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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)	
)	
FRATERNAL ORDER OF POLICE/)	
METROPOLITAN POLICE DEPARTMENT)	PER Case No. 03-A-09
LABOR COMMITTEE)	
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Petitioner,)	Opinion No. 770
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)	
and)	
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DISTRICT OF COLUMBIA)	
METROPOLITAN POLICE DEPARTMENT,)	
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Respondent.)	

DECISION AND ORDER

On September 23, 2003, the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP or Union) filed an Arbitration Review Request (Request). FOP seeks review of an arbitration award (Award) which determined that the Agency violated Article 4¹ of the parties' collective bargaining agreement (CBA) by failing to adhere to its procedures² for promoting employees to Detective Grade One positions. FOP took issue with the Award because the Arbitrator denied the remedy FOP had sought. FOP contends that the: (1) Award is contrary to public policy and (2) Arbitrator was without authority to grant the Award. (Request at p. 2).

¹Article 4 of the parties' CBA provides that management has the right to, *inter alia*, "determine the qualifications of employees for ...promotion...as long as such rights are not exercised contrary to applicable laws, rules, and regulations." (Award at pg.3). The Arbitrator deemed the Department's requirements regarding the Detective Grade One promotions to be incorporated into Article 4.

²On August 28, 2001, MPD issued an Announcement of the 2001 Detective Grade One Selection Process (CIR-01-06). It required that applicants have current in-service training and firearms certification.

The Metropolitan Police Department (MPD or Department) opposes the Request.

The issue before the Board is whether “the award on its face is contrary and public policy” or whether “the Arbitrator was without or exceeded his or her jurisdiction...” D.C. Code §1-605.2(6) (2001 ed.)

MPD promoted fifty-five (55) employees to Detective Grade One positions. In determining who would be selected, MPD qualified and eventually selected several applicants who had not completed the requisite in-service and firearms training. MPD’s regulations which govern the Detective Grade One selection process required that eligible candidates have current in-service training and firearms certifications. FOP filed two separate group grievances based on the fact that some of the selected candidates did not have the required training and certifications. As a result, FOP contended that MPD violated Article 4 of the parties’ CBA. As a remedy, the separate group of grievants requested two different forms of relief. One grievance requested that all detective candidates who applied be promoted to Detective Grade One positions. The other grievance requested that MPD promote the same number of candidates that were promoted without proper qualifications³.

In a decision issued on August 29, 2003, the Arbitrator determined that MPD violated the parties’ collective bargaining agreement by promoting candidates who had not met the requirements set forth in its own regulations. As a remedy, the Arbitrator found it appropriate to issue a cease and desist order prohibiting the Agency from promoting members who had not met the requirements of the Agency’s promotion rules and regulations pursuant to Article 4. (Award at pg. 7). In awarding this relief, the Arbitrator found that the relief was consistent with Article 1⁴ of the parties’ CBA. Furthermore, the Arbitrator indicated that “subsequent similar violations by the Agency could warrant more serious action, depending on the circumstances involved.” (Award at pg. 18).

In rejecting the Union’s proposed remedies, the Arbitrator found that FOP had not established that additional promotions were warranted under the agreement. In addition, the Arbitrator found that ordering MPD to promote additional candidates would be contrary to management’s right to determine the number of promotions it believes are necessary to carry out its operations. (Award at pg. 18).

³ Evidence in the record suggested that this was thirteen (13) candidates.

⁴ In his Award, the Arbitrator noted that pursuant to Article 1 of the parties’ CBA, the parties expressly agreed to honor their Agreement commitments and to “promote a sound and effective labor-management relationship in order to achieve mutual understanding of practices, procedures and matters affecting conditions of employment and to continue working toward this goal.” (Award at pgs. 17-18).

FOP takes issue with the Arbitrator's Award. FOP asserts that the Arbitrator's Award is contrary to the public policy of promoting sound and effective labor-management relations pursuant to Article 1, §2 of the parties' agreement. Specifically, FOP contends that in refusing to award additional promotions based on the Department's undisputed, knowing and intentional violation of its own requirements, the Award detracts from the stated goal of Article 1. Instead of promoting sound labor-management relations, the Award effectively condones the Department's conduct and denies the Union any relief for the Department's flagrant violations. Moreover, FOP contends that the mere suggestion of more severe penalties in the future, depending on the circumstances, does nothing to cure the lack of an appropriate remedy in the present case. Instead, in FOP's view, the Arbitrator's Award damages the labor-management relationship between the parties. Therefore, such a result is "obviously contrary to the clear mandate of public policy set forth in the CBA." (Request at pg. 5).

