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. 10-A-11
	Opinion No. 1125
Fraternal Order of Police/Metropolitan Police Department Labor Committee, (on behalf of Officer Eric Melby),	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On December 23, 2009, the District of Columbia Metropolitan Police Department ("MPD", "Department" or Complainant") filed an Arbitration Review Request ("Request") in the above captioned matter. MPD seeks review of an arbitration award ("Award") that sustained the Fraternal Order of Police/Metropolitan Police Department Labor Committee's ("Union", "FOP" or "Respondent") grievance filed on behalf of Officer Eric Melby ("Grievant" or "Officer Melby") with MPD.[1] The Arbitrator ruled that MPD violated the collective bargaining agreement ("CBA" or "the Agreement") between the Union and MPD.

The issue before the Board is 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 March 25, 2005 termination of Officer Melby's employment.

II. Discussion

A. Arbitrator's Award

The Arbitrator took note of the following facts which were presented at the Departmental Hearing:

> On August 4, 2002, Grievant was working his regular midnight tour. At approximately 3:40 a.m., he received an emergency radio call for assistance near New York and New Jersey Avenues, N.W. Grievant proceeded on I-395 and through the 3rd Street tunnel. Grievant was operating alone in his police cruiser. He drove the lead vehicle, followed by two other police cruisers, one being operated by Officer Modlin and another by Officers Parker and Koenig. Grievant exited I-395 and turned right onto New York Avenue (heading east). As Grievant approached the 3rd Street intersection, he made a left turn prior to the intersection in an effort to block westbound New York Avenue traffic. As he executed the left turn, Grievant was involved in an accident with a vehicle being driven by [a citizen].

(Award at pgs. 6-7) (Citations to record omitted).

MPD conducted an investigation of the incident. (See Award at p. 7). The Arbitrator observed that MPD took the following actions:

> Sergeant Clearwater was assigned to investigate the accident. He concluded that the statements of Mr. Dent and two uninvolved witnesses conflicted with Grievant's account of the accident. He further concluded that Grievant's "unreasonable speed and failure to exercise proper caution in the traffic conditions" were contributing factors to the accident and recommended that the accident be deemed "preventable." MPD's Crash Review Board concluded that the incident was "preventable" and recommended that adverse actions be taken against Grievant.
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> On October 27, 2004, the Department served Grievant with a Notice of Proposed Adverse Action ("Proposed Notice"). The Proposed Notice contained three charges against Grievant for his August 4, 2002, incident:
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> > Charge 1 was "using unnecessary and wanton force in arresting or imprisoning any person or being discourteous or using unnecessary violence toward any person," and was supported by three specifications;

> Charge 2 was "[c]onduct unbecoming an officer," and was supported by seven specifications; and
>
> Charge 3 was "[f]ailure to obey orders or directives issued by the Chief of Police," and was supported by one specification.

The Proposed Notice informed Grievant that, if he desired to have a Departmental Hearing, the Hearing would be held on November 17, 2004. By letter dated October 27, 2004, Grievant requested a Departmental Hearing with regard to the charges against him.

By letter dated November 9, 2004, [. . .] Grievant's attorney request[ed] a continuance of the hearing . . . currently scheduled for November 17, 2004. . . .

As a result of this request for continuance, [Grievant] agrees to waive the 55-day rule in accordance with Article 12, Section 6(b) [sic] of the Collective Bargaining Agreement.

The hearing was rescheduled and conducted on December 16, 2004.

(Award at pgs. 7-8) (citations to record omitted).

The Arbitrator found that at the outset of the Trial Board Hearing, the Grievant pled guilty to Charge 1, Specification 1; Charge 2, Specifications 1 and 4; and Charge 3, Specification 1. (See Award at p. 8). Applying the facts to the charges, the Trial Board asserted the following:

> Charge 1, Specification 1:
>
> In that on August 8, 2002, you were involved in an on duty traffic accident in the 300 block of New York Avenue, Northwest. By your own admission you told the driver to exit his vehicle, when Mr. Dent didn't comply, you opened his car door and ordered him to exit his vehicle. Due to Mr. Dent's failure to comply, you reached into his car, took hold of his arm and brought him to a standing position and walked him to the trunk of the vehicle.
>
> Charge 2, Specification 1:

