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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-03
)	
and)	Opinion No. 886
)	
Fraternal Order of Police/Metropolitan)	
Police Department Labor Committee)	
(on behalf of Andre Powell),)	
)	
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or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter, in which the Arbitrator rescinded the termination of Andre Powell ("Grievant"), a bargaining unit member, because MPD violated the 55-day rule contained in the parties' collective bargaining agreement ("CBA").

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

On May 3, 2002, the Grievant was on duty and was driving a District of Columbia police vehicle on Interstate 295. The Grievant's vehicle was clocked on photo radar at 16 to 20 miles per hour over the posted speed limit. On May 16, 2002, Captain Gerald Barnes received a copy of a Notice of Infraction relating to the Grievant's May 3, 2002 speeding charge and ordered the Grievant to respond to the Bureau of Traffic Adjudication to obtain a disposition of the matter.

On February 10, 2003, the Grievant appeared before a hearing examiner at the Bureau of Traffic Adjudication. During the hearing, the Grievant "testified that he was on official police business at the time cited and submitted a PD Form 775 to the hearing examiner verifying his testimony to be true. On the basis of the testimony and verification provided by [the Grievant], the hearing examiner dismissed the Notice of Infraction." (Award at p. 2).

On or about March 4, 2003, Captain Gerald Barnes ordered an investigation regarding the disposition of the Grievant's speeding infraction. "As a part of this investigation, [the Grievant] was interviewed by agents of the Office of Internal Affairs. He admitted during this interview (1) to driving over the speed limit on May 3, 2002, (2) to giving false testimony to the Bureau of Traffic Adjudication Hearing Examiner, (3) to creating a false document and (4) [to] presenting such falsified document to the Hearing Examiner. Approximately a year and four months later, on September 1, 2004, Assistant Chief-Human Services Shannon P. Cockett served [the Grievant] with a Proposed Notice of Adverse Action charging him with four counts of misconduct and advising him that it was the intent of the [MPD] to terminate his employment." (Award at p. 3).

On September 7, 2004, the Grievant submitted a request for a Departmental Hearing. A three member Adverse Action Panel ("Panel") was convened on September 27, 2004 to hear the Grievant's appeal. At the hearing the Grievant pled guilty to all four of the charges and specifications filed against him. In addition, the Grievant presented the Panel with a prearranged plea agreement in which he pled guilty to all charges and agreed to be subject to a forty five (45) day disciplinary suspension without pay. (See Award at p. 5).

The Panel accepted the Grievant's Plea Agreement and unanimously recommended that the Grievant be suspended without pay for forty five (45) days rather than be terminated. (See Award at pgs. 5-6).

Assistant Chief Cockett rejected the Panel's recommendation in total and affirmed the penalty she had originally proposed in the September 1, 2004 Notice of Proposed Adverse Action. "Assistant Chief Cockett then ordered that [the Grievant] be removed from the force effective February 4, 2005." (Award at p. 6). The Grievant appealed the decision to the Chief of Police. The Chief of Police denied the appeal and FOP invoked arbitration pursuant to the parties' CBA. (See Award at p. 6).

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within 55 days of the date that the Grievant filed her request

for a departmental hearing. 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. 7-8). FOP argued that in this case the Grievant requested a departmental hearing on September 7, 2004. (See Award at p. 7). However, the written decision was not issued until December 17, 2004, one hundred and one (101) days after the September 7, 2004 request for a hearing. (See Award at p. 7). FOP claimed that MPD's violation of the 55-day rule was sufficient to require recession of the termination without considering the merits of the case. (See Award at p. 7).

MPD acknowledged that its final decision was issued more than 55 days after the date the Grievant elected to have a hearing before the trial board. However, MPD argued that the violation of the 55-day rule constituted harmless error and that the termination should be sustained.

In an Award issued on January 9, 2006, Arbitrator Arthur Fisher rejected MPD's argument by noting the following:

Section 6 of Article 12 is the product of the collective bargaining process and reflects the joint agreement of the parties that in any disciplinary situation the employee involved "shall be given a written decision and the reasons therefore no later than fifty five (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."

The arbitrator sees Section 6 of Article 12 to be clear and unambiguous. It is generally held at arbitration that where a contract provision is clear and unambiguous an arbitrator is constrained to give effect to the provision its clear meaning.

While notice of [the Grievant's] termination was not given to him until after 101 days following his request for a departmental hearing, the Police Department argues that its failure to provide its written decision and the reasons therefore to [the Grievant] within the required 55 days was harmless error.

Article 12, Section 6 is the product of the collective bargaining process wherein the provision was developed jointly by the parties. Neither party, of course, has the right to amend it without the express agreement of the other party.

Section 6 is written in clear and unambiguous language intended to provide timely notification to grievants in certain disciplinary situations. It is a substantive right, not merely procedural.

The failure of the police Department to issue its decision to [the Grievant] within 55 days of the date he requested a departmental hearing is not, in the judgment of the arbitrator, simply harmless error. (Award at pgs. 7-8).

Arbitrator Fisher found that MPD violated Article 12, Section 6 of the parties' CBA by issuing the final decision to discharge the Grievant one hundred and one (101) days after the Grievant's request for a departmental hearing. The Arbitrator concluded "[t]hat failure, in and of itself, [was] sufficient reason to rescind [the Grievant's] discharge." (Award at p. 9). Therefore, Arbitrator Fisher ordered that the Grievant should be reinstated "with full back pay and benefits." (See Award at p. 10).

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).

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. 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 argues that in the present case, "the Arbitrator was guided by Judge Kravitz's decision and, therefore, concluded that he had the authority to fashion a remedy for the failure of [MPD] to comply with the CBA that required [MPD] to provide a written decision within fifty-five days." (Request at p. 4). MPD "submits . . . that the decision of Judge Abrecht should have been followed 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 he remained in a pay status." (Request at p. 6).

MPD notes that it should not be ignored that the Grievant was found guilty of committing serious acts of misconduct, and that determination has not been contested or otherwise challenged. (See Request at p. 6). Also, MPD claims that if the Grievant "is reinstated the nature of his misdeeds makes it unlikely that he would be returned to a full-duty status." (Request at pgs. 6-7). 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. (See Request at p. 7).

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 parties' CBA. This we will not do.

MPD suggests that the plain language of Article 12, Section 6 of the 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).

In numerous cases involving the same parties, we have considered the question of whether an arbitrator exceeds his authority when he rescinds a Grievant's termination because of MPD's violation of Article 12, Section 6 of the parties' CBA. In each of those cases we rejected the same argument being made in the instant case and held that the Arbitrator was within his authority to rescind a Grievant's termination to remedy MPD's violation of the 55-day rule. (See, e.g., 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. 738, 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). In addition, 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.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 Fisher concluded that MPD violated Article 12, Section 6 of the parties' CBA, he also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator Fisher did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator Fisher acted within his authority.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (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,

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

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 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 Department of Corrections v. Teamsters Union Local 246, 54 A2d 319, 325 (D.C. 1989).

Relying on Judge Abrecht's decision, MPD contends that the award violates the "harmless error" rule found in the Civil Service Reform Act, 5 U.S.C. §7701(c)(2)(A). 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 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.

In view of the above, we find no merit to either of 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.

April 20, 2007

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.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.06-A-03 was transmitted via Fax and U.S. Mail to the following parties on this the 20th day of April 2007.

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