Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department,	
Petitioner,	PERB Case No. 14-A-05
v.	Opinion No. 1473
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of DeVon Goldring),	
Respondent.	

DECISION AND ORDER

The D.C. Metropolitan Police Department ("MPD") appeals an award issued in a grievance arbitration brought by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") on behalf of Officer DeVon Goldring ("Grievant"). MPD contends that (1) the Arbitrator's finding regarding the deciding official's authority to increase a disciplinary penalty was contrary to law and public policy and (2) the award of attorneys' fees was beyond his jurisdiction.

I. Statement of the Case

In his findings of fact, the Arbitrator found that on December 21, 2009, MPD served the Grievant a notice of proposed adverse action arising out of a domestic altercation that took place on August 16, 2009. The notice charged Grievant with committing an act that constituted a crime and conduct unbecoming an officer in violation of General Order 120.21 attachment A, parts A(7) and A(12) The notice proposed his termination.

Grievant requested a hearing before an adverse action panel.[1] The adverse action panel hearing this case ("Panel") found that the testimony, though inconsistent, established that the Grievant allowed an argument with his son's mother, Bianca Warren, and her sister at Warren's home to escalate into a physical altercation in which an assault occurred. When the Grievant

[1] An adverse action panel is also referred to as a departmental hearing panel, a hearing panel, a hearing board, a trial board, and a hearing tribunal. (Award 6, 41.)

drove away from the altercation, he did not notice that Warren was near his car, and he drove over her leg. The Panel found the Grievant guilty of the charges and proceeded to consider and weigh the relevant Douglas factors in relation to the charges. The Panel concluded that termination was not warranted and recommended a twenty-one-day suspension without pay. (Award 12-14.)

The Director of the Human Resources Management Division ("Director" or "HRD") agreed with the findings of guilt but disagreed with the penalty. The Director wrote in the final notice of adverse action that she issued to the Grievant, "The penalty is not consistent with the Disciplinary Procedures and Processes Table of Offenses and Penalties and does not take into account the egregious nature of your conduct." (Arbitration R. (pt. 1) at 209.) The final notice of adverse action concluded, "I hereby affirm the original penalty as proposed in the Notice of Proposed Adverse Action. . . . For the cited violation you will be removed from the force effective December 28, 2010." (*Id.* at 212; Award 14.) The chief of police denied the Grievant's appeal from the final notice of adverse action. (Award 20.)

The Grievant then appealed to arbitration as provided in the collective bargaining agreement ("CBA"). The issues posed to the Arbitrator were:

1. Whether HRD has the authority to increase the Panel's penalty?

2. Is there sufficient evidence to support a finding of guilt for the Charges and Specifications?

3. If so, what is the appropriate penalty?

(Award 20.)

Summarizing the arguments made regarding the authority of the Director to increase the Panel's penalty, the Arbitrator stated, "Each party expends considerable effort to interpret, explain, and rationalize to their advantage the statutory and regulatory changes and modifications that constitute an unbecoming labyrinth, confounding common understanding and acceptance." (Award 40.) MPD relied upon General Order 120.21 (formerly 1202.1) for the Director's authority. Part VI(K)(8) of General Order 120.21 provides:

> After reviewing the Hearing Tribunals proposed decision, the Assistant Chief, OHS [Office of Human Services], may remand the case to the same, or a different tribunal, or issue a decision (Final Notice of Adverse Action) affirming, reducing, or setting aside the action, as originally proposed in the Notice of Proposed Adverse Action.

(Award 16.) The chief of police asserted in her denial of the Grievant's appeal that the Director is "equivalent to the role of Assistant Chief, OHS that existed when G.O. was promulgated." FOP did not challenge that assertion. (Award 26.)