> In that on August 8, 2002, Mr. Dent stated that you jumped out of your vehicle and began cussing at him, saying "what the hell are you doing?" "Get the hell out of the car," and "put the damn cigarette out." Mr. Dent described your behavior as "irate" and that you were pacing back and forth. As a result of your behavior, Mr. Dent felt scared, urinated on himself and cried.
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> Charge 2, Specification 4:
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> In that on August 8, 2002, Lieutenant Gerry Scott observed you screaming at Mr. Dent saying, "I don't believe this shit," "What in the hell were you doing?" Lieutenant Scott also stated that you were waving your hands and walking back and forth yelling and appeared out of control.
>
> Charge 3, Specification 1:
>
> In that on August 4, 2002, you were involved in a[n] on duty traffic accident in the 300 block of New York Avenue, N.W., that was deemed by the Crash Review Board as "preventable."

(Award at pgs. 8-9) (Citations to the record and footnotes omitted).

The Arbitrator remarked that the "Grievant pleaded "not guilty" to the remaining charges and specifications." (Award at p. 9).

Based upon the evidence presented, the Adverse Action Panel ("AAP") issued a Summary of Evidence, Findings of Fact, Conclusions, and Recommendation. (See Award at p. 9). The Arbitrator found that the AAP made 19 Findings of Fact, and specifically noted the following findings:

> [Grievant] ordered Mr. Dent to exit his vehicle, and when Mr. Dent didn't comply, [Grievant] reached into Mr. Dent's vehicle, grabbed Mr. Dent's arm and brought him to a standing position and walked him to the trunk of his vehicle.
>
> [Grievant] reported that he was irate as a result of the accident and was yelling, cursing and screaming at Mr. Dent. . . .
>
> [Grievant] kicked Mr. Dent's left leg and then his right leg. Mr. Dent stated that the kick to his right leg was much harder. Officers observed [Grievant] kick Mr. Dent's legs apart.
>
> [Grievantl's behavior on the scene of this incident was erratic, unprofessional and unbecoming an officer.

> [Grievant] acted unprofessional and used profane language while addressing Mr. Dent. All witnesses testified to this fact and [Grievant] reported that he did curse but not at Mr. Dent.
>
> Ms. Kaisken described [Grievant] as using the "F" word while screaming at Mr. Dent.
>
> Officer Parker testified that [Grievant] was upset, yelling and cursing at Mr. Dent.
>
> Lieutenant Scott testified that [Grievant] was yelling, walking back and forth and appeared out of control.
>
> [Grievant]'s only reason to his actions was that he acted this way due to being injured and that his past pursuits he was involved in made him act unprofessional. He received counseling.

The Arbitrator found that based on the findings noted above, "the AAP accepted Grievant's guilty pleas to Charge 1, Specification 1; Charge 2, Specifications 1 and 4; and Charge 3, Specification 1. In addition, the AAP found Grievant guilty of Charge 1, Specifications 2-3; and Charge 2, Specifications 2 and 5-7. It found Grievant not guilty of Charge 1, Specification 3, and made no determination regarding Charge 2, Specification 3." (Award at p. 10).

In addition, the AAP stated that it:

> weighed Grievant's offenses according to each of the *Douglas* factors. The panel recommended (unanimously) that the Grievant be terminated. By Memorandum dated February 1, 2005, and received by Grievant on February 3, 2005, Assistant Chief Shannon P. Cockett accepted the AAP's recommendation and issued Grievant a Final Notice of Adverse Action. Grievant was terminated from the Department effective March 25, 2005.

(Award at pgs. 10-11).[2]

In response to the Department's determination, the Respondent filed an appeal of the Department's Final Notice of Adverse Action with Chief of Police Charles H. Ramsey. (See Award at p. 11). In the grievance, the Union contended that the Grievant's termination should be rescinded:

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[2] See *Douglas v. Veterans Administration*, 5 MSPR 280 (1981).

> Based on a 1) clear violation of the 55-day provision in the Collective Bargaining unit, 2) the D.C. Code provision requiring the department to complete its investigation within 90-business days, 3) insufficient evidence contained in the trial record to prove [Grievant]'s guilt, and 4) the overwhelming mitigation submitted at the hearing, [Grievant] respectfully requests that you reject the recommended conclusion and penalty determination of the Panel as they are contrary to the evidence and reinstate [Grievant].

(Award at p. 11) (Citations to the record and footnotes omitted).

