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

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee,)	
(on behalf of Officer Timothy Harris))	
)	
Petitioner,)	
)	PERB Case No. 09-A-11
and)	
)	Opinion No. 1295
)	
District of Columbia Metropolitan Police)	
Department,)	
)	
Respondent.)	
)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

On July 27, 2009, the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union,” “Petitioner,” or “FOP”) filed an Arbitration Review Request (“Request”) in the above-captioned matter. FOP seeks review of an arbitration award (“Award”) that denied the Union’s grievance filed on behalf of Officer Timothy Harris (“Grievant” or “Officer Harris”) with the District of Columbia Metropolitan Police Department (“MPD,” “Respondent” or “Department”).¹ The Arbitrator ruled that MPD did not violate the collective bargaining agreement (“CBA” or “the Agreement”) between the Union and MPD.

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

¹ The Union’s grievance concerned the termination of Officer Harris’s employment.

II. Discussion:

On July 22, 2004, MPD served Officer Timothy Harris with a Notice of Proposed Adverse Action, which asserted six charges of misconduct stemming from Officer Harris's involvement in a September 13, 2002, altercation. (See Award at p. 2). Officer Harris was charged with:

- 1.) Failure to obey orders and directives by discharging his service weapon during an altercation with his brother.
- 2.) Insubordination by failing to comply with direct orders from superior officers.
- 3.) Being under the influence of alcohol when off duty.
- 4.) Conduct unbecoming an officer by shouting profanity towards a lieutenant and assaulting a sergeant. Firing service weapon during altercation with his brother.
- 5.) Willfully and knowingly making an untruthful statement that he fired one shot when his weapon was discharged twice.
- 6.) Commission of any act which could constitute a crime by being indicted for assault on a police officer and assault with a dangerous weapon.

(Award at p. 1).

On July 23, 2004, Officer Harris requested a departmental hearing to address the charges against him. (See Award at p. 3). The hearing scheduled for August 13, 2004, was continued at the request of the Grievant and held on October 29, 2004.² The Department's charges of "failure

² FOP states that "[i]n requesting the continuance, Officer Harris agreed to waive the 55-day provision for the length of the continuance, as contained in Article 12, Section 6 of the [parties' CBA], which provides, in pertinent part:

The employee shall be given a written decision and the reasons therefore no later than fifty-five (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, where applicable, except that:

to obey orders” (Charge No. 1) and “willfully and knowingly making an untruthful statement” (Charge No. 5) were withdrawn. (See Award at p. 3). In addition, the Grievant pleaded guilty to “Charge No. 3, Specification No. 1, admitting that he was under the influence of alcohol while off-duty on the date of the occurrence.” (Request at p. 4). The Hearing Panel found the Grievant guilty concerning the remaining charges (i.e. Charge No. 2, Charge No. 4 and Charge No. 6), and recommended that he be terminated from his employment. (See Award at pp. 3-4). Assistant Chief of Police Crockett reviewed and concurred with the Hearing Panel’s recommendation. (See Award at p. 4). On December 14, 2004, the Grievant was served with a Final Notice of Adverse Action, which ordered the Grievant’s termination from employment, effective February 4, 2005. (See Award at p. 4 and Request at p. 4). The Grievant filed an appeal with Chief of Police Ramsey, which was denied by letter on January 11, 2005. (See Award at p. 4 and Request at p. 4).³

Pursuant to Article 19, Paragraph E of the parties’ CBA, FOP invoked arbitration. (See Request at p. 4). The parties submitted their positions and arguments on briefs. The Arbitrator identified the issues as:

- 1) Whether MPD violate the 55-day rule of the parties’ CBA.
- 2) Whether MPD violated the 15-day rule as set forth in Article 12, Section 7 of the parties’ CBA.
- 3) Whether there was sufficient evidence to support Grievant’s termination for cause.
- 4) Whether termination was an appropriate penalty.

(See Award at p. 2).

The Arbitrator determined that the Union’s position argued that: (1) MPD violated the 55-day Rule, Article 12, Section 6 of the parties’ CBA by not providing the Grievant with its final decision until the sixty-first (61st) day after he had requested a hearing; and (2) that the 15-day rule, Article 12, Section 7, of the parties’ CBA was violated when the Chief of Police failed to respond until the day after the Grievant’s appeal had been submitted. (See Award at p. 4). As a result of these violations, FOP argued that the Grievant should be reinstated “with full back pay and lost job benefits and that a rescission of termination should be reflected in the Grievant’s

when an employee requests and is granted a postponement or continuance of a scheduled hearing, the fifty-five (55) day time limit shall be extended by the length of the delay or continuance, as well as ... the number of days consumed by the hearing . . .

