Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Keith Lynn),	
Petitioner,	PERB Case No. 05-A-01
and	Opinion No. 845
District of Columbia Metropolitan Police Department,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") filed an Arbitration Review Request ("Request") in the above-captioned matter. FOP contends that the Award is contrary to law and public policy. (See Request at p. 2) The District of Columbia Metropolitan Police Department ("MPD" or "Agency") 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).

II. Discussion

The facts as found by the Arbitrator are as follows. Officer Keith Lynn ("Grievant" or "Officer Lynn") was appointed to the MPD on January 27, 1997 and was assigned to the Fifth District. "On or about August 1, 2001, Captain Daniel Dusseau of the Prince George's County Police Department, Professional Compliance Division, contacted Captain Joshua Ederheimer of the MPD to inform him that Fifth District Officer Lynn had reportedly been using and distributing illegal steroids to persons in Prince George's County. Captain Dusseau stated that

according to the information he had received, Officer Lynn might be assigned to the Fifth District and was a weight lifter." (Award at p. 2). On August 15, 2001, Lieutenant Jova of the MPD, requested a fitness for duty examination of Officer Lynn. "In making this request, Lieutenant Jova testified that he relied on information provided by the Prince George's County Police Department and his general medical and legal knowledge. On the basis of Lieutenant Jova's request for a fitness exam, Officer Lynn submitted a urine sample on August 15, 2001. . . American Medical Laboratories (AML) reported to Ira E. Stohlman, Director MSD, that urine specimen number #3625772 was confirmed positive for trenzolone, mesterolone, stanozolol, boldenone, and methenolone. On August 21, 2001, Dr. Craig Thorne, Associate Medical Director, MSD, formally advised Mr. Stohlman of the results of the AML report and recommended that a Medical Review Officer (MRO) interview be scheduled with Officer Lynn. On August 31, 2001, Officer Lynn reported to the MSD for the MRO interview." (Award at p.3) Dr. Craig Thorne conducted the interview. "Additionally, Officer Lynn subsequently reported to the [Office of Internal Affairs] OIA and provided a taped oral statement." (Award at p. 3).

In a memorandum dated September 6, 2001, Dr. Thorne advised Mr. Stohlman that he had determined that "no legitimate medical reason exists for the positive test. . . . On September 6, 2001, Mr. Stohlman prepared a memorandum report to the Chief of Police, outlining the above-referenced sequence of events. On December 2, 2001, the OIA made a final request to the Director of MSD for the Litigation Package concerning Officer Lynn's positive drug specimen confirmation of August 15, 2001." (Award at p.3)

"Officer Lynn was queried about the presence of illegal steroids that were indicated by his urine specimen which he provided to the MSD on August 15, 2001. Officer Lynn reported the following:

> •The officer is a body-builder and was preparing to enter body building competition at the national level.
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> •The officer takes several over-the-counter supplements. He produced the supplements at the time of his interview. They were labeled as: Xanadrine RFA-Maximum Strength (rapid fat loss catalyst); 4 Dial 250 Androstenediol (warning this product contains steroid hormones); 19 - nor 25019 -Norandrostenedine (warning this product contains steroid hormones); Equi-bolan Anabolic Compound (1.4 Androstadiene - 3, 17-dione, highly anabolic/androgenic compound); Ultimate Oragen (workout drink mix) and Phosphagen HP Dietary Supplement (detroxe, phosphagen, HPC pure creatine monohydrate, taurine).
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> •The officer provided a medical prescription for a nasal spray - Nasacort Nasal Inhaler (Trimeinolone) actonide written by Dr. Hillary Woodson, date 7/23/01 CVS Pharmacy#1348 prescription #635231.

> •The officer did not provide a medical prescription for the sterioidal substances found in his urine specimen.
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> •The officer obtained his over-the-counter supplements from the Vitamin Shop or GNC stores, located in Laurel, Maryland.
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> •The Officer denied ever injecting any soluble steroidal substance in his body with a hypodermic syringe." (Award at p. 3)

On February 1, 2002, Officer Lynn reported to the OIA to sign his transcribed statement from the August 31, 2001 interview. At that time, Officer Lynn provided an additional written statement and reported the following:

> "In addition to purchasing my supplements at GNC and the Vitamin Shop, I have purchased several supplements from muscle magazines and other health food stores in which are stated by the manufacturers to be legal supplements. Answer to my question about the supplements I have taken. I can't state exactly every supplement that I have taken. I have taken numerous supplements. Every supplement has been stated by the manufacturer to be legal [sic]." (Award at p. 4)

