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

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| In the Matter of: | |
| Fraternal Order of Police/Metropolitan Police Department Labor Committee, (on behalf of Christopher Micciche), | |
| Petitioner, | |
| and | PERB Case No. 04-A-19 |
| Metropolitan Police Department, | Opinion No. 913 |
| Respondent. | |

## DECISION AND ORDER

### I. Statement of the Case

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP", "Union" or "Petitioner") filed an Arbitration Review Request ("Request") in the above captioned matter. FOP seeks review of an arbitration award ("Award") which sustained the Metropolitan Police Department's ("MPD") ninety (90) day suspension of Officer Christopher Micciche ("Grievant"), a bargaining unit member.

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

On June 30, 2000, the Grievant and Officers Tucker and Harris responded to a domestic dispute at approximately 11:30 p.m. involving a Mr. Carr. While at the location of the dispute, the Grievant and the other officers became involved in an altercation with Mr. Carr. As a result of the altercation, the Grievant pepper-sprayed, placed in handcuffs

and arrested Mr. Carr. (See Request at p. 2).[1] Officers Salmond and Wilson also responded to the incident. While attempting to place Mr. Carr in the police scout car, Officers Salmond and Tucker, as well as Mr. Carr, allegedly witnessed the Grievant spitting on Mr. Carr and slamming the door of the police scout car on Mr. Carr's legs.

An investigation was conducted, and on November 22, 2002, a Final Notice of Adverse Action was issued, which imposed a thirty (30) day suspension. (See Award at p. 13). The Notice contained two charges: (1) Violation of General Order Series 1202, Number 1. Part I-B-11 that provides: "Using unnecessary and wanton force in arresting or imprisoning any person or being discourteous or using unnecessary violence towards any person(s), or the public."; and (2) Violation of General Order Series 1202, Number 1. Part I-B-12 that provides: "Conduct unbecoming an officer including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." (Award at p. 13). On December 4, 2002, the Grievant filed an appeal to the Chief of Police, who issued a Final Agency Action on January 10, 2003, denying the appeal and increasing the penalty to a ninety (90) day suspension. (See Award at pgs. 13-14). Specifically, the Chief of Police increased the penalty due to the "gravity and public nature of Officer Micciche's conduct." (Award at p. 14, and Joint Exhibit-9). On January 24, 2003, the Union, pursuant to the parties' collective bargaining agreement ("CBA") invoked arbitration on behalf of the Grievant. (See Award at p. 14).

At arbitration, the following issues were before the Arbitrator:

1. Whether the Grievant Micciche committed the acts as alleged in the Final Notice of Adverse Action dated November 22, 2002, and if so, whether the penalty of a 90-day suspension is appropriate.

2. Whether [MPD] violated Article 4 of the [CBA] by not completing the investigation within 90 days.

3. Whether [MPD] violated Article 10 of the [CBA] by not responding to Grievant Micciche's request for information and as a result, whether Grievant Micciche was denied due process.

4. Whether [MPD] violated Article 12, Section 7 of the [CBA] by not responding to Grievant Micciche's appeal within 15 days.

[1] The Board notes that there is a discrepancy between the date of the incident as referenced in the Award (June 30) and in the Request (June 20). However, the Board finds that the difference in dates is not material to its decision.

> 5. Whether the Chief of Police violated the [CBA] by increasing the proposed suspension from 30 to 90 days.

(Award at p. 14).

At arbitration, the Union contended that: (1) MPD violated Article 12, Section 1 of the CBA because the suspension was not for just cause; (2) the Grievant was not afforded due process due to the length of time it took before the Grievant was served with the Final Notice of Adverse Action; and (3) the Grievant's suspension should be reversed because the Chief of Police failed to respond to the Grievant's appeal of the Final Notice within the 15 days as required by the parties' CBA.[2] (See Award at pgs 15-16).