MPD contends that FOP's public policy argument has no merit. Specifically, MPD asserts that Article 1 of the parties' CBA does not rise to the level of public policy, as defined by the Board's case law⁵, that will allow the dismissal of an Arbitrator's Award. Therefore, MPD asserts that the Board has no basis to reverse the Arbitrator's decision on public policy grounds.

As a second basis for review, FOP contends that the Arbitrator exceeded his authority by merely issuing the cease and desist order and threatening more severe penalties in the future. FOP observed that "one of the tests to determine whether an Arbitrator has exceeded his jurisdiction and was without authority to render his award is whether the award draws its essence from the collective bargaining agreement." See, (Request at pg. 5) and Dobbs, Inc. v. Local No. 1614, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 813 F.2d 85 (6th Cir. 1987). FOP contends that this Award fails to draw its essence from the parties' contract. To support its argument, FOP relied on Cement Division, National Gypsum Co. V. United Steel Workers for America, AFL-CIO, Local 135 for the applicable standard. 793 F.2d 759, 765 (6th

⁵MPD relies on D.C. Metropolitan Police Department and Fraternal Order of Police/ Metropolitan Labor Committee, 47 DCR, Slip Op. No. 633, PERB Case No. 00-A-04 (2000) in support of its argument that this Award should not be reversed on public policy grounds. In DCMPD v. FOP/MPDLC, the Board ruled that a reference to the domestic violence laws of the District of Columbia did not satisfy the "specific public policy that has been violated" standard. See, Opposition at pg. 2 and Id. at pg. 3. Consequently, MPD argues that in the present case, merely referring to a provision in a CBA cannot meet the standard of proving that a "specific public policy has been violated." Opposition at pg. 2. Furthermore, MPD argues that the Union has failed to identify a specific public policy. Therefore, there can be no violation of an unidentified policy.

Cir. 1986). Applying the test set forth in Cement v. United Steel⁶, FOP contends that “the Arbitrator’s Award effectively failed to enforce the CBA between the parties in that it failed to effectively award the Union an actual remedy.” (Request at pg. 6). Instead, it “merely provided for the possibility of an unspecified prospective remedy, despite the knowing and intentional violation by the Department.” (Request at pg. 6). Finally, FOP argues that the Board has previously determined that awards concerning “future conduct” exceed an Arbitrator’s authority.⁷ Therefore, in FOP’s view, the Arbitrator’s Award failed to draw its essence from the CBA as established by case precedent (Request at pg. 6).

In response to FOP’s second basis for review, MPD contends that the Arbitrator did *not* exceed his authority by providing a cease and desist order as a remedy. Additionally, MPD contends that D.C. WASA v. AFGE, Local 639 is distinguishable from the one presently before the Board. 49 DCR 11123, Slip Op. No. 687, PERB Case No. 02-A-02 (2002). MPD asserts that the Arbitrator in WASA v. AFGE was attempting to impose *new* criteria that *were not found* in the parties’ CBA⁸. In the present case, MPD contends, the opposite is true. The Arbitrator

⁶ An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. Cement Division, National Gypsum Co. v. United Steel Workers for America, AFL-CIO, Local 135, 793 F.2d 759, 765(1986)

⁷FOP also relies on two Board cases to support its position that the Arbitrator exceeded his authority in this case. They are: D.C. Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Labor Committee and District of Columbia Water and Sewer Authority v. American Federation of Government Employees. 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2002) and 49 DCR 11123 Slip Op. No. 687, PERB Case No. 02-A-02 (2002). In MPD v. FOP/MPDLC, the Board held that the Arbitrator exceeded his authority by ordering the Agency to reinstate a police officer to a civilian non-union position. *Id.* In WASA v. AFGE, Local 631, the Board held that an award which imposes additional requirements that are not expressly provided for in the parties’ CBA exceed an Arbitrator’s authority. 49 DCR 11123, Slip Op. No. 687, PERB Case No. 02-A-02(2002).

