Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
District of Columbia Fire and Emergency Medical Services,	
Petitioner,	PERB Case No. 10-A-18
and	Opinion No. 1109
	Order for Briefs
American Federation of Government Employees, Local 3721,	
	CORRECTED COPY
Respondent.	

ORDER FOR BRIEFS

I. Statement of the Case:

On December 23, 2009, the District of Columbia Fire and Emergency Medical Services ("Agency" or "EMS" or "Petitioner") filed an Arbitration Review Request ("Request") in the above-captioned matter. EMS seeks review of an arbitration award ("Award") that sustained a grievance filed on behalf of Sonyia Lesane. The Arbitrator ruled that FEMS violated the 90-day rule for initiating corrective or adverse action and reinstated the grievant to her position. EMS claims that the Award is contrary to law and public policy. The Agency requests that the Board find that there may be grounds to modify or set aside the Arbitrator's award and require submission of briefs.

The American Federation of Government Employees, Local 3721 ("Union" or "AFGE" or "Respondent") filed an Opposition. AFGE argues that the Agency failed to meet the procedural requirements for conducting a fitness for duty examination and for initiating adverse action under the District Personnel Manual ("DPM").

The issue before the Board is whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02(6) (2001 ed.).

II. Discussion

The Agency hired the grievant, Sonyia Lesane, as a Paramedic in 2001. In 2005, Ms. Lesane sustained a rotator cuff injury while on the job and returned to full duty on or about April 2006. Two months later, she sustained another rotator cuff injury while on the job. Commencing on October 30, 2006, the Agency placed the grievant on light duty for 90 days. Pursuant to the provisions of the collective bargaining agreement,[1] in February 2007, the grievant requested an extension of light duty status because her personal physician had not yet released her to work on full duty status. The Agency denied the request for an extension. On February 27, 2007, the Agency returned the grievant to regular duty based on a clearance from her own physician. (See Award at p. 2).

The grievant was placed in a Preceptor Program.[2] Her duties involved converting patient records into electronic form. On May 21, 2007, she wrote a report to the Captain of the Preceptor Program stating that she could not lift her 50-pound medical bag "due to physical recoveries from both of my Rotator Cuff injuries." (Award at p. 2).

In light of her report, the Agency scheduled a fitness for duty examination at the Agency's Police and Fire Clinic. The psychological component of the exam was scheduled for May 31, 2007, and June 1, 2007, and the medical component was scheduled for June 14, 2007. The examinations took place as scheduled. The psychologist who performed the psychological component found the test to be invalid and inconclusive in view of the grievant's "consciously guarded approach to the testing." (Award at p. 3). The psychological exam was rescheduled to August 2, 2007. The testing psychologist again found that the test was invalid and could not be interpreted fully. (See Award at p. 3).

On August 23, 2007, Fire Chief Begley and the doctors who performed the grievant's fitness for duty physicals met with the grievant and informed her that she was unfit to perform

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[1] Article 24, Section B of the parties' collective bargaining agreement provides:

> In order to assist an employee, who is incapacitated due to an on-the-job injury and unable to perform the full range of duties of his/her position, Management agrees that if the nature of the injury is short term, Management will find work, if it is available, for a period of 90 days. During this 90-day period, the employee must obtain a physician's certificate indicating a date when the employee is expected to be able to return to full duty.

[2] The Preceptor Program is utilized for paramedics who have not been in a full duty capacity for a period of time. This Program enables the Agency to evaluate such paramedics to assure that their skills are up to par and their certifications are current.

the full duties of a paramedic based on her fitness for duty evaluation.[3] The Executive Vice President of the Union attended the meeting. (See Award at p. 3).

On August 27, 2007, the doctor who had performed the medical component on June 14, 2007, advised the Fire Chief that the grievant was not currently fit for full duty based on physical limitations. Therefore, the grievant continued to work on light duty.

