10.

⁴² Award at 11, 14, 16.

prohibited MPD from raising this argument for the first time at arbitration.⁴³ MPD's disagreement with the Arbitrator's findings is not a sufficient basis for finding that the Arbitrator exceeded his jurisdiction.

Third, MPD states that the Arbitrator exceeded his jurisdiction by finding that MPD violated the Managements Rights provision in Article 4 of the parties' collective bargaining agreement by suspending the Grievants from the ATEU program. MPD contends that the Arbitrator failed to analyze how the temporary removal of the Grievants from "this voluntary overtime program, which was not part of the member's regular duties, was an adverse action as there was no fine, suspension, removal from service, reduction in pay in the member's regularly assigned duties or reduction in rank."⁴⁴ MPD contends that the Arbitrator exceeded his authority by "essentially creating a right to overtime" where none exists in the collective bargaining agreement.⁴⁵

The Board finds that MPD's contentions here are merely disagreements with the Arbitrator's evidentiary findings and conclusions. MPD's position is a reiteration of the arguments presented before the Arbitrator and rejected in the Award.⁴⁶ The Board has repeatedly held that "[a]n Arbitrator need not explain the reason for his or her decision."⁴⁷ An Arbitrator's decision is not unenforceable merely because he or she fails to explain a certain basis for his or her decision.⁴⁸ Moreover, the Board has held that an arbitrator need not address and consider all the arguments made at arbitration.⁴⁹ In the present case, the Arbitrator made ample factual conclusions and discussed the Parties' arguments in supporting his decision. As stated previously, the Arbitrator found that a suspension is an adverse action under Article 12 of the parties' collective bargaining agreement as well as under General Order Article III, Sections 2,2; Article III, Section 8; and Article VI, Section H.⁵⁰ Therefore, the Board finds that MPD's argument also lacks merit.

B. The Award was not contrary to law and public policy.

As a second basis for review, MPD asserts that the Arbitrator's Award violates law and public policy on the grounds that the back pay award is speculative and provides unjust enrichment. The Board's scope of review, particularly on the basis of law and public policy, is narrow. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial

⁴³ Award at 11, 14, 16. The Board notes that the Arbitrator determined that even if MPD were permitted to make a timeliness argument, the grievance of Sergeant Urps was timely filed.

⁴⁴ Request at 15.

⁴⁵ Request at 16.

⁴⁶ *D.C. Pub. Sch. v. Wash. Teachers' Union, Local #6, Am. Fed'n of Teachers, AFL-CIO*, 64 D.C. Reg. 4875, Slip Op. No. 1610 at 5, PERB Case No. 16-A-09 (2016).

⁴⁷ *FOP/Dep't of Corr. Labor Comm. v. D.C. Dep't of Corr.*, 61 D.C. Reg. 11301, Slip Op. 955 at 8, PERB Case No. 08-A-06 (2010) (citing *Lopata v. Coyne*, 735 A.2d 931, 940 (D.C. 1999)); *FOP/MPD Labor Comm. v. D.C. MPD*, 59 D.C. Reg. 3543, Slip Op 882 at n.7, PERB Case No. 07-A-13 (2008); *FOP/MPD Labor Comm. v. D.C. MPD*, 59 D.C. Reg. 3875, Slip Op. 911 at n.8, PERB Case No. 06-A-12 (2007).

⁴⁸ *Id.* (citing *Chicago Typographical Union 16 v. Chicago Sun Times Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991)).

⁴⁹ *Id.*

⁵⁰ Award at 8.

review of arbitration awards under the guise of public policy.”⁵¹ The law and public policy question must be “well defined and dominant,” and is to be ascertained “by reference to the law and legal precedents and not from general considerations of supposed public interest.”⁵² Absent a clear violation of law evident on the face of the arbitrator’s award, the Board lacks authority to substitute its judgment for that of the arbitrator.⁵³

MPD takes the position that there is a law and public policy against the “extraction of compensation for services not performed.”⁵⁴ MPD contends that this law and public policy is articulated in section 158(b)(6) of the National Labor Relations Act, which prohibits “extracting compensation from employers for work not performed.”⁵⁵ MPD states that this public policy is evident in decisions of the Supreme Court applying this statute.⁵⁶ MPD also contends that the Award is contrary to section 1-611.03(e) of the D.C. Official Code, which prohibits the payment of overtime for hours not worked, in accordance with the overtime provision of section 7 of the Fair Labor Standards Act.⁵⁷ However, MPD does not explain how the Award violates the stated law and public policy. Additionally, the Award does not contravene section 1-611.03(e) of the D.C. Official Code or section 158(b)(6) of the National Labor Relations Act since neither statute prohibits an arbitrator from awarding back pay as a remedy. In the absence of express contractually agreed-upon limits to back pay awards by the parties for arbitration awards, the Board does not find that the awarding of back pay contravenes applicable law and public policy.

II. Conclusion

The Board rejects MPD’s arguments and finds no cause to set aside or modify the Arbitrator’s Award. Accordingly, the Department’s request is denied and the matter is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
2. Pursuant to Board Rule 599, this Decision and Order is final upon issuance.

⁵¹ *Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (quoting *Am. Postal Workers Union v. US Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

⁵² *DC Metro. Police. Dep’t v. Fraternal Order of Police/ DC Metro. Police Dep’t Labor Comm.*, 63 DC Reg. 4573, Slip Op. 1561, PERB Case No. 14-A-09 (2016); *See Am. Postal Workers Union v. U.S. Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986).

⁵³ *DC Metro. Police. Dep’t*, Slip Op. 1561 at 6.

⁵⁴ Request at 15.

⁵⁵ Request at 12.

⁵⁶ Request at 13-14.

⁵⁷ Request at 11.

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BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

November 15, 2018

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-10, Opinion No. 1691 was sent by File and ServeXpress to the following parties on this the 27th day of November, 2018.

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