The Union's grievance was denied in a letter dated February 25, 2005, in which Chief Ramsey stated, "[t]he issues of the 55-day Rule and the 90 business-day Rule are in litigation and the trial record is replete with evidence, including [Grievant]'s admissions of guilt, to support the termination. Also, while there may be other cases involving excessive force and verbal abuse, this case is unique in terms of the preventable accident and the public traumatism *[sic?]*of the citizen who lost control of his bladder and was reduced to uncontrollable crying." (Award at p. 11).

Whereas the Parties were unable to resolve the dispute through the grievance procedure in the parties' CBA, the Union invoked arbitration. The Arbitrator stated that his findings were "based solely on the record established in the Departmental Hearing . . ." (Award at p. 12).

The parties' positions at the arbitration were argued on brief. The Arbitrator summarized their arguments as follows:

> **The Department** argues that it did not violate the 55-day rule, grievant waived the 55-day rule and, even if it did violate the 55-day rule, its violation was *de minimus* and, therefore, harmless. It asserts that the record establishes that the decision is supported by substantial evidence and urges that the penalty of termination was proper.
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> MPD further argues that, during the pendency of the disciplinary action, two different collective bargaining agreements were in effect - the 2003 Agreement and the 2008 Agreement. It contends that the 2003 Agreement was in effect when it served Grievant with the Proposed Notice but that the 2008 Agreement, which changed the method by which the days are counted for purposes of the 55-day rule from calendar days to business days, was in effect before the passage of 55 calendar days under the 2003 Agreement. Although MPD acknowledges that, under the 2003 Agreement, it was required to issue its decision to Grievant on the Proposed Notice on or before January 29, 2005, it maintains that under the 2008 Agreement, it did not violate the 55-day rule

when it provided its decision on February 3, 2005. It asserts that under the 2008 Agreement and the 55-business day requirement, it had until February 17, 2005 to issue its decision. Under that provision, MPD maintains that the decision was not untimely.

The Agency further argues that when Grievant's Counsel requested that the hearing originally scheduled for November 17, 2004, be continued, he waived the 55-day rule. It points out that counsel's letter stated, "As a result of this request for continuance, [Grievant] agrees to waive the 55-day rule in accordance with Article 12, Section 6(b) [*sic*] of the Collective Bargaining Agreement." MPD maintains that it relied on Grievant's waiver when it granted the requested continuance. It asserts, citing *Hoang Nguyen*,[3] that, when the 55-day rule is expressly waived, Article 12, Section 6, has no application to the related proceeding. It contends that counsel in *Nguyen* submitted a written request for a continuance, using waiver language similar to that used in the instant case. It points out that Arbitrator Murphy stated that the "request was in writing and it was made not by a lay person, but by legal counsel, who would be knowledgeable as to the implications of the use of waiver language" and specifically represented that grievant "waive[d] the application of the '55-day rule' in accordance with Article 12 § 6(a)" and, therefore, found that, "[f]or a number of reasons . . . this was an express waiver of the application of the rule (an agreement that the rule would be totally disregarded for all purposes), offered as a *quid pro quo* for being granted the requested continuance."

The Department further argues that, in the instant case, Grievant requested a continuance of the November 17, 2005 hearing and agreed to waive application of the 55-day rule as a part of his request. It contends that the plain meaning of Grievant's waiver is that Article 12, Section 6, of the 2003 Agreement would not apply. MPD maintains that Grievant now wants his waiver to be ignored and the provisions of Article 12, Section 6, enforced. It asserts that Grievant freely waived Article 12, Section 6, and his attempt to invoke it now should be rejected.

MPD further argues that, even assuming that the Grievant did not expressly waive the 55-day rule and the 2003 Agreement governs, thus making the Department's written decision late, the five-day delay in its issuance was *de minimus* and, therefore,

[3] FMCS Case No. 50712-05-75453-A (Michael A. Murphy, Arb.) (2006). See also *Minh Ngo*, FMCS Case No. 04115-51806 (Joseph M. Sharnoff, Arb.) (2005).

