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

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|--|---|-----------------------|
| In the Matter of:  | ) |                       |
|  | ) |                       |
| District of Columbia Metropolitan Police<br>Department,  | ) |                       |
|  | ) |                       |
| Petitioner,  | ) |                       |
|  | ) | PERB Case No. 07-A-04 |
| and  | ) |                       |
|  | ) | Opinion No. 928       |
|  | ) |                       |
| Fraternal Order of Police/Metropolitan Police<br>Department Labor Committee<br>(on behalf of Maurice MacDonald), | ) |                       |
|  | ) |                       |
| Respondent.  | ) |                       |
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|  | ) |                       |

**DECISION AND ORDER**

**I. Statement of the Case:**

On May 9, 2007, the District of Columbia Metropolitan Police Department ("MPD") filed an Arbitration Review Request ("Request") in the above captioned matter. MPD seeks review of an arbitration award ("Award") which rescinded the termination of Officer Maurice MacDonald ("Grievant") and directed that MPD remand the case to the Adverse Action Panel. MPD asserts that the Award is contrary to law and public policy and that the Arbitrator was without authority to grant the Award. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Union" or "Respondent") opposes the Request.

The issues before the Board are whether "the arbitrator was without, or exceeded his or her jurisdiction" or 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 the evening of July 22, 2004, the Grievant, while off duty, consumed a number of alcoholic beverages. (See Award at p. 2). While drinking alcoholic beverages at a bar in Shirlington, Virginia, "the Grievant [became involved in] an argument with an off-duty member of the Arlington County Police Department. A physical fight ensued, in which the Grievant had to be restrained by several Arlington County Police officers and a security employee of the bar. Even after he was ejected from the bar, the Grievant continued to try to fight with the people who had just removed him from the premises. The Grievant was later served with a judicial summons charging him with disorderly conduct; that charge was later dismissed administratively by the Commonwealth of Virginia." (Award at p. 2).

"On January 31, 2005, the Grievant was served with a 'Notice of Proposed Adverse Action,' issued by Shannon P. Cockett, Assistant Chief, Human Services [MPD]. The notice proposed the Grievant's termination from employment by MPD based on three charges: (1) conduct unbecoming an officer, (2) being under the influence of alcohol while off-duty, and (3) conviction of a crime or involvement in the commission of any act constituting a crime 'whether or not a court record reflects a conviction.' All three charges stem from the Grievant's conduct the night of July 22, 2004." (Award at p. 2).

The Grievant appealed the proposed termination to a hearing panel, which MPD refers to as an 'Adverse Action Panel' ("Panel") and which the Union refers to as a "Trial Board." (See Award at p. 2). The Panel conducted an evidentiary hearing in which both MPD and the Grievant presented testimony. (See Award at p. 3). The Grievant contested all of the charges against him. Based on the testimony, the Panel found that the Grievant was guilty of Charge 1 (conduct unbecoming an officer) and Charge 2 (being under the influence of alcohol while off-duty). (See Award at p. 3). However, the Panel found that there was no evidence to sustain Charge 3 (i.e. evidence that the Grievant's conduct rose to the level of a criminal offense). (See Award at pgs. 3-4). Based on the mitigating factors, the Panel recommended a 45-day suspension and mandatory participation in the Employee Assistance Program. (See Award at p. 4).

"On April 29, 2005, Assistant Chief Cockett issued a Final Notice of Adverse Action, in which she affirmed the Panel's conclusions with respect to Charges 1 and 2, but rejected the recommended dismissal of Charge 3." (Award at p. 4). Assistant Chief Cockett reviewed the findings of the Panel and the Virginia Code, found the Grievant guilty of disorderly conduct and re-imposed the original penalty of termination. (See Award at p. 5). The Union, on behalf of the Grievant, appealed to the Chief of Police, who denied the appeal. Subsequently, the Union invoked arbitration on behalf of the Grievant. (See Award at p. 5).

