Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department,	
Petitioner,	PERB Case No. 06-A-06
and	Opinion No. 866
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Toledo Kelley),	
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Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter, which rescinded the termination of Toledo Kelley ("Grievant"), a bargaining unit member. Specifically, the Arbitrator found that MPD violated the 55-day rule contained in the parties' collective bargaining agreement ("CBA").

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

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the arbitrator was without or exceeded his or her jurisdiction...." D.C. Code §1-605.02(6) (2001 ed).

II. Discussion

"Beginning around November 20, 2000 and continuing to October 2, 2003, the Grievant was employed as a part-time counselor for the Edgemeade Center in Upper Marlboro, Maryland, where she counseled abused adolescents. On March 22, 2002, she fell off a chair while on police duty and injured herself. While on paid leave from MPD, she worked a full shift on March 24 and March 29, 2002, at the Edgemeade Center. . . Since she had never obtained permission to be employed outside of MPD, she was charged with being employed without prior authorization. She pleaded guilty to this charge. In addition, since she continued to work while on paid leave from MPD, she was charged with malingering, which she denied." (Award at p. 6) On July 30, 2004, the Grievant received a Notice of Proposed Adverse Action. The Grievant had been employed by MPD for approximately 15 years when she received the Notice of Proposed Adverse Action. Prior to July 30, 2004 there is no indication that she had been subject to any disciplinary action.

On August 3, 2004, the Grievant filed a response to the Notice of Proposed Adverse Action and requested a departmental hearing. On August 24, 2004 a hearing was held before a three-member panel. At the hearing an additional charge of "conduct unbecoming an officer" was added to the other two charges. (See Award at p. 2 and Request at p. 3)

The panel recommended the Grievant's termination. On October 6, 2004, the Grievant was advised that she would be terminated by MPD effective on November 12, 2004. The Grievant appealed the decision by invoking arbitration pursuant to the parties' CBA. (See Award at p. 1)

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within 55 days of the date that the Grievant filed her request for a departmental hearing. 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 p. 2.) FOP argued that in this case the Grievant requested "a [d]epartmental hearing by memo of August 3, 2004." (Award at p. 3) Therefore, MPD "had until on or about September 27, 2004, or fifty-five (55) from her request for a hearing, to issue a written decision. [However, the written decision was not issued] until October 6, 2004, nine (9) days after the due date." (Award at p. 3) FOP argued that "numerous arbitral decisions, PERB rulings and a D.C. Superior Court ruling mandate that the case against [the Grievant] be dismissed because of this violation."[1] Id. In addition, FOP contended that "the penalty . . . assessed [against the Grievant was] per se arbitrary and inappropriate." (Award at p. 4)

[1]FOP also claimed that MPD violated the D.C. Personnel Manual by: (1) adding an additional charge during the hearing and (2) allowing Assistant Chief Cockett to propose the adverse action and to serve as the deciding official. FOP argued that these procedural violations were grounds for reinstating the Grievant.

MPD acknowledged that its final decision was issued more than 55 days after the date the Grievant elected to have a hearing before the three member panel. However, MPD argued that the violation of the 55-day rule constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained.[2] In support of its position, MPD cited Judge Abrecht's decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002).

In an Award issued on February 6, 2006, Arbitrator Michael Murphy rejected MPD's argument by noting the following:

> Article 12 Section 6, directs that the Employer must notify an employee in writing of any disciplinary decision no later than 55 days after the employee requests a Departmental hearing. . . . The record reflects that the grievant made her request for a Departmental hearing by memo dated August 3, 2004. The fifty-five (55) days for the MPD to provide her with written notification would have been up on or about September 27, 2004. . . [t]he grievant was not notified in writing that she was to be terminated until October 6, 2004. . . .This notification occurred 9 days after the expiration of the 55 day notice period commonly referenced as the fifty-five (55) day rule. The Employer candidly acknowledges that it is in violation of the rule. What remains to be determined are the consequences, if any, that follow from the admitted violation. The Union contends that this should lead to a reversal of the disciplinary action. The Employer contends that it is harmless error which should have no impact on the outcome of the case. . . .(Award pgs. 6-7) Judge [] Albrecht's opinion,. . . would be far more compelling if this was ruling on a federal sector case, instead of a D.C. case. . . The Supreme Court made it clear that, in the federal sector, in light of the express language of 5 USC §7701 (c) of the CSA, an arbitrator may overturn an agency disciplinary action on procedural grounds only for "harmful error", which in fact can be shown to have substantially affected the outcome of the case. . . .Procedural matters regarding D.C. employees are not governed by 5 USC §7701 (c) of the CSA. . . .(Award pgs. 12-13) Consistent with the discussion set forth above, the arbitrator holds that the grievant's discharge was violative of the procedural rights guaranteed to the grievant by Article 12, Section 6 of the CBA and her termination was, therefore, not for cause as required by Article

[2]MPD also asserted "that the charge that Assistant Chief Cockett impermissibly acted in dual capacities . . .[could not be] raise[d] at arbitration [because it had] not [been] previously raised on appeal." (Award at p. 5) In addition, MPD argued that the charge of conduct unbecoming an officer was properly added because the MPD Trial Board Handbook allows charges to be added based on evidence presented.