> harmless. It contends that, although a D.C. Court of Appeals upheld PERB's decision sustaining an arbitrator's award reinstating an officer with back pay where there was a violation of the 55-day provision by roughly one and one-half years, Senior Judge Frank E. Schwelb stated that he might well conclude otherwise if the final adverse "decision had been issued within 56 days instead of about 600 [days]." It points out that Judge Schwelb reasoned that, "an interpretation of the collective bargaining agreement. . . 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."[4]
>
> The Agency further argues that, although an arbitrator recently concluded that the Department violated the 55-day rule by six days, he found that the seriousness of the misconduct with which the employee was charged made the six-day violation *de minimus*. It maintains that Arbitrator Gullifer found that "the violation [of the 55-day rule] pales in comparison to the finding of the panel in regards to the actions of [the grievant]," and "the violation of 'the 55-day rule' to be *de minimus* ..." and upheld the termination. It asserts that the period of violation in the instant case, five days past the 55-day deadline, is a technical violation or "slight imperfection in the process." It points out that Grievant pleaded guilty to three of the charges and specifications of misconduct, thereby acknowledging his culpability, and was found guilt [*sic*] of seven of the remaining specifications of misconduct. It contends, in addition, that Grievant failed to demonstrate any prejudice resulting from the five-day violation. It asserts, therefore, that reinstating Grievant with full back pay for MPD's violation would be, in the words of Judge Schwelb, "so unreasonable that its enforcement would be contrary to public policy."

(Award at pgs. 12-16)(citations to the record omitted and emphasis in original).

The Arbitrator summarized the Union's argument as claiming that:

> the Department's charges against Grievant are not supported by substantial evidence. It maintains that the evidentiary record

[4] *Metropolitan Police Department v. D.C. Public Employee Relations Board* ("*MPD v. PERB*"), 901 A.2d 784, 790 (D.C. 2006).

> demonstrates that Grievant's use of inappropriate language toward Mr. Dent was the direct result of head trauma that he suffered during the accident, moments before the interaction between them. FOP contends that Grievant used an appropriate level of force when he removed Mr. Dent from his vehicle and ordered him to stand near the rear of his vehicle. It asserts that the Department failed to present substantial evidence to support its findings of guilt.

(Award at p. 18).

The Union also argued that:

> the Agency failed to provide Grievant with its final decision until the 60th day after he had requested a hearing, thereby violating the 55-day rule. [The Union] asserts that it did not waive the 55-day rule entirely, as argued by MPD, but only waived it for the length of the continuance it requested. It maintains that the Department's charges against Grievant are not supported by substantial evidence and that, in any case, termination is not an appropriate penalty.

(Award at p. 18).

Upon consideration of the parties' arguments, the Arbitrator concluded that: (1) "the Agency failed to meet its burden to prove compliance with the negotiated 55-Day rule"; and (2) that "[i]t did not provide its Final Notice to Grievant timely and, therefore, violated the 55-day rule. The only appropriate remedy is reinstatement." (Award at p. 32).

MPD filed the instant review of the Award, contending that: "(1) the award is contrary to law and public policy; and (2) the arbitrator was without authority to grant the award." (Request at p. 2).

B. MPD's Request

As an initial matter, Respondent asserts that the Request is untimely. (*See* Opposition at p. 4). FOP states that the pursuant to Article 19 § 6 the parties' Collective Bargaining Agreement ("CBA"), "[e]ither party may file an appeal from an arbitration award to the [Board], not later than twenty (20) days after the award is served. . ." (Opposition at p. 4). Also, FOP claims that the Award was served by Arbitrator M. David Vaughn to the parties on November 29, 2009.[5] (See Opposition at p. 4). FOP argues that Petitioner's Request was filed December

[5] As noted by Respondent, an Affidavit attached to the Petition, averred that the Department received the Opinion and Award by mail on December 3, 2009.

23, 2009, "four (4) days after the deadline for filing such requests, as established, and controlled by the CBA." (Opposition at p. 4).

In *American Federation of State, County and Municipal Employees, Local 2401 (on behalf of Albert Jones) and Office of the Attorney General*, 54 DCR 2951 Slip Op. No. 856, PERB Case No. 07-A-01 (2006), we stated the following:

> Board Rule 501.16 provides in pertinent part that "[s]ervice of pleadings shall be complete on personal delivery ... depositing the document in the United States mail or by facsimile." Also, Board Rule 599 defines pleadings as "Complaint[s], petitioner[s], appeal[s], request[s] for review or resolution [s], motion[s], exception[s], brief[s] and responses to the foregoing. In light of the above, we believe that Board Rule 501.16, concerns the service of a pleading filed with the Board and not to the service of an award issued by an arbitrator on parties that participated in the arbitration proceeding. Even assuming arguendo that Board Rule 501.16 is applicable in this case, we have previously found that "[t]he Board's Rules exist to establish and provide notice of a uniform and consistent process for proceeding in matters properly within our jurisdiction. In this regard, we do not interpret our rules in such a manner as to allow form to be elevated over the substantive objective for which the rule was intended." *Citing District of Columbia General Hospital and Doctors' Council of the District of Columbia General Hospital*, 46 DCR 8345, Slip Op. No. 493 at p. 3, PERB Case No. 96-A-08 (1996). AFSCME's argument that although the parties agreed to accept issuance of Arbitrator Coburn's award via email, the parties did not stipulate that service of the award via electronic mail would be sufficient, is such an application of our Rules. While the Award transmitted to AFSCME on August 21, 2006, was not served by one of the methods of service noted in Board Rule 501.16, we find under these facts that the impact of this requirement is one of form rather than substance. . . In light of the above, we do not find AFSCME's argument to be persuasive.

