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

In the Matter of:)

Fraternal Order of Police/Department of)
Corrections Labor Committee on (behalf of)
John Jackson),)

Petitioner,)

and)

District of Columbia Department of)
Corrections,)

Respondent.)

PERB Case No. 08-A-06

Opinion No. 955

DECISION AND ORDER

I. Statement of the Case:

The Fraternal Order of Police/Department of Corrections Labor Committee ("FOP" or "Union") filed a document styled "Arbitration Review Request and Request for Oral Argument" in the above-captioned matter. FOP seeks review of an Arbitration Award ("Award") that sustained the termination of bargaining unit member John Jackson ("Grievant").

FOP contends that the: (1) Award is contrary to law and public policy; and (2) Arbitrator exceeded his authority. (See Request at p. 3). The District of Columbia Department of Corrections ("DOC" or "Agency") opposes the Request.

The issues before the Board are 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).

II. Discussion

DOC employs correctional officers to provide public safety to residents and visitors to the District of Columbia. "The primary task of the Agency is to provide the safe and secure confinement of inmates who have been imprisoned. Due to the safety issue, the Agency requires all correctional officers to have the right to bear arms." (Award at p. 2).

"In 1996 a new federal statute was passed impacting on the right to have access to guns. The statute bars any person convicted of a misdemeanor of domestic violence from carrying, possessing or using a firearm. There is no exemption in the law for police or correctional officers. (The law does not expressly require that such officers be discharged, but they are barred from carrying a weapon even in the performance of their duties). The relevant portion of that statute, Title 18 U.S.C. Section 922 (9)(g) (also called the 'Lautenberg Amendment') [provides that]: A misdemeanor conviction is defined as (1) a misdemeanor under federal or state law, and (2) that has an element, the use or attempted use of physical force, or the threatened use of a deadly weapon committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." (Award at p. 3).

The Grievant was a correctional officer with DOC for fifteen (15) years. In September 1999,¹ the Grievant was "convicted of a misdemeanor crime of attempted threat (Domestic Violence) under D.C. Law." (Award at p. 3). "On May 8, 2006, the Grievant received a 20-day Notice of Proposed Termination . . . recommending termination as a result of his . . . conviction." (Request at p. 3). "The . . . Notice of Proposed Termination . . . asserted that he was to be discharged because he was no longer authorized to possess a firearm. The [G]rievant filed a response on May 11, 2006 and requested a hearing." (Award at p. 2). "Evidence of this conviction was introduced in the hearing before. . . Keith Godwin and he relied on it to rule that the [G]rievant no longer had a right of access to a firearm and thus was no longer competent to perform the job of a correctional officer. The victim of the crime was Ms. Felicia Bullock, a person with whom the [G]rievant cohabited and had a child. The [G]rievant and Ms. Bullock had a verbal altercation in which he threatened to 'blow her mother fu**ing head off.' " (Award at pgs. 3-4). On June 20, 2006, hearing officer Keith Godwin "issued his recommendation for termination of the Grievant for incompetence. . .". (Award at p. 2). On February 27, 2007,

¹In his Award the Arbitrator indicates that the Grievant was convicted in September 1999. (See Award at p. 3). However, FOP asserts that the conviction occurred in 1998. (See Request at p. 3). The disparity concerning the date of the conviction is not at issue in FOP's Request.

DOC's Director "Devon Brown, issued his final decision confirming Mr. Godwin's recommendation of termination." (Award at p. 2).

Pursuant to the parties' collective bargaining agreement ("CBA"), FOP invoked arbitration on behalf of the Grievant.