Arbitrator Michael Wolf decided that the issues before him were: (1) "whether Assistant Chief Cockett was authorized to issue a final decision that increased the penalty

recommended by the hearing panel”; (2) “if she had the authority, . . . whether the evidentiary record supported her decision”; and (3) “if Assistant Chief Cockett’s decision was unauthorized or unsupported by the facts, then [what is] an appropriate remedy.” (Award at p. 6).

At arbitration, the Union did not contest the findings of the Panel, but did contest Assistant Chief Cockett’s findings and decision to terminate the Grievant. The Union argued that “[u]nder General Order 1202.1, Part I, Paragraph G.3.b.3, Assistant Chief Cockett could affirm the Panel recommendation, dismiss the adverse action, or reduce or set aside the original proposed adverse action; alternatively, the General Order permitted Assistant Chief Cockett to remand the case to the same or a different Panel for further consideration. Assistant Chief Cockett had no authority under the General Order to make the additional finding that the Grievant was guilty of Charge 3,” or to increase the penalty from the Panel’s recommendation of 45-day suspension to removal. (Award at p. 6). Furthermore, the Union claimed that 6A D.C. Municipal Regulations (“DCMR”) Section 1001.5 barred the Chief from increasing the penalty beyond that recommended by the trial board.<sup>1</sup> (See Award at p. 7). “Because Article 4 of the collective bargaining agreement (“CBA”) requires disciplinary action to comply with the laws, rules and regulations of the District of Columbia, [the Union argued that] the Grievant’s removal violated his contractual rights.” (Award at p. 7). The Union also argued that Assistant Chief Cockett had no “substantial evidence” that the Grievant was guilty of Charge 3 and her decision regarding the Grievant did not reflect consideration of the mitigating principles set forth in *Douglas v. Veterans Administration*, 5 MSBP 312 (1981). (See Award at p. 8).

MPD countered that General Order 1202.1, Part I, Paragraph G.3.b.3 authorized Assistant Chief Cockett to issue a final notice of adverse action “as originally proposed in the notice of adverse action” (i.e. the proposed notice of termination originally issued by Assistant Chief Cockett on January 31, 2005). (Award at p. 8). In addition, MPD asserted that recent arbitration awards between the parties permitted the Assistant Chief to increase a penalty proposed by the Panel.<sup>2</sup> (See Award at p. 9). MPD also claimed that Assistant Chief Cockett’s findings regarding Charge 3 were based on the Panel’s evidentiary findings. (See Award at p. 9). MPD argued that 6A DCMR Section 1001.5 was inapplicable because D.C. Code § 1-632.03 rescinded the trial board procedures for

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<sup>1</sup> 6A DCMR 1001.5 states as follows:

Upon receipt of the trial board’s findings and recommendations, and no appeal to the Mayor has been made, the Chief of Police may either confirm the findings and impose the penalty recommended, reduce the penalty, or declare the board’s proceedings void and refer the case to another regularly appointed trial board.

<sup>2</sup> MPD referred to *In the Matter of Arbitration between FOP and MPD* cases: (1) FMCS Case 060706, Oct. 30, 2006 (Arbitrator Leahy); and (2) AAA Case No. 16 39 00 354 86 S (Arbitrator Seidenberg) (March 4, 1987).

all officers hired after 1980, and therefore rescinded D.C. Code § 5-133.06 (relating to trial boards). (See Award at p. 10).

The Arbitrator reviewed the history of the various laws, rules and regulations governing discipline of police officers. (See Award at p. 26). The Arbitrator concluded that "6A DCMR Section 1001.5 is still applicable to this Grievant and that this provision of the regulations must take precedence over General Order 1202.1. Accordingly, neither Chief Cockett nor Chief Ramsey had the authority to increase the penalty recommended by the hearing panel in the Grievant's case." (Award at p. 26). Having concluded that MPD violated 6A DCMR 1001.5 and/or 6 DCMR 1613.2, the Arbitrator discussed at length the "tangled mess" of parts 1 and 2 of the General Order 1202.1 and its inconsistency with 6A DCMR Section 1001.5. He found that the two arbitration awards MPD cited did not deal with the relevance of 6A DCMR 1001.5. (See Award at p. 27, n. 10).