In 2008, the Agency scheduled the grievant for a fitness for duty physical on February 1, 2008, and a psychological examination on February 6, 2008. After conducting the psychological portion of the examination, the Agency notified the grievant that her psychological fitness exam would not be evaluated because she had altered the consent provision and indicated that the test was "mandatory" and not voluntary. (See Award at pgs. 3-4).

The Union filed a Step 1 grievance on February 8, 2008, alleging that the Agency failed to follow the procedures for conducting a fitness for duty physical as set forth in the District Personnel Manual, Chapter 20B, Section 2049.11.[4] As a remedy, the Union requested that the grievant be returned to the Preceptor Unit for evaluation of her fitness for duty.

The Agency did not respond to the grievance, and the Union advanced the grievance to Step 2. In March, at a meeting with Agency and Union representatives, the Agency presented the grievant the options of submitting to a psychological examination or resign. These options were also provided by written notice dated March 6, 2008. (See Award at p. 4).

On May 29, 2008, and June 5, 2008, the grievant was the subject of a psychological examination. Dr. Hugonnet, the psychologist, concluded that the grievant was not fit for full duty. He noted that in his prior testing: the grievant's "limited cooperation and defensive approach to testing ... is consistent with a paranoid style. The consistency of these findings and seemingly unchanged emotional constellation suggests that Paramedic Lesane may never be able to return to full duty." (See Award at p. 5). Therefore, on July 10, 2008, the Agency made a determination that the grievant was not fit for full duty and placed her on administrative leave. On August 5, 2008, the Fire Chief proposed the grievant's removal based on a "June 30 determination by Dr. Jackson, the Coordinator of Occupational Health Services, that she was not fit for full duty." (See Award at p. 5).

The Union filed a Step 3 grievance in this matter on August 8, 2008, alleging contractual and statutory violations by the Agency when it subjected the grievant to multiple fitness for duty examinations and placed her on "enforced sick leave." (Award at p. 5). In addition, the Union

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[3] This decision was based on Dr. Smith-Jefferies' memorandum to Battalion Fire Chief Begley dated September 17, 2007.

[4] DPM Chap. 20, Sec. 2049.11(a) allows for notice; subsection (b) allows an employee the opportunity to submit medical documentation from a personal physician. DPM, Chap. 20, Sec. 2049.11(d), limits the Agency's ability to order a psychological examination, allowing a psychological examination "only when the result of a current general medical examination which the agency ... has the authority to order under this section indicates no physical explanation for behavior or actions which may affect the safe and efficient performance of the individual or others."

filed with the Agency a Reply to the Notice of Proposed Adverse Action and alleged that the Agency had exceeded its statutory and regulatory time limits for the imposition of any administrative disciplinary action.[5] By notice dated September 15, 2008, the Agency terminated the grievant. (See Award at p. 6). On October 8, 2008, the Union filed a demand for arbitration. (See Request at p. 26).

Before the Arbitrator, the Union argued that the Agency failed to follow its own policy for conducting fitness for duty examinations regarding the requirement that the Agency's Medical Director review the psychologist's findings. The Union also alleged that the Agency failed to make the finding that the grievant's psychological condition "is of sufficient severity to prevent an Applicant from performing, with or without reasonable accommodation...the essential functions of...a paramedic without posing a significant risk of substantial harm/risk to the safety and health of the applicant or others." (emphasis in original). (Award at p. 7).

Further, the Union argued that the psychological report was used inappropriately because, in his report, "Dr. Hugonnet[,] [the testing psychologist,] took issue with the Agency's failure to evaluate past personnel evaluations and information from supervisors and coworkers prior to removing [the grievant] for unfitness for duty. He particularly noted that if there were no reported documented deficiency in work performance his report is rendered moot. Without having the opportunity to look at the whole picture of the grievant's job performance over the years, Dr. Hugonnet indicated that his report was incomplete. Under these circumstances, he believed that the Agency's reliance entirely on his report in removing the grievant was an inappropriate use of his report." (Award at p. 8).

