

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

_____)	
In the Matter of:)	
)	
District of Columbia Fire and Emergency)	
Medical Services,)	
)	PERB Case No. 10-A-18
Petitioner,)	
)	Opinion No. 1236
and)	
)	
American Federation of Government)	
Employees, Local 3721,)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case:

The District of Columbia Fire and Emergency Medical Services (“Petitioner” or, “Agency” or, FEMS) filed an Arbitration Review Request (“Request”) seeking review of an arbitration award (“Award”) that reinstated the grievant (“grievant” or, “employee”) to her position. The Agency asserts that the award was contrary to law and public policy. (See Request p. 2). The American Federation of Government Employees, Local 3721 (“Union” or “AFGE” or “Respondent”) filed an Opposition.

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). In its Request, FEMS requested leave to file briefs.

II. Arbitrator’s Award

D.C. Official Code § 5-1031 (2001 ed.), requires that corrective or adverse action commence within 90 days of when the Agency knew or should have known of the act or occurrence allegedly constituting cause for the corrective or adverse action. The Arbitrator found that FEMS did not commence the adverse action within 90 days of knowing that there was cause for corrective or adverse action, sustained the grievance and returned the employee to her position. The Arbitrator relied on the following set of facts:

1. The employee, an emergency medical technician, or paramedic, sustained on-the-job injuries to her shoulders in April and June 2006, and requested a light duty assignment that required no lifting.
2. The collective bargaining agreement provides for 90 days of light duty work, if available, for employees with short term, work-related injuries. Extensions for 90 days intervals are available upon request. 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.

3. The Agency placed the employee in a light duty assignment for 90 days, pursuant to the collective bargaining agreement ("CBA"). The assignment was extended for another 90 days...
4. On February 16, 2007, the Employee requested another 90-day extension, which the Agency denied. The employee was examined by her own physician and on February 27, 2007, and he cleared her to return to regular duty.
5. On May 21, 2007, the employee informed management that she had problems lifting her medical bag, due to the long recovery of the injury in both shoulders. The Agency assigned the employee light duty in the Preceptor Program, a program for paramedics who have not been in a full duty capacity for a period of time. This program enables the Agency to evaluate the paramedics to assure that their skills are up to par and their certifications are current.
6. Having been returned to light duty, on May 21, 2007, the employee was scheduled for a fitness for duty examination. The medical component was scheduled for June 14, 2007 and the psychological component, on May 31 and June 1, 2007.
7. The grievant was given psychological tests by Dr. Hugonnet. In these tests, Dr. Hugonnet found that the results of the test were invalid and not interpretable, in view of the grievant's guarded approach to the testing, which allowed her to appear superficially cooperative without revealing any emotionally meaningful information about herself. As a result, a re-test was scheduled for August 2, 2007.

8. On August 2, 2007, the employee's psychological examination was again found to be invalid and inconclusive in view of the grievant's consciously guarded approach to the testing. The employee's medical test results listed some physical limitations and the doctor who performed the physical examination advised the Battalion Chief that the employee was not currently fit for duty.
9. As to the grievant's psychological re-test on August 2, 2007, Dr. Hugonnet again found that the test results were invalid and could not be interpreted fully. However, he found that the grievant evidenced "delusional paranoid thinking at higher elevations." He found also that, "Paranoid thinking tends to be chronic, entrenched and resistant to mental health treatments including psychotherapy and medications."
10. On August 27, 2007, Chief Begley and the doctors who performed the employee's fitness for duty physicals met with the employee to inform her about the Police and Fire Clinic's ("PFC's") "final determination" that she was unfit to perform the full duties of a paramedic based on her fitness for duty evaluation. The Union was present.
11. The employee continued to work in a limited duty status in the Electronic Patient Care Program.
12. The Agency scheduled the employee for another fitness for duty examination on February 1, 2008 (medical), and February 8, 2008 (psychological). After conducting the psychological examination, the Agency notified the grievant that her psychological fitness for duty examination would not be evaluated because she had altered the consent provision, indicating the test was "mandatory" and not voluntary.
13. Also on February 8, 2008, the Union filed a Step 1 grievance on behalf of the employee, alleging that the Agency failed to follow the proper procedures for conducting fitness for duty physicals, requesting that she be placed on the Preceptor program. The Agency did not respond. On February 28, 2008, the Union advanced the grievance to Step 2.
14. At a March 6, 2008 grievance meeting, the Agency refused to accept the grievant's offer to provide a psychological evaluation from a private physician. Instead, the Agency advised her to submit to the psychological evaluation or resign. This instruction was confirmed by memorandum to the grievant on May 8, 2008.
15. On May 29 and June 5, 2008, the grievant was the subject of another psychological examination.