Slip Op. No. 856 at p.11. (Emphasis added.)

MPD attached to its Request an affidavit by Shamieka Donawa, a paralegal specialist within its Personnel and Labor Relations Section, declaring that her review of the mail log indicated that MPD received the Award via U.S. Mail on December 3, 2009. Board Rule 501.4 provides no exception to the 5 additional days afforded an individual for initiating a cause of action. With respect to weighing the probative value of conflicting evidence under these circumstances, we have observed that without addressing the veracity of the affidavit, nothing in FOP's Response rebuts the affidavit that service of the Award was by mail, on December 3,

2009. *See District of Columbia Public School and Washington Teachers' Union*, 42 DCR 5479, Slip Op. No. 335, at p. 2, PERB Case No. 92-A-10 (1992). Moreover, the date of service of the Award, and not the date of receipt, is the controlling factor in determining when the time period under Board Rule 538.1 commences for purpose of initiating an arbitration review request. *See American Federation of Government Employees, Local 727, AFL-CIO (On Behalf of Carlise Clayton) and District of Columbia Board of Parole*, 45 DCR 5071, Slip No. 551, PERB Case No. 98-A-01(1998).

However, the Board's precedent shows that the five days added to pleadings when served by mail have also been added to the initial date to file a request in an arbitration review case when the award was served by mail. *See D.C. General Hospital v. Doctors Council of DCGH, supra*; *see also Health and Hospital Public Benefit Corporation and International Brotherhood of Police Officers, Local 446 (On Behalf of Officer James Owens)*, 45 DCR 4954, Slip Op. No. 549, PERB Case No. 98-A-03 (1998) (Board Rule 501.4 provides an unqualified uniform enlargement of time, i.e., five (5) days, to file pleadings when service is by mail).

Whereas the service of the Award in this case was by mail on November 29, 2009, the request was due twenty days, plus five additional days, from that date, or December 24, 2009. As previously acknowledged, the Request was filed on December 23, 2009, and is therefore deemed timely.

As to the merits of the Request, the Board has held that when a party files an arbitration review request, the Board's scope of review is extremely narrow.[6] 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.).

As to MPD's claim that the Award is on its face contrary to law and public policy, we disagree for the reasons discussed below.

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[6] In addition, 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:
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> (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.

As stated above, the Board's scope of review, particularly concerning the public policy exception, is extremely narrow. Furthermore, the U.S. Court of Appeals, District of Columbia Circuit, observed that "[i]n *W.R. Grace*, the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" Obviously, the 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).[7] 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). See also *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 the 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. (See Request at p. 5). However, MPD asserts "that its violation of the 55-day provision by one (1) day is a minor or technical violation." (Request at p. 8). Therefore, MPD is requesting that the Board reverse the Arbitrator's Award. In support of its position, MPD notes that "in his concurring opinion, Senior Judge Schwelb stated:

> If the MPD panel's written decision had been issued within 56 days, instead of about 600, and if reinstatement with back pay had nevertheless been ordered by the arbitrator, by the PERB, and by the trial court, I might well conclude otherwise. 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

[7] See *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 2176, 76 L. Ed. 2d 298 (1983).

> 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; citing 901 A. 2d 784, 790).

Relying on Judge Schwelb's concurring opinion, MPD contends that "[t]he period of the violation here, 1 day past the 55-day deadline, should be deemed to be a slight imperfection in the process. [The Grievant] pled guilty to all charges except Charge 2, Specification 2, thereby acknowledging his culpability. Also, the Grievant failed to demonstrate any prejudice as a result of the 1-day violation. As such, the Arbitrator's ruling is 'so unreasonable that its enforcement would be contrary to public policy." (Request at p. 8). We disagree.

The majority opinion rejected MPD's assertion that a "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 judgment for [the arbitrator's].