At arbitration, FOP asserted that the Grievant's misdemeanor conviction of "attempted threat" is not a qualifying conviction of domestic violence under the Lautenberg Amendment. (See Award at p. 4). "The Union takes this stance by also arguing that the underlying facts in the case cannot be examined." (Award at p. 4). In addition, FOP claimed that, "even if the Grievant was no longer authorized to utilize a gun, his regular assignment was to patrol the cells in the prison, and correctional officers there did not carry guns." (Award at pgs. 4-5). Also, FOP contended "that the appointment of [Keith] Godwin [as the hearing officer assigned to hear the Grievant's appeal,] was a violation of due process because [Keith Godwin] was biased toward [DOC's] interest." (Award at p. 5). Finally, FOP argued that the Grievant was denied equal protection because District of Columbia residents have "virtually no options to clear their records of a qualifying misdemeanor conviction of domestic violence in contrast to similarly situated officers in other jurisdictions." (Award at p. 6).

DOC countered that an examination of the facts underlying the misdemeanor conviction is appropriate to make a judgment as to whether the conviction qualifies under the Lautenberg Amendment. (See Award at p. 4). DOC did not deny that correctional officers patrolling the cells do not carry guns. However, DOC claimed "that even an officer patrolling the cells might be called upon to possess a gun in the event of an emergency, like an attempt to escape by inmates. Also, the [G]rievant could not perform armed assignments which range from the canine unit, escorting inmates to the courts. . . , the perimeter security and towers unit." (Award at p. 5).

Citing *Withrow v. Larking*, 421 U.S. 35 (1975), DOC argued that "where a due process violation is alleged, the Union [bears]. . . the burden of showing a risk of bias or prejudgment and that adjudicators have a presumption of honesty and integrity. . . [Furthermore, DOC contended that] [t]he Union introduced no specific evidence of bias on Mr. Godwin's part." (Award at pgs. 5-6). DOC also asserted that under the parties' CBA "Article II section 9 defines a disinterested designee as one who meets the following criteria: (1) is a Grade 13 or higher, (2) had no direct or personal knowledge of the matter contained in the disciplinary case, and (3) is not in the chain of command between the proposing and deciding official." (Award at p. 6). DOC claimed that "under these factors Mr. Godwin was a disinterested designee." (Award at p. 6).

In an Award issued on July 4, 2008, Arbitrator Leroy Clark determined that the Grievant's misdemeanor conviction of "attempted threat" was a qualifying conviction under the Lautenberg Amendment. Therefore, Arbitrator Clark concluded that the Grievant was barred from carrying, possessing or using a firearm. In support of his finding, the Arbitrator noted the following:

The Arbitrator. . . accepts the Agency's argument on this issue, namely that an examination of the facts underlying the misdemeanor conviction is appropriate to make a judgment as to whether the conviction qualifies under the Lautenberg Amendment. When the facts are also examined, it becomes clear that the grievant was threatening to shoot the victim, and thus within the language of the Lautenberg Amendment he had "threatened use of deadly force". (Award at p. 4).

In addition, the Arbitrator rejected FOP's argument that "even if the Grievant was no longer authorized to utilize a gun, his regular assignment was to patrol the cells in the prison, and correctional officers there did not carry guns." (Award at p. 4). In reaching this conclusion, Arbitrator Clark stated:

The Arbitrator. . . buys the Agency's counter argument here also. The Agency does not deny that correctional officers patrolling the cells do not carry guns. (It must be because this avoids the possibility that inmates might overpower the correctional officer and take the gun). However, the Agency counters that even an officer patrolling the cells might be called upon to possess a gun in the event of an emergency, like an attempt to escape by inmates. Also, the grievant could not perform armed assignments which range from the canine unit, escorting inmates to the courts. . . , the perimeter security and towers unit. The Agency made an inquiry as to whether there was a position elsewhere in the D.C. government which did not require the employee to have access to a gun, but the Agency was unable to find the grievant suitable alternative employment. (Award at pgs. 4-5).

The Arbitrator also rejected FOP's arguments concerning "due process" and "equal protection" by stating the following:

The Union introduced no specific evidence of bias on Mr. Godwin's part. . . Moreover, the Union cannot argue that Mr. Godwin was biased because he served at the pleasure of Director

Brown because this would mean that bias exists for anyone employed below the Director. (Award at pgs. 5-6).