16. On June 20, 2008, the psychologist, Dr. Hugonnet, issued his report concluding that the grievant was not fit for full duty. He noted that in his prior testing of the grievant, her "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 [the employee] may never be able to return to full duty."
17. On July 10, 2008, the grievant was advised that she was not fit for full duty and she would be placed on administrative leave pending further Agency action.
18. On August 5, 2008, Assistant Fire Chief Lee proposed the removal of the grievant.
19. On August 8, 2008, the Union filed a Step 3 grievance alleging statutory and contractual violations by the Agency when it required the grievant to undergo multiple fitness for duty examinations, and when it placed her on enforced sick leave.
20. Also, the Union filed a Response to the Proposed Adverse Action, arguing that the Agency had exceeded its statutory and regulatory time limits for the imposition of any administrative disciplinary action.
21. On September 10, 2008, the FEMS Hearing Officer conducted an administrative review of the proposed adverse personnel action and sustained the adverse action.
22. On September 15, 2008, Fire and FEMS Chief Rubin issued a Final Agency Decision, terminating the grievant.

(See Award at pgs. 7-11)

The parties advanced the grievance to arbitration. The Agency argued before the Arbitrator that the grievant did not work in her paramedic position since June 24, 2006, and this fact alone hindered the Agency's ability to carry out its functions. "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 p. 13). The Agency noted that the grievant served in light duty for nearly two years, exceeding the contractual time limit for light duty. In 2008, as there was no reasonable expectation that she could return to full duty, the Agency determined that termination of the grievant was warranted. The Agency further noted that "[w]ith respect to Dr. Hugonnet's contention that his medical 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 ("DPM"), the Agency gave the grievant a 15-day advance written

notice of the charges with a statement of the evidence supporting such charge. The grievant was given the right to review the documents which supported the charges, and the right to respond to the charges. The Agency asserted that “[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).

In the Agency’s view, the act or occurrence that gave rise to the discharge was the grievant’s final fitness for duty evaluation administered in June 2008. Therefore, the Agency asserts that the adverse action was commenced within 90 days of the act or occurrence giving rise to the adverse action. The Agency believed that it was not required to move to terminate the grievant within the prescribed 90 day period after the August 2007 fitness for duty examination. (See Award at p. 16).

Before the Arbitrator, the Union countered that the termination was not for cause and advanced various arguments in defense of the grievant. The Union alleged that the Agency violated several provisions in the District of Columbia Municipal Regulation (“DCMR”) regarding established procedures for conducting a fitness for duty examinations.¹ Also, the Union argued that the Agency did not provide the grievant with the material upon which the notice of termination was based, as required by District Personnel Manual (“DPM”), Section 1608.3. The Union argued that the compilation of materials provided to the grievant did not include Dr. Hugonnet’s report, which the Agency testified was the sole basis for removing the grievant.² In addition, the Union argued that under Article 30, Section E of the CBA, all employees are entitled to reasonable and timely notice of disciplinary action and of the basis for the action. The Union claimed that the Agency’s delay of more than one year from the date of

¹ The Union argued as follows:

- a) the examination was not properly authorized (in violation of Section 6 DCMR 2049.8);
- b) the Agency did not inform the grievant of the reason for the examination nor of the consequences for failing to cooperate (in violation of 6 DCMR Section 2049.11);
- c) the Agency failed to offer the grievant an opportunity to submit medical documentation from her personal physician (in violation of Section 6 DCMR Section 2049.11);
- d) Section 2049.11(d) authorizes the personnel authority or agency to order a psychiatric examination only when the result of a current medical examination indicates no physical explanation for behavior or actions which may affect the safe and efficient performance of the individual or others. Here, the Agency relied solely on the psychological evaluation, administering the examination in isolation or in advance of any physical exam. Also, there is no evidence that the Agency’s Medical Doctor reviewed the results of the examination, pursuant to regulation.
- e) Section 2049.1 (i) provides that a report of the examination shall be made available to the applicant or employee. In violation of this regulation, the Agency ordered the grievant to sign a form which specified that she could receive the report of examination only if the Agency consented, which it did not, despite many requests by the grievant before she was removed.

(See Award at pgs. 9-10)

² The Union maintained that in his medical report, Dr. Hugonnet 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 noted that if there were no reported documented deficiency in work performance, his report is rendered moot. (See Award at p. 12).

the first psychological evaluation (in May and June 2007) until the proposed notice of removal (August 2008) was not reasonable, nor did it provide timely notice.

Finally, the Union argued that removal of the grievant violated D.C. Code Section 5-1031, which states that no corrective or adverse action shall be commenced more than 90 days after the Agency knew or should have known of the act or occurrence allegedly constituting cause. The Union argued that the Agency knew or should have known the same information regarding the grievant's fitness for duty in August 2007, as it did in June 2008.³

The Arbitrator considered the positions of the parties. Relying on D.C. Code Section 5-1031(a), the Arbitrator stated as follows:

In the instant case, the evidence shows that in June 2007, the grievant was given psychological tests by Dr. Hugonnet. In these tests, Dr. Hugonnet found that the results were invalid and not interpretable in view of the grievant's guarded approach to the testing, which allowed her to appear superficially cooperative without revealing any emotionally meaningful information about herself. As a result, a re-test was scheduled for August 2, 2007.

