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

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Rex Plant),)	
)	
Petitioner,)	PERB Case No. 06-A-12
)	
and)	Opinion No. 911
)	
District of Columbia Metropolitan Police Department,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case:

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") filed an Arbitration Review Request ("Request") in the above-captioned matter. FOP seeks review of an Arbitration Award ("Award") that sustained the termination of Rex Plant ("Grievant"), a bargaining unit member.

Arbitrator Lois Hochhauser was presented with the three following issues: (1) whether the Metropolitan Police Department ("MPD") violated the District Personnel Manual ("DPM") when it terminated the Grievant; (2) whether MPD had sufficient evidence to support its decision to take adverse action against the Grievant; and (3) whether termination was an appropriate remedy. (See Award at pgs. 1-2). Arbitrator Hochhauser found that: (1) MPD did not violate the DPM and (2) there was ample evidence in the record to support MPD's decision to remove the Grievant. FOP contends 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 District of Columbia Metropolitan Police Department ("MPD" or "Agency") opposes the Request.

The issues before the Board are whether "the arbitrator was without or exceeded his or her jurisdiction" or whether "the award on its face is contrary to law and public policy." D.C. Code §1-605.02(6).

II. Discussion

The facts as found by the Arbitrator are as follows. "On April 11, 2000, Grievant, an officer Grade 1/Step 8 who had been employed with MPD since October 1988, reported to the Police and Fire Clinic that he was suffering from 'stress caused by burnout from performing his duties as a Crime Scene Technician.'" (Award at p. 2). He was immediately placed on sick leave. On July 18, 2000, he was placed on performance-of-duty sick leave ("POD").¹

On August 30, 2004, the Grievant received the first notice of proposed removal. He elected to have a hearing. An amended notice was issued on November 12, 2004. The hearing was scheduled for January 25, 2005. On January 21, 2005, MPD amended the notice, adding a new charge.

MPD charged the Grievant with committing acts of misconduct during the period between April 14, 2000 and May 27, 2004. Specifically, the Grievant was charged with: (1) two charges of failure to obey orders or directives issued by the Chief of Police by engaging in outside employment while in an extended sick leave status; (2) commission of any act which would constitute a crime (fraud) by working and receiving pay from outside employment while also receiving his regular salary from MPD; and (3) two charges of willfully and knowingly making untruthful statements by stating that he was not engaged in outside employment while in an extended sick leave status. (See Award at pgs. 2-6). On January 25, 2005, the Grievant was afforded an evidentiary hearing regarding the charges before a three-member panel ("Panel") comprised of senior police officials. The "Grievant did not appear, but his representative, Kyle McGonigal, . . . was present and initially sought a continuance based on the addition of a new charge on January 21 and his recent receipt of certain evidence. Mr. McGonigal, . . . then stated that Grievant 'voluntarily' withdrew his hearing request and sought to submit a written response. The Panel denied the request for continuance and granted the request to submit a written statement. The Panel stated it would proceed with the hearing. Grievant, through counsel, did not object to the participation of any of the Panel members but voiced his objection to the hearing going forward based on his withdrawal of his hearing request. The charges were read and Grievant, through his representative, stated he was not guilty of any charge or specification. The Panel stated it would consider Grievant's written response. Mr. McGonigal then left, and the hearing proceeded with MPD offering testimonial and documentary evidence. The Adverse Action Panel sustained the charges. In determining the penalty, the Panel reviewed the Douglas factors and concluded removal was the appropriate penalty." (Award at p. 6).

The final notice of adverse action was issued on March 2, 2005. MPD sustained all of the charges and specifications. The notice advised the Grievant that he could appeal to the Chief of Police, and that the Chief's reply would constitute the final agency decision. On March 11, 2005, the Grievant appealed the final decision to Chief of Police Ramsey who denied the appeal

¹ "Placement on POD status entitled Grievant to receive two-thirds of his salary, tax free, and to accrue annual and sick leave." (Award at p. 2, footnote 3).

on March 23, 2005. Pursuant to the parties' collective bargaining agreement ("CBA"), FOP invoked arbitration on behalf of the Grievant.