The Agency allows any employee who has a qualifying conviction to show that he received a reversal on appeal, an expungement or a pardon. The grievant took an appeal of his conviction, but it was denied, and he offered no evidence of a pardon. The Union argues that the grievant has a claim of denial of equal protection because D.C. residents have "virtually no options to clear their records of a qualifying misdemeanor conviction of domestic violence in contrast to similarly situated officers in other jurisdictions". The Union admits, however, that the issue "has not been decided by the Courts". Further, the Arbitrator accepts the Agency's reply that a D.C. resident securing a pardon is not factually "impossible", and "the fact that a pardon is difficult to obtain is not the criteria for equal protection violations." (Award at pgs. 6-7).

For the reasons discussed above, Arbitrator Clark found that: (1) the Grievant's conviction qualified as a misdemeanor conviction of domestic violence under the Lautenberg Amendment; (2) DOC required correctional officers to be able to possess a firearm as a condition of employment; (3) DOC did not violate the Grievant's due process rights when it appointed Keith Godwin as the hearing officer to consider the Grievant's appeal; and (4) DOC had the right to discharge the Grievant for cause since his conviction rendered him unable, under the Lautenberg Amendment, to perform an essential element of the job. As a result, Arbitrator Clark denied FOP's grievance and sustained the Grievant's termination. (See Award at p. 7).

FOP challenges the arbitrator's decision. Specifically, FOP claims that: (1) the award on its face is contrary to law and public policy; and (2) Arbitrator Clark exceeded his authority. (See Request at p. 3). We disagree.

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. if "the arbitrator was without or exceeded his or her jurisdiction";
2. if "the award on its face is contrary to law and public policy"; or
3. if the award "was procured by fraud, collusion, or other similar and unlawful means."

D.C. Code §1-605.02(6).

FOP contends that Arbitrator Clark's Award is contrary to law and public policy because "under the plain language of the Lautenberg Amendment, Cpl. Jackson's conviction does not qualify [as a misdemeanor conviction of domestic violence]." (Request at p. 5). 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). 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) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." *Department of Corrections v. Teamsters Local 246*, 554 A.2d 319, 325 (D.C. 1989). Relying on *Columbia Gas of Ohio, Inc., v. Local No. 349, Utility Workers Union of America*, 2008 U.S. Dist. Lexis 37062 at p. 6 (6th Cir. 2008), FOP notes in the present case that:

the public policy exception is limited, and must meet explicit criteria . . . The decision must violate explicitly well-defined and dominant public policy, and the conflict between the public policy and the award must be clearly shown . . . On these facts in this award, the union argues the two part test is met. (Request at pgs. 10-12, n. 8).

However, FOP does not identify a "definite public policy" that the Award contravenes. Therefore, FOP has failed to provide a statutory basis for reversing the Award based on a violation of public policy.

As a second basis for review, FOP asserts that the Award "violates the law because it erroneously expands federal law by misinterpreting the definition of a qualifying conviction

under the Lautenburg Amendment.” (Request at p. 5). In support of its position, FOP states the following:

On September 30, 1996, the [federal Gun Control Act] was enacted. See, generally, 18 U.S.C. § 921 and § 922. The parties agree that § 922(g) of the [federal Gun Control Act] makes it unlawful for persons convicted of a “misdemeanor crime of domestic violence”² to possess a firearm.

* * *

Cpl. Jackson’s conviction of “attempted threats” does not qualify under the [federal Gun Control Act], which defines a “misdemeanor crime of domestic violence” as one that:

- (I) is a misdemeanor under Federal, State, or Tribal law; and
- (ii) **has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,** committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. 18 U.S.C. § 921(a)(33).