As to the grievant's re-test on August 2, 2007, Dr. Hugonnet again found that the test results were invalid and could not be interpreted fully. However, he found that the grievant evidenced "delusional paranoid thinking at higher elevations." [The doctor] found also that, "Paranoid thinking tends to be chronic, entrenched and resistant to mental health treatments including psychotherapy and medications."

In view of these findings by Dr. Hugonnet in August 2007, I find 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, I find 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

³ The Union maintained that the Agency's reliance on Dr. Hugonnet's 2008 report, as opposed to his 2007 report, did not cure the violation of the 90-day time limit. The Union argued that "simply because a new 2008 document was involved that contained the same information as the 2007 document, this does not render the 90 day requirement inapplicable in this matter." The Union argued that there is nothing in the statute that exempts from the 90 day rule any alleged cause of action that is continuing or recurring. Moreover, the Union contended that the statute provides causes of action based on misconduct.

by Dr. Hugonnet's report of June 20, 2008 which reiterated the same findings as those which he made in August 2007.

...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.⁴

Under these circumstances, I find 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 D.C. Code Section 5-1031(a).

(Award at p. 19).

Concluding that the adverse action was untimely implemented, the Arbitrator sustained the grievance, and reinstated the grievant to her position. The Arbitrator cautioned, that "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' 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. (See Request p. 2).

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, 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.)⁵

⁴ The Arbitrator noted that in a meeting held on August 2, 2007, Chief Begley and the doctors who performed the grievant's fitness for duty examinations informed the grievant of the Police and Fire Clinic's "final determination" that she was unfit to perform the full duties of a paramedic based on the fitness for duty evaluation.

⁵ In addition, the same grounds are incorporated in Board Rule 538.3, "Basis For Appeal".

The Agency requested that that the Board overturn the Arbitrator's decision as contrary to the law and public policy that requires employees be mentally fit to perform their full duties. (See Request at p. 4). The Agency maintained 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. (See Request at p. 4). The Agency contended that the Award also hinders the Agency's public safety mission and subjects the Agency to legal and financial exposure for negligent retention. (See Request at p. 4).

The Agency also stated 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 an injury or illness. The Agency cites the Federal Family and Medical Leave Act (FMLA) of 1993, ("FMLA") at 29 USCA 2612, which affords federal employees up to twelve (12) weeks of unpaid leave and job protection while they recover from an illness or injury. The District of Columbia enacted the District of Columbia Family and Medical Leave Act ("DC FMLA") at D.C. Code 32-501 *et seq.*, which expands these benefits to sixteen (16) workweeks. The Agency submits that 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, "because the injured patient would be precluded from demonstrating that they can return to work." (Request at pgs. 2-3). The Agency asserted that an arbitrator's award that requires the Agency to initiate a termination action within the first 90 days of a reported injury or illness, is a clear violation of law and public policy, when the DC FMLA statutes allows employees a period longer than 90 days to demonstrate that they can return to full duty. (See Request at p. 3).

The Agency also alleged that the Award is contrary to law and public policy because it is contrary to the express terms of Article 24 of the collective bargaining agreement ("CBA"), which affords employees an opportunity to recover before an adverse action can be initiated. Article 24 of the CBA allows 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. The Agency asserts that an Award that forces the Agency to issue disciplinary action within 90 days, pursuant to D.C. Official Code § 5-1031 (2001 ed.), 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. (See Request at pgs. 3-4).

Finally, the Agency argued that the Award is contrary to law and public policy because Article 31 § 4(h) of the CBA states that the "arbitrator shall not have the power to add to, subtract from or modify the provisions of this agreement through the award." The Agency contends that the Award modifies the contractual provision granting up to 180 days of light duty before an employee is required to return to work, retire, or seek workers' compensation. Therefore, the Agency asserts that the Award is contrary to the express language in the CBA. (See Request at pgs. 5-6).

The Agency requested that the Board determine, pursuant to PERB Rule 538.2, that there may be grounds to modify or set aside the Arbitrator's award and allow the parties to fully brief the above issues. (See Request at p. 7).

After reviewing the Agency's Request, the Board found that it was not clear how the Award, based on D.C. Code § 5-1031,⁶ contravened law and public policy. Pursuant to Board Rule 538.2, the Board instructed the parties to brief the relevance of the time limits found in various statutes and contractual clauses cited in the Request.⁷

Agency's Brief

In its submission, the Agency argues that there is applicable law and clear public policy that mandates that the arbitrator arrive at a different result. The Agency reiterated that the Arbitrator's decision is contrary to law and public policy because it necessitates that the Fire Department terminate an employee within 90 days, under D.C. Official Code § 5-1031, without affording the employee the rights guaranteed under the FMLA statutes and Article 24 of the CBA. The Agency asserts that the Arbitrator also exceeded his authority because the Award fails to draw its essence from the contract, as it conflicts with the light duty provision of Article 24.

