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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. 06-A-16
)	
and)	Opinion No. 875
)	
Fraternal Order of Police/Metropolitan)	
Police Department Labor Committee)	
(on behalf of Bridget King),)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the case:

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an arbitration award ("Award") which rescinded the termination of Bridget King ("Grievant") a bargaining unit member. MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

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

II. Discussion:

The Grievant began her employment with MPD on April 9, 1989. MPD proposed to terminate her employment based on charges that she was involved in a physical and verbal altercation with another MPD officer on April 13, 2003. On July 29, 2004, MPD served the Grievant with a Notice of proposed Adverse Action.

On August 2, 2004, the Grievant requested a hearing. An Adverse Action Panel, was convened on September 20, 2004. The Grievant pleaded not guilty to Charge One and pleaded guilty to Charge Two.

On November 5, 2004, the Panel sustained the charges and recommended termination. On November 5, 2003, MPD informed the Grievant of the final decision to terminate his employment. FOP appealed the matter to the Chief of Police. The Chief of Police denied the grievance and FOP invoked arbitration pursuant to the parties' collective bargaining agreement ("CBA").

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within fifty-five (55) days of the date that the Grievant requested a hearing. (See Award at p. 5) Article 12, Section 6 of the parties' CBA provides in pertinent part that an employee "shall be given a written decision and the reasons therefore no later than . . . 55 days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing." (Award at pgs. 3-4) FOP argued that the Grievant was notified of the charges on July 28, 2004, but was not served with the final decision until November 5, 2004. FOP claimed that because of this violation the termination should be rescinded. (See Award at p. 5)

MPD countered that even if a violation of the fifty-five day rule occurred it was harmless error and that the parties' CBA does not authorize the Arbitrator to rescind the termination. (See Award at p. 5).

In a Award issued on May 15, 2006, Arbitrator Lois Hochhauser concluded that MPD violated Article 12, Section 6 of the parties' CBA when it failed to issue a written decision within the fifty-five (55) days of the date the Grievant elected to proceed with a departmental hearing. Specifically, Arbitrator Hochhauser noted the following:

[The] Grievant requested a hearing on August 2, 2004. The hearing was initially scheduled for August 18, 2004, but was rescheduled at the Grievant's request and was heard on September 20. The Final Notice of Adverse Action was issued on November 5, 2004. Calculating the 55 days from the date of the request [for a] hearing, the decision should have been issued on September 27, 2004. The decision was issued 94 days from the initial date of the hearing request. However, [the] Grievant requested a continuance

of the hearing date from August 18 to September 20, 2004, thus MPD is entitled to an extension of 33 days since that time period is not calculated into the 55 days. . . . [MPD] issued its decision on November 5, 2004, a period of 62 days from when the request for a hearing was made. (Award at pgs 4-5)

In view of the above, the Arbitrator rescinded the termination and ordered that the Grievant be reinstated with full back pay and benefits. (See Award at p. 8)

MPD takes issue with the Award. Specifically, MPD argues that the: (1) Arbitrator was without authority to grant the Award and (2) Award is contrary to law and public policy. (See Request at p. 2).

MPD asserts that the Arbitrator was presented with two decisions of the District of Columbia Superior Court regarding a remedy for violations of the CBA's fifteen-day rule and fifty-five day rule. (See Request at p. 4) In both instances the cases were before the Superior Court on review of arbitration decisions that reversed the discipline imposed by MPD due to missed contractual time limits. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-19 (September 10, 2002), Judge Abrecht reversed the decision of the arbitrator. In the other case, Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-18 (September 17, 2002), Judge Kravitz upheld the decision of the arbitrator. MPD suggests that in the present case, the Arbitrator was guided by Judge Kravitz's decision, therefore, she concluded that she had the authority to fashion a remedy for the failure of MPD to comply with the 55-day rule. MPD asserts that the decision of the Arbitrator was contrary to law and was not based upon any authority set forth in the parties' CBA. (See Request at pgs. 4-5) MPD submits "that the decision of Judge Abrecht should have been followed by the Arbitrator [and not that of Judge Kravitz.]" (Request at p. 6)

In addition, MPD contends that "[t]he failure to comply with the fifty-five day period was harmless in that [the] Grievant was not denied any due process protections. Moreover, [the] Grievant was not prejudiced by the delay because during the period after the expiration of the 55-days, she was in a pay status." (Award at pgs. 6-7) Also, MPD argues that "resolution of this matter should be controlled by *Fraternal Order of Police/Metropolitan Police Department Labor Committee and D.C. Metropolitan Police Department*, Case No. 50620-656821-A (March 14, 2006), where Arbitrator Joan Parker observed that it would be inappropriate to rescind a termination based upon a 55-day rule violation and stressed instead that the 'appropriate remedy for such a violation would be back pay for any pay [g]rievant lost as a result of the delay in [issuing a] written decision beyond the fifty-five days after he elected a hearing.'" (Request at p. 7)

MPD notes that the Grievant was found guilty of committing serious acts of misconduct. "If [the] Grievant is reinstated, the nature of her misdeeds makes it unlikely that she would be returned to a full-duty status. Under the circumstances, a remedy of reinstatement would violate the public policy in that [the] Grievant would be unable to provide the services to the public as set forth in D.C. Official Code 2001 Edition. . ." (Request at p. 7) Also, MPD claims that "[i]t is

beyond question that the suitability of a person employed as a police officer is an important public policy. [The] Grievant committed her misdeeds while employed as a police officer [and MPD] decided that [the Grievant] was no longer suitable to function in that capacity.” (Award at p. 7) Finally, MPD asserts that a remedy of reinstatement returns to MPD an individual “unsuitable to serve as a police officer. Clearly such a remedy would violate public policy.” (Request at p. 7)

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 Arbitrator Hochhauser. Neither MPD’s disagreement with the Arbitrator’s interpretation of Article 12, Section 6, nor MPD’s disagreement with the Arbitrator’s findings and conclusions, are grounds for reversing the Arbitrator’s Award. See MPD and FOP/MPD Labor Committee (on behalf of Keith Lynn), Slip Op. No 845, PERB Case No. 05-A-01 (2006).

