Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Metropolitan Police Department,	)	
Petitioner,	)	PERB Case No. 07-A-02
and	)	Opinion No. 872
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Anthony Hector),	)	
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case:

On November 22, 2006, the Metropolitan Police Department ("Agency" or "MPD") filed an Arbitration Review Request ("Request"). MPD seeks review of an Arbitration Award ("Award") that rescinded the termination of Anthony Hector ("Grievant") and found that the appropriate discipline should be a suspension "from the date of ... termination to the date of ... reinstatement". (Leahy Award at p. 13).

MPD is seeking review of the Award on the ground that the Award on its face is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

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

II. Discussion

"Officer Anthony Hector (Grievant) was terminated from the Metropolitan Police Department . . . based upon acts of misconduct . . . on January 26, 2003. The [MPD] charged [the] Grievant with committing misconduct when he forced two individuals who he observed urinating in public to wipe up their urine with their clothing and put the wet clothing back on their bodies. On March 1, 2005 . . . [the] Grievant was afforded an evidentiary hearing regarding the charges before a three-member panel (panel) comprised of three senior police officials. Following the hearing, the [p]anel found [the] Grievant not guilty of one specification each of conduct unbecoming an officer, neglect of duty, and unnecessary use of force. The panel recommended that he be suspended for sixty (60) days. On April 27, 2005, the Assistant Chief for Human Services ("ACHS") issued [the] Grievant a Final Notice of Adverse Action. The Grievant was further notified that the ACHS found the recommended penalty of a sixty (60) day suspension to be inconsistent with the facts and circumstances of the case and [ordered that] the Grievant would be removed from the Department, effective June 10, 2005." (Request at pgs. 2-3).

The Grievant appealed the termination to the chief of Police. The Chief denied it and pursuant to the collective bargaining agreement ("CBA"), the Union invoked arbitration. At arbitration, In presenting the matter, [the] Grievant argued that the termination penalty should be rescinded because the: (1) ACHS lacked the authority to increase the recommended penalty, or in the alternative that (2) removal was inappropriate under the *Douglas* factors. MPD countered that the ACHS has the authority to impose the penalty and termination was appropriate. (See Request at p. 3).

"In a decision dated October 30, 2006, the Arbitrator concluded: (1) ACHS Shannon Cockett had authority to exceed the penalty recommended for Officer Hector by the Adverse Action Panel; (2) ACHS Cockett reasonably applied the *Douglas* factors in reaching her decision; (3) Assistant Chief Cockett's finding that the offenses committed by Officer Hector warranted a penalty more severe than a sixty day suspension was reasonable; and (4) the penalty of termination was excessive because neither Assistant Chief Cockett, nor Chief Ramsey gave sufficient, if any, consideration to significant mitigating facts within the 'just cause' standard of the Parties' Agreement, before reaching termination as the final decision for the Department. . . .The Arbitrator concluded that the D.C. Metropolitan Police Department did not have just cause to terminate the employment of Officer Anthony Hector. The Arbitrator's Award reinstated Grievant to his position without back pay. . . ." (Request at p. 4).

The FOP asserts in its Opposition that the Request was untimely filed. The FOP contends that "the time limit for which the Petitioner may request a review of the arbitration decision has expired, and therefore the Board must deny its review request. Pursuant to the [CBA], '[e]ither party may

file an appeal from an arbitration award to the PERB, not later than twenty (20) days after the award is served . . .' See Article 19 § 6. . . . [T]he Arbitrator's award was received at the Office of the Attorney General (OAG) on November 1, 2006. . . . [The] arbitration review request [was filed] on November 22, 2006. . . . Thus, [MPD] filed its arbitration review request two (2) days after the deadline for filing such requests." (Opposition at p. 3)

Board Rules 538.1, 501.4 and 501.5 provide in relevant part as follows:

> **538.1 - Filing**
> A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board **not later than twenty (20) days after service of the award . . . .** (emphasis added).
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> **501.4 - Computation - Mail Service**
> Whenever a period of time is **measured from the service of a pleading and service is by mail, five (5) days shall be added to the prescribed period.** (emphasis added).
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> **501.5 - Computation - Weekends and Holidays**
> In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included. . . .**Whenever the prescribed time period is eleven (11) days or more, [Saturdays, Sundays and District of Columbia Holidays] shall be included in the computation**. (emphasis added).