On April 9, 2002, [MPD] served Officer Lynn with a Notice of Proposed Adverse Action proposing his termination based on the allegation that he had wrongfully used "illegal steroids/controlled substances". (Award at p. 2) A hearing before an MPD Trial Board was conducted on November 26, 2002 and December 31, 2002. At that hearing, Officer Lynn sought to present a defense primarily based on evidence that he had not knowingly ingested illegal anabolic steroids but that his positive urinalysis test was triggered by his innocent and lawful ingestion of certain legal over-the-counter nutritional supplements. However, the Trial Board rejected Officer Lynn's argument and recommended that Officer Lynn be terminated. In accordance with Agency procedure, Officer Lynn filed an appeal of the Trial Board's recommendation to the Chief of Police. On April 23, 2002, the Chief of Police denied Officer Lynn's appeal without elaboration. (See Award p. 2). Pursuant to the parties' collective bargaining agreement, FOP filed for arbitration on behalf of Officer Lynn.

At arbitration FOP argued that the Grievant's "termination was in violation of the labor agreement, departmental orders, and/or other applicable legal authority in that the Agency lacked sufficient evidence to support a 'reasonable suspicion' search, for the 'fitness for duty' urinalysis testing directed on August 15, 2001." (Award at p. 4) In support of this position the Union raised the following arguments in its Post Hearing Motion to Dismiss Proceedings:

> Although a lesser standard than "probable cause," "reasonable suspicion" nevertheless imposes a threshold requirement upon an employer's decision to direct urinalysis testing. Specifically, the employer must have "some question of individualized suspicion as

> opposed to an inarticulate hunch". . .Notably an employee's mere association with somebody who deals in illegal drugs has been held not to amount to "reasonable suspicion" of illegal drug use. . . Counsel for Officer Lynn argues that the urinalysis testing on August 15, 2001, was based on nothing more than an "inarticulate hunch" which is legally insufficient as a basis for a reasonable suspicion search. The evidence developed during the Adverse Action hearing, summarized above, strengthens this conclusion all the more. To the extent that [MPD] relied on Officer Lynn's believed "association" with someone who had used illegal steroids, such an association is an insufficient basis for reasonable suspicion, moreover the testimony presented at the hearing indicated that there was no association. To the extent that [MPD] relied on information provided by an anonymous source, the testimony presented at the hearing indicated that the reliability and veracity of this source was totally unknown. The conclusions of a seasoned investigator, formerly employed by the MPD as a detective support the conclusion that his information falls far short of the basis for "reasonable suspicion." (Award at p. 5).

In addition, FOP claimed that the Grievant's termination was in violation of departmental orders in that the MPD failed to provide a second urine sample to the employee for independent urinalysis testing. Specifically, FOP asserted that:

> MPD General Order 1002.4 (Attachment Urine Specimen Collection Manual at page 8 requires that "If a sample is screened as positive and confirmed positive the [Union] will be contacted to arrange for the second sample . . . to be transported to the Union confirmation laboratory for an independent confirmation test. In this case, the Department failed to comply with this procedure. As a consequence, the [Grievant] has been denied a full opportunity to contest the urinalysis test results upon which this disciplinary action is based. (Award at p. 5).

Also, FOP contended that the Grievant was denied "due process" when he was precluded from: (1) presenting exculpatory results of a computer voice stress analysis and (2) calling expert witnesses to establish the basis for his defense.[1]

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[1]FOP argued that the Grievant "was denied 'due process' when he was precluded from calling expert witnesses to establish the basis for his defense. The Union assert[ed] that the testimony of [Patrick Arnold and Richard Collins] should have been admitted . . . [The Union noted that Mr.] Arnold, a chemist who developed and marketed one of the legally available nutritional supplements Officer Lynn was taking at the time he was subjected to urinalysis (19 norandrostendione). The Union asserted that Patrick Arnold would have testified that the ingestion of such legally available substances can cause a 'false positive' test for illegal anabolic steroids such as those for which Officer Lynn tested positive. The Union

Finally, FOP argued "that the alleged errors, whether considered individually or cumulatively, warrant the required remedy of reinstatement with back pay. It is the position of the Union that [any one] of the above described errors provides a basis for rescinding Officer Lynn's termination and granting the remedy of reinstatement with full back pay." (See Award at p. 6)

