

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 Metropolitan Police
Department,

Petitioner,

and

Fraternal Order of Police/Metropolitan Police
Department Labor Committee
(on behalf of Richard Moats),

Respondent.

PERB Case No. 08-A-02

Slip Opinion No. 1014

DECISION AND ORDER

I. Statement of the Case:

On November 19, 2007, the District of Columbia Metropolitan Police Department ("MPD") filed an Arbitration Review Request ("Request") in the above captioned matter. MPD seeks review of an arbitration award ("Award") which sustained in part and denied in part the grievance regarding the demotion of Sergeant Richard Moats ("Grievant"). MPD asserts that the Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Union" or "Respondent") opposes the Request.

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

II. Background

On October 25, 2005, the Grievant entered the office of Sergeant Curtis Williams at the First District substation and pinched the nipple of Officer Anthony Faverio twice. Afterwards, Officer Faverio told the Grievant to not touch him. (See Award at pgs. 1-2). The Grievant backed away from Officer Faverio and offered an apology. (See Award at p. 2). Sergeant Williams reported the incident to Lieutenant Renato Caldwell. (See Award at p. 2). The next day, Officer Faverio reported the incident to Inspector Andrew Solberg, who, in turn reported the matter to Sergeant Caldwell. (See Award at p. 2). Sergeant Caldwell informed Officer Faverio that he must report the incident to the Diversity and EEO Compliance Unit. (See Award at p. 2). Officer Faverio contacted Debbie-Anne Burt, EEO Investigator on November 3, 2005, and reported that he had been assaulted by the Grievant. (See Award at p. 2). An investigation was conducted and two other officers indicated that the Grievant had touched, or attempted to touch them. (See Award at p. 3).

MPD requested the United States Attorney to review the matter and determine whether a charge of misdemeanor sexual abuse should be brought against the Grievant. (See Award at p. 3). On December 9, 2005, the United States Attorney advised MPD that criminal prosecution would not be pursued. (See Award at p. 3).

The Grievant was interviewed as part of the investigation and denied any sexual intent and explained that he "was just kidding around." (Award at p. 3). A report was issued in which it was determined that the Grievant's conduct did not rise to the level of illegal sexual harassment under Title VII of the Civil Rights Act of 1964. (See Award at p. 4). Investigator Burt found sufficient evidence that the Grievant had touched Officer Faverio's nipples and engaged in misdemeanor sexual abuse pursuant to D.C. Code § 22-3001.¹ (See Award at p. 4). Investigator Burt also noted that General Order 1202.1, Part

¹ D.C. Code § 22-3001 provides, in pertinent part, that:

For the purposes of this chapter:

(1) "Actor" means a person accused of any offense proscribed under this chapter.

(4) "Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.

(8) "Sexual act" means:

1(B)(7) prohibits "commission of any act which constitutes a crime whether or not a court record reflects a conviction." (Award at p. 4). Investigator Burt also recommended that the Grievant be disciplined and reassigned from the First District. (See Award at p. 4).

The Grievant was issued a Notice of Proposed Adverse Action ("Notice") by Assistant Chief Cockett on March 6, 2006, to demote the Grievant to the rank of Officer. (See Award at p. 4). Inspector Deidre Porter, who prepared the Notice, considered the *Douglas*² factors and determined that demotion was the appropriate penalty because the Grievant was a supervisor. (See Award at p. 4). Inspector Porter also stated at the hearing that she did not have the Grievant's information on his previous good record, including various commendations, which might have had an effect on the choice of penalty she recommended. (See Award at pgs. 4-5).

The Notice charged the Grievant with two acts of misconduct:

Charge 1: Violation of General Order 1202.1 I-B-24, conduct prejudicial to the reputation and good order of the police force. Specification: pinching Faverio's nipple on October 25, 2005, conduct offensive to Faverio.

Charge 2: Violation of General Order 1202.11 I-B-7, commission of an act that would constitute a crime,

(A) The penetration, however slight, of the anus or vulva of another by a penis;

(B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

(C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph.

(9) "Sexual contact" means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(11) "Victim" means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter.

² See *Douglas v. Veterans Administration*, 5 MSBP 312 (1981)

whether or not a court reflects a conviction. Specification: pinching Faverio's nipple on October 25 constituted misdemeanor sexual abuse under [District of Columbia Code] § 22-3006.

(Award at p. 5).