The Arbitrator found that General Order 1202.1 is not a "regulation". (See Award p. 27). Specifically, the Arbitrator looked to District of Columbia Court of Appeals precedents which have held that "General Orders are not regulations and therefore cannot override provisions of the DCMR." (Award at p. 29); See *Abney v. District of Columbia*, 580 A. 2d 1036, 1040-41 (D.C. 1990), (a general order "essentially serves the same purpose of an internal operating manual and does not have the full force of a statute or regulation."; *Wanzer v District of Columbia*, 580 A. 2d 127, 133 (D.C. 1990) ("agency protocols and procedures, like agency manuals, do not have the force and effect of a statute or an administrative regulation.")).

The Arbitrator also took note of the fact that MPD's Operational Handbook indicates "General Orders and Municipal Regulations are not functionally equivalent and that the only regulations are those issued by the Department and those published in the DCMR." (Award at p. 31). Specifically, the Arbitrator found that the General Order was not a regulation for purposes of the Comprehensive Merit Personnel Act ("CMPA"). (See Award at p. 31). In addition, the Arbitrator determined that if 6A DCMR Section 1001.5 did not apply to this case, then 6 DCMR Section 1613.2 prevails.<sup>3</sup> (See Award at pgs. 26, 31).

In regard to the remedy, the Arbitrator found that if Assistant Chief Cockett believed that the Grievant was guilty of Charge 3, the appropriate step would have been to remand the matter to the hearing panel for more findings consistent with 6A DCMR 1001.5 and 6 DCMR 1613.2. (See Award at p. 33). The Arbitrator determined that the appropriate remedy is "to remand the case to the original hearing Panel with the instruction that it re-consider Charge 3 and the overall penalty. . . . The Panel should consider all relevant facts and determine whether the application of Virginia law to those facts proves the Grievant was guilty or not guilty of Charge 3. The Panel should then

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<sup>3</sup> 6 DCMR Section 1613.2 states that: "[t]he deciding official shall either sustain the penalty proposed, reduce it, remand the action for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty."

prepare its findings, conclusions and recommendations with respect to Charge 3 and with respect to an appropriate penalty for all three Charges.” (Award at p. 34). The Assistant Chief and the Chief are to issue their decisions should the grievant appeal the Panel’s decision. (See Award at p. 34). In addition, the Arbitrator retained jurisdiction should the Grievant proceed to arbitration. (See Award at p. 34). Consequently, the Arbitrator determined that the appropriate remedy was to rescind the Grievant’s termination and remand the case to the Panel. (See Award at p. 34).

In its Request, MPD contends that: (1) the Award is on its face is contrary to law and public policy; and (2) the arbitrator was without authority to grant the Award. (See Request at p. 2). FOP opposes the Request on the ground MPD has failed to establish a statutory basis for the Board’s review of this case.

When a party files an arbitration review request, the Board’s scope of review is extremely narrow. Specifically, the 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.).

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 interpretation of the contract. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). “[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.’” *Id.* A petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well-defined, public policy grounded in law or legal precedent. See *United Paperworkers International Union, AFL-CIO v. Misco, Inc.* 484 U.S. 29, 43; *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234, 1239 (D.C. Cir. 1971). The violation must be so significant that the law or public policy “mandates that the Arbitrator arrive at a different result.”<sup>4</sup> The party seeking to overturn the award has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). As the Court of Appeals has stated, we must “not be

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<sup>4</sup> *MPD v. FOP/MPD Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing *AFGE, Local 631 and Dep’t of Public Works*, 45 DCR 6617, Slip Op. 365 at p. 4 n, PERB Case No. 93-A-03 (1998); 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).

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 Local 246*, 54 A.2d 319, 325 (D.C. 1989).