At arbitration FOP argued that the Grievant's termination should be rescinded because MPD violated Sections 1607.3² and 1612.2³ of the DPM which require that the hearing officer and the deciding official must not be the same person as the proposing official in an adverse action proceeding. Specifically, FOP asserted that Assistant Chief Shannon Cockett acted as the: (1) proposing official; (2) hearing officer and (3) deciding official. (See Award at p. 7).

In addition, FOP claimed that "MPD did not prove that Grievant was employed or paid during the entire period it alleged he taught at Prince George's Community College, or for the Taylor Group. Since MPD [could not] prove the substantive violations, . . . it cannot meet its burden that Grievant intentionally made untruthful statements." (Award at p. 10). FOP also contended that the penalty imposed was too severe. In support of this position FOP argued that MPD did not consider all of the factors articulated in Douglas v. Veterans Administration, 5 MSFR 313 (1981). Specifically, FOP argued that "there was no analysis of how the decision was reached to remove the Grievant, no consideration of his potential for rehabilitation or his prior work history." (Award at p. 14).

MPD countered that FOP could not raise the issue of the DPM violation because Article 19, Section E. 5.2⁴ of "the parties' [CBA] requires that new arguments cannot be raised during Arbitration, and this issue was not raised below."⁵ (Award at p. 7).

In addition, MPD argued that the record contains substantial evidence that the Grievant was employed for pay by Prince George's Community College and the Taylor Group while in an extended sick leave status. Therefore, MPD asserted that it had met its burden of proof.

Concerning FOP's claim that termination was an inappropriate penalty, MPD contended that this argument lacked merit. Specifically, MPD argued that it gave thoughtful and thorough

² Section 1617.3 provides that "the proposing official shall not be the deciding official, except the proposing official may be the deciding official when the proposing official is the head of an agency."

³ Section 1612.2 lists the criteria for the hearing officer conducting the administrative review.

⁴ Article 19, Section E. 5.2 of the parties' CBA provides as follows:

The parties to the grievance or appeal shall not be permitted to assert in such arbitration proceeding any ground or to rely on any evidence not previously disclosed to the other party.

⁵ FOP did not dispute that it was aware of Assistant Chief Cockett's involvement and that it failed to raise this issue at any prior stage of the procedure. Instead, FOP argued that "due process rights cannot be waived." (Award at p. 8).

consideration to each of the relevant *Douglas* factors in reaching its decision regarding the penalty. (See Award at pgs. 14-15).

In an Award issued on April 6, 2006, the Arbitrator rejected FOP's argument regarding the DPM violation by noting the following:

[MPD] argues Grievant is barred from raising this argument since the parties' Labor Agreement . . . requires that new arguments cannot be raised during Arbitration, and this issue was not raised below . . . MPD contends Grievant could and should have raised this issue in a timely manner since Assistant Chief Cockett's name appeared on the notices, Grievant was aware of this, and Grievant was represented throughout the procedure. The Union does not argue that Grievant was unaware of Assistant Chief Cockett's involvement or dispute that it failed to raise this issue at any prior stage of the procedure. . . . Rather it argues that due process rights cannot be waived.

"Due process" is a legal concept contained in the U.S. Constitution that ensures that an individual is not deprived of life, liberty, property or any right without notice and an opportunity to be heard . . . The Union argues that Assistant Chief Cockett, by serving in more than one role, deprived Grievant of his due process rights.

* * *

The Union can point to no specific General Order that was violated, but rather contends there is an inherent violation of due process rights if the same person that issues the proposed notice also issues the final notice. The Arbitrator does not agree that due process requires different individuals to make those decisions.

* * *

. . . [A]ccording to the voluntarily negotiated Labor Agreement, the Chief of Police may issue both the proposed notice (Article 4) and the final notice (Article 7). This supports the conclusion that a due process right is not violated when the same individual issues the proposed and final notices. In addition, in this case, Grievant appealed the decision issued by Assistant Chief Cockett to Chief Ramsey, consistent with Article 7. Chief Ramsey's decision, in accordance with the Labor Agreement, constituted the final agency action. In this instance, Assistant Chief Cockett did not issue the final agency

decision. Therefore, that issue is not ripe for decision in this arbitration.

