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

In the Matter of:

District of Columbia
Metropolitan Police Department,

Petitioner,

and

Fraternal Order of Police/Metropolitan
Police Department Labor Committee
(on behalf of Tara Resper),

Respondent.

PERB Case No. 06-A-21

Opinion No. 887

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or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter, in which the Arbitrator rescinded the termination of Tara Resper ("Grievant"), a bargaining unit member, because MPD violated the 55-day rule contained in the parties' collective bargaining agreement ("CBA").

MPD contends that the 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." D.C. Code §1-605.02(6) (2001 ed).

II. Discussion

The Grievant was appointed to the MPD on January 20, 1999. On July 21, 2003, the Grievant was off-duty and was a passenger in Officer Marjorie Temple's vehicle. On that date the Grievant observed Officer Marjorie Temple, who was also off-duty, involved in three separate physical altercations with an unidentified female in the 3200 block of M Street, N.W. As a result of the July 21, 2003 incident, a Notice of Proposed Adverse Action (termination) was issued to the Grievant on October 25, 2004. MPD charged that "[a]s an officer of the Metropolitan Police Department [the Grievant] knew or should have known that Officer Temple's acts and omissions constituted violations of the criminal code and/or rules and regulations of the department, yet [the Grievant] failed to report these violation to her superiors." (Award at p. 7) The Notice indicated that the proposed termination was based on the Grievant's failure to take certain police action on July 21, 2003. The Notice described the Grievant's misconduct and "contained four charges supported variously by six specifications." (Award at p. 2) By letter dated October 26, 2004, the Grievant elected to have a departmental hearing before an Adverse Action Panel (Panel). That hearing was conducted on January 11, 2005. At the hearing the Grievant pled guilty to two charges and not guilty to the other charges. "In a written decision [issued] on February 28, 2005, the Panel found the Grievant guilty of all charges and specifications with the exception of a not guilty finding as to any criminal conduct or gross neglect of duty as alleged in Charge No. 2, Specification No. 1 and recommended that [the Grievant] be terminated." (Award at p. 2)

Assistant Chief Shannon Cockett adopted the findings and conclusions of the Panel, including the Panel's recommendation that the Grievant be removed from the police force. The Grievant appealed the decision to the Chief of Police. The Chief of Police denied the appeal and FOP invoked arbitration pursuant to the parties' CBA. (See Award at p. 2).

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 pgs. 9-10). FOP argued that in this case the Grievant requested a departmental hearing on October 26, 2004. "Initially, the departmental hearing was scheduled for November 16, 2004 but was postponed at the request of the Grievant and subsequently conducted on January 11, 2005. [However, the Grievant] was not served with the Final Notice of Adverse Action until February 28, 2005, sixty-eight (68) days after the Grievant requested said hearing, excluding the time elapsed due to the requested continuance (November 16 through January 11, 2005)." (Award at pgs. 10-11). FOP claimed that MPD's violation of the 55-day rule was sufficient to require rescission of the termination without considering the merits of the case. (See Award at p. 11).

MPD countered "that it complied with the 55-day rule by issuing a written decision within forty-seven (47) days of the date [the] Grievant elected to have a departmental hearing. In this connection, [MPD] noted that the hearing was initially scheduled for November 16 and 18, 2004. At the Grievant's request the hearing was postponed and not held until January 11, 2005. According to [MPD], as the Grievant elected to have a hearing on January 11, 2005, the 55-day rule as per Article 12, Section 6(a) of the CBA began on January 12, 2005, or forty-seven (47) days after the [the Grievant elected to have a hearing]." (Award at p. 12) In the alternative, MPD argued that even if its final decision was issued more than 55 days after the date the Grievant elected to have a hearing, said violation constituted harmless error and the termination should be sustained. (See Award at p. 12)

In an Award issued on July 29, 2006, Arbitrator Irwin Kaplan rejected MPD's arguments by noting the following:

The record disclosed that the MPD did not serve the Grievant with the final removal decision until February 28, 2005, sixty-eight (68) days after she requested the departmental hearing. After carefully reading the contractual provisions that pertain to the 55-day rule and noting particularly, that the notice requirement is mandatory, I am persuaded that the [MPD] did not timely serve the Grievant with its final decision and thereby violated Article 12, Section 6, as contended by the Union. Thus, in agreement with the Union and in line with numerous arbitrator decisions, I find that the starting date for considering compliance with the 55-day rule was October 26, 2004 when the Grievant elected to have a departmental hearing.¹

