Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
District of Columbia Metropolitan Police Department,	)	
Petitioner,	)	PERB Case No. 04-A-23
and	)	Opinion No. 808
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Ariel Mannes),	)	
Respondent.	)	

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. MPD seeks review of an arbitration award ("Award") which rescinded the termination of Ariel Mannes ("Grievant") a bargaining unit member. MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) 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" or whether "the arbitrator was without or exceeded his or her jurisdiction...." D.C. Code §1-605.02(6) (2001 ed.)

II. Discussion:

By letter dated April 3, 2003, MPD notified the Grievant that it was proposing his termination for conduct unbecoming an officer. Specifically, MPD alleged that the Grievant obtained vehicle ownership information on Jason Cherkis from the Washington Area Law Enforcement System ("WALES") without a legitimate law enforcement purpose, and then posted that information on an internet website with the suggestion that other MPD officers target the individual for law enforcement. The April 3rd letter advised the Grievant that if he desired a departmental hearing, one would be scheduled for May 29, 2003. The Grievant elected to have a hearing, which initially was convened on May 29th and then continued to June 11th. The Grievant testified at the hearing; however, before any other witnesses were heard, the Grievant pled guilty to all charges. (See Award at pgs. 2-3) On July 5, 2003, the hearing panel issued its findings accepting the Grievant's guilty pleas and unanimously recommending the Grievant's termination from the MPD. (See Award at p. 3) On August 5, 2003, MPD informed the Grievant of the final decision to terminate his employment, effective September 5, 2003. FOP appealed the matter to the Chief of Police. The Chief of Police denied the grievance and FOP invoked arbitration pursuant to the parties' collective bargaining agreement ("CBA").

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within fifty-five (55) days of the date that the Grievant was notified of the charges. (See Award at p. 7) 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 p. 4) FOP argued "that [the] Grievant was notified of the charges on April 4, 2003, but was not served with the final decision until August 5, [2003.]" (Award at p. 7) FOP claimed that this delay was in violation of the parties' CBA; therefore, the termination should be rescinded. Also, FOP contended that the penalty of termination was too severe and should be mitigated to a lesser penalty. (See Award at p. 5)

MPD countered that the termination was appropriate because of the seriousness of the Grievant's offenses. (See Award at p. 8) Also, MPD claimed that it complied with the fifty-five day rule and that at no time prior to the arbitration did the Grievant raise the issue of an alleged violation of the fifty-five day rule. (See Award at p. 10) Finally, MPD asserted that even if a violation of the fifty-five day rule occurred, it was harmless error.

In an Award issued on August 9, 2004, Arbitrator Barry Shapiro concluded that MPD violated Article 12, Section 6 of the parties' CBA when it failed to issue a written decision within the fifty-five (55) day time limit. (See Award at p. 13) Specifically, Arbitrator Shapiro noted the following:

> [The] Grievant declared his wish for a hearing on April 4. Under the 55-day rule, a final decision on the proposal to terminate him would

> have been due on May 29. The hearing was continued with [the] Grievant's agreement until June 11. Under Article 12 Section 6, . . . the time taken up by the continuance automatically extended the date by which the final decision was due to June 11. Even if the two days of the hearing are excluded from the 55-day count, the decision would have been due on June 13. At the conclusion of the hearing the MPD was not yet in violation of the 55-day rule, and neither [the] Grievant or the Union was under any obligation to remind the MPD of the rapidly approaching deadline. (Award at pgs. 12-13)

In view of the above, the Arbitrator found that when the Adverse Action Panel issued their recommendation on August 2003, MPD was in violation of Article 12, Section 6 of the parties' CBA. As a result, the Arbitrator rescinded the termination and ordered that the Grievant be reinstated with full back pay and benefits. (See Award at p. 14).

MPD takes issue with the Award. Specifically, MPD argues that the: (1) Arbitrator was without authority to grant the Award and (2) Award is contrary to law and public policy. (See Request at p. 2).