The Agency maintains that DC FMLA is relevant to this case because it provides a guideline for protecting employees from termination when they need to be away from their jobs temporarily due to a medical condition. (Agency Brief at pgs. 5-6).⁸

⁶ The Arbitrator based his decision on D.C. Code § 5-1031 which provides:

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.

⁷ The Board requested that the parties address the following provisions raised in the Request:

- a. District Personnel Manual (DPM) Chap. 20, Section 2049.2 (fitness for duty)
- b. Article 24 of the collective bargaining agreement (90 days light duty and 90-day extension)
- c. Article 31, Sec. 4 (h) (powers of the arbitrator)
- d. D.C. Code Sec. 5-1031 (90-day rule for taking corrective or adverse action)
- e. Family and Medical Leave Act of 1993, 29 USCA 2601 (90 days leave in one year)
- f. District of Columbia Family Medical and Leave Act of 1990, D.C. Code 32-501 *et seq.* (120 days leave in one year).

⁸ The Agency notes that the District's policy of providing job security for short term periods of absence is not limited to DC FMLA. The same rationale underlies the federal Family and Medical Leave Act of 1993, 29 U.S.C. Chapter 28 §§ 2601 *et seq.* (1993) and the Americans with Disabilities Act of 1990, 42 U.S.C. §§12101 *et seq.* (1990). (Agency Brief, n. 4).

The Agency asserts that 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." (Agency Brief at p. 8). A 90-day extension is allowable if it is reasonably expected by his or her physician that within a reasonable amount of time, commensurate with the injury, the employee could return to full duty. (See Agency Brief at p. 8). Thus, the Agency argues that the collective bargaining agreement provides more time for recovery from an illness or injury, than the 90-day limitation for initiating adverse action under D.C. Code § 5-1031. (See Agency Brief at p. 8). In addition, the Agency contends that the law or rule most generous to the employee should apply. (See Agency Brief at p. 8). In this case, the Agency argues that the CBA would give the employee the maximum amount of time to recuperate and return to work if possible. (See Agency Brief at p. 8). Based on this view, the Agency asserts that the Award was contrary to law and public policy and the Arbitrator was required to render a different result. (See Agency Brief at p. 8).

Finally, the Agency argues in its brief that the Award was contrary to law and public policy because the discharge of the grievant was non-disciplinary and therefore D.C. Code § 5-1031 does not apply. (See Agency Brief at p. 11).

The Agency contends that failing a fitness for duty examination results in a non-disciplinary discharge because the discharge is not based upon misconduct. The Agency reasons as follows:

A non-disciplinary termination is a termination based upon an employee's individual status. See, 9-239 Labor and Employment Law, § 239.01 (Matthew and Bender 2011). A non-disciplinary termination is not predicated upon an accusation of wrong doing by the Grievant. *Id.* Examples of non-disciplinary discharges or duty status terminations include the following: lack of required licensure, employee retirement, either voluntarily or involuntarily, employee resigns voluntarily or is treated as having done so, or an employee may be unable to perform his or her job duties because of physical or mental incapacities. *Id.*

[The Agency contends that there is support in the CBA for its position that a separation for failing a fitness for duty examination ...is non-disciplinary.] Under the CBA...employee[s] who ha[ve] exhausted their light duty rights must retire or seek compensation if they are unable to return to work. See, Article 24, Section D.⁹ ([stating that after] the initial 180 days or as provided in Section C, an employee must return to full duty or seek compensation or retirement through an appropriate Agency). Retirement and workers' compensation actions are non-disciplinary separations of employment. Those actions are not based upon misconduct. Nevertheless, the result is the same, the employee is no longer employed by the Agency.

⁹ Petitioner asserts that the cause standard found in the DPM still applies.

Additional support [for the Agency's position] is found in the D.C. Code. As shown above, two major provisions of Bill 15-32, the Omnibus Public Safety Reform Amendment Act of 2003, was the enactment of D.C. Official Code §5-632 and § 5-633. The legislative history states that the act was to create a comprehensive limited duty program to streamline the process for retiring individuals who cannot work full duty. D.C. Council, Report on Bill 15-32 at 17 (2003). A mandatory retirement is imposed on an employee who cannot return to work after two years. D.C. Council, Report on Bill 15-32 at 17 (2003)...The District's public policy is to give employees who are injured or ill additional time to recover and require mandatory retirement only if the employee cannot return to work.

. . .

The Grievant was sent ...for a [fitness for duty examination]. [The Grievant] would be in the same position as a firefighter or police officer with mandatory retirement. As mentioned above, in those cases, the employee is not required to retire for at least two years. [The Agency reasons that a] forced retirement is a non-disciplinary discharge, therefore, [a separation for not being able to return to full duty after a failing a fitness for duty examination,] is a non-disciplinary discharge.

