Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Fire and Emergency Management Services Department,	
Petitioner,	
and	PERB Case No. 08-A-03
	Opinion No. 951
International Association of Firefighters, Local 36,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On February 21, 2008, the District of Columbia Fire and Emergency Management Services Department ("FEMS" or "Department") filed an Arbitration Review Request ("Request") in the above captioned matter. FEMS seeks review of an arbitration award ("Award") which rescinded the charges and penalties assessed against Firefighters Michael Roy and Frelimo Simba ("Grievants"). FEMS asserts that the Arbitrator was

without authority and exceeded his jurisdiction by directing FEMS to advise Firefighter Roy in writing that he was free to apply for any position for which he was qualified and that he would be considered in accordance with his qualifications. (See Request at p. 2). The International Association of Firefighters, Local 36 ("Union"), opposes the Request.

The issue before the Board is whether "the arbitrator was without, or exceeded his or her jurisdiction". D.C. Code § 1-605.02(6) (2001 ed).

II. Discussion:

On January 6, 2006, a resident of the 3800 block of Gramercy Street N.W. discovered an unknown man lying on the sidewalk in front of the resident's home. The resident's wife called 911 and the Office of Unified Communications ("OUC") dispatched fire, police and ambulance personnel to the scene. (See Award at p. 5). These emergency responders "did not detect serious injuries, illness, or evidence that the then un-known man had been physically attacked. He had no identification in his pocket, but was wearing a wedding band and a watch. Stereo headphones were found on the ground near him on the grass. Because he was vomiting, and because one or more of the responders thought they smelled alcohol, the man was presumed to be intoxicated. Consequently, the man was identified as a low priority patient and transported to the Howard University Hospital (Howard) Emergency Department where, after lying in a hallway for more than an hour, medical personnel discovered that he had a critical head injury." (Award at p. 5). The man was later identified by a police officer as David Rosenbaum. (See Award at pgs. 5-6). On January 7, 2006, Howard determined that Mr. Rosenbaum had a head injury and reported that information to MPD. (See Award at p. 6). Police initiated an assault and robbery investigation. (See Award at p. 6). "Despite surgery and other medical interventions to save him, Mr. Rosenbaum died on January 8, 2006. The autopsy report issued on January 13, 2006, by the Office of the Chief Medical Examiner listed the cause of death as "BLUNT IMPACT TRAUMA OF THE HEAD, TORSO, AND EXTREMITIES," and the manner of death was determined to be "HOMOCIDE."" (Award at p. 6).

The Office of the Inspector General ("OIG") conducted a review of FEMS' response to the January 6th scene. (See Award at p. 6). Firefighters Roy and Simba were asked to prepare reports of their involvement with the January 6th response. (See Award at p. 7). OIG issued a report on June 15, 2006, ordering the Trial Board to determine if Firefighters Roy and Simba had "omitted material information during the investigation [of the January 6th incident] and if so, did they fail to follow appropriate medical protocols." (Award at p. 9). Firefighter Roy was charged "with obstructing a Department investigation by, *inter alia*, reporting that he did not observe any injuries or bleeding on the scene; and was charged with violation of medical protocols by, *inter alia*, not deriving a [Glasgow Coma Scale] GCS score." (Award at p. 9). Firefighter Simba was similarly charged "with obstructing a Department investigation and violation of medical protocols in respect to, *inter alia*, information supplied concerning bleeding at the scene and failure to derive a GCS score." (Award at p. 9).

A Trial Board hearing was conducted and concluded on January 26, 2007. During these proceedings the Grievants argued in a motion to dismiss that the charges did not meet the 75-day time limit required by Article 32, Section B of the parties' Collective Bargaining Agreement ("CBA").[1] The Union filed its "Time Limits Grievance" on January 26, 2007. The Trial Board issued its decisions in April 2007.