MPD contends the Award is contrary to law and public policy because 6A DCMR 1001.5 and 6 DCMR 1613.2 are inapplicable to this case. Specifically, MPD alleges that the Arbitrator erred in finding General Order 1202.1, Part I, Paragraph G.3.b.3 to not be a regulation for purposes of the CMPA. (See Request at pgs. 7-12). MPD argues that the Arbitrator's conclusion that Assistant Chief Shannon Cockett did not have the authority to increase the penalty recommended by the Panel is contrary to the District of Columbia Metropolitan Police Department General Order 1202.1.G.3.b.3 which reads as follows:

After reviewing the Board's recommendations, the Administrative Services Officer may remand the case to the same or a different board, or issue a final notice of adverse action (decision) affirming, reducing or setting aside the action, as originally proposed in the notice of proposed adverse action.

We find that MPD has not cited any specific law or public policy that mandates that the Board reverse 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). Here, MPD failed to do so. Instead, MPD argues that the Arbitrator should have concluded that Assistant Chief Cockett was authorized to increase the penalty recommended by the Panel. We find MPD's arguments are a repetition of the arguments considered and rejected by the Arbitrator. Furthermore, we have held that by 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. See, *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). Also, 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.* The 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 an Arbitrator. MPD's argument is merely a disagreement with the Arbitrator's interpretation of the language in the DCMR, D.C. Code and MPD's General Orders. MPD's Request asks the Board to adopt its interpretation of these provisions. This we will not do. The Board finds that

MPD's disagreement with the Arbitrator's interpretation is not grounds for reversing the Arbitrator's Award.<sup>5</sup>

MPD also asserts that the Award conflicts with previous arbitration awards from Arbitrator Leahy and Arbitrator Seidenberg which MPD claims allow the Assistant Chief to reject the recommendation of a Panel.<sup>6</sup> The Court of Appeals has noted 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. Contrary to MPD's contention, the Arbitrator was not bound by other arbitral decisions. Thus, the Arbitrator's Award is not on its face contrary to law and public policy by not following arbitral precedent. In addition, the Arbitrator distinguished these two cases from the case before him.

We find that Arbitrator Wolf had the authority to rescind the Grievant's termination and direct MPD to remand the case to the Panel regarding Charge 3. We have held that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." *D.C. Department of Public Works and AFSCME, Local 2091*, 35 DCR 8186, Slip Op. No. 194 at p. 2, PERB Case No. 87-A-08 (1988). 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.<sup>7</sup> 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). Furthermore, the

Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.* 363, U.S. 593, 597 (1960), that arbitrators bring their "informed judgment" to bear on the interpretation of collective bargaining agreements, and that is "especially true when it comes to formulating remedies." [Also, t]he . . . courts have followed the Supreme Court's lead in holding that arbitrators have implicit authority to fashion appropriate remedies . . . (See, *Metropolitan Police Department v. Public Employee*

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<sup>5</sup> 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).

<sup>6</sup> See Footnote 1.

<sup>7</sup> 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.

*Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6  
(May 13, 2005).

In the present case MPD does not cite any provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power. Therefore, once Arbitrator Wolf concluded that General Order 1202.1.G.3.b(3), 6A DCMR 1001.5 and 6 DCMR 1613.2 did not permit Assistant Chief Shannon Cockett to increase the penalty recommended by the Panel, Arbitrator Wolf had the authority to determine the appropriate remedy.

In view of the above, we find no merit to MPD's arguments. 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. Therefore, no statutory basis exists for setting aside this Award. As a result, we deny MPD's Arbitration Review Request.

**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.**

**January 16, 2008**



**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 07-A-04 was transmitted via Fax and U.S. Mail to the following parties on this the 16<sup>th</sup> day of January 2008.

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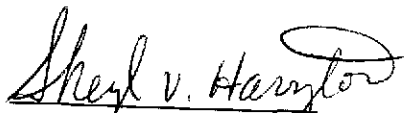
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