The Union asserted violation of numerous provisions in the DCMR and the collective bargaining agreement. Specifically, the Union cited 6 DCMR 2049.12 and 13, which require an Agency to provide employees with counseling or therapy to address alleged psychological problems. The Union stated that Article 12 of the collective bargaining agreement also affords employees with the opportunity for counseling. Moreover, the Union maintained that the DCMR requires the Agency to determine if there is another position for which the grievant qualifies, if reasonable accommodation could not be made to enable the grievant to perform the essential functions of her position. The Union charged that the Agency completely failed to meet these obligations. (See Award at p. 8).

Additionally, the Union relied on 6 DCMR 2049, subsections 8, 11, 11(b), 11(d), 11(i), which describe procedures for conducting fitness for duty examinations for civilian career employees of the District, in stating that the DCMR is applicable here, not the Agency's Order book, as stated by the Agency. The Union argued that, assuming *arguendo* the provisions of the Agency's Order book are applicable to paramedics such as the grievant, the Order book contains

[5] On September 10, 2008, the Agency's Hearing Officer conducted an administrative review of the proposed adverse personnel action. The Hearing Examiner found that: (a) the Agency met its burden by a preponderance of the evidence that the grievant was not fit for duty and therefore incompetent as of June 30, 2008; (b) the 90-day limitation (in D.C Code Sec. 5-1031) for the Agency to take corrective or adverse action was not violated because the cause is continuous and ongoing; and (c)" the grievant's inability to meet the mental and physical requirements of the Paramedic position places herself and citizens of the District in danger and thereby interferes with the integrity of government operations." (Award at p. 6).

no procedures for fitness for duty examinations. Therefore, the Union alleged the Agency's Order book does not conflict with the procedural requirements found in the DCMR for conducting fitness for duty examinations. (See Award at pgs. 8-10).

The Union further asserted that the Agency commenced action against the grievant outside of the mandatory 90-day limitation found in D.C. Code Sec. 5-1031. The Union argued that there is no exception in the statute that exempts cause that is continuing or recurring from the 90 day rule. (See Award at p. 11). The Union maintained, therefore, that the Agency's removal of the grievant violated the 90-day limitation of D.C. Code Section 5-1031. "In addition, under Article 30, Section E of the parties' collective bargaining agreement, "all employees are entitled to reasonable and timely notice of disciplinary action and the basis of such action." The Union argued that a delay of over one year is not reasonable. (Award at p. 12).

Also, the Union argued that it timely filed the grievance within 12 calendar days of the grievant's termination, in adherence to Article 30, Sec. B.2 of the parties' collective bargaining agreement, requiring that a grievance be filed within 15 calendar days.

Finally, the Union argued that "[t]he District Personnel Manual Sections 1608.1 and 1608.2 provide, in part, that 'an employee against whom an adverse action is proposed shall have the right to an advanced written notice' which shall include 'the action that is proposed and the cause for the action' and 'the specific reasons for the proposed action.' DPM Section 1608.2 further grants affected employees the right to respond. Also, the Agency did not provide the grievant with the material upon which the notice of termination was based consistent with [DPM] Section 1608.3. While the Union was provided with information from the Agency which constituted certain materials upon which the proposed action was based, the compilation of materials did not include Dr. Hugonnet's report which the Agency testified was the sole basis for removing the grievant. This constituted a failure by the Agency to abide by basic due process protections... Finally, there is no evidence that in reaching its decision to terminate the grievant the Agency considered the Douglas Factors or any mitigating factors in this matter." (Award at p. 12).

The Agency countered before the Arbitrator that the grievant has not worked in her Paramedic position since June 24, 2006, and this fact alone hindered the Agency's ability to carry out its functions. The Agency noted that "while the grievant provided a service to the Agency in her light duty assignment, she was not performing in the capacity for which she was hired." (Award at p. 13). Furthermore, the Agency stated the grievant failed to provide any independent information as to her medical condition. The grievant served in light duty for nearly two years, which exceeded the contractual requirement of light duty. The Agency believed that allowing her to continue to perform in a light duty position is tantamount to creating a permanent light duty position. As there was no reasonable expectation that she could return to full duty in 2008, the Agency determined that termination was warranted. What is more, the Agency noted that "[w]ith respect to Dr. Hugonnet's contention that his report should not have been used as the sole factor in the grievant's discharge ... he nevertheless stood by his reports that the grievant was unfit to return to full duty." (Award at p. 13).