MPD countered that there was just cause for the Grievant's suspension. Also, MPD asserted that the Chief of Police has the authority to increase a penalty. Lastly, MPD argued that there was no violation of the CBA by not: (1) completing the investigation within 90 days; (2) providing all the information the Grievant requested for the trial board hearing; and (3) responding to Grievant's appeal within 15 days. (See Award at p. 16).

In the Award, the Arbitrator found that the evidence presented supported MPD's charge that the Grievant had spat on Mr. Carr and slammed a scout car door on Mr. Carr's leg while handcuffed. (See Award at pgs. 18-22). In addition, the Arbitrator determined that pursuant to the table of penalties a suspension of 90 days was appropriate for conduct unbecoming an officer. (See Award at p. 21). Furthermore, the Arbitrator determined that nothing limited the Chief of Police's authority to increase the penalty from a 30-day suspension to a 90-day suspension. (See Award at p. 27). The Arbitrator also found that the length of the investigation was reasonable and presented no harm to the Grievant. (See Award at pgs. 22-23). Concerning MPD's failure to provide all the information the Grievant requested for the trial board hearing, the Arbitrator found that the Grievant's request failed to reveal any relevant withheld evidence that would have affected the Arbitrator's decision. (See Award at p. 24).

The Arbitrator also found that Article 12, Section 7 of the parties' CBA had been violated by the Chief of Police's failure to respond to the Grievant's appeal within 15 days. However, the Arbitrator concluded that the violation did not "deprive Grievant of

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[2] Article 12, Section 7 of the parties' CBA 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).

due process or affect the decision to discipline." (Award at p. 26). Moreover, the Arbitrator ruled that it was insufficient to show that a contractual procedure had not been followed, without showing that the violation also caused harm.[3] The Arbitrator found that the Grievant had presented no evidence that the delay in the Chief of Police's response had any affect on the MPD's decision or was in any way harmful.

The Union filed the instant Request and asserts that the decision of the Arbitrator was contrary to law and public policy because: (1) the Arbitrator erred in forgiving harmless error; (2) the length of the investigation was not reasonable; and (3) the Arbitrator should have found the information the Grievant requested from MPD for the trial board hearing, but was denied, to be relevant to the Arbitrator's decision.

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, the Union argues that the Award is contrary to law and public policy and did not follow other arbitration and Board decisions regarding the mandatory nature of Article 12, Section 7 of the parties' CBA. (See Request at pgs 5-7). Specifically, the Union claims that harm need not be established in order to reverse the discipline by MPD where the Agency has violated contractual time limits. The Union also contends that the Arbitrator's decision is contrary to law and public policy by requiring the Grievant to show that the Chief of Police's violation of Article 12, Section 7 of the CBA caused harm.

In addition, the Union asserts that the Arbitrator's Award is contrary to law and public policy because the Union finds that the length of the investigation was unreasonable. The Union argues that MPD's failure to complete its investigation within 90 days violated Article 4 of the parties' CBA which requires MPD to recognize the laws of the District of Columbia. (See Request at p. 7). Specifically, the Union points to D.C. Code § 1-616.51, which provides that employees subject to discipline be given an opportunity to be heard within a reasonable period of time. (See Request at p. 7). The Union suggests that this period of time should be consistent with a Memorandum of

[3] The Arbitrator relied on the reasoning in *Cleveland Board of Education v. Loudermill*, 470 A. 2d 532 (1985) and *Handy v. United States Postal Service*, 754 F. 2d 335, 338 (Fed.Cir. 1985).

Agreement ("MOA") between MPD and the United States Department of Justice dated June 13, 2001, that investigations should be completed in 90 days.[4]

Lastly, the Union claims that the Arbitrator's Award is contrary to law and public policy in finding that the information the Grievant had requested prior to the trial board hearing was not relevant to making the Arbitrator's decision. The Union contends that MPD's failure to provide this information and the Arbitrator's Award are inconsistent with Article 10 of the parties' CBA, which requires MPD to release all pertinent information to a grievant which he requests in order to address the charges against him.

