Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Metropolitan Police Department,	
Petitioner,	
and	PERB Case No. 04-A-09
	Opinion No. 791
Fraternal Order of Police/Metropolitan Police Department Labor Committee,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

The Metropolitan Police Department ("MPD"), filed an Arbitration Review Request ("Request") on March 18, 2004. MPD seeks review of an arbitration award ("Award") in a group grievance involving eight police officers (Grievants) in which Arbitrator Bernard Ries (Arbitrator Ries) ordered "that the MPD reclassify the eight grievants as Detective Grade Two effective December 1, 2002."[1] (Award at p. 7). The MPD asserts that the "reason for appealing the award is that 'the award, on its face, is contrary to law and public policy' and [the Arbitrator] exceeded his authority." (Request at p. 2). 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" and "the arbitrator was without or exceeded his or her jurisdiction." D.C. Code § 1-605.02 (6) (2001 ed.).

[1] The Grievants are: Nathaniel C. Britt, Robert J. Bush, Jr., Wai Tat Chung, Corpus Garcia, Joseph M. Gatling, Jocelyn R. McFadden, John P. Reese and Eduardo Vazquez. (Award at p. 1).

Arbitrator Ries' February 24, 2004 Award addresses the issue of whether the eight Grievants ever achieved Investigator status so as to be capable of further promotion to Detective II ("D-II") pursuant to the parties' collective bargaining agreement and MPD policies in MPD General Orders (G.O.), specifically G.O. 201.1 (February 24, 1992). (Award at p. 2). Arbitrator Ries noted that in a previous arbitration heard by Arbitrator Charles Donegan (hereinafter referred to as the *Donegan* Award) in 2001, these same eight Grievants asserted that they were entitled to D-II promotions and back pay for the period in which they actually performed as D-II's.[2] (Award at p. 2). Arbitrator Ries noted in the Award, which is the subject of the MPD Request, that Arbitrator Donegan concluded that the Grievants could be promoted "only . . . by a personnel action by Management, which was not done in the case of the grievants." (Award at p. 2) Arbitrator Ries also noted that, based on the parties' contractual requirement of higher-level pay for higher-level work, Arbitrator Donegan found that the Grievants should be compensated "at the D-2 higher rate of pay."[3] (Award p. 2). Based on the record, Arbitrator Ries found that, following the *Donegan* Award between August 22 and September 10, 2001, the Grievants' Personnel Action Form 1's ("Form 1") reflected a change in assignment from "Officer" to "Investigator" and an annual salary increase of $1250.00. In addition, Arbitrator Ries found that the record established that the "Remarks" section of the Grievants' Form 1 read, "Action taken in accordance with arbitration between FOP/MPD Labor Committee and the Metropolitan Police Department," a reference to the *Donegan* Award. (Award at p. 2). Arbitrator Ries observed that the Grievants' Form 1's effective dates were almost all in the early 1990's and that the Union "eschewed any claim to back pay for the grievants." (Award at p. 2, n. 2).

Arbitrator Ries noted that the testimony of an MPD staffing supervisor established that as a result of the *Donegan* Award the Grievants' Form 1's: made them "become" Investigators; that the Form 1's changed their "status" and titles; and, while the Grievants' assignments were "temporary" or "Acting Investigators," they "would receive all the prerequisites of Investigators." (Award at p. 5). Arbitrator Ries concluded that the MPD staffing supervisor's testimony favored the Union's case. (Award at p. 5). He also found that the facts established that the "MPD formally changed the classification of the grievants from Officer to Investigator, and the MPD never attempted to retract those actions." (Award at p. 5). Moreover, Arbitrator Ries noted that:

> [O]n August 13, 2001, in responding to a list of 33 members thought by FOP to be Investigators, the MPD Director of Human Resources found the present eight grievants to be such, all as early as the beginning of the 1990's. This analysis was made after Arbitrator Donegan's award, but shortly before the Form 1's were executed. (Award p. 5, n. 7).

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[2] *FOP/MPD Labor Committee, John Reese, et al. and Metropolitan Police Department*, FMCS Case No. 000802-14041-7, May 26, 2001 (Arb. Charles Donegan) (*Donegan*).

[3] *Donegan*, at pgs. 54-55.

Arbitrator Ries found that the factual record developed by the parties established that on September 30, 2002, Lieutenant Atchison, the Grievants' supervisor, recommended their promotion to D-II. (Award at pgs. 1, 6 and 7, n. 11.). However, Assistant Chief Barrett rejected the Grievants promotion to D-II. Arbitrator Ries determined that the record established that Assistant Chief Barrett's rejections of Atchison's recommendations of the Grievants' promotions were based on Barrett's interpretation of the *Donegan* Award as reflected in the "Remarks" section of the Grievants' Form 1's. (Award at p. 6).