The Arbitrator averred that General Orders are not adopted in accordance with the Administrative Procedures Act and that municipal regulations take precedence over General

Orders. (Award 42, 44.) In particular, General Order 120.21 part VI(K)(8) is superseded by 6A DCMR 1001.5, which the Award also cites as CDCR-1001.5, ("Section 1001.5"). Section 1001.5 provides:

> Upon receipt of the Trial Boards findings and recommendations, and no appeal to the Mayor has been made, The Chief of Police may either confirm the findings and impose the penalty recommended, reduce the penalty or may declare the board's proceedings void and refer the case to another regularly appointed trial board.

(Award 16.) In view of this provision, the Arbitrator held that the Director "does not have the authority to increase the penalty recommended by the Adverse Action Panel. She, or other deciding officials, must adhere to the clear options provided in 6A DCMR 1001.5." (Award 44.) The Arbitrator added that even if Section 1001.5 did not apply, then chapter 16 of title 6 of the D.C. Official Code governs the procedures. (*Id.*)

The Arbitrator also stated that he did not rely solely on the Director's lack of authority to increase the penalty. He found that the Director abused whatever authority she did have by increasing the penalty on the basis of her unreasonable, arbitrary, capricious, and even malicious distortion of the facts found by the Panel. (Award 45-49.) Imposition of the penalty of removal was without reasoned decision and without cause. (Award 52.)

The Award upheld the grievance in "major part" and rejected it "in minor part in as much as the grievant requested that he be found not guilty of all charges and specifications." (Award 52.) The Award further stated, "The termination (removal) of Officer DeVon Goldring (the grievant) shall not stand. Instead, as recommended b[y] the Adverse Action Panel, his penalty is hereby ordered to be a 21 day suspension without pay commencing on the date he was wrongfully terminated." (Award 53.) The Arbitrator granted FOP's request for attorneys' fees and directed FOP to make a detailed request within thirty days.

MPD filed with the Board an arbitration review request and a "Memorandum of Points and Authorities in Support of Arbitration Review Request" ("Memorandum"). FOP filed an opposition to the arbitration review request.

II. Discussion

MPD invokes two of the of the statutory grounds for appeal from an arbitration award, namely, that the award is contrary to law public policy and that the arbitrator was without or exceeded his jurisdiction. *See* D.C. Official Code § 1-605.02(6). MPD does not establish the presence of either ground in this case.

A. Authority of the Director to Increase the Penalty

MPD contends that the Award is contrary to law and public policy insofar as it concluded that the Director acted without authority to increase the Panel's recommended penalty. In its version of the history of the relevant laws, regulations, and orders, MPD begins with a statute, originally enacted by Congress and presently codified at D.C. Official Code § 5-133.06, that

authorized trial boards to hear disciplinary charges against police officers. Rules governing trial boards, including Section 1001.5, were adopted in 1972. (Memorandum 5-6.) The Comprehensive Merit Personnel Act, enacted in 1979, provides that D.C. Official Code § 5-133.06 "shall not apply to police officers and fire fighters appointed after the date that this chapter becomes effective," D.C. Official Code § 1-633.03(a)(1)(Z), which was January 1, 1980. (Memorandum 6.) MPD contends that D.C. Official Code § 5-133.06 as well as rules adopted pursuant thereto "including § 1001.5, do not apply to MPD officers, including [Grievant] hired after January 1, 1980." (Memorandum 8.)

Instead, the Comprehensive Merit Personnel Act authorized the adoption of rules "to establish the disciplinary system." D.C. Official Code § 1-616.51. The Memorandum sets forth two such rules, which are codified in title 6, chapter 16 of the DCMR.

> 1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.
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> 1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty.

6B DCMR § 1613; Memorandum 7.

The Memorandum then notes that MPD issued a General Order relating to the same subject, General Order 120.21. The General Order is the basis for MPD's contention that the Award is contrary to law and public policy. MPD asserts,

> With respect to the Hearing Tribunal's penalty recommendation, and in accordance with 6B DCMR § 1613, the Order provides that:
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> > After reviewing the Hearing Tribunals proposed decision, the [HRD] may remand the case to the same, or a different tribunal, or issue a decision (Final Notice of Adverse Action) affirming, reducing, or setting aside the action, as originally proposed in the Notice of Proposed Adverse Action.
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> Thus, General Order 120.21 authorizes the HRD to impose the penalty that was originally imposed, i.e., termination, even if that penalty is greater than the penalty recommended by the Hearing Tribunal.