Having concluded that the Union did not establish that Grievant's due process rights were violated, the Arbitrator concludes that by failing to raise the matter in a timely fashion, Grievant cannot raise the issue at this time. (Award at pgs. 7-9).

The Arbitrator was emphatic that her decision on this issue was based on FOP's failure to raise the DPM issue in a timely manner. (See Award p. 9, footnote 6).

The Arbitrator also rejected FOP's substantive challenges that: (1) MPD did not prove that the Grievant was employed or paid during the entire period it alleged he taught at Prince George's Community College ("PGCC"), or for the Taylor Group and (2) since MPD did not prove the substantive violations, it did not meet its burden that the Grievant intentionally made untruthful statements. (See Award at p. 13). In reaching this conclusion, Arbitrator Hochhauser stated:

In this case, the Arbitrator found the evidence presented by MPD to be credible, consistent and pertinent to its charges. [MPD] presented both testimonial and documentary evidence to support its claim that Grievant was employed and paid by PGCC and the Taylor Group during the periods charged, times he was on POD and did not have leave . . . MPD submitted, among other things, Grievant's contracts from PGCC; the announcement for the Taylor Group listing the Grievant as the instructor for courses in 2002 and 2003, a copy of a Grievant's 2003 form 1099-MISC from Taylor Group showing he received \$55,442.61. (Award at p. 13).

Concerning FOP's argument that the penalty was too severe and that MPD did not consider the *Douglas* factors, the Arbitrator stated that "the Panel addressed and analyzed the *Douglas* factors before reaching its conclusion that the Grievant should be terminated." (Award at p. 15). The Arbitrator noted that "[r]emoval comes within the range of penalties permitted for the misconduct and the Panel considered it appropriate in this matter." (Award at p. 15). In view of the above, the Arbitrator concluded that the penalty of termination was not arbitrary, was reasonable and did not violate the law. (See Award at p. 15).

FOP claims that: (1) the arbitrator was without authority to grant the Award and (2) the award on its face is contrary to law and public policy. (See Request at p. 2).

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 asserts that "[b]y not abiding by the terms of the CBA, the Arbitrator implicitly exceeded her authority and created new precedent that does not comport with the [Office of Employee Appeal ("OEA")] decision[s]." (Request at p. 5). In support of its position, FOP argues the following:

An arbitrator is bound by the terms of the CBA. To go outside of its terms exceeds the authority granted to the arbitrator. Art. 4 of the CBA expressly incorporates all laws, rules, and regulations in the District of Columbia. . . . In her decision, the Arbitrator stated that "[a]rbitrators are not bound by other arbitral awards or by decisions from the D.C. Office of Employee Appeals, although it is useful to consider all related matter." . . . The Arbitrator fails to follow Art. 4 of the CBA by not adhering to the laws of the District of Columbia. The OEA is bound by the terms of the CBA and must follow the procedures outlined therein. District of Columbia Metropolitan Police Department v. Pinkard, 801 A. 2d 86, 91 (D.C. 2002). Further, a CBA that "establishes guiding principles and nondiscretionary policy for a government agency . . . has the effect of a regulation, and . . . [the OEA] has jurisdiction to interpret any provision of the agreement which pertains to an issue under review." Rousey and Jones v. Department of Consumer and Regulatory Affairs, OEA Matter No. 1602-0114-90, and 1602-0115-90. . . . The OEA is the agency responsible for handling District of Columbia government employee appeals concerning employment related matters. OEA decisions are likewise included. Arbitration is controlled by the CBA. Any action taken outside of the CBA exceeds the arbitrator's authority. (Request at p. 4).