As the Union pointed out in its Post-Hearing Brief, the requirement of necessary force has been addressed by the Courts, and more than a de minimus amount of force is necessary to qualify. See, generally, United States v. Serrao, 301 F.Supp.2d 1142 (D.Hawaii, 2004). Being convicted of attempting to threaten does not qualify as “more than a de minimus amount” of force.

²18 U.S.C. § 922(g) provides in relevant part as follows:

It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Moreover, no court in the country has determined that as a matter of law, "attempted threats" meets the criteria of a qualifying conviction under the Lautenberg Amendment. It was not appropriate for the Arbitrator to do so. Therefore, the award is contrary to law and public policy.

The Arbitrator stated in his Award that he, "accepts [DOC's] argument on this issue, namely that an examination of the facts underlying the misdemeanor conviction is appropriate to make a judgment as to whether the conviction qualifies under the Lautenberg Amendment." See Award at 4. However, this conclusion is unsupported by law or the facts in this case.

[DOC], in its Post Hearing Brief, relied upon Evans v. United States to support their argument that Cpl. Jackson's conviction qualifies under the Lautenberg Amendment. In Evans v. United States, the Court held that "attempted threats" is a statutory crime in the District of Columbia. See, generally, Evans v. United States, 779 A2d 891 (D.C. 2001).³ Evans merely confirms that attempted threats is a crime in the District of Columbia. The decision sets forth the elements of that offense. Those elements, when compared with the definition of a qualifying conviction, make clear that attempted threats cannot qualify under Lautenberg.

Regardless, the arbitrator is bound to look only at the elements of the conviction, not the underlying facts and circumstances leading to the commission of a crime. It is not precisely clear what those elements were at the time of Cpl. Jackson's conviction.⁴ However, the subsequent decision in Evans makes clear that the elements do

³FOP claims that "[i]n Evans v. United States, . . . the D. C. Court of Appeals held that "attempted threats" is a crime in the District of Columbia. The Court articulated the essential elements of the offense to include: (1) that the defendant uttered words to another person; (2) that the words were of such a nature as to convey fear of serious bodily harm or injury to the ordinary hearer; (3) that the defendant intended to utter the words which constituted the threat. . .". (Request at p. 7, n. 5).

⁴FOP states that Evans was decided three years after Cpl. Jackson's conviction. (See Request at p. 8, n. 6).

not meet the Lautenberg definition. (Request at pgs. 5-7, emphasis in original).

The present case involves a grievance filed pursuant to “a collective bargaining agreement between the parties who, subject only to the limitations of D. C. Code § 1-605.02(6), have ‘bargained for [the arbitrator’s] construction of the contract,’ not a court’s . . .” *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 901 A.2d 784, 789 (D.C. 2006 (quoting *United Steelworkers v. Enter. Wheel & Car Corp.* 363 U.S. 593, 599)). The District of Columbia Court of Appeals has explained:

[w]hen construction of the contract implicitly or directly requires an application of “external law” i.e., statutory or decisional law [such as what constitutes a qualifying conviction], the parties have necessarily bargained for the arbitrator’s interpretation of the law and are bound by it. Since the arbitrator is the “contract reader,” his interpretation of the law becomes *part of the contract* and thereby part of the private law governing the relationship between the parties to the contract.” *Id.* (Quoting *Am. Postal Workers v. United States Postal Serv.*, 252 U.S. App. D.C. 169, 174, 789 F2d 1, 6 (1986)).

Here the parties bargained for the arbitrator’s interpretation of the Lautenberg Amendment and “absent a clear violation of law-one evident on the face of the arbitrator’s award-neither the Board nor a court has . . . authority to substitute its judgment for [that of the arbitrator’s].” *Id.*

Furthermore, FOP’s arguments are a repetition of the arguments considered and rejected by the Arbitrator. (See Award at pgs. 6-7). Therefore, we believe that FOP’s ground for review only involves a disagreement with Arbitrator Clark’s determination that the Grievant’s conviction was a qualifying conviction under the Lautenberg Amendment, as well as his findings and conclusions. FOP requests that we adopt its interpretation of: (1) what constitutes a qualifying conviction under the Lautenberg Amendment; and (2) the evidence presented. This we cannot do.