[Further, the Agency asserts that a] non-disciplinary discharge is not covered by D.C. Code § 5-1031....The purpose of § 5-1031 was to define when the disciplinary process began. D.C. Council, Report on Bill 15-32 at 15 (2003). The committee did not want employees subjected to a disciplinary action for an incident that occurred, for example, three years prior, especially when management knew about the incident and chose not to pursue action at that time. D.C. Council, Report on Bill 15-32 at 15 (2003).

[The Agency maintains that] D.C. Official Code § 5-1031 was intended to address adverse or corrective actions based upon misconduct. Examples given in the legislative history related to misconduct actions, such as sexual harassment, financial malfeasance, or other acts warranting discipline. D.C. Council, Report on Bill 15-32 at 14 (2003). The Agency contends that these] examples speak to misconduct and not duty status cases.

. . .

[The Agency claims that the] law cannot be reconciled as the Council gave members of FEMS who had performance of duty injuries up to 2 years before they forced them to retire. Under § 5-1031, FEMS would initiate a discharge action against the injured employee within 90-days of the incident giving rise to the discharge. If an employee who had a performance of duty injury was subject to the 90-day rule, then the City Council would not have provided those members with 2 years to work light duty before they were forced into retirement. D.C. Official Code § 5-632. The Agency was not required to initiate a non-disciplinary action of an injured employee within 90-days of the medical opinion. Council had a separate process for injured employees that could not return to work. The process was a forced retirement under § 5-633. The Grievant's discharge was a non-disciplinary discharge, and it is not governed by the 90-day rule. As such, the Arbitrator's decision finding a violation § 5-1031 for a non-disciplinary discharge is against law and public policy and the decision must be overturned.

(Agency Brief at pgs. 11-15).

Union's Brief:

In its submission, the Union challenges the Agency's argument that the 90-day light duty provisions in Article 24 of the CBA prevented it from complying with the 90-day statutory limitation for issuing discipline. The Union asserts that this argument fails because:

- 1) The agency did not raise this issue before the arbitrator and as such cannot raise it here;
- 2) Article 24 of the CBA does not have application to this case, as that article regards "incapacity due to on-the-job injury" and requires the agency's determination that the injury is "short-term". By contrast, the basis for the grievant's removal, alleged mental inability to perform the duties of her position, was not an on-the job injury, and the agency did not believe it was short term;
- 3) The agency could have complied with both Article 24 and the District's 90-day statutory limit to initiate disciplinary action; and
- 4) The CBA does not and cannot control over a statute.

(See Union Brief at p. 19).

First, the Union states that the Board has consistently and repeatedly held that an issue not presented to the arbitrator cannot be raised for the first time before the Board on an

arbitration review request. (See Union Brief at p. 8, citing *Fraternal Order of Police/Department of Corrections Labor Committee (Dexter Allen) v. D.C. Department of Corrections*, _ DCR _, Slip Op. No. 920, PERB Case No. 07-E-02 (2007), and *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip Op. No. 282 at p. 4 n. 5, PERB Case No. 87-A-04 (1992). The Union argues that there is no indication that FEMS raised before the Arbitrator the issue of a conflict between the 90-day light duty provisions of Article 24, and the 90-day time limitation for initiating adverse action under D.C. Code Section 5-1031. Therefore, the Union asserts that the Agency may not base its arbitration review request on this issue. (See Union Brief at p. 10).

Moreover, the Union contends that the only applicable statute in this case is D.C. Code § 5-1031, as it was the only statutory provision argued before the arbitrator. The Union asserts that any other provision, such as the District FMLA, or Federal FMLA, is not properly before the Board. (See Union Brief p.1). The Union states that the FMLA statutes concern leave for injured employees and time is measured in increments of calendar weeks, whereas D.C. Code § 5-1031 concerns the 90-day time limit for initiating adverse action, and is measured in workdays. The Union claims that in this case, the time limits do not conflict. Counting from August 2, 2007, the 16 calendar weeks under FMLA end *prior* to the 90 workdays under D.C. Code § 5-1031. (See Union Brief p. 3). The Union maintains, therefore, that the Agency can comply with both statutes simultaneously.

In addition, the Union argues that under the Federal Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*, and the DC Family Medical and Leave Act of 1990, D.C. Code § 32-501, *et seq.*, it is the employee who must initiate a request for sick leave, which did not occur in this case. Therefore, the Union asserts that neither the federal, nor the DC FMLA is applicable here. (See Union Brief at pgs. 25-26).

The Union contends that the 90-day time limitation for initiating disciplinary action in D.C. Code § 5-1031, begins to run only when there is a permanent injury, or when the short term injury is of sufficient duration that light duty would have to cease under Article 24. Here, by August 27, 2007, the Agency had determined that the grievant's injury was permanent, and not short term. Therefore, the Union asserts that the 90-day time limitation for initiating adverse action commenced in August 2007.¹⁰ (See Union Brief at p. 9).

