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

_____)	
In the Matter of:)	
)	
District of Columbia)	
Metropolitan Police Department,)	
)	PERB Case No. 06-A-09
Petitioner,)	
)	Opinion No. 883
v.)	
)	
Fraternal Order of Police/Metropolitan)	
Police Department Labor Committee)	
(on behalf of Hoang Nguyen),)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Metropolitan Police Department (“MPD” or “Agency”) filed an Arbitration Review Request (“Request”) in the above-captioned matter. MPD seeks review of an Arbitration Award (“Award”) that rescinded the termination of Hoang Nguyen (“Grievant”), a bargaining unit member.

Arbitrator Michael Murphy was presented with the issue of whether MPD had just cause to terminate the Grievant.¹ The Arbitrator found that MPD failed to prove that it had just cause to terminate the grievant, but did prove that it had cause to discipline the Grievant. CITE. As a result, the Arbitrator ruled that the appropriate discipline in this case should be a sixty day suspension. (Award at 18).

¹ The Arbitrator also considered the Fraternal Order of Police’s argument that: (1) MPD violated the 55-day rule contained in the parties’ collective bargaining agreement, and (2) MPD violated the District Personnel Manual. The Arbitrator found that the Grievant expressly waived application of the 55-day rule. (Award at 11). In addition, the Arbitrator ruled that MPD did not violate the District of Columbia Personnel Manual by adding a charge of “Neglect of Duty” at the end of the hearing. (Award at 12).

MPD contends that: (1) the Arbitrator was without authority to grant the Award; and (2) the Award is contrary to law and public policy. (Request at 2). The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request ("Opposition").

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

II. Discussion

Beginning around November 2001 and continuing to April 2003, the Grievant was hired as a crossing guard at the Maret School, a private school in the northwest section of Washington, D.C. (Award at 6).

MPD claimed that the Grievant failed to obtain approval for this outside employment. (Award at 6). In addition, MPD asserted that the Grievant "acted as a go between for other officers, regarding the Maret School, by scheduling their work assignments and picking up checks...in violation of MPD regulations." (Award at 6).

On June 8, 2004, MPD served the Grievant with a Notice of Proposed Adverse Action indicating MPD's intention to terminate him for his participation in the crossing guard operation at the Maret School. (Award at 2). That same day, the Grievant responded to the Notice and requested that a Trial Board be convened. (Award at 7).

The Trial Board proceeding was scheduled for June 29. On June 24, 2004, the Grievant's counsel noted a scheduling conflict for the June 29 hearing and asked that the proceeding begin on June 30, 2004. (Award at 8).

The Trial Board Convened on June 30, 2004, to hear the charges against the Grievant for engaging in unauthorized outside employment at the Maret School and brokering outside employment for other officers.² The Trial Board found the Grievant guilty of several charges and recommended that he be suspended for sixty days. (Award at 1).

On September 22, 2004, the Grievant received a Final Notice of Adverse Action from Assistant Chief Shannon P. Cockett, Director of Human Services. This Notice did not adopt the findings of the Trial Board that the Grievant be suspended for sixty days; instead, it found that termination was the appropriate penalty. (Award at 1-2). The Grievant appealed the decision by invoking arbitration pursuant to the parties' collective bargaining agreement ("CBA"). (Award at 2).

² In addition, at the hearing the charges and specifications were amended to include a "neglect of duty" allegation. (Award at 2).

At arbitration, FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within fifty-five days of the date that the Grievant filed his request for a departmental hearing. (Award at 1). Article 12, Section 6 of the parties' CBA provides in pertinent part that an employee "shall be given a written decision and the reasons therefore no later than...55 days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing." (Award at 3). FOP argued that in this case the Grievant requested a "hearing by memo of June 8, 2004." (Award at 4). Therefore, MPD was required to provide a written decision no later than August 2, 2004. MPD issued its final decision ordering the Grievant's termination on September 22, 2004, well after the deadline. (Award at 4-5). FOP argued that because of this violation the termination should be rescinded. (Award at 4).

Additionally, FOP claimed that MPD violated the District of Columbia Personnel Manual ("DPM") by adding an additional charge of "neglect of duty" during the hearing. (Award at 5). FOP argued that this procedural violation was grounds for dismissing the charge. *Id.* Further, FOP asserted that the penalty imposed was arbitrary and inappropriate. (Award at 5).

