GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
District of Columbia Metropolitan Police Department,	)	
Petitioner,	)	
and	)	PERB Case No. 87-A-04 Opinion No. 282
Fraternal Order of Police, MPD Labor Committee (On behalf of Officer Clark M. Gutterman),	)	
Respondent.	)	

on Remand

DECISION AND ORDER [1]/

On April 1, 1987, the District of Columbia Metropolitan Police Department (MPD) filed an Arbitration Review Request with the District of Columbia Public Employee Relations Board (Board). [2]/ MPD requested that the Board review an arbitration

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[1]/ Members Kohn and Danowitz did not participate in either the discussion or decision of this case.

[2]/ This case is now being considered by the Board on remand by order of the D.C. Superior Court. The Arbitration Review Request was initially dismissed by the Board as untimely, whereupon MPD appealed the dismissal to the Superior Court. The Superior Court reversed the Board's dismissal on the grounds that it was unduly harsh in view of the absence in the record of any evidence of prejudice resulting from MPD's untimeliness. D.C. Metropolitan Police Department v. Fraternal Order of Police, MPA 10-87, Slip Op. at 8 (Nov. 20, 1987). Following the Superior Court's denial of the Board's Motion for Reconsideration, the Board appealed the matter to the D.C. Court of Appeals. The Court of Appeals affirmed the Superior Court's reversal of the Board's decision to dismiss the Arbitration Review Request; however, it rejected the Superior Court's grounds for its decision. The Court of Appeals ruled that "time limits for filing appeals with administrative adjudicative agencies [,e.g., the Board,] are mandatory and jurisdictional, thus obviating any need for a showing of prejudice...." Public Employee Relations Board v. D.C. Metropolitan Police Department, No. 88-868 (June 25, 1991), Slip Op. at 2. The Court upheld the reversal, however, on the grounds that the Board lacked "reliable, probative
(Footnote 2 Cont'd)

award (Award) that decided a grievance filed by the Fraternal Order of Police, MPD Labor Committee (FOP) on behalf of Officer Clark M. Gutterman, the Grievant. MPD alleged in its Request that the Award is contrary to law and public policy. FOP filed an Opposition to the Arbitration Review Request on April 29, 1987, arguing that the request be denied. [3]/

The pertinent background of this matter is as follows. The Grievant, a Police Officer employed by the MPD, was charged with a series of thefts occurring over a period of several months from a commissary jointly maintained by MPD and the D.C. Fire Department, and operated on an honor system. Notice of proposed adverse action to terminate was preferred on the Grievant by MPD's Administrative Services Officer (ASO). The matter was referred to a three-member Adverse Action Panel (AAP) for hearing; whereupon two of the members recommended that: (1) Grievant's termination be reduced to a 30-day suspension and (2) the Grievant be transferred from his assigned station where the incident occurred. The third member recommended that the Grievant be dismissed. The recommendations of the AAP were reviewed by the ASO for a final decision. The ASO ruled that there were no mitigating factors to warrant retaining Grievant and adhered to the initial proposal to terminate. (Award at 3.) The Grievant's appeal of the ASO's decision to the Chief of Police was denied and the matter was submitted to the arbitration proceeding which is the subject of this appeal.

The Arbitrator ruled that "there is no valid basis to challenge the statutory or regulatory underpinning of the relevant sections of the Comprehensive Merit Personnel Act or Department General Order 1202" concerning the authority of the ASO to reject the recommendation of the AAP. (Award at 15.) He further found that the parties' "collective bargaining agreement also vests in the Administrative Services Officer the right to take adverse action against employees, providing the requisite

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(Footnote 2 Cont'd)
and substantial evidence" on the date from which the filing deadline commenced to support its dismissal. Id. at 6.

