Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department,	
Petitioner,	
and	PERB Case No. 05-A-11
	Opinion No. 1206
Fraternal Order of Police/Metropolitan Police , Department Labor Committee, (on behalf of Joseph Stimmell),	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

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 MPD seeks review of an arbitration award ("Award") which rescinded the termination of Officer Joseph Stimmell ("Grievant"). The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Union" or "Respondent") opposes the Request.

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).

II. Discussion

On July 2, 2001, MPD issued a notice proposing to terminate the Grievant's employment with MPD, charging him with domestic misconduct and knowingly making false statements to the officers that investigated the alleged misconduct. (See, Award at p. 3). The Adverse Action Panel ("Panel") conducted an evidentiary hearing on August 21, 2001. The Panel sustained the charges and recommended the Grievant be terminated. (See, Award at p. 3). On September 28, 2001, the Final Notice of Adverse Action was issued to the Grievant, notifying him he would be terminated effective November 21, 2001, and informing he could file an appeal within ten (10) days to the Chief of Police.

The Grievant filed an appeal with the Chief of Police on October 3, 2001. The Chief denied the Grievant's appeal by notice dated January 23, 2004. The Grievant was terminated on February 2, 2004. Prior to February of 2004, the Grievant remained in salary status, but in a non-contact capacity. (See, Award at p. 3). The Union filed a grievance, and the matter proceeded to arbitration.

At arbitration, the Union asserted the Grievant's termination should be reversed because the Chief failed to respond to the Grievant's appeal of the Final Notice within the 15 days allotted by the parties' Collective Bargaining Agreement ("CBA" or "Agreement").[1] MPD did not dispute that the Chief had not responded within the 15 day period. Nonetheless, MPD argued reversal of the termination was not a remedy authorized by the CBA. (See, Award at p. 4). In addition, MPD claimed the Grievant was not prejudiced by MPD's violation of the CBA and failure to comply with the 15-day time period was harmless error. (See, Request at p. 3).

The Arbitrator found MPD had violated Article 12, Section 7 of the CBA, where the Grievant had filed his appeal on October 3, 2001, and the Chief's denial was not issued until January 23, 2004, over two years after the appeal was filed. (See, Award at p. 4). Thus, the issue before the Arbitrator was "if the Arbitrator has the Authority to fashion a remedy where [MPD] violated Article 12, Section 7 of the parties' Agreement." (Award at p. 3).

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[1] Article 12, Section 7 provides, in pertinent part, that:

> The employee shall be given fifteen (15) days advance notice in writing prior to the taking of adverse action. Upon receipt of this notice, the employee may within ten (10) days appeal the action to the Chief of Police. **The Chief of Police shall respond to the employee's appeal within fifteen days.** In cases in which a timely appeal is filed, the adverse action shall not be taken until the Chief of Police has replied to the appeal. The reply of the Chief of Police will be the final agency action on the adverse action. (Emphasis Added).

In her analysis, the Arbitrator took into consideration two decisions directly addressing whether the Chief's failure to issue a timely decision invalidated the imposed discipline. The two decisions of the District of Columbia Superior Court regarded 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 reversing 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.

First, the Arbitrator concluded she had the authority to formulate a remedy for violation of the parties' CBA, even where it was silent as to remedies. (See, Award at pgs. 6-7). Second, the Arbitrator found the harmless error standard was not imposed by the CBA. However, the Arbitrator found, even if the harmless error standard were mandatory, the Grievant had been harmed by the delay in excess of two years before a final decision was issued. (See, Award at p. 7). Based upon the above, the Arbitrator directed MPD to return the Grievant to his position.

MPD takes issue with the Award. Specifically, MPD claims "the [A]ward is contrary to law and public policy and. . .the arbitrator was without authority to grant the [A]ward." (Request at p. 2). The Union opposes the Request.

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 ed.).

In the present case, MPD contends the Arbitrator lacked the authority to reinstate the Grievant as a remedy for MPD's violation of Article 12, Section 7 of the parties' CBA. In support of this contention, MPD cites a District of Columbia Superior Court case, *Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 01-MPA-19 (September 10, 2002), in which Judge Abrecht held a remedy reinstating a grievant for violation of the 15-day rule did not draw its essence from the agreement.

MPD suggests the plain language of Article 12, Section 7 of the CBA does not impose a penalty for noncompliance with the 15-day rule. Therefore, by imposing a

penalty where none was expressly stated or intended, MPD asserts the Arbitrator added to and modified the parties' CBA. (See, Request at pgs. 5-6).

We have held and the District of Columbia Superior Court has affirmed, "[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the [CBA]." *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract." *Misco, Inc.*, 484 U.S. at 38. We have explained:

> [by] submitting a matter to arbitration "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based."

District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004). In the present case, the Board finds 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 7 of the parties' CBA. MPD merely requests we adopt its interpretation and remedy for its violation of the above-referenced provision of the parties' CBA. This we will not do.

In addition, we have found an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.[1] 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). Here, MPD states the Arbitrator is prohibited from issuing an award that would modify, or add to, the CBA. However, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once Arbitrator Hochhauser concluded MPD violated Article 12, Section 7 of the parties' CBA, she also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator Hochhauser did not add to or subtract from the parties' CBA but merely used her equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator Hochhauser acted within her authority. The Board finds MPD's argument asks that this Board adopt its interpretation

[1] 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.

of the CBA and merely represents a disagreement with the Arbitrator's interpretation. As stated above, the Board will not substitute its, or MPD's, interpretation of the CBA for that of the Arbitrator. Thus, MPD has not presented a ground establishing a statutory basis for review.

As a second basis for review, MPD claims the Award is on its face contrary to law and public policy because it conflicts with Judge Abrecht's Superior Court decision. (Request at pgs. 5-7). 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 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 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 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 Union Local 246*, 54 A2d 319, 325 (D.C. 1989).

Also, in *Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 901 A.2d 784 (D.C. 2006), the District of Columbia Court of Appeals considered whether the harmful error analysis was required in arbitration cases: The Court held 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.[2]

(Emphasis added).

In the present case, MPD asserts the Award is on its face contrary to law and public policy. However, MPD does not specify any "applicable law" and "definite public policy" that mandates the Arbitrator arrive at a different result. Instead, MPD alleges the Arbitrator's decision was contrary to law because it conflicts with Judge Abrecht's decision. Relying on Judge Abrecht's decision, 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). MPD's arguments are a repetition of the arguments considered and rejected by the Arbitrator. Therefore, we believe MPD's ground for review only involves a disagreement with the Arbitrator's interpretation, findings, and conclusions and asks that the Board adopt its interpretation of the evidence presented. This we will not do.

We have held a disagreement with the Arbitrator's interpretation does not render an award contrary to law. See, *DCS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 49 DCR 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. MPD's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. See, *University of the District of Columbia and UDC Faculty Association*, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991). We also find MPD's

[2]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.

disagreement with the Arbitrator's findings and evaluation of the evidence does not present a statutory basis for review. See, *DCS and Washington Teachers' Union Local 6, American Federation of Teachers*, 43 DCR 1203, Slip Op. No. 349, PERB Case No. 93-A-01 (1996). In conclusion, MPD has 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 has failed to do so.

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

October 11, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-A-11 was transmitted via Fax and U.S. Mail to the following parties on this the 11th day of October 2011.

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