> The Trial Board divided two to two on the charges leveled against [Firefighter] Simba. In accordance with the CBA procedures, the Assistant Chief intervened and found Simba guilty as charged and adopted the Trial Board's recommended penalty of 120 duty-hours suspension on Charge 1, and 132 duty-hours suspension on Charge 2. On May 1, 2007, new-Fire Chief Dennis L. Rubin advised Simba that it was his decision to terminate Simba effective May 2, 2007.
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> [Firefighter] Roy was unanimously found not guilty on Charge 2 [sic], obstructing a Department investigation, but the Trial Board divided two to two on Charge 2, that Roy failed "to perform a proper assessment on a patient with altered mental status." The Assistant Fire Chief intervened and found Roy guilty on this charge and adopted the Trial Board's recommended penalty of 84 duty-hours suspension. On May 1, 2007, Chief Rubin advised Roy that it was his decision to suspend him for 192 duty-hours, to commence May 4, 2007.

(Award at p. 10).

On April 30, 2007, Chief Rubin and Mayor Fenty announced at a press conference that the penalties assessed would be increased against Simba to termination and for Roy to a suspension for "one-month followed by an assignment in [FEMS'] organization where, for the rest of his career, he will not have contact with the public." (Award at p. 11). On May 1, 2007, the Union filed a Penalty Grievance. (See Award at p. 11).

The grievances were submitted to arbitration and the penalties against Firefighters Roy and Simba were held in abeyance pending the results of the arbitration. (See Award at p. 11). Arbitrator John Truesdale determined the two issues to be:

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[1] Article 32 Section B of the parties' CBA requires Initial Written Notification of charges provided to the members "within seventy-five (75) days after the alleged infractions or complaint or such time as the employer becomes aware of the alleged infraction or complaint." (Award at p. 3).

Time Limits Grievance

Whether the Agency violated the CBA when it issued Initial Written Notification of the potential discipline to FFs Simba and Roy on June 26, 2006.

If so, what should be the remedy?

Penalty Grievance

Whether the Department violated Article 32 F.5 or 6 of the CBA (and/or corresponding provision of the Order Book) when the Fire Chief rejected the penalty recommendations of the Trial Board as to Firefighter Simba and Roy and chose, instead, to terminate Simba and, as to Roy, to impose a lengthier unpaid suspension and to bar Roy for the remainder of his career from holding a position within the Department that would allow him contact with the public.

If so, what should be the remedy?

(Award at p. 2).

At arbitration, the Union argued that Article 32, Section B of the parties' CBA was violated because the Department learned of the alleged infractions by the Grievants on January 19, 2006, and that the notification of charges to the Grievants was not made until after 75-days. Consequently, the Union asked that the charges against Roy and Simba be dismissed. In addition, the Union argued that the restriction against Roy of having contact with the public be rescinded. (See Award at p. 13). FEMS argued that it was not aware of the alleged infractions until the issuance of the OIG report in June of 2006, and therefore the notifications were issued within the 75-day time limit. (See Award at p. 14). In addition, the Department reversed its decision to augment the recommendations of the Trial Board prior to the arbitration. (See Award at p. 14). The Department stated that if the penalties are imposed, they will not exceed the recommendations of the Trial Board. (See Award at p. 14).

The Arbitrator found that FEMS was aware of the alleged infractions in January 2006 and that the Initial Written Notifications to Firefighters Roy and Simba were not brought until June 26, 2007. Consequently, the Arbitrator found that the notifications were not timely issued. (See Award at p. 16).

As to the Penalty Grievance, the Arbitrator noted that Article 32, Section F (5) and/or (6) of the Parties' CBA provide that the Fire Chief may not increase the Trial Board's recommendations. (See Award at p. 16). The Arbitrator also indicated that the

augmentation of the penalties against Roy and Simba violated the parties' CBA, and that neither grievant suffered any loss of pay or benefits. (See Award at p. 16). However, the Arbitrator noted that Firefighter Roy had been transferred to the Training Academy, and that there had been no formal rescission of Chief Rubin's pronouncement at the April 30 press-conference that Roy would no longer be permitted to have contact with the public. (See Award at p. 16).