MPD countered with the argument that when FOP asked for continuance of the hearing before the Trial Board, its continuance request resulted in a complete waiver of the 55-day time limitation in Article 12, Section 6 of the parties' CBA. (Award at 5). Therefore, the 55-day rule should not apply. (Award at 5). In addition, MPD asserted that even if a violation of the 55-day rule occurred, it constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. (Award at 5). In support of its position, MPD cited the decision in *Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 01-MPA-19 (September 10, 2002).

Further, MPD urged that the charge of "neglect of duty" was properly added because the MPD Trial Board Handbook permits charges to be added based on evidence presented. (Award at 6).

In addition, MPD denied that it erred in its application of the *Douglas* factors in this case. (Award at 6). With regard to the penalty imposed on the Grievant (termination), MPD claimed that there was substantial evidence to support the action taken. (Award at 6).

In an Award issued on February 27, 2006, Arbitrator Michael Murphy found that FOP expressly waived application of the 55-day rule in this case. (Award at 10). In addition, the Arbitrator rejected FOP's claim that MPD violated the DPM by adding a charge at the hearing. Specifically, the Arbitrator noted that "[p]age 6 of the MPD Trial Handbook...specifically provides that, where appropriate based on the evidence, the Panel is authorized to add charges. Since the addition of a charge is an authorized Trial Board procedure, the Union argument on this point is not persuasive." (Award at 12).

Having addressed the two procedural arguments raised by FOP, the Arbitrator focused on the merits of the case and addressed the issue of whether MPD had just cause to terminate the Grievant. Arbitrator Murphy indicated the following:

The question remains as to whether just cause existed for increasing the penalty from a sixty (60) day suspension to termination, as proposed by Assistant Chief Shannon P. Cockett. After reviewing the findings of the Trial Board, Chief Cockett rendered a decision in Officer Nguyen's case in which she stated:

In accordance with General Order 1202.1.G.3.b (3), I hereby affirm the original penalty as proposed in the Notice of Proposed Adverse Action, dated June 8, 2004, and received by you on that date. For the cited violations you will be removed from the force. Your removal will become effective November 5, 2004.

The General Order relied on by Chief Cockett...notes that the board, at the conclusion of the hearing, shall make findings of fact, conclusions of law and recommendations to the Administrative Services Officer (that person is Chief Cockett), setting forth its opinion in the matter. The Administrative Services Officer then has a number of options as outlined in the General Order. The case may be remanded to the same Board or a different Board, which did not happen in Officer Nguyen's grievance. Alternatively, the Administrative Services Officer can affirm, reduce or set aside the Trial Board's recommendation. However, there is no mention in the General Order of there being any authority for the Administrative Services Officer to increase a proposed penalty. Nonetheless, Assistant Chief Cockett opted to increase the penalty proposed by the Trial Board. How does this affect the outcome?

* * *

In the instant case we have precedent that is less than a month old, addressing the very same issue (General Order 1202.1.G.3.b(3)) and involving the very same parties. The MPD has offered absolutely no countervailing argument on this point that would support the actions taken by Chief Cockett. Accordingly, the arbitrator is constrained to find that Chief Cockett exceeded the limits of her authority when she increased the penalty that had been recommended by the Trial Board. The General Order, which she cited and which sets forth her authority, simply does not grant her this power. As a result of this arbitrary action, and consistent with the recent arbitral award on this very point, the undersigned arbitrator is ineluctably drawn to the conclusion that the MPD did not have cause for terminating the grievant and its actions in this regard must be set aside.

* * *

Consistent with the discussion set forth above, the arbitrator holds that the Grievant's discharge was arbitrary and therefore not for cause as required by Article 4.5 and Article 12.1 of the CBA. However, the penalty recommended by the Trial Board was for just cause. In light of this finding, the grievance is sustained and the grievant shall be reinstated to his former position with the MPD, subject to the penalty of a sixty day suspension without pay, a suspension from participating in the Outside Employment Program for a period of six (6) months, and a transfer from the Special Operations Division to a Patrol District, as recommended by the Trial Board.

(Award at 15-18).

