Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Fire and Emergency Medical Services,	
Petitioner,	PERB Case No. 10-A-18
and	Opinion No. 1236
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.
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> 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."
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> 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.
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> ...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]
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> 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]

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[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.*
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> [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).