(Request at p. 3).

³ The Grievant’s appeal of the Final Notice was submitted on December 23, 2004.

personnel file and that attorney fees should be awarded.” (Award at p. 4). In addition, FOP contended that the Hearing Panel’s “decision on penalty recommendation [cannot] be given deference as it is not supported by the record evidence.” (Award at p. 4). Therefore, FOP requested that the Grievant’s penalty be reduced to a suspension. (See Award at p. 4).

MPD’s position averred that the Hearing Panel’s “decision is fully supported by the record.” (Award at p. 4). Also, MPD asserted that the Grievant’s termination was in compliance “with the law and the parties’ [CBA].” (Award at pp. 4-5). In addition, MPD countered FOP’s argument that MPD violated the 55-day rule by arguing that: (1) the Grievant waived application of the 55-day rule;⁴ (2) MPD did not violate the 55-day rule; and (3) even if MPD had violated the 55-day rule, that the violation “was [*de minimis*] and therefore harmless.” (Award at p. 5).

Upon consideration of the parties’ arguments, the Arbitrator found “that the Grievant did not [waive] his rights, as provided for in Article 12, Section 6 of the [parties’ CBA]. (Award at p. 6). The Arbitrator also observed that “the parties agree[d] on all the dates in question concerning notices, request, etc.” and rejected MPD’s contention that the “parties ratified the current [CBA], fiscal year 2004 [through] fiscal year 2005 with retroactivity and in so doing changed the time lines in Article 12, Section 6, as it pertains to this case [and] is simply not founded in fact in anything submitted to me.” (Award at p. 7). In conclusion, the Arbitrator recognized that:

[w]hile the Employer did violate the “55-day rule” in this instant case, I find the violation pales in comparison to the finding of the [adverse action] panel in regards to the actions of Officer Timothy Harris on September 13, 2002 as [outlined] in the parties’ briefs along with the record.

Accordingly, I find no compelling reason to modify or set aside the employer termination of Timothy Harris and the violation of the “55-day rule” to be *de minimus*, and issue the following.

Grievance denied.

(Award at p. 8).

The Arbitrator also ordered the Union, as the “losing party”, to bear the costs of arbitration pursuant to Article 19, Paragraph E, Section 5.7 of the parties’ CBA. (See Award at p. 8).

⁴ In its view, MPD had fifty-five (55) business days from the date the Grievant requested a hearing to issue a written decision, which was extended by the period of the continuance, plus the day of the hearing. (See Award at p. 5).

In its Request, FOP claims that: “(1) the award on its face is contrary to law and public policy[;] and (2) the arbitrator was without authority or exceeded jurisdiction granted.” (Request at p. 3). In response, MPD submitted an “Opposition to Petitioner’s Arbitration Review Request” (“Opposition”), asserting that “the Union has failed to establish a statutory basis for review.” (Opposition at p. 1).

When a party files an arbitration review request, the Board’s scope of review is extremely narrow.⁵ Specifically, the Comprehensive Merit Personnel Act (“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.).

FOP argues that the Arbitrator’s Award is contrary to law and public policy “because [the Award] violated the parties’ CBA, which required MPD to issue Officer Harris a written decision . . . no later than fifty-five (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 . . .” (Request at p. 5). Also, FOP states that “after accounting for the continuance requested by Officer Harris, MPD did not issue its final decision until the sixty-first day after an evidentiary hearing was requested in writing.” (Request at p. 5).

In support of its argument, FOP asserts that “[i]t is well settled that the “55-day rule” has been determined to be a substantive right, and that its violation constitutes harmful error. See *Metro. Police Dep’t v. D.C. Pub. Employee Relations Bd.*, 901 A.2d 784 (D.C. 2006) (“*Fisher*”).” (Request at p. 5). “But in clear contradiction of the Court of Appeals’ decision in *Fisher*, the arbitrator found ‘the violation of the “55-day rule” to be *de minimus*...’” (Request at p. 6). FOP maintains that “[t]he arbitrator provides no explanation, analysis or justification for his characterization of the violation as *de minimus* [where] the Court of Appeals’ determination that the 55-day rule amounts to a substantive right.” (Request at p. 6) (emphasis added).⁶

⁵ Board Rule 538.3 - Basis For Appeal - provides:

In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:

- (a) The arbitrator was without authority or exceeded the jurisdiction granted;
- (b) The award on its face is contrary to law and public policy; or
- (c) The award was procured by fraud, collusion or other similar and unlawful means.