901 A2d 784, 789.

MPD also argues that "[i]t is beyond question that the suitability of a person employed as a police officer is an important public policy. Grievant committed his misdeeds while employed as a police officer and Employer decided that he was no longer suitable to function in that capacity. A remedy of reinstatement returns to the Employer an individual unsuitable to serve as a police officer. Clearly, such a remedy would violate public policy." (Request at p. 9). The Board, however rejects this argument, and finds the Court of Appeals' *Fisher* decision, to provide guidance. In *Fisher*, MPD argued that the award was contrary to law and public policy because of "the strong public interest in insuring the competence and honesty of public employees, especially armed police officers. . . ." 901 A. 2d 784 at 789.

However, the Court of Appeals stated that:

> no one disputes the importance of this governmental interest; the question remains whether it suffices to invoke the *"extremely narrow"* public policy exception to enforcement of arbitrator awards. *Am. Postal Workers,* 252 U.S. App. D.C. at 176, 789 F.2d at 8 (emphasis in original). Construing the similar exception in federal arbitration law, the Supreme Court has emphasized that a public policy alleged to be contravened "must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L.Ed.2d 298 (1983) (citation and internal quotation marks omitted); *see E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17,* 531 U.S. 57, 63, 121 S. Ct. 462, 148 L.Ed.2d 354 (2000) (for exception to apply, the arbitrator's interpretation of the agreement must "run contrary to an explicit, well-defined, and dominant public policy"). Even where, in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.,* 484 U.S. 29, 108 S. Ct. 364, 98 L.Ed.2d 286 (1987), an employer invoked a "policy against the operation of dangerous machinery [by employees] while under the influence of drugs" a policy judgment "firmly rooted in common sense" the Supreme Court reiterated "that a formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award ... entered in accordance with a valid collective-bargaining agreement." *Id.* at 44, 108 S. Ct. 364.

Id. at pgs. 789-790.

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 judgment 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). Instead MPD repeats the same arguments considered and rejected by the Arbitrator; this time asserting that the Arbitrator misinterpreted the Court of Appeals' *Fisher* decision.

We have held that a disagreement with the Arbitrator's interpretation does not render an award contrary to law. See *DCPS 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).

In the present case, MPD also contends that the CBA does not expressly grant the Arbitrator the authority to issue a remedy for a violation of the 55-day rule. (See Request at p. 6). MPD suggests that the plain language of Article 12, Section 6 of the CBA does not impose a penalty for noncompliance with the 55-day rule. Therefore, by imposing a penalty where none was expressly stated or intended, MPD asserts that the Arbitrator added to, and modified the parties' CBA. (*See* Request at p. 7). In addition, MPD argues that by adding to, subtracting from or otherwise modifying provisions of the agreement in adjudicating cases, the Arbitrator's Award did not draw its essence from the agreement. (See Request at p. 7).

The Board has held, as has the Court of Appeals for the Sixth Circuit, that questions of procedural aberration, asking whether: (1) the arbitrator acted outside his authority by resolving a dispute not committed to arbitration; (2) the arbitrator committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award; and (4) the arbitrator, in resolving any legal or factual disputes in the case, was arguably construing or applying the contract; so long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made serious, improvident, or silly errors in resolving the merits of the dispute. See *Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M*, 475 F. 3d 746, 753 (2007) (overruling *Cement Divisions, Nat. Gypsum Co. (Huron) v. United Steelworkers of America, AFL-CIO-CLC*, Local 135, 793 F.2d 759).

In light of the above, the Board finds that there is no claim that the arbitrator acted outside his authority by resolving a dispute not committed to arbitration, committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award. The Board finds that here, the Arbitrator, in resolving any legal or factual disputes in the case, was arguably construing or applying the contract. Therefore, the Board rejects MPD's argument that the Arbitrator exceeded his authority or acted outside his jurisdiction in resolving the grievance before him.

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 [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). 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."

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 that 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 6 of the parties' CBA. MPD merely requests that 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 that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.[8] 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 that 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 the Arbitrator concluded that MPD violated Article 12, Section 6 of the parties' CBA, she also had the authority to determine the appropriate remedy. Contrary to MPD's contention, the Arbitrator 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, the Arbitrator acted within her authority. The Board finds that MPD's argument asks that this Board adopt its interpretation 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.

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.

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.

August 31, 2011

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[8] 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.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-11 was transmitted via U.S. Mail to the following parties on this the 31st day of August 2011.

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