FOP's analysis is based on its interpretation and application of D.C. Code §§ 1-606.01 and 606.03 (2001 ed.)⁶ which relate to the OEA. The OEA is a quasi-judicial body empowered to review final agency decisions affecting, *inter alia*, performance ratings which result in terminations, adverse actions for cause that result in removal, suspensions of 10 days or more, and reductions-in-force. By contrast, this Board is a quasi-judicial, independent agency entrusted, *inter alia*, with review of arbitration awards affecting employees of the District of Columbia. See, D.C. Code § 1-605.02(6). FOP conflates OEA's standard of review concerning an agency's decision to terminate an employee, with the power that this Board has to overturn an arbitration award which sustained a termination. The standard of review for the reversal of an arbitrator's decision differs significantly from OEA's review of a managerial decision. While this Board may only overturn an arbitrator's award under limited circumstances, *see* D.C. Code § 1-605.02(6), the Act that created the OEA does not define the standards by which the OEA is to review management decisions. *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).⁷ As a result, OEA defers to management decisions unless such decisions are not supported by substantial evidence. It is clear that OEA and this Board are two distinct independent agencies with separate and distinct jurisdiction. Also, in the present case, the Arbitrator's review of MPD's termination of Officer Rex Plant arises out of the parties' CBA and not D.C. Code §§ 1-606.01 and 606.03. In view of the above, FOP's claim that Arbitrator Hochhauser exceeded her authority by not relying on OEA precedent lacks merit. Therefore, FOP has failed to state a statutory basis for reversing the Award.

FOP also suggests that the Arbitrator exceeded her authority by finding that "[a]rbitrators are not bound by other arbitral awards. . . ." (Request at p. 4). The Court of Appeals has noted that: "[I]n bargaining for an arbitrator to make findings of fact and to interpret the Agreement, the parties chose a forum that is not bound by precedent. Arbitration decisions do not create binding precedent even when based on the same collective bargaining agreement. See, e.g., *Hotel Ass'n of Washington, D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25*, [1995] 295 U.S. App. D.C. 285, 286-88, [1995] 963 F.2d 388, [1995] 389-391 (D.C. [1995] Cir. 1992)." *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations*

⁶ Prior codification at D.C. Code §§ 1-606.1 and 1-606.3 (1981 ed.).

⁷ The District of Columbia Court of Appeals concluded, based on D.C. Code §§ 1-606.1 and 1-606.3, that:

[a]lthough the Act does not define the standards by which the OEA is to review these decisions, it is self-evident from both the statute and its legislative history that the OEA is not to substitute its judgment for that of the agency and its role . . . is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." . . . Although the OEA has a "marginally greater latitude of review" than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. The "primary discretion" in selecting a penalty has been entrusted to agency management, not the [OEA]. (Citations omitted). *Stokes*, 1009-1010 and 1011).

Board, 901 A.2d 784, 789 (D.C. 2006). Contrary to FOP's contention, Arbitrator Hochhauser was not bound by other arbitral decisions. Thus, Arbitrator Hochhauser acted within her authority.

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

In the present case, FOP asserts that the Award is on its face contrary to law and public policy. However, FOP does not specify any "applicable law" and "definite public policy" that mandates that the Arbitrator arrive at a different result. Instead, FOP argues that MPD violated the Grievant's Fifth Amendment right to due process when it violated Sections 1607.3 and 1612.2 of the DPM which require that the hearing officer and the deciding official must not be the same person as the proposing official in an adverse action proceeding.⁸ (See Request at p. 5). Specifically, FOP contends that MPD violated the Grievant's due process rights when it allowed Assistant Chief Shannon Cockett to act as the: (1) proposing official; (2) hearing officer and (3) deciding official. (See Award at p. 7). Furthermore, FOP argues that the Grievant's due process rights cannot be waived. FOP's arguments are a repetition of the arguments considered and rejected by the Arbitrator. Therefore, we believe that FOP's ground for review only involves a

⁸ In its Request, FOP also complains that "[t]he Arbitrator failed to discuss any of [FOP's] analysis in her decision." (Request at p. 5). An Arbitrator need not explain the reason for his or her decision. 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 Hochhauser made ample factual conclusions and discussed at length FOP's arguments in supporting her decision.

disagreement with the arbitrator's findings and conclusions. FOP merely requests that we adopt its interpretation of the evidence presented.

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. 2-3, PERB Case No. 95-A-02 (1995). In the present case, the parties submitted their dispute to the Arbitrator. 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.

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/Metropolitan Police Department 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.

September 18, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-12 was transmitted via Fax and U.S. Mail to the following parties on this the 18th day of September 2007.

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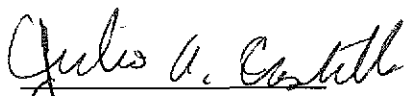
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