⁶ “In denying grievances, arbitrators sometimes apply the rule of *de minimis non curat lex*, under which trifling or immaterial matters will not be taken into account. Often in applying this principle the arbitrator concludes that the action complained of is such a slight departure from what is generally required by the agreement that the action must

In addition, FOP contends that by finding:

[the] [f]inal decision “*de minimus*,” the arbitrator essentially ignores the Court of Appeals’ pronouncement that the 55-day rule is a substantive right, the violation of which amounts to harmful error. Accordingly, the Award is contrary to law and public policy and must be remanded for the purpose of granting Officer Harris a remedy for the Department’s violation of Article 12, Section 6 of the parties’ CBA.

(Request at p. 6).

The Board has firmly held that 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.” *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 789 F. 2d 1, 8 (D.C. Cir. 1986).

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 Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also *D. C. Pub. Schs. and Am. Fed’n of State, County and Mun’l Employees, Dist. Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must “not be led astray by our own (or anyone else’s) concept of ‘public policy’ no matter how tempting such a course might be in any particular factual setting.” *D.C. Dep’t of Corrections v. Teamsters Union Local 246*, 54 A2d 319, 325 (D.C. 1989).

FOP acknowledges that in a recent Court of Appeals case, *District of Columbia Metropolitan Police Department v. District of Columbia Public Relations Board*, 901 A.2d 784 (D.C. App. 2006), the Court upheld the Board’s decision sustaining an arbitrator’s award that rescinded a Grievant’s termination due to MPD’s failure to issue a decision within 55 days as required by Article 12, Section 6 of the parties’ CBA. However, FOP asserts that the Arbitrator erred when he found a violation of the 55-day provision, but would not sustain the grievance because he found the violation to be *de minimis*. (See Request at p. 6). Therefore, FOP is requesting that the Board reverse the Arbitrator’s Award. In support of its position, FOP argues that in *District of Columbia Metropolitan Police Department v. District of Columbia Public Relations Board*:

the [Court] cited the arbitrator’s decision wherein [the arbitrator] determined that the 55-day rule is a “bargained-for procedural right which created in essence a substantive right [... and] failure to issue

be viewed either as a permissible exception or as not creating any injury at all.” Elkouri & Elkouri, *How Arbitration Works* 1214-15 (6th ed. 2003).

the decision within the 55 days, as pr[e]scribed must be viewed as harmful error." *Id.* at 786. In *Fisher*, following his determination that the Department had violated the 55-day rule, the arbitrator rescinded the employee's termination, and reinstated her to her previous position with full back pay and benefits.

(Request at p. 6).

The Board finds FOP's argument misconstrues the Court of Appeals' holding. The Board has addressed the holding of *Fisher* in several recent decisions and has determined that the majority opinion rejected the assertion that the "harmless error analysis" is *required* in the interpretation of the parties' CBA. 901 A.2d at 787-88. In other words, the *Fisher* decision does not require *nor does it preclude* a finding that the violation was harmless. No such requirement governs this case under the CMPA. *Id.* at 787. Specifically, the majority in *Fisher* concluded that "the arbitrator's interpretation of Article 12, Section 6 as mandatory and conclusive was not contrary 'on its face' to any law." *Id.* at 788. Furthermore, the majority noted the following:

When construction of the contract implicitly or directly requires an application of the "external law," i.e., statutory or decisional law [such as the mandatory-directory distinction MPD cites], the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the "contract reader," his interpretation of the law becomes *part of the contract* and thereby part of the private law governing the relationship between the parties to the contract. . . . Here the parties bargained for the arbitrator's interpretation of Article 12, Section 6, and absent a clear violation of the law -- one evident 'on the face' of the arbitrator's award -- neither PERB nor 'a court has . . . authority to substitute its judgment for [the arbitrator's].'

901 A.2d at 784, 789.

We find that FOP's ground for review involves only a disagreement with the Arbitrator's interpretation of Article 12, Section 6 of the parties' CBA. FOP requests that we adopt its interpretation and remedy for MPD's violation of the above-referenced provision of the parties' CBA. This we will not do.

Moreover, FOP has not cited any specific law or public policy that was violated by the Arbitrator's Award. We decline FOP's request that we substitute the Board's judgment for that of the Arbitrator, a decision for which the parties bargained. FOP 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, FOP failed to do so.