On the issue of whether the Grievants were Investigators, Arbitrator Ries concluded based "on the particular facts relevant to these grievants" that the Grievants "had achieved the status of Investigator." (Award p. 5). Based on the factual record developed by the parties and his analysis of the requirements of G.O. 201.1 Part I. C.2, concerning "elevation to D-II," Arbitrator Ries held that the FOP's "grievance should be sustained and [the Grievants] should be so promoted." (Award p. 5). In conclusion, Arbitrator Ries Award sustained FOP's grievance and ordered the MPD to "reclassify the eight grievants as Detective Grade Two effective as of December 1, 2002," two months after Atchison's recommendation that the Grievants be promoted. (Award p. 7, n. 11).

II. The Request for Review

MPD asserts that the Award "on its face, is contrary to law and public policy" and the Arbitrator exceeded his authority. (Request at p. 2).

According to MPD, the Grievants had been awarded only acting-pay for performing the duties of D-II pursuant to the *Donegan* Award. MPD asserts that it was "forced to issue" the Grievants' Form 1's to authorize the additional compensation. (Request at p. 2). Also, MPD argues that Arbitrator Ries concluded that the Grievants were Investigators because of the Forms 1's and "the equivocal testimony of a management witness as to [the forms'] impact." (Request p. 2). MPD claims that since Arbitrator Ries concluded that the Grievants were Investigators and that there was no evidence that the Grievants had not satisfied other prerequisites for promotion to D-II, he ruled that the Grievants should be promoted to D-II. (Request at p. 3).

MPD contends that Arbitrator Ries exceeded his authority when he ignored the plain language of the *Donegan* Award. In this regard, MPD argues that Arbitrator Ries elevated a witness's explanation of the *Donegan* Award over the award's clear and plain language which provided, in pertinent part, that the Grievants,

> in the instant case could only be promoted by a personnel action by Management, which was not done in the case of the grievants.

* * *

> The grievants must be compensated at the D-2 higher rate of pay for JFTF work performed after the grievance was filed. The grievants are not promoted to the D-2 Detective rank. (*Donegan* at pgs. 39-40 and 54-55, Request at p. 4).[4]

According to MPD, Arbitrator Ries exceeded his authority by construing the implementation of the *Donegan* Award to hold that MPD had promoted the Grievants to Investigators. MPD argues that, notwithstanding witness testimony which Arbitrator Ries described as "surprising and contrary," the language of the *Donegan* Award is unambiguous. Furthermore, in response to Arbitrator Ries' comment that MPD did not rescind the Grievants' Form 1's, MPD argues that it could not rescind the forms while the Grievants were performing the functions which Arbitrator Donegan found required additional compensation.

MPD asserts that the Award is contrary to law and public policy based on D.C. Code § 1-617.08, which grants enumerated rights to management, including, as regards this Request, the right to promote. MPD argues that the statutory management right to promote has been incorporated into the parties' collective bargaining agreement at Article 4. According to MPD, the *Donegan* Award, providing that the Grievants were ***not*** to be promoted, became "law" in June 2001 when the FOP did not appeal the *Donegan* Award. MPD argues that the instant grievances were filed in February 2003 after the MPD instituted a new and different process for Officers to qualify for Investigator. MPD argues that Arbitrator Ries concluded that the implementation of the *Donegan* Award promoted the Grievants *de facto* to Investigator and without regard to the G.O. 201.1 prerequisites. MPD argues that G.O. 201.1 no longer even applied in 2002 or 2003 when the Grievants were recommended for D-II promotions by Atchison and the instant grievances were filed. Therefore, MPD claims the Grievants did not qualify for D-II promotions under the regulations in force when they were recommended for promotion or when they grieved their non-promotion. Consequently, MPD argues that Arbitrator Ries could not order the promotion of the Grievants at a time when they were not qualified under the pertinent regulations. For these reasons, MPD concludes that the Award is contrary to law and violates the statutory management right to promote.

Despite its initial claims presented in the Request, MPD asserted no argument that the Award was contrary to public policy.