For the reasons noted above, the Arbitrator determined that: FEMS violated (1) Article 32, Section B of the parties' CBA by issuing the Initial Written Notifications against Firefighters Roy and Simba more than 75-days after FEMS became aware of their alleged infractions; (2) Article 32, Section F (5) and/or (6) by increasing the recommended penalties of the Trial Board. As a remedy, the Arbitrator rescinded the charges and penalties assessed against the Grievants and directed that FEMS advise Roy in writing that he: (1) is free to apply for any position within FEMS for which he is qualified; and (2) will be considered in accordance with his qualifications. (See Award at pgs. 16-17).

FEMS filed the instant arbitration review request, stating:

> The reasons for appealing the award are as follows: The Arbitrator ruled that the Fire Chief's statement that FF Roy would never be assigned to a public contact position constituted an enhancement of the penalty recommended by the Trial Board, in violation of the [parties' CBA]. In so doing, he exceeded his authority by attempting to preempt an inchoate and theoretical violation because the Union presented no evidence that FF Roy had applied for a public contact position and been denied. The CBA authorizes the arbitrator to rule on actual disputes regarding violation of the [CBA]. It does not empower arbitrators to rule on violations that might occur at some unknown point in the future or otherwise penalize the agency for potentially future allegations of contractual violation(s). In order for the Arbitrator to properly establish jurisdiction over such a dispute, the Union would need to allege some evidence that FF Roy has been actively denied the ability to apply for and receive a public contact position. This clearly has not been done. As a result, the Arbitrator exceeded the jurisdiction granted by the CBA in violation of Board Rule 538.3(a).

(Request at pgs. 2-3).[2]

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[2] Board Rule 538.3(a) provides "[t]hat 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:

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, FEMS claims that the Arbitrator "exceeded his authority by attempting to preempt an inchoate and theoretical violation because the Union presented no evidence that FF Roy had applied for a public contract position and been denied." (Request at p. 2). FEMS argues that the CBA only allows an arbitrator to rule on actual disputes and not on future violations which have not yet occurred. The Board believes that FEMS' request represents a disagreement with the Arbitrator's finding that there was a violation of Article 32 of the parties' CBA by augmenting the penalty against Roy to include a prohibition against working in contact with the public. FEMS' argument fails because it is not a future violation at issue but the augmentation of the penalty upon which the Arbitrator found a violation. Thus, FEMS' assertion that there was no evidence of a violation of the parties' CBA because Firefighter Roy had not yet applied for, or been denied, a position with public contact is, therefore, without merit.

We have held and the District of Columbia Superior Court has affirmed that, "[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 [parties' 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 that:

> [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."

(a) The arbitrator was without authority or exceeded the jurisdiction granted.

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).

FEMS' contention that was the Arbitrator was without authority to direct FEMS to rescind the Fire Chief's pronouncement that Firefighter Roy would be prohibited from applying or holding a position of public contact is merely a disagreement with the Arbitrator's finding that it violated Article 32, Section F (5) and/or (6) of the parties' CBA and requests that we adopt its interpretation of the CBA and version of the facts. "[T]his 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 No. 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 Arbitrator Truesdale. Neither FEMS' disagreement with the Arbitrator's interpretation of Article 32, Section F (5) and/or (6) nor FEMS' disagreement with the Arbitrator's findings and conclusions, are grounds for reversing the Arbitrator's Award. See *MPD and FOP/MPD Labor Committee (on behalf of Keith Lynn)*, Slip Op. No. 845, PERB Case No. 05-A-01 (2006).

In view of the above, we find no merit to FEMS' arguments. We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous 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 District of Columbia Fire and Emergency Medical Services' 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 16, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.08-A-03 was transmitted via Fax and U.S. Mail to the following parties on this the 16th day of July 2010.

Devki Virk, Esq.
Bredhoff & Kaiser
808 15th Street, N.W.
10th Floor
Washington, D.C. 20005

FAX & U.S. MAIL

Jonathan K. O'Neill, Esq.
Supervisory Attorney Advisor
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Natasha Campbell, Director
D.C. Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

U.S. MAIL

Sheryl V. Harrington
Secretary