Further, the Union maintains that by its own terms Article 24 of the CBA applies only if the nature of the injury is short term. Article 24 grants employees light duty work for a period of 90 calendar days, if it is available, for an employee who is incapacitated due to an on the job injury and if the nature of the injury is short term. (See Union Brief at pgs. 4-5).

¹⁰ The Union reasons that "[t]here should be no concern that [the Board] is returning to duty an employee who failed a psychological exam, because this was never proven. Dr. Hugonnet testified that the Agency misused his report. He did not believe it was appropriate for the Agency to act on his report without documented instances of problems from the employee. He stated that "If there is no documented deficiency in work performance, it renders moot the report." (Union Brief at p. 6, n. 1).

With regard to whether a fitness for duty removal is disciplinary in nature, the Union asserts that:

Regardless of whether all terminations for failing a fitness for duty exam are disciplinary in nature, the Agency in this case proposed and decided [the grievants's] termination as a disciplinary termination. The Advance Notice/Removal...stated: "In accordance with Chapter 16 of the D.C. Personnel Regulations, this is at least fifteen (15) calendar days of a [sic] proposal to remove you from your position as Paramedic.... This conduct is further defined as case, to wit: 'Incompetence' in 6 DCMR § 1603.3 (f)(5)." The [Union states that the reference to] "Chapter 16 of the D.C. Personnel Regulations ... is a reference to the "General Discipline and Grievances subchapter of the Comprehensive Merit Personnel Act..., [D.C. Code §] 1-616.51, which specifies that "disciplinary actions may only be taken for cause. The reference to 'incompetence' in 6 D.C.M.R. § 1603.3 (f)(5) is a reference to the District Personnel Manual list[] of the various matters that can constitute "cause," one of them being "incompetence."

(Union Brief at p. 11, n. 3).

As the Agency used the adverse action procedures for removing the grievant in this case, the Union claims that the procedure set forth in D.C. Code § 5-1031 (a), is applicable. Therefore, the 90-day limitation for initiating adverse action is applicable here. (See Union Brief at p. 14).

Further, the Union addressed whether an Agency may terminate an employee for failing to pass a fitness for duty examination without complying with the "for cause" provisions of the CMPA, D.C. Code §§ 1-601.01 *et seq.* The Union made the following observations:

In *D.C. Metropolitan Police Department v. Perry*, 638 A. 2d 1138 (1994), [stating that] the District of Columbia Court of Appeals considered a very similar question. (See Union Brief p. 14).

In [*Perry*], the agency had issued disciplinary actions against 14 police officers pursuant to the Civilian Complaint Review Board Act ("CCRB Act"), a statute enacted after the CMPA, and which statutorily provided a mechanism for disciplining police officers as a result of citizen complaints. The police officers claimed that these disciplines violated their rights under the CMPA, which requires that the Agency:

1. Initiate discipline within 45 workdays from "the date the Agency knew or should have

known” of the act or occurrence allegedly constituting cause.

2. Provide an employee with written notice stating any and all causes for which the employee is charged, and the reasons, specifically and in detail, for the proposed action.
3. Allow the employee to answer the notice of proposed action, either orally or in writing, or both.

....the employee is [then] entitled to a review by a disinterested designee prior to a final decision by the agency. *Perry*, 638 A. 2d at 1140. The police officers claimed that the disciplines imposed under the CCRB Act violated their rights under the CMPA, because the Agency failed to comply with the above CMPA requirements. *Id.* In determining whether the CCRB Act provisions effectively repealed the CMPA to the extent that they applied to the same situation, the District Court of Appeals relied upon the maxim that “both statutes should be given effect unless they are irreconcilable.” 638 A. 2d at 1144. As such, the Court held that the Agency’s failure to comply with the CMPA and its requirements violated the employees’ rights regarding discipline and as such those disciplines could not stand.

* * *

[The Union reasons that this] situation involving the CMPA’s discipline and corrective action requirements versus the fitness-for-duty [CBA] provisions compels the same result, but even more persuasively. This is so because the CMPA statutorily requires that “cause” be established for removals, that there be advance notice, and an opportunity to be heard, and,...in the case of an employee of the D.C. [FEMS], that the Agency initiate the action within 90 workdays of when the Agency knew or should have known of the basis for the action. D.C. Code § 1-601.01 *et seq.*, D.C. Code § 5-1031 (a). By comparison, the statutory provision regarding fitness for duty, D.C. Code § 1-620.07, does not...on its own terms provide for employee removal for failing a fitness for duty examination.

* * *

...[The Union maintains that] were the [the Board] to hold that the fitness for duty regulation allows for removals that are not “for cause” under the CMPA statute, [in the Union’s opinion, such a holding]...would be “contrary to law,” specifically the CMPA, D.C. Code § 1-610.01 *et seq.*; *see* also *Joseph v. D.C. Fire and Emergency Medical Services Department*, 54 DCR 6163, OEA Matter No. 1602-0030-06 (June 22, 2007) (“It is a generally well known principle that the D.C. Official Code shall prevail over the DPM.”).