(Memorandum 8) (citations to the record omitted.) "Therefore," MPD concludes, "6B DCMR § 1613.2 and General Order 120.21 applied to Employee and, in accordance with those provisions, the HRD had the proper authority to impose the original penalty of termination. The Arbitrator's conclusion that HRD could not increase the penalty the Panel recommended is erroneous as a matter of law and must be vacated." (Memorandum 9-10.)

It is unnecessary to evaluate MPD's contentions that Section 1001.5 is inapplicable or that General Order 120.21 is "in accordance with 6B DCMR § 1613" in allowing the Director to impose the original penalty of termination.[2] Even if the Director had the authority to increase the penalty to one of termination, the Award must be sustained because the Arbitrator also found, based upon his review of the record, that the penalty of termination was not for cause as required by the CBA. (Award 44, 51-52.) MPD does not challenge this finding, nor could it. A dispute over the weight and significance of evidence leading the Arbitrator to conclude that the Grievant's termination was not for cause would not state a statutory basis for review. *See D.C. Hous. Auth. and AFGE, Local 2725*, 46 D.C. Reg. 10006, Slip Op. No. 598 at p. 3, PERB Case No. 99-A-06 (1999). Therefore, MPD has failed to show that the Award is contrary to law and public policy.

B. Award of Attorneys' Fees

MPD's argument regarding attorneys' fees begins with the premise that an arbitrator's authority is conferred by—and may be limited by—the collective bargaining agreement of the parties. MPD contends that FOP and MPD agreed in their CBA that each party is responsible for its own attorneys' fees. Article 19E, section 5(3) of the CBA provides that all parties to a hearing on a grievance or appeal "shall have the right at their own expense to legal and/or stenographic assistance at this hearing." On the basis of this provision, MPD asserts that "the Arbitrator's decision awarding attorney fees must be vacated." (Memorandum 10.) FOP responds that this provision does not relate to remedies.

MPD failed to raise its objection to an award of attorneys' fees during the arbitration. The Arbitrator set a briefing schedule whereby FOP would file an initial brief, and then MPD would file its brief, to be followed by a reply brief from FOP. (Award 1.) FOP's initial brief, dated December 29, 2011, requested attorneys' fees. (Arbitration R. (pt. 2) at 1703; Award 25.) MPD then filed its brief, dated March 5, 2012. MPD's brief does not object to the request for attorneys' fees. (Arbitration R. (pt. 3) at 2426-59.) The Arbitrator did not interpret article 19E, section 5(3) of the CBA as MPD did not suggest to him that the provision had a bearing on the remedy in this matter. An argument may not be raised for the first time in an arbitration review request. *AFGE Local 3721 (on behalf of Chasin) v. D.C. Fire & Emergency Med. Servs. Dep't*, 59 D.C. Reg. 7288, Slip Op. No. 1251 at p. 8, PERB Case No. 10-A-13 (2012).

Therefore, MPD has failed to show that the Award is contrary to law and public policy or that the Arbitrator was without or exceeded his jurisdiction. Accordingly, the Board sustains the Award.

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[2] MPD assumes without explanation that the penalty 6B DCMR § 1613.2 bars from being increased is the penalty proposed by the notice of proposed adverse action and not the penalty recommended by the hearing officer. Yet these rules authorize administrative review by a hearing officer only in cases involving a proposed removal, 6B DCMR §§ 1611.1, 1612.1-1612.4, a penalty that cannot be increased anyway.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration award is sustained.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Member Ann Hoffman. Member Donald Wasserman recused himself from the consideration of this Decision and Order.

Washington, D.C.

June 4, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-A-05 is being transmitted via File & ServeXpress to the following parties on this the 5th day of June 2014.

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