We have held that a “disagreement with the Arbitrator’s interpretation . . . 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 pgs. 203, PERB Case No. 95-A-02 (1995). In the present case, the parties submitted their dispute to Arbitrator Clark. FOP’s disagreement with the Arbitrator’s findings and conclusions is not a ground for reversing the Arbitrator’s Award. (See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008 (May 13, 2005) and *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 01 MPA 18 (September 17, 2002). In conclusion, FOP has 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, FOP failed to do so.

Also, in attempting to show that the Award is contrary to law, FOP argues that “[a]nother basis on which the Award is contrary to law and public policy is the short shrift given to the denial of Cpl. Jackson’s equal protection rights.” (Request at p. 8). Specifically, FOP asserts that:

The Arbitrator did not resolve the dispute, or even analyze this issue. Rather, the Award only sets forth the positions of the parties, and concludes by stating that because “securing a pardon is not factually ‘impossible’ . . . only difficult to obtain [which] is not the criteria for equal protection violations. See Award at 5-6. This is contrary to law.

It is “factually impossible” for Cpl. Jackson to obtain a pardon or expungement for his conviction as a D.C. resident, as the Agency is well aware. The fact that Cpl. Jackson has not sought one is not conclusive of a determination otherwise. Cpl. Jackson does not believe that his conviction qualifies under the Lautenberg Amendment. Certainly, the Agency’s conduct for the past nine years enabled Cpl. Jackson to reach that conclusion.

However, even assuming Cpl. Jackson had committed a qualifying conviction, the options available to him as a D.C. resident to clear his name are virtually non-existent relative to residents of other states. The GCA explicitly provides those circumstances in which a person with a qualifying conviction shall not be considered to have been convicted of such an offense. See, generally, 18 U.S.C. § 921(a)(33)(B). The law is practically inapplicable to Cpl. Jackson because as a D.C. resident, the options provided under the GCA to clear himself are unavailable to him or any other law enforcement officer working for and living in the City with a qualifying conviction.

While equal protection challenges have arisen involving the rights and restrictions of D.C. residents, this specific issue (whether law enforcement officers of the City, who are also residents of the City, are denied equal protection of law by facing virtually no options to clear their records of a qualifying misdemeanor conviction of domestic violence in contrast to similarly situated officers in other jurisdictions) has not been decided by the Courts. This Arbitrator cannot make a determination that the Court system in the jurisdiction has not.

Here, the Union relies upon its legal arguments in its Post-Hearing Brief, and maintains that the federal legislation, as it exists, unfairly punishes law enforcement officers of the City with

qualifying convictions, who are also residents of the City; it is a law that employs "a suspect classification" and therefore should come under "close scrutiny because it applies only to the District." This is so because the classification denies Cpl. Jackson his property right - his public employment - without any rational basis, let alone one that would pass constitutional muster. There is no evidence found by the Union that shows that the extreme disparity in the options available to officers in Cpl. Jackson's position was even a consideration in passing the federal law. What is clear is that there are essentially no local options for Cpl. Jackson to clear himself, unlike just about any other jurisdictions in the country. As such, Cpl. Jackson is being denied equal protection of the law.

D.C. law is similarly unsupportive of Cpl. Jackson seeking a pardon. D.C. law provides explicit instances in which the Mayor can provide a pardon; however, those laws do not apply to the crime for which Cpl. Jackson was convicted. See D.C. Code § 1-301.76. In fact, the only real pardon relief available to Cpl. Jackson is a Presidential Pardon.

The Agency relied upon United States v. Barnes, 295 F3d 1354 (D.C. 2002) for the proposition that Cpl. Jackson has no equal protection argument. However, neither the facts nor the equal protection issue in Barnes are the same as the issue presented in this case, and the Arbitrator could not have relied upon that case.