"The Agency maintained that the grievant received her due process rights. Under the District Personnel Manual, the grievant was entitled to 15 days advance written notice of the charges with a statement of the evidence supporting such charges, a right to review the documents supporting the charges and a right to reply to the charges within six days. The Agency declared that all of these requirements were satisfied. Also, "[a]lthough Dr. Hugonnet's June 20, 2008 report was not provided, the grievant knowingly and voluntarily signed a waiver and thereby released the Agency from any obligation to provide her with the test results." (Award at p. 14).

The Agency maintained that the Agency's Order Book and not the District Personnel Manual, governs paramedics, not the District Personnel Manual, Section 2049. (See Award at p. 14). The Agency submitted that it followed the provisions of the Agency Order book in ordering the grievant to take fitness for duty examinations and that the Order book prevails over the DPM because D.C. Code Sec. 1-632.01 allowed that "all personnel rules and regulations issued [prior to 1979] stay in effect until superseded." (Award at p. 14).

Regarding timeliness, the Agency contended that the Union did not timely file a grievance under the provisions of the collective bargaining agreement, which require a grievance to be filed within 10 working days.[6]

"Finally, the Agency contended that it timely commenced an adverse action against the grievant. Thus, in the Agency's view, the act or occurrence that gave rise to the discharge was the grievant's final [fitness for duty] evaluation given in June 2008. In the Agency's view, it was not required to move to terminate the grievant within the prescribed 90 day period after the latter's June 2007 fitness for duty examination. The Agency asserted that [t]he February 2008 fitness for duty evaluation provided the grievant [with] another opportunity to show that she could return to full duty. Under the circumstances, ordering a new examination was the best practice and prevented an arbitrary decision. In this case, the grievant's fitness for duty evaluation in June of 2008 was the basis for the discharge, not the grievant's prior invalid examinations. Therefore, the adverse action was commenced within 90 days of the act or occurrence giving rise to the adverse action." (Award at p. 16).

After reviewing the record, the Arbitrator relied on D.C. Code Section 5-1031, which provides that "[n]o corrective action or adverse action against any sworn member or civilian

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[6] The Agency contends also that the Union did not advance its grievance timely under the provisions of the collective bargaining agreement, which require a grievance to be filed within 10 working days of the occurrence of the event giving rise to the grievance or within 10 working days of the Union's or employee's knowledge of the occurrence of the event giving rise to the grievance. In this regard, the evidence shows that the Union filed a Step 2 grievance alleging a violation of District Personnel Manual Section 2049 on February 28, 2008. At the subsequent March 6, 2008, meeting between the parties, the Union was of the view that no settlement of the grievance was reached. The Union did not thereafter advance the grievance within 10 days and it was therefore abandoned. The Union had several opportunities to advance the Step 3 grievance after the grievant was advised on March 6, 2008, that she had to be re-tested and the re-test was scheduled, but it did not. Instead, the Union waited until August 8, 2008, to file its Step 3 grievance after the test results were in and the Agency moved to terminate the grievant. Under these circumstances, the Union and grievant abandoned their right to challenge the fitness for duty process.

employee of the Fire and Emergency medical Services Department or Metropolitan Police Department shall be commenced more than 90 days...after the date that the Fire and Emergency Medical Department...knew or should have known of the act or occurrence allegedly constituting cause." (Award at pgs. 18-19).