⁸In WASA v. AFGE, Local 631, as a remedy for an improper hiring decision which violated the parties’ contract, the Arbitrator’s Award ordered the Agency to establish hiring

in the present case is directing MPD to follow its *existing* CBA in making future promotions. Therefore, MPD suggests that the Award does, in fact, draw its essence from the parties' CBA. In response to FOP's concern that the cease and desist order Award is not effective because it does not establish binding precedent, MPD asserts that Arbitrators do, in fact, look at other Arbitrators' decisions and are influenced by them where they consider it appropriate.⁹ Furthermore, MPD asserts that the Board will entertain injunctive relief in appropriate cases. See, Washington Teachers Union, Local 6, AFT/AFL-CIO and D.C. Public Schools, 46 DCR 6265, Slip Op. No. 478, PERB Case No. 96-U-18 (1996). Therefore, MPD argues that the "Union's claim that a cease and desist order is not an Award runs counter to PERB doctrine and practice." (Opposition at pg. 4). Based on the foregoing, MPD asserts that FOP's argument that the Award has no effect is without merit. MPD urges the Board to deny FOP's Arbitration Review Request.

Discussion and Analysis

As stated earlier, FOP requests that the Board grant its Petition to reverse the Arbitrator's Award on two grounds: (1) that his award is contrary to public policy and (2) that the Arbitrator exceeded his authority by merely issuing a cease and desist order concerning future conduct.

The Board has stated that "to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). We find that FOP has failed to cite any specific public policy or law that was violated by the Arbitrator's Award. Instead, FOP asserts that the Arbitrator's Award is contrary to the well established public policy embodied in Article 1, Section 2, of the parties' CBA. Therefore, FOP's claims only disagree with the Arbitrator's interpretation of Article 1, Section 2 of the parties' CBA. FOP has failed to point to any clear public policy or law which the Award contravenes. Finally, the Board has held that a disagreement with an arbitrator's choice of remedy does not render the Award contrary to law and public policy. D.C. Housing Authority v. Newell, 46 DCR 10375, Slip Op. No. 600, PERB Case No. 99-A-08). In this case, we find that FOP merely disagrees with its chosen Arbitrator's choice of remedy. In view of the above, we find that FOP's public policy argument is without merit. Therefore, we cannot reverse the Arbitrator's decision on this ground.

In response to FOP's second basis for review, we find that the Arbitrator did *not* exceed

criteria based on objective factors in the future. 49 DCR 11123, Slip Op. No. 687, PERB Case No. 687 (2002).

⁹To support its argument, MPD relies on the chapter entitled "Precedent Value of Awards" from How Arbitration Works. Elkouri & Elkouri, page 605 (5th Ed)(1997).

his authority in shaping the remedy. As a result, FOP's argument on this issue also lacks merit.

As an initial matter, 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, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). Moreover, the Board will not substitute its own interpretation for that of the duly designated Arbitrator. Id. Here, the Arbitrator determined that MPD violated the parties' CBA by failing to adhere to its promotion standards and issued a cease and desist order as the remedy. The remedy sought to prevent MPD from violating its own promotion procedures in the future. The Board has held that an Arbitrator has equitable power concerning remedies, unless restricted by contract. D.C. Metropolitan Police Department v. FOP/MPD on behalf of Vernon Gudger, 48 DCR 10989, Slip Op. No. 663, PERB Case No. 01-A-08 (2001). FOP has failed to cite any language in the parties' CBA which limits the Arbitrator's equitable powers. As a result, we have no basis to nullify or reverse the Arbitrator's Award.

One of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining agreement". D.C. Public Schools v. AFSCME, District Council 20, 34 DCR 3610 at p. 5, Slip Op. No. 156, PERB Case No. 86-A-05 (1987); Also see, Dobbs, Inc. v. Local No. 1614, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America 813 F. 2d 85 (6th Cir. 1987). In D.C. Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Labor Committee, the Board expounded on what is meant by "deriving its essence from the terms of the collective bargaining agreement." 49 DCR 810, Slip Op. No. 669 at pg.5, PERB Case No. 01-A-02 (2002) The Board relied on a statement from the Sixth Circuit Court in Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135, which explained the standard as follows:

An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765(1986).