In the present case, Arbitrator Leahy issued his Award on October 30, 2006. (See Award at p. 13). There is no dispute that the Award was served on the parties by mail. However, FOP argues that the Award was received by MPD on November 1, 2006 and that pursuant to Board Rule 538.1, MPD was required to file the Request within twenty days of the receipt date, or November 21, 2006. MPD did not file their Request until November 22, 2006. Thus, FOP claims that MPD's November 22nd filing was not timely.

MPD's timeliness argument is based on their belief that the receipt date is the operative factor which triggers the computation of the twenty-day filing requirement noted in Board Rule 538.1. However, Board Rule 538.1 states that an arbitration review request must be filed "not later than twenty (20) days after *service* of the award." (Emphasis added.) Pursuant to Board Rule 501.4, five days must be added to the prescribed twenty-days if *service is by mail*, as it was in this case. In view of the above, MPD was required to file their Request no later than *twenty-five* (25) days after the service date. Since it is undisputed that the Award was *mailed* by the arbitrator on October 30, 2006,

MPD was required to submit their pleading no later than November 25, 2006. Therefore, we find that MPD's November 22nd filing was timely.

We now turn to FOP's claim that the Award on its face is contrary to law and public policy. When a party files an arbitration review request, the Board's scope of review is extremely narrow. 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).

In the present case, MPD claims that the Award on its face is contrary to law and public policy because "the standard relied upon by the Arbitrator, i.e., just cause, to reduce the penalty of removal was inappropriate and therefore the award is contrary to law and public policy." (Request at p. 5).

MPD asserts that the "[a] remedy of reinstatement would violate . . . public policy in that a remedy of reinstatement would violate D.C. Code 2001 Edition § 5-101.03.[1] MPD argues that "a

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[1]D.C. Code § 5-101.03 (2001 ed.) provides as follows:

§ 5-101.03 General duties of Mayor [formerly § 4-115]
It shall be the duty of the Mayor of the District of Columbia at all times of the day and night within the boundaries of said Police District:

(1) To preserve the public peace;
(2) To prevent crime and arrest offenders;
(3) To protect the rights of persons and of property;
(4) To guard the public health;
(5) To preserve order at every public election;
(6) To remove nuisances existing in the public streets, roads, alley, highways, and other places;
(7) To provide a proper police force at every fire, in order that thereby the firemen and property may be protected;
(8) To protect strangers and travelers at steamboat and ship landings and railway stations;
(9) To see that all laws relating to the observance of Sunday, and

remedy of reinstatement returns to the Employer an individual unsuitable to serve as a police officer. Clearly, such remedy would violate public policy." (Request at p. 7).

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. Also, 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). Moreover, the violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result."[2] Furthermore, MPD 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).

MPD contends that the Award violates D.C. Code § 5-101.03. However, none of the provisions identified by MPD mandate removal. Instead, they list the duties of the police force. Since termination is not mandatory under any of the above-referenced provisions, we find that MPD has not cited any specific law or public policy that was violated by the Award. 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 Dept. of Public Works*, 48 DCR 10955, Slip Op. No. 413 at pgs. 2-3, PERB Case No. 95-A-02 (1995).

> regarding pawnbrokers, mock auctions, election, gambling, intemperance, lottery dealers, vagrants, disorderly persons, and the public health, are promptly enforced; and
> (10) To enforce and obey all laws and ordinances in force in the District, or any part thereof, which are properly applicable to police or health, and not inconsistent with the provisions of this title. The police shall, as far as practicable, aid in the enforcement of garbage regulations.