In view of these findings by Dr. Hugonnet, the Arbitrator found that "the Agency in August 2007 knew or should have known that there was no reasonable expectation that the grievant would be able to fulfill her vital paramedic duties as set forth above. Rather, the Agency allowed the grievant to remain in limbo for approximately one year in indefinite light duty status unsure of what action the Agency would ultimately take. Moreover, [the Arbitrator found] that in view of Dr. Hugonnet's clear psychological findings in August 2007, it was not reasonable to expect a different conclusion resulting from additional fitness for duty examinations while the grievant continued to be in light duty status. This was confirmed by Dr. Hugonnet's report of June 20, 2008 which reiterated the same findings as those which he made in August 2007." (Award at p. 19). The Arbitrator stated that "[b]ased on the foregoing, it is clear that the Agency had essentially the same information and findings in August 2007 as it had in June 2008 which formed the basis of its removal of the grievant. [in fact, the Agency met with the grievant and a Union representative and informed her that she was unfit to perform the duties of a paramedic.] Under these circumstances, [the Arbitrator found that] ... the adverse action in this matter was untimely since the Agency instituted the adverse action more than 90 days after it "knew or should have known of the act or occurrence allegedly constituting cause" within the meaning of DC Code Section 5-1031(a)."[7] (Award at pgs. 18-21).

Concluding that the adverse action was untimely implemented, the Arbitrator sustained the grievance and reinstated the grievant to her position. The Arbitrator cautioned, however, that

[7] The arbitrator stated as follows:

> In reaching this finding, I reject the conclusion of the Hearing Officer contained in his September 10, 2008 recommendation to Chief Rubin that the Agency's action in this matter was timely and not inconsistent with the provisions of D.C. Code Section 5-1031(a). In this regard, the Hearing Officer contended that the Agency took action against the grievant for "cause" that was continuing or recurring and the "cause" in this case was the June 2008 not-fit-for-duty finding which was timely as a basis for removal pursuant to DC Code Section 5-1031(a).
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> I disagree with the Hearing Officer's conclusion in this regard. Since as of August 2007, the Agency had the findings of Dr. Hugonnet and took no action, I find the Agency's conduct in allowing the grievant to remain in limbo for almost a year was inconsistent with the intent of DC Code Section 1031(a). Nor do I find that the holding of subsequent fitness for duty examinations tolled the 90 day requirement.
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> The Hearing Officer further concluded that the grievant had failed to meet the physical requirements, of the paramedic position. The evidence, however, reveals that the there was no physical testing of the grievant subsequent to February 2008 and that the basis for the Agency's termination of the grievant was the psychological test results in June 2008.

"[t]he sustaining of the grievance in this matter was based solely on the fact that the Agency's conduct in terminating the grievant was untimely. It should be noted that the reinstatement order herein does not insulate the grievant from future agency action if, in the agency's view, she cannot reasonably demonstrate that she is able to function at the full employment level of a paramedic. Pursuant to the Union's request, I will retain jurisdiction in this matter if questions concerning implementation of the remedy arise." (Award at p. 21).

The Agency filed the instant review of the Award, contending that the award is contrary to law and public policy and, pursuant to Board Rule 538.1 (e), requested to brief its position in a brief. (See Request at pgs. 2 and 7).

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) (2001 ed.).[8]

Here, the Arbitrator returned the grievant to work as of the date of the 2007 fitness for duty examination. FEMS claims that the Award is on its face contrary to law and public policy.

In its Request to the Board, the Agency asserts that the Arbitrator's Award violates law and public policy that requires employees be mentally fit to perform their full duties under Chapter 20, of the District of Columbia Personnel Manual § 2049.2. More specifically, the Agency asserts that "Arbitrator Reuben's Award is contrary to law and public policy because it returns to full duty a paramedic, whose essential functions are to provide for the health and safety of the public, despite the clear evidence that she is incapable of performing as a paramedic without jeopardizing the public's safety. [The Agency maintains that] [t]his decision not only jeopardizes public safety, but also hinders the Agency's public safety mission. Likewise, it subjects the Agency to legal and financial exposure for negligent retention." (Request at p. 4). Furthermore, the Agency asserts that the Award "on its face is also contrary to law and public policy because "it requires FEMS to start termination proceedings within 90 days of knowing of

[8] In addition, Board Rule 538.3 – Basis for Appeal – provides:

(a) If "the arbitrator was without, or exceeded his or her jurisdiction";

(b) If "the award on its face is contrary to law and public policy"; or

(c) If the award "was procured by fraud, collusion or other similar and unlawful means."

the injury or illness, but before there is proof that the employee will not be able to perform the essential functions of the job."[9] (Request at p. 4).