MPD countered that "the Grievant's termination was not in violation of the labor agreement, departmental orders and/or other applicable legal authority because the agency had sufficient evidence to support a reasonable suspicion search." (Award at p. 6)

In addition, MPD argued that the trier of fact has wide latitude in the admission or exclusion of expert testimony. (See Award at p. 8) MPD claimed that both the case law and the factual evidence supports the reasonableness of the Trial Board's decision to exclude the testimony of Patrick Arnold and Richard Collins. Therefore, MPD asserted "that the Grievant was not denied due process when he was precluded from calling expert witness[es] to establish the basis for his defense." (Award at p. 8)

Also, MPD contended "that the Grievant was not denied due process when he was precluded from presenting exculpatory results of a computer voice stress analysis [CVSA] test because he was:

> charged with ingesting illegal steroids and or controlled substances. Thus, it is submitted, whether he knew the substances he ingested were prohibited is not a defense. Accordingly, the introduction of a CVSA test is not relevant to the charges and specification. (Award at p. 9 quoting Agency Brief, p. 14).

"Additionally, [MPD] assert[ed] that admission of such tests is not relied on by administrative bodies or courts." (Award at p. 9). Further, MPD noted that FOP could not cite any case in which a CVSA test was admitted in a Trial Board or any other administrative proceeding in the District of Columbia.

Concerning the Union's allegation that the Grievant's termination violated the parties' agreement and departmental orders because MPD failed to provide a second urine sample to the Grievant, MPD argued that the evidence does not support FOP's claim. Specifically, MPD noted: "By Grievant's own testimony, his counsel and members of the [FOP] were aware [that] his specimen had tested positive for prohibited substances, they chose not to request . . . a second test [because it] would not benefit the Grievant." (Award at p. 8).

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assert[ed] that Mr. Arnold was a witness of such 'skill, knowledge, or experience so that his opinion [would] probably aid the trier of fact in his search for the truth.' *(Citing* Nixon v. United States, 728 A.2d 582, 587 (DC 1999)). Additionally, the Union assert[ed] that Richard Collins, Esquire should have been permitted to testify as an expert witness in view of his pertinent knowledge and experience as an attorney specializing in a pertinent field (i.e. Anabolic Steroids and sports doping)." (Award at pgs. 5-6)

In an Award issued on September 30, 2004, the Arbitrator rejected FOP's arguments by noting the following:

> The Grievant has alleged that the [MPD] did not have sufficient evidence to order Grievant to submit to a "reasonable suspicion" search. . . .After reviewing the evidence presented in the transcript, a review of the [FOP's] and [MPD's] briefs. . . the Arbitrator finds that [MPD met] the threshold requirement for an employer to direct a urinalysis testing. As [MPD] states in its Post Hearing Motion to Dismiss Proceedings "reasonable suspicion" is a lesser standard than "probable cause." . . . Both in terms of applicable case law cited by [MPD] and the facts of this case, the arbitrator finds that there was "individualized suspicion" not merely an "inarticulate hunch." Secondly, [MPD] established to the satisfaction of the arbitrator . . . , that the information "was provided by reliable and credible sources or independently corroborated." Additionally, the evidence as developed by the record establishes that another law enforcement agency had informed [MPD] that it had received information that the Grievant was selling and using illegal steroids, thus there was "individualized suspicion" not merely an "inarticulate hunch." (Award at p. 11)

FOP asserted that the Grievant's termination violated Article 4 of the parties' labor agreement because MPD did not provide the Union with a second urine sample for independent testing. The Arbitrator found that the "decision not to pursue a second urine test was [FOP's], not [MPD's] failure to comply with the contract." (Award at p. 11). As a result, he rejected FOP's argument and concluded that MPD did not violate Article 4 of the parties' labor agreement. (See Award at p. 12)

The Arbitrator also rejected FOP's argument that the Grievant was denied "due process" when he was precluded from calling expert witnesses to establish the basis for his defense. In reaching this conclusion, the Arbitrator indicated that:

> The Police Trial Board did not abuse its discretion in refusing to admit the testimony of Patrick Arnold, an individual with only a Bachelor's Degree in Chemistry and some graduate courses in Chemistry at Montclair State University, who at the hearing was not certain of what degree he was completing. As to Richard D. Collins, Esq. the other expert witness preferred by the Union, it was not unreasonable for an attorney without a scientific background, to be excluded from testifying about whether the Grievant's urine sample was positive for steroids or controlled substances; a scientific