MPD takes issue with the Award. Specifically, MPD argues that: (1) the Arbitrator was without authority to grant the Award; and (2) the Award is contrary to law and public policy. (Request at 2).

MPD contends that "the authority of...Assistant Chief [Cockett] is clear. The Assistant Chief may (1) remand the case to the same or different Board, or (2) the Assistant Chief may issue a decision affirming, reducing, or setting aside the action, **as originally proposed in the notice of proposed action.**" (Request at 4-5; emphasis in original). Therefore, MPD suggests that the Arbitrator exceeded his authority.

MPD's arguments are a repetition of the positions it presented to the Arbitrator and its ground for review only involves a disagreement with the Arbitrator's interpretation of General Order 1202.1.G.3.b(3). MPD merely requests that the Board adopt its interpretation of the General Order. This we will not do.

We have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." *University of the District of Columbia and University of the District of Columbia Faculty Association*, 39 D.C. Reg. 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, the Board has 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/or regulations as well as his evidentiary findings and conclusions." *Id.* Moreover, "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 D.C. Reg. 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 Arbitrator Murphy. Neither MPD's disagreement with the Arbitrator's interpretation of General Order 1202, nor MPD's disagreement with the Arbitrator's findings and conclusions, are grounds for reversing the

Arbitrator's Award. See *MPD and FOP/MPDLC (on behalf of Keith Lynn)*, __ D.C. Reg. __, Slip Op No. 845, PERB Case No. 05-A-01 (2006).

The Board finds that Arbitrator Murphy was within his authority to rescind the Grievant's termination. We have held that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions." *D.C. Department of Public Works and AFSCME Local 2091*, 35 D.C. Reg. 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). 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.³ See *MPD and FOP/MPDLC*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Furthermore, the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), that arbitrators bring their "informed judgment" to bear on the interpretation of collective bargaining agreements, and that is "especially true when it comes to formulating remedies." Further, other courts have followed the Supreme Court's lead in holding that arbitrators have implicit authority to fashion appropriate remedies. See *Metropolitan Police Dept. v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPD 0008 at p. 6, (May 13, 2005).

In the present case, MPD does not cite any provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that MPD failed to prove that it had cause to terminate the Grievant, but did prove that it had cause to discipline him, the Arbitrator had authority to determine what he deemed to be the appropriate remedy.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (Request at 2). For the reasons discussed below, we disagree.

In support of its public policy argument, MPD states the following:

[I]t should not be ignored that the Grievant was found guilty of committing serious acts of misconduct, and that determination has not been contested or otherwise challenged...It is beyond question that the suitability of a person employed as a police officer is an important public policy. [The] Grievant committed his misdeeds while employed as a police officer and [MPD] decided that he was no longer suitable to function in that capacity. A remedy of reinstatement returns to MPD an individual unsuitable to serve as a police officer. Clearly such a remedy would violate public policy.

(Request at 6).

³ We note that if MPD had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

The possibility of overturning an arbitration decision on the basis of public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to an arbitrator’s ruling. “[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy.” *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). A petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well-defined public policy grounded in law 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/MPDLC*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also *District of Columbia Public Schools and AFSCME District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 85-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 Local 246*, 54 A.2d 319, 325 (D.C. 1989).

We find that MPD has not cited any specific law or public policy that was violated by 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/MPDLC*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, MPD failed to do so. Moreover, it is clear that MPD’s argument involves a disagreement with the Arbitrator’s ruling. This Board has held that “a disagreement with the arbitrator’s interpretation...does not make the award contrary to law and public policy.” *AFGE Local 1975 and Department of Public Works*, 48 D.C. Reg. 10955, Slip Op. No. 413 at pp. 2-3, PERB Case No. 95-A-02 (1995).

In view of the above, we find no merit to MPD’s arguments. Additionally, we find 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 this authority under the parties’ collective bargaining agreement. Therefore, no statutory basis exists for setting aside the Award.

ORDER

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 30, 2012

CERTIFICATE OF SERVICE

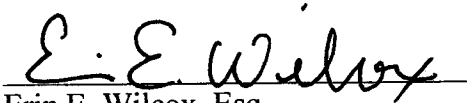
This is to certify that the attached Decision and Order in PERB Case No. 06-A-09 was transmitted via U.S. Mail to the following parties on this the 30th day of July, 2012.

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