The Agency maintains that the "Award is also contrary to the express terms of the CBA that afford employees an opportunity to recover before an adverse action can be initiated. Article 24 of the CBA states in relevant part that, 'an employee who has an injury may be placed on light duty for a period of 90 days.' A 90-day extension is allowable if it is reasonably expected by his or her physician that within a reasonable amount of time ... the employee could return to full duty. Only after the initial 180 days or [another] reasonable extension is an employee required to return to full duty or seek compensation or retirement through the appropriate agency." (Request at p. 5).

The Agency also believes that the Arbitrator's award is contrary to the negotiated language in the CBA that affords employees an opportunity to seek limited duty if there is a possibility that the employee can return to work. (Request at p. 6). The Agency submits that

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9 The Agency makes the following arguments:

> There is a clear public policy, both nationally and in the District of Columbia, that favors the rehabilitation of injured or seriously ill employees and allowing them an opportunity to return to work after the injury or illness is abated. The federal Family and Medical Leave Act (FMLA) of 1993 was enacted in part to protect employees from discharge because they were injured or ill due to a serious health condition.[9] Employees must be returned to work after taking FMLA leave provided that they can resume their duties. The federal FMLA affords the employees up to twelve weeks of unpaid leave and job protection to recover."
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> To combat this dilemma in the District of Columbia, the City Council enacted the District of Columbia's Family and Medical Leave Act (FMLA),[9] which is modeled after the federal FMLA. The D.C. FMLA grants job protection rights to injured or seriously ill employees for up to sixteen weeks - or 120 days. It would be a violation of federal and state law for an employer to take or initiate any action against the employee during this period of time.
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> The same rationale applies here. An arbitrator's award that required the Agency to initiate a termination action within the first ninety days of a reported injury or illness is a clear violation of law and public policy because the injured patient would be precluded from demonstrating that they can return to work. This result would occur regardless of whether the employee could be returned to work after recuperating. The timing of the adverse action would be more important than the Agency saving the job of a potentially viable public safety officer. The Agency's right to exercise discretion and afford employees more time to recover would also be hampered. It would require FEMS to act irrespective of whether the employee could be returned to duty or risk an adverse arbitration award for violating the 90-day rule. The law in the District of Columbia favors rehabilitation and returning the employee to work after an injury or illness. It is only after it has been demonstrated that the employee cannot return to work that the employee may be discharged. To rule otherwise is against law and public policy.

"D.C. Official Code § 5-1031 (2001 ed.), which requires that corrective or adverse action commence within 90 days of when the FEMS knew or should have known of the act or occurrence allegedly constituting cause for corrective or adverse action must be read in conjunction with, and not contrary to, the CBA or other relevant laws. Because light duty is afforded to injured employees, the time to initiate action must commence after the chance for rehabilitation has been exhausted. In this case, August 2007 started the light duty process for the Grievant. There was no evidence that FEMS knew or should have known prior to June 30, 2008, that the employee would not be able to return to full duty. On August 27, 2007, the PFC determined that the employee was not currently fit to return to full duty, but could return to work in a limited capacity. It is after all options have been exhausted that the discharge action should be initiated. If the Board upholds the Arbitrator's award it will force FEMS to initiate discharge actions against employees without evidence that the employee cannot be rehabilitated or save their jobs. To enforce the 90 day rule under the facts of this case is contrary to the CBA and the clear public policy that favors rehabilitation." (Request at p. 6).