> 4.5 and Article 12.1(b) of the CBA. In light of this finding. . . [the grievant] shall be returned to employment with full back pay and benefits and without any loss of seniority. (Award at p. 18)

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

MPD asserts that the Arbitrator was presented with two decisions of the District of Columbia Superior Court regarding a remedy for violations of the CBA's fifteen-day rule and fifty-five day rule. In both instances the cases were before the Superior Court on review of arbitration decisions that reversed the discipline imposed by MPD due to missed contractual time limits. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-19 (September 10, 2002), Judge Abrecht reversed the decision of the arbitrator. In the other case, Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-18 (September 17, 2002), Judge Kravitz upheld the decision of the arbitrator. MPD argues that in the present case, "the Arbitrator was guided by Judge Kravitz's decision and, therefore, concluded that he had the authority to fashion a remedy for the failure of [MPD] to comply with the 55-day rule. . ." (Request at p. 4) MPD "submits . . . that the decision of Judge Abrecht should have been followed and not that of Judge Kravitz." (Request at p. 6)

In addition, MPD contends that "[t]he failure to comply with the fifty-five day period was harmless in that [the] Grievant was not denied any due process protections. Moreover, the Grievant was not prejudiced by the delay because during the period she remained in a pay status." (Award at p. 6)

MPD notes that it 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. (See Award at p. 6) Also, MPD claims that the "Grievant's misconduct compromised her integrity and honesty. Consequently, her value as a police officer was lost." (Award at pgs. 6-7) Finally, MPD asserts that a remedy of reinstatement returns to MPD an individual unsuitable to serve as a police officer. Clearly such a remedy would violate public policy. (See Request at p. 7).

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 Article 12, Section 6 of the parties' CBA. MPD merely requests that we adopt its interpretation and remedy for its violation of the above-referenced provision of the parties' CBA. This we will not do.

MPD suggests that the plain language of Article 12, Section 6 of the CBA does not impose a penalty for noncompliance with the 55-day rule. Therefore, by imposing a penalty where none was expressly stated or intended, MPD asserts that the Arbitrator added to and modified the parties' CBA. (See, Request at pgs. 5-6)

In cases involving the same parties, we have previously considered the question of whether an arbitrator exceeds his authority when he rescinds a Grievant's termination for MPD's violation of Article 12, Section 6 of the parties' CBA. In those cases we rejected the same argument being made in the instant case and held that the Arbitrator was within his authority to rescind a Grievant's termination to remedy MPD's violation of the 55-day rule. (See MPD and FOP/MPD Labor Committee (on behalf of Jay Hang), Slip Op. No 861, PERB Case No. 06-A-02 (2007), MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez, Slip Op. No 814, PERB Case No. 05-A-03 (2006) and MPD and FOP/MPD Labor Committee (on behalf of Angela Fisher) Slip Op. No., PERB Case 02-A-07, *affirmed by Judge Kravtz of the Superior Court in .Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 01-MPA-18 (September 17, 2002), affirmed by District of Columbia Court of Appeals in Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 2006). 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, 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).

In the present case, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that MPD violated Article 12, Section 6 of the parties' CBA, he also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator Murphy 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, Arbitrator Murphy acted within his authority.

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

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 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

[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.

tempting such a course might be in any particular factual setting." District of Columbia Department of Corrections v. Teamster Union Local 246, 54 A2d 319, 325 (D.C. 1989).

MPD contends that the award violates the "harmless error" rule found in the Civil Service Reform Act, 5 U.S.C. §7701(c)(2)(A). We have previously considered and rejected this argument. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 2006) MPD appealed our determination that the "harmless error rule" was not applicable in cases such as the one currently before the Board. The District of Columbia Court of Appeals rejected MPD's argument that a violation of the CBA's 55-day rule was subject to the "harmless error" rule by stating the following:

> The Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-617.01 *et seq.*. (2001), regulates public employee labor-management relations in the District of Columbia, and, as MPD concedes, the CMPA contains no provision requiring harmful (or harmless) error analysis before reversal of erroneous agency action is permitted. Neither do PERB's rules impose such a review standard on itself or on arbitrators acting under its supervision. MPD points out that had Officer Fisher, instead of electing arbitration with the sanction of the FOP, chosen to appeal her discharge to the Office of Employee Appeals (OEA), *see* D.C. Code § 1-606.02, she would have been met with OEA's rule barring reversal of an agency action "for error . . . if the agency can demonstrate that the error was harmless," 6 DCMR § 632.4, 46 D.C. Reg. 9318-19; and MPD, again citing *Cornelius*, warns of the forum-shopping and inconsistency in decisions that could result if PERB (and arbitrators) were not held to the same standard. *See Cornelius*, 472 U.S. at 662 ("If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim . . . would tend to select the forum - - the grievance and arbitration procedures - - that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid."). But, as the quotation from Cornelius demonstrates, Congress made its intent to avoid these evils "clear" in the Civil Service Reform Act. *Id.* at 661 ("Adoption of respondents' interpretation . . . would directly contravene this clear congressional intent.") Since MPD can point to no similar expression of legislative intent here, it cannot claim a misinterpretation of law by the arbitrator that was apparent "on its face." 901 A.2d 784, 787[4]

[4]The Court of Appeals also rejected MPD's argument that the time limit imposed on the agency by Article 12, Section 6 of the parties' CBA is directory, rather than mandatory.

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/MPD Labor Committee, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, MPD failed to do so.

In view of the above, we find no merit to either of MPD's arguments. Also, 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 his 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.

February 9, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-06 was transmitted via Fax and U.S. Mail to the following parties on this the 9th day of February 2007.

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