> determination not a legal one. In view of the above, the Arbitrator finds that the exclusion of these as individual as expert witnesses was based on the informed discretion of the trial judge. Thus, the Police Trial Board decision clearly was not manifestly erroneous. In view of the above, the Arbitrator finds that the Grievant was not denied due process because the Police Trial Board did not permit these individuals to testify as expert witnesses. (Award at p. 12)

Concerning FOP's argument that the Grievant was denied "due process" when he was precluded from presenting exculpatory results of a computer voice stress analysis, for the purpose of assessing Officer Lynn's credibility, in denying knowingly ingesting illegal steroids, . . .[the Arbitrator indicated that] "the fundamental issue in this case is not whether the Grievant knowingly ingested steroids but whether he ingested steroids and/or other controlled substances. Thus, evidence of knowledge of ingesting steroids is not in this case exculpatory. In view of the above, the [Arbitrator concluded that the] Grievant was not denied due process when he was precluded from presenting the results of a computer voice stress analysis test in his defense." (Award at p. 12, emphasis in original.)

The Arbitrator concluded that the Police Trial Board did not err with respect to any of these issues. As a result, the Arbitrator found that there were no individual or cumulative errors to warrant the Grievant's reinstatement with back pay. (See Award at p. 13)

In its post hearing brief, MPD argued that FOP failed to invoke arbitration in a timely manner. The Arbitrator found that:

> "With respect to this issue the Arbitrator finds that the Agency has improperly raised the issue of arbitrability in contravention of the terms of the Collective Bargaining Agreement – Article 19E, Section 2 which states the parties to the grievance shall not be permitted to assert any ground not previously disclosed to the other party.
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> "Specifically[,] the Union is correct in stating that in various e-mail correspondence leading up to this arbitration, the parties stipulated to the issues that the arbitrator would consider a s well as setting forth a briefing schedule. In an E-mail sent to the arbitrator on April 1, 2004 no mention is made that an arbitrability issue would be raised. Additionally the Union has correctly cited arbitral awards of the issue, that past practice requires submission of a demand for arbitration within 15 days of the time that the employee is served with and accordingly has knowledge of the Chief's Final Action.
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> "In view of the above, the Arbitrator finds that [MPD] has improperly raised the issue of arbitrability at this time. The arbitrator finds that given that the Grievant had no knowledge of the Chief's April 23, 2003 final action until May 2, 2003 and filed his

> grievance on May 16, 2003, that the grievance was filed in a timely manner." (Award p. 13).

FOP claims that the Award is on its face contrary to law and public policy. (Request at p. 2). 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). Also, 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). In addition, 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). Furthermore, as the Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." Department of Corrections v. Local 246, 554 A.2d 329, 325 (D.C. 1989).

In the present case, FOP asserts that the Award is on its face contrary to law and public policy. However, FOP does not specify any "applicable law" and "definite public policy" that mandates that the Arbitrator arrive at a different result. Instead, FOP asserts that "[f]or purposes of this Arbitration Review Request, [FOP] adopts all arguments made in [its] arbitration brief." (Request at p. 2). Thus, FOP's arguments are a repetition of the position it presented to the Arbitrator. Furthermore, we believe that FOP's ground for review only involves a disagreement with the arbitrator's findings and conclusions. FOP merely requests that we adopt its interpretation of the evidence presented.

We have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement . . . as well as his evidentiary findings and conclusions . . ." Id. Moreover, "[this] 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 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). Also, we have 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). In the present case, the parties submitted their

dispute to the Arbitrator. Neither FOP's disagreement with the Arbitrator's interpretation of Article 4, nor FOP's disagreement with the Arbitrator's findings and conclusions, are grounds for reversing the Arbitrator's Award. See, Metropolitan Police Department v. Public Employee Relations Board, D.C. Sup. Ct. No. 04 MPA 0008 (May 13, 2005) and Metropolitan Police Department v. Public Employee Relations Board, D.C. Sup. Ct. No. 01 MPA 18 (September 17, 2002). In conclusion, FOP has the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, FOP failed to do so.

In view of the above, we find that there is no merit to FOP's arguments. Moreover, we believe that the Arbitrator's conclusions are based on a thorough analysis of the record, and cannot be said to be clearly erroneous or contrary to law or public policy. Therefore, 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.

September 29, 2006

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-A-01 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of September 2006.

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