III. Discussion

The Board has determined that a "disagreement with the Arbitrator's interpretation of the parties' contract does not make the Award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413 at p. 3, PERB Case No. 95-A-02 (1995). Moreover, the Board has held that "to set aside an award as contrary to law and public

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[4] JFTF is the acronym for the Joint Fugitive Task Force.

policy, the Petitioner must present applicable law and definite public policy that mandate that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). *See also* AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993) and W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983). With respect to the Arbitrator's findings and conclusions, the Board has stated that resolution of "disputes over credibility determinations" and "assessing what weight and significance such evidence should be afforded" is within the jurisdictional authority of the Arbitrator. *See* American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO and District of Columbia General Hospital, 37 DCR 6172, Slip Op. No. 253 at p. 2, PERB Case No. 90-A-04 (1990) and University of the District of Columbia and District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248 at n. 8, PERB Case No. 90-A-02 (1990), respectively.

In addition, this Board has found that by submitting a matter to arbitration, "the parties also agree to be bound by the Arbitrator's decision which necessarily includes the Arbitrator's interpretation of the parties' agreement and related rules and/or regulations as well as his evidentiary findings and conclusions upon which the decision is based." University of the District of Columbia and University of the District of Columba Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p.2, PERB Case No. 92-A-04 (1992). Also, "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 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).

The gravaman of MPD's Request is based on a reading of the *Donegan* Award as if it placed a prohibition on the Grievants ever becoming Investigators which, according to MPD's General Orders and promotional policies, is a mandatory incremental-step to a D-II promotion. The MPD argument continues in its reasoning as follows, if the Grievants are not Investigators, then they cannot be promoted to D-II's. However, Arbitrator Ries considered the MPD's argument that the Grievants were merely acting-Investigators and found based on the evidence and testimony that

> Whatever its motivation, the fact of the matter is the MPD formally changed the classification of the grievants from Officer to Investigator, and it never attempted to retract those actions. (Award at p. 5).

The plain language of the Award confirms that Arbitrator Ries concluded that the Grievants were Investigators based on testimony of MPD's witness, an MPD staffing supervisor, and MPD G.O. 201.1, concerning the Investigator and Detective promotional process. His conclusion contrary to MPD on this issue was arrived at after assessing what weight and significance should be afforded to the testimony of MPD's own witness and the MPD General Order pursuant to the parties' collective bargaining agreement. Arbitrator Ries' conclusion is fully supported by the record in the arbitration proceedings and MPD's contrary assertions constitute mere disagreement with his

conclusion.

Having found that the Grievants were Investigators, Arbitrator Ries then concluded that the Grievants were entitled to promotion to D-II. Specifically, Arbitrator Ries found, and the record taken as a whole supported his conclusions: first, that Lieutenant Atchison recommended the Grievants for promotion to D-II; and second, that the promotions were denied because Assistant Chief Barrett incorrectly read the *Donegan* Award as a limitation of the Grievants' future promotional potential. Moreover, an objective reading of the *Donegan* Award establishes that it resolved only the issue of the appropriate pay the Grievants were entitled to for their work on the Joint Fugitive Task Force in the higher graded D-II position without additional compensation. (*Donegan* Award p. 2). Arbitrator Ries' Award determined the distinct issue of whether the Grievants were entitled to promotion to D-II based on Lieutenant Atchison's promotion recommendation and the provision of G.O. 201.1. His conclusion as to the Grievants' right to D-II promotions was based on an interpretation of the parties' agreement and related rules and/or regulations as well as evidentiary findings and conclusions. In this regard, the Award does not violate the management right to promote, as argued by the MPD, but is grounded in the MPD's own promotional policies and procedures, and enforces the parties' collective bargaining agreement with regard to the promotion of the Grievants based on the particular facts established by the parties in this case. Furthermore, MPD has not presented any applicable law that mandates that Arbitrator Ries should have arrived at a different result or that the Arbitrator exceeded his authority.

For all these reasons, the Board finds that Arbitrator Ries' conclusions are based on a thorough analysis of the record and cannot be said to be clearly erroneous or that the Arbitrator exceeded his authority. Therefore, the Board finds that no statutory basis exists for setting aside the Award.

MPD has asserted as well, but without argument or supporting case precedent, the corollary, but separate claim, that the Award is contrary to public policy.

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 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.'" *Id.* at 8. Also, a petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well-defined, public policy grounded in law or legal precedent. *See* Misco, 484 U.S. at 43; Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971). Moreover, the violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result." *See* MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing AFGE, Local 631 and Department of Public Works, 45 DCR 6617, Slip Op. 365 at p. 4 n, PERB Case No. 93-A-03

(1998); *see* District of Columbia Public Schools and The 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).

MPD's Request presents no argument or case precedent to support the claim that the Award is contrary to public policy.

In view of the above, we find no merit to MPD's arguments. In addition, the Board finds 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' collective bargaining agreements. Therefore, no basis exists for setting aside this Award. As a result, we deny MPD's Arbitration Review Request.

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.

August 18, 2005