Contrary to FOP's argument, we believe that the Award derives its essence from the collective bargaining agreement and; therefore, meets the Cement Division standard. In our view, the *Award of a cease and desist order in this matter is consistent with the express terms of the*

parties' agreement. For instance, Article 4 of the parties' CBA requires that management "determine the qualifications of employees for promotions, as long as such rights are not exercised contrary to applicable laws, rules, and regulations." (Request at pg. 3). In this case, the Agency promoted employees in a way that was contrary to its own regulations and procedures, as incorporated in Article 4 of the parties' agreement. To remedy this violation, the Arbitrator looked to the parties' agreement and mandated that the Agency effect promotions consistent with Article 4 and its embodied regulations. We see no conflict with the express terms of the agreement. *The Award imposes no additional requirements that are not provided for in the agreement. The Award has support because it merely orders the Agency to do what it has already agreed to do through its CBA. Furthermore, the Award is based on the express terms of the agreement, and not on general considerations of fairness and equity.* The express terms of the agreement instruct management to follow its own rules and regulations when promoting employees. The Arbitrator's Award essentially mandates the same thing by prohibiting the Agency from implementing promotions in a way that is inconsistent with the party's collective bargaining agreement. Therefore, we find that the Award draws its essence from the parties' collective bargaining agreement. As a result, we find no statutory basis to reverse the Arbitrator's Award on this ground.

Finally, the Board has not previously decided the precise issue of whether "cease and desist" orders which enjoin future conduct are appropriate in circumstances such as this one. However, the Board has found two cases which establish that cease and desist orders are appropriate to prevent future misconduct in some circumstances. The Board relies on the decisions of other labor relations bodies and other states where it has no precedent on an issue. See, University of the District of Columbia v. University of the District of Columbia Faculty Association, 37 DCR 5666, Slip Op. No. 248, PERB Case No. 90-A-02 (1990). In one case, a court found appropriate and upheld several cease and desist orders that Arbitrators issued as an Award. See, New Orleans Steamship Association v. General Longshore Workers, ILA Local Union No. 1418 et.al, 486 F. Supp 409 (1980). These cease and desist orders sought to enjoin union members from striking pursuant to a non-strike clause in the parties' CBA. *Id.* The other case involved a cease and desist order concerning an Agency's implementation of disciplinary procedures. See Loretta Cornelius, Acting Director of Office of Personnel Management v. Allison E. Nutt, 472 U.S. 648, 664; 105 S.Ct. 2882 (1985). In Cornelius v. Nutt, the Supreme Court found, *inter alia*, that an Arbitrator may remedy a violation of disciplinary procedures outlined in the parties' contract by ordering the Agency to cease and desist from any further violation of those procedures. See, *Id.* Based on the foregoing, we find that a "cease and desist order" remedy is appropriate in limited circumstances such as the one presently before the Board. Finally, we note that cease and desist order remedies must be evaluated on a case by case basis. Therefore, we find that FOP has not established a statutory basis for our review and reversal of the Arbitrator's Award.

Pursuant to D.C. Code §1-605.2(6), the Arbitrator's Award did not violate law and public policy. Furthermore, the Board finds that the Arbitrator did *not* exceed his jurisdiction or authority by issuing the remedy noted above. Therefore, FOP's Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Request for Review of the Arbitration Award is hereby denied.
2. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 7, 2004

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 03-A-09 was transmitted via Fax and U.S. Mail to the following parties on this the 7th day of December 2004.

Kyle A. McGonigal, Esq.
1320 G Street, S.E.
Washington, D.C. 20003

FAX & U.S. MAIL

Harold Vaught, Esq.
1320 G Street, S.E.
Washington, D.C. 20003

FAX & U.S. MAIL

Dean S. Aqui, Esq.
Labor Relations Division
Metropolitan Police Department
Office of the Corporation Counsel
300 Indiana Avenue, N.W.
Room #5004
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Mark A. Rosen, Arbitrator
4701 Connecticut Avenue
Suite LL2
Washington, D.C. 20008

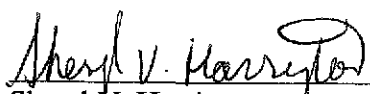
U.S. MAIL

Gregory I. Green
Acting Chairman, FOP/MPD Labor Committee
1524 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

U.S. MAIL

Dr. Chris Kaufman
P.O. Box 167
Benedict, Md 20612

U.S. MAIL



Sheryl V. Harrington
Secretary