[3]/ The Opposition was filed following the Board's granting FOP's Motion for Extension of Time. These filings were followed by MPD's Supplemental Submission in Support of Arbitration Review Request and FOP's Response to Supplemental submission in Support of Arbitration Review Request on June 16 and 22, 1987, respectively. There being no objection to these submissions by the parties or provision under our rules expressly prohibiting supplemental Arbitration Review Request submissions, we have accepted for filing and consideration these additional pleadings.

and antecedent procedures have been followed", i.e., the right to appeal ASO's decision to the Chief of Police and to submit related issues to arbitration. (Award at 15.) However, upon review of the total record, the Arbitrator concluded, "that the dismissal of the Grievant [was] not the appropriate sanction to assess." (Award at 17.) [4]/ As a result, the Arbitrator issued an Award which reduced the Grievant's termination to a 6-month suspension without pay. (Award at 17.) MPD's request for review presents several arguments in support of its contention that part of the Arbitrator's Award ruling that the "[G]rievant's dismissal was not the appropriate level of discipline" is contrary to law and public policy. (Request at 2.)

Under the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Section 1-605.2(6), the Board is authorized to, "[c]onsider appeals from arbitration awards pursuant to grievance procedures: Provided, however, that such awards may be reviewed only if...the award on its face is contrary to law and public policy...." The Board has reviewed the Arbitrator's conclusions, the pleadings of the parties and applicable law, and concludes that the Award on its face is not contrary to law and public policy and therefore we lack the authority to grant the requested review.

MPD first argued in its Request that by altering the disciplinary decision of the ASO, the Award "in effect substitutes the Arbitrator's judgment for that of the Department, i.e., MPD." MPD cited the U.S. Supreme Court decision in United Steelworkers v. Enterprise Wheel Car Corp., 363 U.S. 593, 597 (1960), in support of this suggested abuse of discretion by the Arbitrator in stating that "an arbitrator does not review cases in order to dispense his 'own brand of industrial justice.'" (Request at 5.) We note, however, that read in context the Court observed that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." Id. at 597. MPD's objection fails to indicate how the Award demonstrates a failure by the Arbitrator to act in conformance with this standard. We have previously stated that an arbitrator does not exceed his authority by exercising his equitable powers

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[4]/ The Arbitrator found that except for the underlying offense prompting the issue before him, the Grievant's record was exemplary. He further found that the acts of theft were not for financial gain or to alleviate "straightened circumstances" but rather resulted from "a lack of maturity and lack of judgment under stress." Finally the Arbitrator found that the Grievant exhibited remorse for "his impermissible conduct" and "was determined not to repeat it." (Award at 17 - 18.)

(unless it is expressly restricted by the parties' contract) to decide that mitigating factors warrant a lesser discipline than that imposed. [5]/ See D.C. Metropolitan Police Department and Fraternal Order of Police, 36 DCR 6016, Slip Op. No. 228, PERB Case No. 89-A-02 (1989); American Federation of State, County and Municipal Employees, Council 20 and the District of Columbia Department of Finance and Revenue, 32 DCR 4681, Slip Op. No. 118, PERB Case No. 85-A-03 (1985); D.C. Metropolitan Police Department and Fraternal Order of Police, 31 DCR 4156, Slip Op. No. 84, PERB Case No. 84-A-04 (1984). It is the Arbitrator's interpretation for which the parties bargained. See, University of the District of Columbia and UDC Faculty Assoc., 36 DCR 3639, Slip Op. No. 220, PERB Case No. 88-A-03 (1989). Thus, we find no basis for concluding that the Arbitrator's Award is on its face contrary to law and public policy.

MPD next argued that in discharging Grievant, it acted consistent with its "right to discharge the employee [,i.e., Grievant,] for cause" pursuant to General Order 1202.1. [6]/ (Request at 7.) General Order 1201.1 implements regulations which, according to MPD, "establishes the permissible penalty" pursuant to management's right to discipline under D.C. Code Sec. 1-618.8(a)(2). MPD asserted that the Arbitrator's "fail[ure] to pay any deference...to the Administrative Services Officer's experience and responsibility in determining the appropriate penalty" violates public policy which emanates from clear

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[5]/ We further note that Section E.2 of the parties' collective bargaining agreement expressly provides that "[i]f the parties are unable to agree on a joint statement of the issue, the arbitrator shall be free to determine the issue." If MPD contends that the issue, i.e., the appropriateness of the discipline imposed, was not arbitrable, it should have made this argument before the Arbitrator. Issues not presented to the arbitrator cannot subsequently be raised before the Board as a basis for vacating an award. Cf., Department of Public Works and American Federation of State, County and Municipal Employees Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). See also, University of the District of Columbia and UDC Faculty Assoc., 36 DCR 2472, Slip Op. No. 216, PERB Case No. 87-A-09 (1989).

