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

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| In the Matter of: | ) | |
| District of Columbia Metropolitan Police Department, | ) | |
| Petitioner, | ) | PERB Case No. 06-A-15 |
| and | ) | Opinion No. 878 |
| Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Celeste Santana), | ) | |
| 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or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter, in which the Arbitrator rescinded the termination of Master Patrol Officer Celeste Santana ("Grievant"), a bargaining unit member, because MPD violated the 55-day rule contained in the parties'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 April 11, 2003, Officer K (a Subordinate officer) was driving a loaner car when it sustained a flat tire. Officer K did not change the flat, but instead parked the car at the substation.

On April 12th, the Grievant conducted an evening roll call. During the roll call, the Grievant noted it was the responsibility of police officers to change flat tires on their vehicles. Officer K responded that it was not her responsibility to change a flat tire.

"The next morning (April 13) at [5:30 a.m. the] Grievant [contacted] Officer K on the radio and directed her to respond to the substation. Officer K did not hear the transmission, but subsequently called the substation by telephone to find out who had called on the radio and for what reason. During this time frame, Officer Lester Taylor drove his scout car to the site where Officer K was located, also in her scout car. Officer Taylor advised Officer K that the Grievant was [calling] her." (Award at p. 2).

Officer K returned to the substation, where the Grievant was standing outside. The Grievant instructed Officer K to add information to the incident report (PD119) which Officer K previously had submitted regarding the flat tire. Officer K refused to do so. Officer K walked past the Grievant into the substation, and came back outside a few minutes later. The Grievant asked Officer K whether she was going to add the information to the PD119, and Officer K said "no" and walked up the steps to the substation.

At the front door of the substation, Officer K opened the door in such a manner that it struck the Grievant in the shoulder. The Grievant walked into the substation approximately 20 seconds after Officer K and a physical altercation ensued. There was a disagreement over which of the two officers was the aggressor in the incident. Ultimately, two other police officers separated the Grievant and Officer K.

"On July 28, 2004 - more than a year after the incident - [MPD] served notice on [the] Grievant proposing to terminate her in connection with the altercation with Officer K." (Award at p. 2).

On August 3, 2004, the Grievant submitted a request for a trial board hearing. On August 19, 2004 a hearing was held. The Grievant pled guilty to having engaged in an altercation with Officer K. However, she pled not guilty to all the other charges. (See Award at p. 4).

The trial board recommended that the Grievant be suspended for ten days. (See Award at p. 5). The trial board's recommendation was forwarded to Assistant Chief Cockett, who issued a Final Notice of Adverse Action on November 5, 2004. "In the Final Notice, it is evident the Assistant Chief independently reviewed the record in the case, because she expressly rejected many of the Panel's fact findings and offered explanations why she reached different conclusions. Based on her independent fact findings, the Assistant Chief concluded [the]

Grievant was 'guilty' of all the charges and specifications, and that discharge was the appropriate discipline. The effective date for [the] Grievant's discharge was December 20, 2004." (Award at p. 5). The Grievant appealed the decision to the Chief of Police. The Chief of Police denied the appeal and the Grievant invoked arbitration pursuant to the parties' CBA. (See Award at p. 1).

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 p. 6.) FOP argued that in this case the Grievant requested a departmental hearing on August 3, 2004. (See Award at p. 6) However, the written decision was not issued until November 5, 2004, ninety-four (94) days after the August 3, 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.[1] (See Award at p. 7) In addition, FOP contended that "the penalty imposed on [the] Grievant [was] disproportionate with penalties imposed on similar-situated police officers." (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.[2] (See Award at p. 7) In support of its position, MPD cited Judge Abrecht's decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002).

In an Award issued on May 3, 2006, Arbitrator Paul Greenberg rejected MPD's argument by noting the following:

> The first paragraph of this contract provision announces a general rule that an employee must be given a written decision on the disciplinary action within 55 days of the employees' request for a trial board hearing.... [The] Grievant was served with charges on July 28, 2004, and requested a trial board proceeding on August 3,

[1]FOP also claimed that MPD violated the District Personnel Manual by allowing Assistant Chief Shannon Cockett to: (1) propose the adverse action and to serve as the deciding official; (2) reverse some of the "not guilty" decisions of the trial board; and (3) amend one of the charged specifications after the hearing. (See Award at p. 7) FOP suggested that these procedural violations were additional grounds for reinstating the Grievant.

[2]MPD also asserted that the alleged District Personnel Manual violations could not be raised at arbitration because they had not been previously raised on appeal. (See Award at p. 7) In addition, MPD argued that the alleged DPM violations were factually inaccurate.

> 2004. Under the "55-day rule," the Department was obligated to provide [the] Grievant with its decision on the proposed discipline no more than 55 days later (i.e., by September 17, 2004), unless one of the labor agreement's provisions extending the time limit applied. The Department's final decision was not issued by the Assistant Chief until November 5, 2004, some 94 days after [the] Grievant's request for a trial board proceeding. The Department argues [that the ] Grievant was not harmed by the delay in issuing a final decision on the proposed adverse action, and therefore any possible violation of the "55-day rule" constituted harmless error. In support of this position, the Department's [sic] analogizes the instant dispute to a case decided by Superior Court Judge Mary Ellen Albrecht, *Metropolitan Police Dep't v. D.C. PERB*, 01 MPA-19 (2002). The underlying issue in the case decided by Judge Albrecht was a violation of a different provision of the collective bargaining agreement between the MPD and FOP, the "15-day rule" found at Article 12 §7. . . This Arbitrator does not find the Department's reliance on Judge Albrecht's decision in case No. 01-MA-19 persuasive. The "55-day rule" at issue in this case differs in critical respects from the "15-day rule" analyzed by the court in 01-MPA-19. . . The intent and operation of the two contract clauses is different, and the Department's effort to analogize one to the other is unpersuasive. (Award at pgs. 8-9)

Arbitrator Greenberg found that MPD violated Article 12, Section 6 of the parties' CBA by issuing the final decision to discharge the Grievant ninety-four (94) days after the Grievant's request for a trial board hearing. Therefore, Arbitrator Greenberg ordered that the Grievant should be reinstated "with full back pay and benefits, less any interim wages Grievant earned subsequent to her discharge." (Award at p. 11)

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 55-day rule." (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. 7)

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 she remained in a pay status." (Request at p. 7)

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. 7). Also, MPD claims that if the Grievant "is reinstated the nature of her misdeeds makes it unlikely that she would be returned to a full-duty status." (Request 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. (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. 5-6).

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 for 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.[3] 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).

[3] 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.

In the present case, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator 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 Greenberg 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 Greenberg 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, 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, 787[4]

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.

[4]The 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.

## 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.

March 21, 2007

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 06-A-15 was transmitted via Fax and U.S. Mail to the following parties on this the 21st day of March 2007.

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