Also, MPD suggests that the plain language of Article 12, Section 6 of the parties’ CBA does not impose a penalty for noncompliance with the 55-day rule. Therefore, by imposing a penalty where none was expressly stated or intended, MPD asserts that the Arbitrator added to and modified the parties’ CBA. (See Request at pgs. 4-5)

MPD’s arguments are a repetition of the positions it presented to the Arbitrator and its ground for review only involves a disagreement with the arbitrator’s interpretation of Article 12, Section 6 of the parties’ CBA. MPD merely requests that we adopt its interpretation and remedy for its violation of the above-referenced provision of the CBA. This we will not do.

In cases involving the same parties, we have previously considered the question of whether an arbitrator exceeds his/her authority when he rescinds a Grievant’s termination for MPD’s violation of Article 12, Section 6 of the parties’ CBA. In those cases we rejected the same argument being made in the instant case and held that the Arbitrator was within his/her authority to rescind a Grievant’s termination to remedy MPD’s violation of the 55-day rule. (See MPD and FOP/MPD Labor Committee (on behalf of Jay Hang), Slip Op. No 861, PERB Case No. 06-A-02 (2007), MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez), Slip Op. No 814, PERB Case No. 05-A-03 (2006) and MPD and FOP/MPD Labor Committee (on behalf of Angela Fisher) Slip Op. No., PERB Case 02-A-07, *affirmed by Judge Kravtz of the Superior Court in Metropolitan Police Dep’t v. D.C. Public Employee Relations Board*, 01-MPA-18 (September 17, 2002), *affirmed by District of Columbia Court of Appeals in Metropolitan Police Dep’t v. D.C. Public Employee Relations Board*, 901 A.2d 784 (D.C. 2006).

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 Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

In the present case, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once Arbitrator Hochhauser concluded that MPD violated Article 12, Section 6 of the parties' CBA, she also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator Hochhauser did not add to or subtract from the parties' CBA but merely used her equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator Hochhauser acted within her authority.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (See Request at p. 2). For the reasons discussed below, we disagree.

The 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 ruling. "[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." American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F. 2d 1, 8 (D.C. Cir. 1986). 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, United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, 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 lead 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 Department of Corrections v. Teamsters Union Local 246, 54 A2d 319, 325 (D.C. 1989).

In the present case, MPD asserts that the Award is on its face contrary to law and public policy. Specifically, MPD asserts that even if a violation of the 55-day rule occurred it constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. (See Request at p. 6) In support of its position, MPD cites Judge Abrecht's decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002). We have previously considered and rejected this argument. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 2006) MPD appealed our determination that the "harmless error rule" was not applicable in cases such as the one currently before the Board. The District of Columbia Court

¹ We note that if MPD had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

of Appeals rejected MPD's argument that a violation of the CBA's 55-day rule was subject to the "harmless error rule" by stating the following:

The Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-617.01 *et seq.* (2001), regulates public employee labor-management relations in the District of Columbia, and, as MPD concedes, the CMPA contains no provision requiring harmful (or harmless) error analysis before reversal of erroneous agency action is permitted. Neither do PERB's rules impose such a review standard on itself or on arbitrators acting under its supervision. MPD points out that had Officer Fisher, instead of electing arbitration with the sanction of the FOP, chosen to appeal her discharge to the Office of Employee Appeals (OEA), *see* D.C. Code § 1-606.02, she would have been met with OEA's rule barring reversal of an agency action "for error . . . if the agency can demonstrate that the error was harmless," 6 DCMR § 632.4, 46 D.C. Reg. 9318-19; and MPD, again citing *Cornelius*, warns of the forum-shopping and inconsistency in decisions that could result if PERB (and arbitrators) were not held to the same standard. *See Cornelius*, 472 U.S. at 662 ("If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim . . . would tend to select the forum - - the grievance and arbitration procedures - - that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid."). But, as the quotation from *Cornelius* demonstrates, Congress made its intent to avoid these evils "clear" in the Civil Service Reform Act. *Id.* at 661 ("Adoption of respondents' interpretation . . . would directly contravene this clear congressional intent.") Since MPD can point to no similar expression of legislative intent here, it cannot claim a misinterpretation of law by the arbitrator that was apparent "on its face." 901 A.2d 784, 787²

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. MPD had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, MPD failed to do so.

²The Court of Appeals also rejected MPD's argument that the time limit imposed on the agency by Article 12, Section 6 of the parties' CBA is directory, rather than mandatory.

In view of the above, we find no merit to MPD's arguments. Also, we find that the Arbitrator's conclusions are 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.

ORDER

IT IS HEREBY ORDERED THAT:

1. The 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 13, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-16 was transmitted via Fax and U.S. Mail to the following parties on this the 13th day of February 2007.

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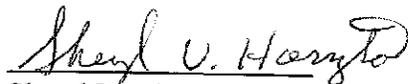
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