[6]/ General Order 1202.1 is a MPD regulatory provision implementing a system for adverse action which supercedes adverse-action-system regulations contained in the District Personnel Manual.

statutory law. [7]/ (Request at 7.) We disagree.

As noted by MPD, D.C. Code Sec. 1-618.8(a)(2) provides management with "the sole right, in accordance with applicable laws and rules and regulations...to suspend, demote, discharge or take other disciplinary action against employees for cause...." This statutory provision was also incorporated in the parties' collective bargaining agreement under Article 4. These provisions establish and implement, respectively, management's right to discipline and the various forms that discipline may take. MPD's contentions and cited case law are premised on the erroneous assertion that the Award "bargain[ed] away management's right to discipline...." (Request at 7.) On the contrary, the Award acknowledged MPD's right to discipline pursuant to the CMPA, MPD's regulatory provisions, and the parties' collective bargaining agreement. (Award at 15-16.) The Arbitrator, in accordance with the parties' negotiated grievance and arbitration procedures, merely rendered an Award addressing the appropriateness of the particular discipline imposed on this Grievant based on the facts and circumstances presented to him by the parties for decision. The Award does not usurp MPD management of its right to discipline or its right to assign a certain disciplinary action to a specific type of conduct. Moreover, MPD neither cites nor do we find anything contained in the statutory

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[7]/ In MPD's Supplemental Submission in Support of Arbitration Review Request, MPD requested that the Board await and consider the then pending case before the Supreme Court, United Paperworkers International Union v. Misco, 484 U.S. 29 (1987), in further support of its contention that public policy precludes enforcement of the Arbitrator's Award reinstating the Grievant. Since then the Court has rendered its decision in that case which we have often cited. The Court observed (quoting W.R. Grace and Co. v. Rubber Workers, 461 U.S. 757, 766 (1983)), that review on this basis is "limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to laws and legal precedent and not from general considerations of supposed public interests.'" See, e.g., D.C. Public Schools and Teamsters Local Union No. 639 a/w Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, ___ DCR ___, Slip Op. No. 277, PERB Case No. 90-A-11 (1991) and University of the District of Columbia and University of the District of Columbia Faculty Association, 37 DCR 5666, Slip Op. No. 248, PERB Case No. 90-A-02 (1990). This decision supercedes, to the extent inconsistent with it, the Court of Appeals decisions cited by MPD. For the reasons discussed in the text above, MPD's contentions in this regard do not meet the Court's view of arbitral review based on public policy.

provision, MPD's regulations, or the parties' contract which unconditionally mandates an employee's dismissal for the cause which the Grievant was charged. In view of the above, we do not find the Arbitrator's interpretations and the Award on discipline to be contrary to law and public policy. [8]/

Accordingly, MPD has provided no basis for finding the Award on its face contrary to law and public policy and therefore we lack the authority to disturb the Award.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Review Request is denied.

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

September 18, 1991

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[8]/ MPD further cited the D.C. Court of Appeals' decision in Stokes v. District of Columbia, 502 A.2d 1006, 1010 (1985) for the proposition that "penalty selection is 'entrusted to agency management' and that the CMPA and its legislative history do not authorize OEA [Office of Employee Appeals] 'to substitute its judgment for that of the agency and that [OEA's] role...is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised [citation omitted]'." (Request at 10.) MPD asserted that "[j]ust as OEA is not permitted to substitute its judgment for the agency's, arbitrators are not authorized to impose their 'own brand of industrial justice.'" In view of our findings as discussed in the text above, we conclude that the Award did not impermissible substitute for the MPD-imposed penalty.