Cpl. Jackson is not simply arguing that he is disadvantaged by the loss of one of the three possible exceptions. Rather, Cpl. Jackson argues that he essentially has no recourse at all. The Arbitrator ignored the existing law in finding for the Agency on this issue, and for this reason, the Award must be overturned. (Request at pgs. 8-10).

An Arbitrator need not explain the reason for his or her decision.⁵ See Lopata v. Coyne, 735 A.2d 931, 940 (D.C. 1999). An Arbitrator's decision is not unenforceable merely because he or she fails to explain certain bases for his or her decision. See, Chicago Typographical Union 16 v. Chicago Sun Times Inc., 935 F.2d 1501, 1506 (7th Cir. 1991). Moreover Arbitrator Clark made ample factual conclusions and discussed the parties' arguments in supporting his decision. Therefore, we find that FOP's argument lacks merit.

⁵Also, an arbitrator is under "no obligation to the court to give [his or her] reasons for an Award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions." United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 598 (1960).

Finally, FOP contends that Arbitrator Clark exceeded his jurisdiction by ignoring the violations of the parties' CBA.⁶ FOP asserts that the evidence presented at the arbitration hearing clearly supported the Union's claim that DOC violated Article 11 of the parties' CBA. (See Request at pgs. 11-12). Furthermore, FOP claims that since the Award fails to address all the "issues"⁷ presented at arbitration, the case should be remanded or the Award reversed. (See Request at p. 15). In support of this contention, FOP cites *University of the District of Columbia Faculty Association/NEA* and the *University of the District of Columbia*, 35 DCR 549, Slip Op. No. 98, PERB Case No. 85-A-01 (1985). In that case, the Board found that although two separate grievances had been filed concerning the University's failure to promote the Grievant, the Arbitrator only addressed the issues raised in the first of the two grievances. Therefore, the Board ordered that the case be remanded so that the arbitrator could consider the issue raised in the second of the two grievances.

The case before the Board is distinguishable from the *University of the District of Columbia* case. The *UDC* case involved two separate grievances and the Arbitrator failed to consider the issue involved in the second grievance. In the present case, only one grievance was presented to the Arbitrator. Moreover, here, the sole issue presented to the Arbitrator was whether there was cause for the Grievant's removal and, if not, what should be the remedy. That issue was clearly identified and addressed by the Arbitrator. "Furthermore, the *UDC* case does not stand for the proposition that an Arbitrator must address and consider all the arguments made at arbitration." *DC Department of Corrections and FOP/DOC Labor Committee*, Slip Op. No. 825 at p. 8, PERB Case No. 04-A-14 (2006). Moreover, we find that FOP is asking this Board to adopt FOP's arguments, findings and conclusions. In view of the above, we believe that FOP's contention amounts to a mere disagreement with the Arbitrator's findings and conclusions. As stated above, a disagreement with the Arbitrator's findings and conclusions does not present a statutory basis for review. Thus, the Board cannot reverse the Award on this ground.

⁶ FOP asserts that there are four examples of how the Award violates explicit provisions of the parties' CBA. Specifically, FOP states that award violates the following provisions of the CBA:

- (a) the agency's designated designee is not disinterested as required by Art. 11, §9C of the CBA;
- (b) the termination action is untimely under Art. 11, §9 of the CBA;
- (c) the agency did not pursue the discipline in a timely manner, as set out under Art. 11, §13 of the CBA; and
- (d) no principles of progressive discipline were utilized, as required Art. 11, §14 of the CBA.

(See Request at p. 12).

⁷DOC uses the term "issues". However, we believe that DOC is actually referring to its factual contentions and arguments.