Grievant responded to the Notice, denying the charges and explaining that his actions on October 25, 2005, were not intended to abuse Officer Faverio. (See Award at p. 5). The Grievant also emphasized his previous good record, including that he had been shot in the line of duty and had numerous commendations. (See Award at p. 5).

The Final Notice of Adverse Action was issued on May 11, 2006, which sustained the two charges recommended in the Notice. (See Award at p. 5). Assistant Chief Cockett did consider the Grievant's previous record of commendable conduct but found that his actions on October 25, 2005, still warranted the penalty. (See Award at p. 6).

The Grievant appealed the Final Notice to Chief of Police Ramsey. (See Award at p. 5). Chief Ramsey denied the appeal on June 14, 2006, at which time the demotion became effective. (See Award at p. 6). The Union invoked arbitration on June 27, 2006. (See Award at p. 6).

The parties' agreed that the following issue was before Arbitrator Shapiro:

"Was Grievant's demotion for cause? If not, what shall be the remedy."

(Award at p. 6).

At arbitration, MPD argued that it had cause to demote the Grievant. In particular, MPD argued that the penalty was appropriate because of: (1) the seriousness of the incident; (2) the Grievant's rank; and (3) the notoriety of the incident.³ (See Award at pgs. 7-8). The Union argued that although the Grievant did pinch Officer Faverio's nipple, the penalty of demotion is not appropriate. (See Award at p. 8). The Union claimed that under General Order 1202.1, Disciplinary Procedures and Processes, discipline should be progressive. In addition, the Union contended that the Grievant's previous good work record was not given proper consideration. Also, the Union noted that the notoriety the incident received was due to MPD's failure to maintain the confidentiality of the materials related to the investigation. (See Award at p. 8).

³ Materials concerning the investigation were faxed to the First District substation, where the fact that Officer Faverio and another officer were homosexuals became generally known. As a result Officer Faverio filed a lawsuit against MPD. (See Award at p. 6).

The Arbitrator first addressed Charge 2 concerning misdemeanor sexual abuse, which is defined as the action of a person who "engages in a sexual act or sexual contact with another person who should have knowledge or reason to know that the act was committed without that other person's permission." (Award at p. 9, citing D.C. Code § 22-3006). The Arbitrator noted that the definition of "sexual contact" for purposes D.C. Code § 22-3006, is "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." D.C. Code § 22-3001(9). (Award at p. 9). The Arbitrator found that there was no evidence that the Grievant had the requisite intent to be found guilty of the crime. (See Award at p. 9). In addition, the Arbitrator stated that Investigator Burt's determination that the mere act of touching Officer Faverio was sufficient to infer intent renders the "with an intent" clause of D.C. Code § 22-3001(9) "superfluous." (Award at p. 9). The Arbitrator also found that MPD "had failed to demonstrate that the Grievant knew or should have known that his contact with Faverio was committed without Faverio's permission." (Award at p. 9). Consequently, the Arbitrator concluded that the Grievant had not committed misdemeanor sexual abuse. (See Award at p. 9.)

Regarding Charge 1, the Grievant admitted his actions were inappropriate. (See Award at p. 10). Therefore, the Arbitrator concluded that it was unnecessary to disturb MPD's finding that the Grievant, by his behavior, engaged in conduct prejudicial to the good order of the police force. (See Award at p. 10). The Arbitrator sustained Charge 1. (See Award at p. 10).

Concerning the penalty, the Arbitrator rejected MPD's decision to impose a penalty "well in excess of the minimum called for in the Table of Penalties", particularly due to "MPD's failure to give serious consideration to mitigating factors." (Award at p. 10). The Arbitrator found that since the Grievant was not guilty of misdemeanor sexual abuse, the Grievant's actions "were not as serious" as MPD purported them to be." (Award at 10). The Arbitrator also found that the offense did not involve an abuse of the Grievant's supervisory position nor were they motivated by malice towards Officer Faverio. (See Award at p. 10). The Arbitrator also noted that MPD had failed to establish that the penalty was consistent with similar misconduct. (See Award at p. 10). In addition, the Arbitrator believed that MPD's assertion that the notoriety of the incident warranted the penalty was without merit. The notoriety, the Arbitrator determined, was caused by MPD's disclosure of the police officers' sexual orientation. (See Award at p. 11). The Arbitrator ruled that MPD had not given sufficient consideration to several of the *Douglas* factors, including the Grievant's potential for rehabilitation. (See Award at pgs. 11-12). In light of these circumstances, the Arbitrator found the demotion "more punitive than corrective." (Award at p. 12).