* * *

[The Union notes that] [i]ncompetence is specifically defined as the “inability [of an employee] to satisfactorily perform the major duties of his or her position.” *Boswell v. D.C. Fire and Emergency Medical Services Department*, 54 DCR 6129, OEA Matter No. 1601-0155-06, p. 4, June 4, 2007. In [*Boswell*], the paramedic employee, who was diabetic, had suffered “two documented episodes of hypoglycemia while in the performance of her duties as a paramedic.” The Agency placed her on limited duty on August 9, 2006 and removed her on September 2, 2006 based upon the cause of “incompetence.” The D.C. Office of Employee Appeals Administrative Judge determined that because Ms. Boswell was diabetic and needed to frequently monitor her blood glucose level, she could not physically perform the duties of a paramedic, due to emergency patient care requirements and emergency medical vehicle driving requirements. As such, she was incompetent to perform the duties of her position, because to do so would endanger the Employee and others. *Id.*, p. 4.

* * *

The [Union argues that the] instant case falls into the same category as the above cases, as the Agency here removed [the grievant] for alleged “cause”, and in support thereof conducted a fitness-for-duty examination. The difference between the instant case and...*Boswell v. D.C. FEMS*, is that [here, the grievant] had exhibited no work performance difficulty that formed the basis for the Agency’s determination that it needed to conduct a mental fitness for duty examination....

(Union Brief at pgs. 14-18).

III. Discussion

As to the Agency's claim that the Award is on its face contrary to law and public policy, we disagree for the reasons discussed below.

As stated above, the Board's scope of review, particularly concerning the public policy exception, is extremely narrow. Furthermore, the U.S. Court of Appeals, District of Columbia Circuit, observed that "the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question "must be well defined and dominant," and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." Obviously, the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of "public policy." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F. 2d 1, 8 (D.C. Cir. 1986).

A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A2d 319, 325 (D.C. 1989).

Here, the Agency asserts that the Award violates law and public policy that: 1) requires employees be mentally and physically fit to perform their full duties; 2) favors rehabilitation and returning employees to work after an injury or illness; 3) is contained in Article 24 of the CBA and affords employees an opportunity to recover before an adverse action can be initiated. Moreover, the Agency states that the Award modifies the time provisions of Article 24 of the CBA, and thus violates Article 31 § 4(h) of the collective bargaining agreement which states that the "arbitrator shall not have the power to add to, subtract from or modify the provisions of this through the award." Thus, the Agency contends that an Award that relies on the 90-day limitation for initiating adverse action, forces the Agency to make a decision prior to June 2008, and is contrary to law and public policy.

The Board notes that in the recent Court of Appeals case, *District of Columbia Metropolitan Police Department v. District of Columbia Public Relations Board*, 901 A.2d 784 (D.C. App. 2006) ("*Fisher*"), the Court upheld the Board's decision sustaining an arbitrator's award that rescinded Fisher's termination due to MPD's failure to issue a decision within 55 days as required by Article 12, Section 6 of the parties' CBA. The majority opinion rejected MPD's assertion that some harmless error analysis is required in the interpretation of the parties' CBA. See, 901 A.2d 784, 787-788. No such requirement governs this case under the CMPA.

Id. at 787. The majority also rejected MPD's argument that the time limit imposed on MPD by Article 12, Section 6 of the parties' CBA is directory, rather than mandatory. Specifically, the majority concluded that "the arbitrator's interpretation of Article 12, Section 6 as mandatory and conclusive was not contrary 'on its face' to any law." *Id.* at 788. Furthermore, the majority noted the following:

When construction of the contract implicitly or directly requires an application of the "external law," i.e., statutory or decisional law [such as the mandatory-directory distinction MPD cites], 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. . . . Here the parties bargained for the arbitrator's interpretation of Article 12, Section 6, and absent a clear violation of the law - one evident 'on the face' of the arbitrator's award - neither PERB nor 'a court has . . . authority to substitute its judgment for [the arbitrator's].

901 A.2d 784, 789.

Here, the Agency argues that the Arbitrator's Award is contrary to law and public policy because it returns to full duty a paramedic who cannot perform the full duties of her position, stating that the Award 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 pgs. 3-4).