[2] *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 The 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 also claims that "[t]here is absolutely no support in law or regulations for the use of a "just cause" standard in assessing a penalty. [MPD asserts that] [w]hile the Arbitrator made reference to the just cause standard of the parties' agreement he failed to identify any provision in the collective bargaining agreement that sets forth that standard. [A] close reading of the agreement clearly demonstrates that no such [explicit] standard exists. Thus, [MPD asserts that] in relying on a just cause standard to reduce the penalty imposed by Chief Cockett, the Arbitrator violated Article 19E, Section 5, provision 4 of the collective bargaining agreement which forbids an arbitrator from, *inter alia*, adding [a] provision [to] the agreement. Thus, [MPD argues that] the award, in reinstating an officer who was found to have committed acts of misconduct that rendered him unfit to continue employment as a police officer, [and] is contrary to law and public policy." (Request at pgs. 5-6).

Further, MPD cites *Stokes, v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985) for the proposition that the reviewing tribunal may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. The Board has previously considered this argument. In *Metropolitan Police Department and National Association of Government Employees, Local R3-5 (on behalf of Angela Burrell)*, __ DCR __, Slip Op. No. 785 at pgs. 4-5, PERB Case No. 03-A-08 (2006), we stated as follows:

> MPD asserts that the Arbitrator is not free to substitute her judgment for that of the MPD when it legitimately invoked and exercised its managerial discretion. . . .
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> The gravamen of MPD's Request is based on its interpretation and applicability of *Stokes* to this Award. In *Stokes*, an Administrative Law Judge . . . of the District of Columbia Office of Employee Appeals ("OEA") mitigated the disciplinary termination of an electrical foreman at the District of Columbia Department of Corrections Youth Center ("DOC") to a 60-day suspension. DOC appealed OEA's decision to the Superior Court of the District of Columbia. The Superior court reversed the OEA's decision and concluded that the DOC's discharge of the employee was reasonable. The employee appealed to the District of Columbia Court of Appeals. The Court of Appeals concluded, based on D.C. Code §§ 1-606.1 and 1-606.3 (1981), that:
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> > [a]lthough the Act does not define the standards by which the OEA is to review these decisions, it is self evident from both the statute and its legislative history that the OEA is not to substitute its judgement for that of the agency and its role . . . is simply to ensure that "managerial discretion has been legitimately invoked

> and properly exercised." Although the OEA has a "marginally greater latitude of review" than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. The "primary discretion" in selecting a penalty has been entrusted to agency management, not the [OEA]. (Citations omitted). (*Stokes*, 1009-1010 and 1011).

> Thus, the Court of Appeals' analysis in *Stokes* is based on the court's interpretation and application of D.C. Code §§ 1-606.1 and 1-606.3 (1981) which created the OEA as "a quasi-judicial body empowered to review final agency decisions affecting, *inter alia*, performance ratings, adverse actions, and employee grievances." (*Stokes*, 1009).

> In the present case, the Arbitrator's review of the MPD's termination of [the grievant] arises out of the parties' CBA and not D.C. Code §§ 1-606.1 and 1-606.3 (1981 ed.).

Similarly, in this case, the Arbitrator's review of the MPD's termination of Anthony Hector arises out of the parties' CBA and not D.C. Code §§ 1-606.1 and 1-606.3 (1981 ed.). In this regard, this Board has held that by 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. 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). By submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement . . . as well as his evidentiary findings and conclusions . . . " *Id.* "[This] 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 and MPD's disagreement with the Arbitrator's interpretation of the language in Article 17 of the parties' collective bargaining agreement is not grounds for reversing the Arbitrator's Award. 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).

We find that the Arbitrator was within his authority to rescind the Grievant's termination. We have held 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). 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." [Also,] [t]he. . . courts have followed the Supreme Court's lead in holding that arbitrators have implicit authority to fashion appropriate remedies . . . (See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 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 did not have just cause to terminate the employment of Officer Hector he had the authority to determine the appropriate remedy.

In view of the above, we find no merit to MPD's arguments. Also, we believe that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law or public policy. Therefore, no statutory basis exists for setting aside this Award. As a result, we deny MPD's Arbitration Review Request.

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 7, 2007

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[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.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-A-02 was transmitted via Fax and U.S. Mail to the following parties on this the 7th day of February 2007.

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