Similarly, the [MPD] has not presented any compelling basis warranting a departure from Judge Kravitz' rulings in MPD v. PERB supra and the numerous arbitration decisions that have rejected arguments regarding harmless error or the arbitrator's authority to rescind the termination penalty for a violation of the 55-day rule. Accordingly, these arguments are rejected in the instant case. With regard to the [MPD's] reference to Article 19, Section E. 5.2, that the Union waived or forfeited its right to rely on the 55-day rule because it failed to raise such issues when it invoked arbitration, I find this assertion factually incorrect. Thus

¹"In determining that the belated service of the final decision was in excess of 55-days thereby violating the CBA, the length of the delay that resulted from the Grievant's requested postponement (November 16, 2004 through January 11, 2005) was excluded from the count, in conformity with Article 12 § 6(a) of the agreement." (Award at p. 18, n. 4).

the record disclosed that the Union raised the 55-day rule violation in the Appeal to Chief Ramsey. . . .

Having found in favor of the Union on the threshold issue vis-a-vis the 55-day rule, I further find that rescission of the removal penalty is warranted. As noted previously, this determination is in line with Judge Kravitz' recent decision in MPD v. PERB, supra. Accordingly, I find it unnecessary to address the merits of the charges with the limited exception noted below:

The record disclosed that at the hearing before the Adverse Action Panel, [the Grievant] pled guilty to Charge No. 1, Specification No. 2 and to Charge No. 3, Specification No. 1. . . . In essence, these charges and specifications relate to physical and verbal altercations between Officer Temple and an unknown civilian female, which the Grievant observed but failed to take appropriate police action, including placing one or both under arrest. As I recently noted in a case involving the same parties, "in the absence of coercion, fraud or misrepresentation (and such is not contended), a guilty plea has consequences [and] [t]he Agency has a right to rely on such a plea." FMCS Case No. 05-51955 at 27 (January 11, 2006) Accordingly, I shall convert the termination to a limited suspension. This principal is not at odds with the Union's position as stated in its Reply Brief. There, the Union urged that "Officer Resper be reinstated and her penalty converted to the appropriate suspension." . . . (Award at pgs. 18-20, emphasis in original.)

As a 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 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).

MPD 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, MPD asserts "that its violation of the 55-day provision by 13 days is a minor or technical violation." (Request at p. 8). Therefore, MPD is requesting that the Board reverse Arbitrator Kaplan's Award. In support of its position, MPD notes that "in his concurring opinion, Senior Judge Schwelb stated, he might well conclude otherwise if the final adverse action 'decision had been issued within 56 days instead of about 600 [days] and if reinstatement with back pay had nevertheless been ordered by the arbitrator, by the PERB, and by the trial court.'" (Request at pgs. 8-9). MPD argues that with respect to the CBA, Judge Schwelb reasoned in pertinent part as follows:

Contracts must be construed to avoid irrational results, and an interpretation of the collective bargaining agreement in this case as meaning that the slightest imperfection in the process requires the reinstatement of an officer, however culpable, with back pay, notwithstanding the absence of any demonstrable prejudice, strikes me as so irrational that the parties should not be deemed to have intended such a result. (Footnote omitted) . . . [T]he parties bargained for a decision by the arbitrator, and that is what they got. At some point, however, a ruling even by an arbitrator becomes so unreasonable that its enforcement would be contrary to public policy. (Request at p. 9)

Relying on Judge Schwelb's concurring opinion, MPD contends that "[t]he period of the violation here, 13 days past the 55-day deadline, should be deemed to be a slight imperfection in the process. [The Grievant] pled guilty to two specifications of the charged misconduct, thereby acknowledging her culpability. Also, she failed to demonstrate any prejudice as a result of the 13-day violation. As such, Arbitrator Kaplan's ruling is 'so unreasonable that its enforcement would be contrary to public policy.' . . . Thus, the [Award] should be set aside because, given the minor nature of the violation, the [Award] 'crosses the line between legitimate arbitration and irrational disproportionality.'" (Request at p. 9). We disagree.

The majority opinion rejected MPD's assertion that some harmless error analysis is required in the interpretation of the parties' CBA. See, 901 A.2d 784, 787-788. No such

requirement governs this case under the CMPA. Id. at 787. The majority also rejected MPD's argument that the time limit imposed on MPD by Article 12, Section 6 of the parties' CBA is directory, rather than mandatory. Specifically, the majority 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 judgement for [the arbitrator's].' 901 A2d 784, 789.

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. We decline MPD's request that we substitute the Board's judgement for the arbitrator's decision for which the parties bargained. 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 MPD's argument. 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.

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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.

May 8, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-21 was transmitted via Fax and U.S. Mail to the following parties on this the 8th day of May 2007.

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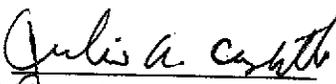
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