The Board, however rejects this argument, and finds the Court of Appeals' *Fisher* decision instructive. In *Fisher*, MPD argued that the award was contrary to law and public policy because of "the strong public interest in insuring the competence and honesty of public employees, especially armed police officers. . . ." 901 A. 2d 784 at 789. However, the Court of Appeals stated that:

No one disputes the importance of this governmental interest; the question remains whether it suffices to invoke the "extremely narrow" public policy exception to enforcement of arbitrator awards. *American Postal Workers*, 252 U.S. App. D.C. at 176, 789 F.2d at 8. Construing the similar exception in federal arbitration law, the Supreme Court has emphasized that a public policy alleged to be contravened "must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L.Ed.2d 298 (1983) (citation and internal quotation marks omitted); see *E. Associated Coal Corp. v. United Mine Workers of America., Dist. 17*, 531 U.S. 57, 63, 121

S. Ct. 462, 148 L.Ed.2d 354 (2000) (for exception to apply, the arbitrator's interpretation of the agreement must "run contrary to an explicit, well-defined, and dominant public policy"). Even where, in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L.Ed.2d 286 (1987), an employer invoked a "policy against the operation of dangerous machinery [by employees] while under the influence of drugs" a policy judgment "firmly rooted in common sense" the Supreme Court reiterated "that a formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award ... entered in accordance with a valid collective-bargaining agreement." *Id.* at 44, 108 S. Ct. 364.

Id. at pgs. 789-790.

The Board finds that the Agency has not cited any specific law or public policy that was violated by the Arbitrator's Award. Contrary to the arguments advanced, in the District an employee's "failure to perform the duties of the position" has resulted in adverse action with a charge of "incompetency". See *Boswell v. D.C. Fire and Emergency Medical Services Department*, 54 DCR 6129, OEA Matter No. 1601-0155-06, p. 4, June 4, 2007. Further, the case law supports the premise that in the District, when implementing adverse action, an agency must afford procedural rights that correspond to a disciplinary or adverse action. See *District of Columbia Metropolitan Police Department v. District of Columbia Public Relations Board*, 901 A.2d 784 (D.C. App. 2006) ("*Fisher*"). Therefore, the Board does not find that the Arbitrator's Award in the present case is contrary to law and public policy.

The Board declines the Agency's request that we substitute the Board's judgment for the arbitrator's decision for which the parties bargained. The Agency had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Instead, the Agency continues to argue that it learned of the cause of action in 2008, and not in 2007 as stated by the Arbitrator, and asks the Board to agree with its interpretation.

We have held that a disagreement with the Arbitrator's interpretation does not render an award contrary to law. See *DCPS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 49 DCR 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. The Agency's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. See *University of the District of Columbia and UDC Faculty Association*, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991).

FEMS further asserts that the Award is contrary to the express language in the collective bargaining agreement. FEMS cites Article 31, Sec. 4 (h) of the CBA which states that "the

arbitrator shall not have the power to add to, subtract from or modify the provisions of this [agreement] through the award." The Agency argues that the Award modifies Article 24 of the CBA. (Request at pgs. 6-7). The Board does not agree. The Agency has not shown that it cannot comply with the provisions of Article 24 that apply to temporary injury or illness.

The Board has held and the District of Columbia Superior Court has affirmed that, "[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the [CBA]." *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract." *Misco, Inc.*, 484 U.S. at 38. We have explained that: [by] submitting a matter to arbitration "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based." *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

In the present case, the Board finds that FEMS's grounds for review only involve a disagreement with the Arbitrator's interpretation of D.C. Code 5-1031 and Article 24 of the collective bargaining agreement. FEMS merely requests that we adopt its interpretation and remedy for its violation of the above-referenced provisions. In addition, we have found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement. See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

Here, FEMS states that the Arbitrator is prohibited from issuing an award that would modify, or add to, the CBA. However, FEMS does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that FEMS violated the 90-day provision of the D.C. Code, he also had the authority to determine the appropriate remedy. Contrary to the Agency's contention, the Arbitrator did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the grievant's termination. Thus, the Arbitrator acted within his authority.

The Board finds that FEMS' argument asks that this Board adopt its interpretation of the CBA and merely represents a disagreement with the Arbitrator's interpretation. As stated above, the Board will not substitute its, or the Agency's interpretation of the CBA for that of the Arbitrator. Thus, FEMS has not presented a ground establishing a statutory basis for review.

In view of the above, the Board finds no merit to FEMS' argument. The Board finds that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly

erroneous, contrary to law or public policy, or in excess of his authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Review Request filed by the District of Columbia Fire and Emergency Medical Services Metropolitan Police Department 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.

December 19, 2011

CERTIFICATE OF SERVICE

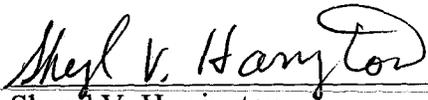
This is to certify that the attached Decision and Order in the Board's Decision and Order in PERB Case No. 10-A-18 is being transmitted via U.S. Mail to the following parties on this the 28th day of December, 2011.

Leisha A. Self, Esq.
District 14 Legal Rights Attorney
AFGE Office of General Counsel
80 F Street N.W.
Washington, D.C. 20001

U.S. MAIL

Repunzelle Johnson, Esq.
Attorney - Advisor
D.C. OLR CB
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

U.S. MAIL



Sheryl V. Harrington
Secretary