FOP also requests that the Board find that “[t]he Arbitrator exceeded his authority by failing to grant a remedy to the grievant for MPD’s violation of the 55-day rule.” (Request at p. 7). In support of its request, FOP claims that “[i]mplicitly underlying the principle that arbitrators are afforded discretion in fashioning remedies for violations of a labor agreement is the understanding that an employee who is harmed by a violation of the agreement *is entitled to a remedy*.” (Request at p. 7)(emphasis in original). In support of its argument, FOP relies on multiple prior arbitration awards that have afforded the affected employee with a remedy for a violation of the 55-day rule. (See Request at p. 7). The District of Columbia Court of Appeals has acknowledged the Board’s clearly held position that “it does not regard the arbitrator’s interpretation [of a parties’ collective bargaining agreement] as binding on another arbitrator in another case, even construing the same paragraph.” *Fisher*, 901 A.2d at 790.

In numerous cases involving these same parties, we have 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 each of those cases we rejected MPD’s argument and held that the Arbitrator was within his authority to interpret the parties’ CBA pertaining to the application of the 55-day rule and the remedy for MPD’s violation of the rule. (See e.g. *MPD and FOP/MPD Labor Comm. (on behalf of Jay Hang)*, 54 D.C. Reg. 2989, Slip Op. No 861, PERB Case No. 06-A-02 (2007); *MPD and FOP/MPD Labor Comm. (on behalf of Miguel Montanez)*, 54 D.C. Reg. 2674, Slip Op. No 814, PERB Case No. 05-A-03 (2006); and *MPD and FOP/MPD Labor Comm. (on behalf of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. No. 738, PERB Case 02-A-07 (2004), *aff’d*, *Metro. Police Dep’t v. D.C. Pub. Employee Relations Bd.*, 01-MPA-18 (D.C. Superior Ct. Sept. 17, 2002), *aff’d*, *Metro. Police Dep’t v. D.C. Pub. Employee Relations Bd.*, 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’ CBA.⁷ See *D.C. Metro. Police Dep’t and Fraternal Order of Police/MPD Labor Comm.*, 39 D.C. Reg. 6232, Slip Op. No. 282 at pp. 3-4, PERB Case No. 92-A-04 (1992).

In the present case, FOP does not cite any provision of the parties’ CBA that limits the Arbitrator’s equitable power. Although the Arbitrator concluded that MPD violated Article 12, Section 6 of the parties’ CBA, there is no requirement in the contract to adopt the Grievant’s requested remedy. Contrary to FOP’s contention, the Arbitrator did not impose “his own brand of ‘industrial justice’” but determined that MPD’s violation did not mandate an exercise of his equitable power to formulate a remedy. Thus, the Arbitrator acted within his authority.

FOP also argues that the Arbitrator exceeded his authority “when he neglected to address the issue of remedy for the Department’s breach of the CBA.” (Request at p. 8). FOP alleges that the “parties specifically asked the arbitrator to address whether termination was an appropriate penalty pursuant to the relevant provision of the CBA, particularly Article 12, Section 6. . . . Instead, the arbitrator ignored the issue and found that Officer Harris was not entitled to a remedy for MPD’s clear violation of the CBA.” (Request at pp. 8-9).

⁷ We note that if MPD had cited a provision of the parties’ CBA that limits the Arbitrator’s equitable power, that limitation would be enforced.

An arbitrator is not required to explain the reason for his or her decision. *See Lopata v. Coyne*, 735 A.2d 931, 940 (D.C. 1999). Moreover, an arbitrator's decision is not unenforceable merely because he or she fails to explain certain bases for his or her decision. *See Chicago Typographical Union 16 v. Chicago Sun Times Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991). In the present case, the Arbitrator made ample factual conclusions and discussed the parties' arguments in supporting his decision. Moreover, the Board has held that an arbitrator need not address and consider all the arguments made at arbitration. *D.C. Dep't of Corrections and FOP/DOC Labor Comm.*, 54 D.C. Reg. 2706, Slip Op. No. 825 at p. 8, PERB Case No. 04-A-14 (2006). Consequently, the Board finds that FOP is asking the Board to adopt FOP's arguments, findings and conclusions. Such a request is beyond the Board's scope of review. In view of the above, the Board believes that FOP's contention amounts to a mere disagreement with the Arbitrator's findings and conclusions. A disagreement with the Arbitrator's findings and conclusions regarding a collective bargaining agreement does not present a statutory basis for review. Thus, the Board finds that FOP's argument lacks merit and that we cannot reverse the Award on this ground.

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' CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration award is sustained. Therefore, the Fraternal Order of Police/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 23, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-A-11 is being transmitted via U.S. Mail to the following parties on this the 23d day of July 2012.

Mark L. Wilhite
Pressler & Senftle, P.C.
1432 K St. NW, 12th floor
Washington, D.C. 20005

U.S. MAIL

Andrea Comentale
Assistant Attorney General
441 4th Street NW, #1180N
Washington, DC 20001

U.S. MAIL


Joyce D. Phillips
Secretary