Additionally, Article 31 § 4(h) of the collective bargaining agreement (CBA) states that the "arbitrator shall not have the power to add to, subtract from or modify the provisions of this through the award." An award that requires the adverse action be initiated in August 2007, and prior to affording the employee an opportunity to demonstrate that he or she can return to full duty, modifies the CBA that allows for up to 180 days of light duty before requiring the employee must return to work, retire, or seek compensation. The Opinion and Award is contrary to the express language in the CBA. (Request at pgs. 6-7).

The Agency requests that the Board determine, pursuant to PERB Rule 538.2, that there may be grounds to modify or set aside the Arbitrator's award so that the parties may fully brief these issues. The Agency believes that the Arbitrator's decision is contrary to law and public policy.

Here, the Arbitrator based his decision on D.C. Code Sec. 5-1031, which provides that "no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturday, Sunday, or legal holidays, after the date the Fire and Emergency Medical Services Department of the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause."

The Agency alleges the Award contravenes the light duty provision in Article 24 of the collective bargaining agreement, allowing employees with work-related injuries be placed on light duty for 90 days, with a possible extension of another 90 days. The Agency maintains that it must not be forced to make a decision within the first 90 days, as Article 24 allows for an extension of time.

The Federal Family Leave Act, at 29 USCA 2612, allows for 12 workweeks (90 days) of leave for illness during any 12 month period to the District of Columbia Family and Medical Leave Act of 1990 at D.C. Code 32-501 *et seq.* Relying on the District statute which extends

this benefit to 16 work weeks, or 120 days,[10] FEMS argues that the Award subscribes to a 90-day time limit for initiating action against the employee, and is therefore contrary to the District's public policy of allowing injured or ill employees 120 days to prove that they are able to perform their full duties.

The Board finds that it is not clear, based on FEMS's arguments, how the Award contravenes law and public policy. Pursuant to Board Rule 538.2, the Board finds that there may be grounds to modify or set aside the Arbitrator's award. Therefore, the Board requests that the parties submit briefs.

The parties' arguments shall address the issue of whether the Award is contrary to law and public policy. Specifically, the parties shall address the impact of the District's time limit for: (1) issuing a corrective or adverse action; (2) determining whether an employee is fit to perform the full duties of the position after a work-related injury; (3) allowing an employee to perform light duty; and (4) allowing Family Leave for injuries or illness. The parties shall also discuss whether termination for failing a fitness for duty exam is disciplinary. If the parties argue that termination for failing a fitness for duty exam is not disciplinary, what governs such a termination? The parties shall address whether any law, statute or policy prevent an agency from allowing an employee to remain on the job as it observes the employee's performance, or giving employees additional time to establish their fitness for duty.

The arguments shall be clear and concise and shall state any law, rule, regulation and/or legal precedent in support of your arguments. Upon review of the briefs, the Board shall render its decision and order in this matter.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Board requests that the parties fully brief their position regarding the following provisions raised by FEMS:

    a. Article 24 of the collective bargaining agreement;

    b. D.C. Code Sec. 5-1031;

    c. Article 31, Sec. 4(h);

    d. Family and Medical Leave Act of 1993, 29 USCA 2601;

[10] D.C. Code 32-501 provides that "any employee who becomes unable to perform the functions of the employee's position because of a serious health condition shall be entitled to medical leave for as long as the employee is unable to perform the functions, except that the medical leave shall not exceed 16 workweeks of leave during any 24-month period."

e. District of Columbia Family Medical and Leave Act of 1990, D.C. Code 32-501 *et seq.*

2. Please address in your briefs whether any law, statute or policy prevent an agency from allowing an employee to remain on the job as it observes the employee's performance, or gives employees additional time to establish their fitness for duty. Cite any other argument, issue, and Federal or District laws or policies which you deem relevant. As the trier of facts, the Arbitrator's findings of fact are conclusive. No recitation of the facts is needed.

3. The briefs are due in this office on August 23, 2011.

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

August 8, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-18 was transmitted via Fax and U.S. Mail to the following parties on this the 8th day of August 2011.

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