Also, one of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining agreement." *D.C. Public Schools v. AFSCME, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). See also *Dobbs, Inc. v. Local No. 1614, Intern. Broth. Of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987). The U.S. Court of Appeals for the Sixth Circuit in *Michigan Family Resources, Inc. v. Service Employees International Union Local 517M*,⁸ has explained what it means for an award to "draw its essence" from a collective bargaining agreement by stating the following standard:

[1] Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration?; [2] Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award?"; "[a]nd [3] [I]n resolving any legal or factual disputes in the case, was the arbitrator arguably construing or applying the contract"? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made "serious," "improvident" or "silly" errors in resolving the merits of the dispute.

475 F.3d 746, 753 (6th Cir. 2007).

In the present case, "[n]othing in the record. . . suggests that fraud, a conflict of interest or dishonesty infected the arbitrator's decision or the arbitral process. [In addition,] no one disputes that the collective bargaining agreement committed this grievance to arbitration or

⁸In *MPD and FOP/MPD Labor Committee*, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001), the Board expounded on what is meant by "deriving its essence from the terms and conditions of the collective bargaining agreement" by adopting the *U.S. Court of Appeals' Sixth Circuit* decision in *Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135*, which explained the standard by stating the following:

An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement; and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765 (6th Cir. 1986).

However, the *Cement Division* standard has been overruled in *Michigan Family Resources*.

disputes that this arbitrator was . . . selected by the parties to be eligible to resolve this dispute. The arbitrator, in short, was acting within the scope of his authority." *Id.* at 754.

That leaves the question of whether the arbitrator was engaged in interpretation: Was he "arguably construing" the collective bargaining agreement? "This view of the 'arguably construing' inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes, a view that respects the finality clause in most arbitration agreements, . . . (stating that 'the arbitrator shall have full authority to render a decision which shall be final and binding upon both parties'), and a view whose imperfections can be remedied by selecting [different] arbitrators." *Id.* at 753-754. In the present case, the Arbitrator's opinion has all the hallmarks of interpretation. He refers to, and analyzes the parties' positions, and at no point does he say anything indicating that he was doing anything other than trying to reach a good-faith interpretation of the contract. "Neither can it be said that the arbitrator's decision on the merits was so untethered from the agreement that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his 'own brand of industrial justice.'" *Id.* at 754. "An interpretation of a contract thus could be 'so untethered to' the terms of the agreement. . . that it would cast doubt on whether the arbitrator indeed was engaged in interpretation. Such an exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that." *Id.* at 753.

Finally, FOP's arguments concerning the agency's disinterested designee and the appropriateness of the penalty imposed by the agency, are a repetition of the position it presented to Arbitrator Clark. (See Award at pgs. 4-6). As a result, we believe that FOP's grounds for review only involves a disagreement with Arbitrator Clark's findings and conclusions. Moreover, FOP merely requests that we adopt its arguments and conclusions.

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. 02-A-04 (1992).⁹ 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 collective bargaining 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 an Arbitrator and FOP's claim that the Arbitrator exceeded his authority only involves a disagreement with the Arbitrator's: (1) interpretation of

⁹See *Fraternal Order of Police v. District of Columbia Public Employee Relations Board*, 973 A.2d 174, 177 n.2 (arbitrator's interpretation merits deference "because it is the interpretation that the parties 'bargained for'."

Article 11 of the parties' CBA; and (2) findings and conclusions. This does not present a statutory basis for reversing the Arbitrator's Award. See, *District of Columbia Department of Mental Health and Psychologists Union, Local 3758 of the D.C. Department of Mental Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State, County and Municipal Employees, AFL-CIO (on behalf of John Bruce)*, Slip Op. No. 850, PERB Case No. 06-A-17 (2006).

In view of the above, we find that there is no merit to FOP's arguments. Moreover, we believe that the Arbitrator's conclusions are based on a thorough analysis of the record, and cannot be said to be clearly erroneous or contrary to law or public policy. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Department of Corrections Labor Committee'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 29, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-A-06 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of April 2010.

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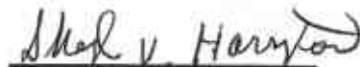
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Secretary