The Arbitrator sustained the grievance in part and denied the grievance in part. (See Award at p. 12). The Arbitrator ruled that "[t]he period of the Grievant's demotion . . . will stand, in these circumstances, in lieu of a suspension." (Award at p. 12). In

addition, the Arbitrator ordered that the Grievant be re-promoted prospectively to the rank of sergeant within thirty days of the date of the Award, and shall have his seniority as sergeant retroactively restored. (See Award at p. 12).

In its Request, MPD asserts that the Award is contrary to law and public policy. (See Request at p. 2). FOP opposes the Request.

III. Discussion

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

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of the contract. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy.'" *Id.* A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well-defined, public policy grounded in law or legal precedent. See *United Paperworkers International Union, AFL-CIO v. Misco, Inc.* 484 U.S. 29, 43; *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234, 1239 (D.C. Cir. 1971). The violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result."⁴ The party seeking to overturn the award has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). 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 Local 246*, 54 A.2d 319, 325 (D.C. 1989).

⁴ *MPD v. FOP/MPD Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing *AFGE, Local 631 and Dep't of Public Works*, 45 DCR 6617, Slip Op. 365 at p. 4 n, PERB Case No. 93-A-03 (1998); 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).

MPD contends that because "Arbitrator Shapiro failed to recognize that non-violent sexual touching assault is a lesser included offense within the crime of misdemeanor sexual abuse, his decision to dismiss the charge against Grievant for engaging in conduct which would constitute a crime is erroneous as a matter of law." (Request at p. 4). In addition, MPD argued that Arbitrator Shapiro's interpretation of how the *Douglas* factors are to be applied was erroneous as a matter of law. Specifically, MPD believes that Arbitrator Shapiro suggests that it was required to consider mitigating factors prior to the issuance of the Notice of Proposed Adverse Action. (See Request at 5).

We find that MPD has not cited any specific law or public policy that mandates that the Board reverse the Arbitrator's Award. MPD 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). Here, MPD failed to do so. Instead, MPD argues that the Arbitrator should have interpreted D.C. Code § 22-3006 to include a lesser offense of simple assault, and also that the Arbitrator should have found the Grievant committed this offense. In addition, MPD argues that the Arbitrator misinterpreted the *Douglas* case with regard to the application of mitigating factors in the determination of the penalty. We find MPD's arguments before us are a repetition of the arguments considered and rejected by the Arbitrator. We have held that by agreeing to submit the settlement of a grievance to arbitration, it is the Arbitrator's interpretation, not that of the Board, for which the parties have bargained. See *University of the District of Columbia and University of the District of Columbia Faculty Association*, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). We have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement and related rules and regulations as well as his evidentiary findings and conclusions . . ." *Id.* This includes the arbitrator's interpretation of all applicable statutes. See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 42 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). The Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." *District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union 246*, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).

In the present case, the parties submitted their dispute to an Arbitrator. MPD's argument is merely a disagreement with the Arbitrator's findings, and interpretation of the language in the D.C. Code and the *Douglas* case. MPD asks the Board to adopt its findings and interpretation of the provisions of the D.C. Code and case law. This we will not do. The Board finds that MPD's disagreement with the Arbitrator's interpretation is not grounds for reversing the Arbitrator's Award.⁵

⁵ See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008 (May 13, 2005) and *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 01 MPA 18 (September 17, 2002).

In view of the above, we find no merit to MPD's arguments. 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. Therefore, no statutory basis exists for setting aside this Award. We deny MPD's Arbitration Review Request.

ORDER⁶

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Arbitration Review Request is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

July 16, 2010

⁶ This Decision and Order implements the decision and order reached by the Board on February 28, 2008 and ratified on April 15, 2010.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.08-A-02 was transmitted via Fax and U.S. Mail to the following parties on this the 16th day of July 2010.

Mr. William B. Sarvis, Jr.
FOP/MPD Labor Committee
1524 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

FAX & U.S. MAIL

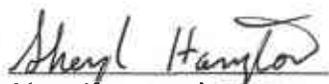
Mark Viehmeyer, Director
Office of Labor Relations
Metropolitan Police Department
300 Indiana Avenue, N.W., Room 4126
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Barry Shapiro, Esq.
8404 Queen Annes Drive
Silver Spring, MD 20910

U.S. MAIL


Sheryl V. Harrington
Secretary