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 A.2d 319, 325 (D.C. 1989).

We find that the Union has not cited any specific law or public policy that mandates that the Board reverse the Arbitrator's Award. The Union 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). Here, the Union failed to do so. Instead, the Union argues that the Arbitrator's Award is contrary to law and public policy because it did not follow arbitral precedent. The Union also cites the decision of Judge Kravitz in *Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 01-MPA-18 (September 17, 2002). In that case, the Superior Court of the District of Columbia reviewed an appeal from an arbitrator's award which reversed a penalty because the discipline was untimely issued. Specifically, the arbitration decision reversed the discipline imposed by MPD due to missed contractual time limits. In the Superior Court case, Judge Kravitz affirmed the decision of the arbitrator, and agreed with the Board "that an arbitrator . . . act[s] within [his] authority by imposing a penalty upon MPD [for

[4] The Arbitrator found this argument to be disingenuous, as the MOA did not become effective until one year after the incident in question occurred. (See Award at p. 7).

violating Article 12, Section 6] without first making a finding of harmfulness." *Id.* That decision was appealed to, and affirmed by, the District of Columbia Court of Appeals. The Board finds the Court of Appeals case to be analogous to the present one. However, the Court of Appeals also stated that: "[i]n bargaining for an arbitrator to make findings of fact and to interpret the Agreement, the parties chose a forum that is not bound by precedent. Arbitration decisions do not create binding precedent even when based on the same collective bargaining agreement. See, e.g., *Hotel Ass'n of Washington D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25*, [295 U.S. App. D.C. 285, 286-88,] 963 F.2d 388, [389-]391 (D.C. Cir. 1992)." *Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 901 A.2d at 790.

Thus, the Court of Appeals made it clear that, contrary to the Union's contention, an arbitrator is not bound by other arbitral decisions even when interpreting the same clause in the same CBA. The Board notes that the Court of Appeals' decision indicates that there is no language in the CMPA which **mandates** application of the harmless error rule. (See *MPD v. PERB*, 901 A. 2d at 787). An arbitrator is within his or her authority to interpret the provisions of the parties' CBA concerning whether or not harm must be shown when reversing disciplinary action.

In the present case, the Arbitrator could have interpreted Article 12, Section 7 of the parties' CBA to make the 15-day response time either mandatory or directory. Neither interpretation creates a statutory ground for the reversal of an award. Here, the Arbitrator found that there was a procedural violation, but that no harm resulted from the violation. Accordingly, the Arbitrator sustained the penalty and denied the grievance. The fact that there are prior arbitral decisions to the contrary involving the same parties did not require the Arbitrator to reverse the discipline imposed by MPD due to the Chief of Police's failure to respond to the Grievant's appeal within 15 days. The Arbitrator's Award is not contrary to law and public policy by not following arbitral precedent.

The Union also contends the Award is contrary to law and public policy because it was inconsistent with the provisions of the parties' CBA which requires MPD: (1) to complete its investigation within 90 days; and (2) furnish FOP with all its requested documents. However, the Union does not specify any law or public policy which mandates that the Arbitrator arrive at a different result. Instead, the Union's arguments are a repetition of the arguments considered and rejected by the Arbitrator. The Board finds that the Union's grounds for review only involve a disagreement with the Arbitrator's interpretation of the parties' CBA. The 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).

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). 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."

*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); See also *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 the Union merely requests that we adopt its proposed findings and interpretation of the parties' CBA. This we will not do. The Board will not substitute its judgment for that of the Arbitrator. As a result, we cannot reverse on this ground.

We find no merit to the Union's arguments. 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. No statutory basis exists for setting aside the Award.

## ORDER

**IT IS HEREBY ORDERED THAT:**

1. The Fraternal Order of Police/Metropolitan Police Department Labor Committee'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 31, 2007**

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 04-A-19 was transmitted via Fax and U.S. Mail to the following parties on this the 31st day of October 2007.

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