In support of this argument, MPD states the following:

> In the instant matter, [the Grievant] was served with the Notice of Adverse Action on April 4, 2003. At that time, he responded with a letter requesting a hearing, thereby consenting to the hearing set by [MPD] for May 29, 2003. . . .Thereafter, on May 29, 2003, [the] Grievant appeared at the hearing with legal counsel and entered a guilty plea. . . . At no time prior to the commencement of the hearing did [the] Grievant raise the issue of timeliness and the fifty-five (55) day time provision of the Agreement. The hearing was concluded on June 11, 2003, after [the] Grievant entered a guilty plea. . . .[The] Grievant's participation, without objection, in the trial board proceeding constituted acquiescence to the timeliness of the hearing. Fifty-five days elapsed between the time of the Notice, April 4, 2003, and the beginning of the hearing, May 29, 2003. Therefore, it was obvious to [the] Grievant at the time he received Notice that the decision would not be issued within fifty-five (55) days. . . . [The] Grievant requested a recess and continuance on May 29, 2003. The hearing was continued until June 11, 2003. . . The fifty-five (55) day time period began to run on June 12, 2003, the first day following the conclusion of the departmental hearing. Therefore, fifty-five (55) days elapsed between June 12, 2003 and August 5, 2003, the date the decision was issued. (Request at pgs. 5-6)

In light of the above, MPD asserts that it is the Employer's position that it timely served the Grievant with the decision on August 5, 2003 and did not violate the fifty-five (55) day rule because the fifty-five day period only began to run from June 12, 2003 (the first day following the conclusion of the departmental hearing) and August 5, 2003 (the date the decision was issued). Therefore, MPD suggests that the Arbitrator's ruling that the Grievant did not waive the 55-day rule, is an incorrect interpretation of Article 12, Section 6 of the parties' CBA. (See Request at pgs. 4-6).

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). In the present case, the parties submitted their dispute to Arbitrator Shapiro and he determined that MPD violated the 55-day rule. Neither MPD's disagreement with the Arbitrator's interpretation of Article 12, Section 6, nor MPD's disagreement with the Arbitrator's findings and conclusions, are grounds for reversing the Arbitrator's Award. See MPD and FOP/MPD Labor Committee (on behalf of Keith Lynn), Slip Op. No. 845, PERB Case No. 05-A-01 (2006).

Also, MPD suggests that the plain language of Article 12, Section 6 of the parties' 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 pgs. 7-10).

We find that MPD's arguments are a repetition of the arguments 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 CBA. This we will not do.

In cases involving the same parties, we have previously considered the question of whether an arbitrator exceeds his authority when he rescinds a Grievant's termination for MPD's violation of Article 12, Section 6 of the parties' CBA. In those cases we rejected the same argument being made in the instant case and held that the Arbitrator was within his authority to rescind a Grievant's termination to remedy MPD's violation of the 55-day rule. (See MPD and FOP/MPD Labor Committee (on behalf of Jay Hang), Slip Op. No 861, PERB Case No. 06-A-02 (2007), MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez), Slip Op. No. 814, PERB Case No. 05-A-03 (2006) and MPD and FOP/MPD Labor Committee (on behalf of Angela Fisher) Slip Op. No., PERB Case 02-A-07, *affirmed by Judge Kravtz of the Superior Court in Metropolitan Police*

Dep't v. D.C. Public Employee Relations Board, 01-MPA-18 (September 17, 2002), affirmed by District of Columbia Court of Appeals in Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 2006). 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.[1] 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).

In the present case, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator Shapiro concluded that MPD violated Article 12, Section 6 of the parties' CBA, he also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator Shapiro did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator Shapiro acted within his authority.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (See 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 lead 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).

In the present case, MPD asserts that the Award is on its face contrary to law and public policy. Specifically, MPD argues that the Award violates the "prejudicial error" rule specified in D.C. Code §2-510(b)(2001 ed.). We have previously considered and rejected this argument by

[1] We note that if MPD had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

stating the following:

> MPD relies on D.C. Code §2-510(b) which permits a reviewing court to apply the "prejudicial error" rule. D.C. Code §2-510(b)(2001 ed.). However, the Arbitrator's Award does not compel the violation of this section of the D.C. Code. MPD's cited section is outside the Comprehensive Merit Personnel Act ("CMPA") which governs this case. The CMPA itself has no provision requiring or permitting this Board to apply the "prejudicial error" rule. . . . As such, the Award does not violate D.C. Code 2-510(b) or the CMPA which does not contain a "prejudicial error" rule.
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> Additionally, MPD relies on Schapansky v. Dep't of Transp., FAA[2] and Shaw v. Postal Service[3] which apply a "procedural error" requirement regarding the Civil Service Reform Act ("CSRA")[4]. MPD argues that only "harmful procedural errors may vitiate an agency action." 5 U.S.C. §7701(c)(2)(A). However, the CSRA's "procedural error" requirement is not applicable to this case because this requirement applies to federal employees who are covered by the CSRA and not employees of the District of Columbia.[5] Having no application to employees of the District of Columbia, section 7701 cannot be violated by the arbitrator's Award, and thus, the Award is not contrary to Schapansky, Shaw, or section §7701(c)(2)(A) of the Civil Service Reform Act.
>
> Furthermore, the Arbitrator had authority to interpret the parties' Agreement, and thus the Board must view the Arbitrator's interpretation of the contract as if the parties had included that interpretation in their agreement. See, Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17, 531 U.S. 57, 62

[2] 735 F. 2d 477 (Fed. Cir. 1984).

[3] 697 F.2d 1078 (Fed. Cir. 1983).

[4] U.S.C. §7701(c)(2)(A).

[5] 5 U.S.C. §7701 is not included among the provisions listed in D.C. Code §1-632.02 and thus does not apply to employees of the District of Columbia. See Newsome v. District of Columbia, 859 A.2d 630, 633 (D.C. 2004)(provisions of the CSRA not listed in D.C. Code §1-632.02 do not apply to employees of the District of Columbia hired prior to or after the effective date of the CMPA).

> (2000). With no showing that the Agreement, as interpreted by the Arbitrator, would run contrary to D.C. Code 2-510(b), Schapansky and Shaw, or section 7701(c)(2)0(A) of the Civil Service Reform Act, MPD's argument fails to provide a basis to vacate the Arbitrator's Award. MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez), Slip Op. No 814 at pgs. 8-9, PERB Case No. 05-A-03 (2006).

In addition, MPD asserts that even if a violation of the 55-day rule occurred it constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. (See Award at pgs. 8-9) In support of its position, MPD cites Judge Abrecht's decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002). We have previously considered and rejected this argument. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 2006) MPD appealed our determination that the "harmless error rule" was not applicable in cases such as the one currently before the Board. The District of Columbia Court of Appeals rejected MPD's argument that a violation of the CBA's 55-day rule was subject to the "harmless error rule" by stating the following:

> The Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-617.01 *et seq.* (2001), regulates public employee labor-management relations in the District of Columbia, and, as MPD concedes, the CMPA contains no provision requiring harmful (or harmless) error analysis before reversal of erroneous agency action is permitted. Neither do PERB's rules impose such a review standard on itself or on arbitrators acting under its supervision. MPD points out that [if] Officer Fisher, instead of electing arbitration with the sanction of the FOP, [had] chosen to appeal her discharge to the Office of Employee Appeals (OEA), *see* D.C. Code § 1-606.02, she would have been met with OEA's rule barring reversal of an agency action "for error . . . if the agency can demonstrate that the error was harmless," 6 DCMR § 632.4, 46 D.C. Reg. 9318-19; and MPD, again citing *Cornelius*, warns of the forum-shopping and inconsistency in decisions that could result if PERB (and arbitrators) were not held to the same standard. *See Cornelius*, 472 U.S. at 662 ("If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim . . . would tend to select the forum - - the grievance and arbitration procedures - - that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid."). But, as the quotation from Cornelius demonstrates, Congress made its intent to avoid these evils "clear" in the Civil Service Reform Act.

> *Id.* at 661 ("Adoption of respondents' interpretation . . . would directly contravene this clear congressional intent.") Since MPD can point to no similar expression of legislative intent here, it cannot claim a misinterpretation of law by the arbitrator that was apparent "on its face." 901 A.2d 784, 787[6]

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. 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 arguments. Also, 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.

February 23, 2007

[6]The Court of Appeals also rejected MPD's argument that the time limit imposed on the agency by Article 12, Section 6 of the parties' CBA is directory, rather than mandatory.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.04-A-23 was transmitted via Fax and U.S. Mail to the following parties on this the 23rd day of February 2007.

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