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Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
District of Columbia Metropolitan Police Department,	)	
Petitioner,	)	PERB Case No. 06-A-02
and	)	Opinion No. 861
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Jay Hang),	)	
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Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter, which rescinded the termination of Jay Hang ("Grievant"), a bargaining unit member. Specifically, the Arbitrator found that MPD violated the 55-day rule contained in the parties' collective bargaining agreement ("CBA").

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

On the evening of December 1, 2001, the Grievant was off duty and was performing private work at the Insomnia Club located on 6th Street, N.W., Washington, D.C. His private work at the Insomnia Club ("Club") had not been authorized by MPD. He was not wearing his uniform.

MPD prohibits members of the police force from engaging in outside employment unless authorized by the Chief of Police and from "being employed (in any capacity) by an ABC establishment, where the primary purpose is the sale of alcoholic beverages." (Award at p. 2)

Sometime during the course of his work, the Grievant consumed alcoholic beverages. At around 2 a.m., the Grievant and a second officer (Officer Le), who was on duty and in uniform were standing near the door of the Club when they heard a noise that was either a popping sound or gunshots. Officer Le ran in the direction of the noise. The Grievant also began to run in the direction of the apparent gunshots; however, the Grievant was uncomfortable with the pursuit because he was intoxicated and did not want to become involved in a situation in which he might need to discharge his service weapon. (See Award at p. 2) As a result, the Grievant returned to the Club.

"[W]hen Officer Le reached the corner of 6th and G Street, N.W., he was confronted by a gunman walking toward him. The gunman attempted to conceal his weapon. Officer Le identified himself and ordered the subject to drop his weapon. The subject opened fire on Officer Le. A foot chase ensued. At some point, Officer Le spotted the marked police units and enlisted their assistance. The subject ultimately was apprehended and weapons were recovered from the scene. (See Award at p. 2)

In light of the above, on July 19, 2004, MPD served the Grievant with a Notice of Proposed Adverse Action proposing the Grievant's termination. The Notice cited the Grievant's "failure to obey orders or directives, being under the influence of alcohol, and neglect of duty. " (Award at p. 3) On July 20, 2004, the Grievant responded to the Notice and requested that a Trial Board be convened.

The Trial Board recommended the Grievant's termination. By memorandum dated September 24, 2004, Assistant Chief Shannon Cockett (Director of Human Resources) confirmed the Trial Board's findings and ordered the Grievant's removal from MPD. The Grievant's removal was to become effective on December 29, 2004. The Grievant appealed the decision by invoking arbitration pursuant to Article 20, Section E of the parties' CBA. (See Award at p. 5)

At arbitration FOP argued that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within 55 days of the date that the Grievant filed his request for a Trial Board. 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. 6.) FOP stated that in this case the "Grievant requested a [T]rial [B]oard hearing on July 20, 2004, and MPD issued its final decision ordering the Grievant's termination on September 24, 2004 - - 66 days later." (Award at p. 7)

FOP argued that "the violation of the 55-day rule [was] sufficient by itself to negate the termination order without considering the merits of. . .[MPD's] decision." (Award at p. 7) The FOP argued that the Grievant should be *reinstated*.

MPD acknowledged that its final decision was issued more than 55 days after the date the Grievant elected to have a hearing before a Trial Board. However, MPD argued that the violation of the 55-day rule constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. In support of its position, MPD cited Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (2002). Also, MPD asserted that termination was appropriate in light of the serious infractions admitted by the Grievant.

In an Award issued on December 27, 2004, the Arbitrator rejected MPD's argument by noting the following:

> Article 12 Section 6 of the collective bargaining agreement provides that an "employee shall be given a written decision [whether discipline will be imposed] and the reasons therefore no later than fifty-five (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, where applicable . . .." This time frame may be extended if (a) the employee seeks a postponement or continuance of the trial board hearing, (b) the employee requests an extension of time for answering the Department's notice of proposed discipline, or (c) either party requests an automatic 30-day extension of the 55-day time limit.
>
> The Department concedes it did not issue its final decision terminating Grievant within the 55-day time limit. Instead, 66 days passed between Grievant's July 20, 2004, letter requesting a hearing before a trial board and the Assistant Chief's Final Notice of Adverse Action issued September 27. There is no indication Grievant requested any postponements of the time schedule prescribed by the collective bargaining agreement, nor apparently did the Department request an "automatic" 30 day extension. The Department argues its failure to meet the 55-day deadline constituted "harmless error." In support of this position, the Department's analogizes the instant dispute to a case decided by the Superior Court, *Metropolitan Police Dep't v. D.C. PERB*, 01-MPA-19 (2002). The underlying issue in that case was a violation

> of the 15-day rule found at Article 12 Section 7 of the labor agreement.
>
> This Arbitrator does not find the Department's analysis relying on Superior Court No. 01-MA-19 to be persuasive. The 55-day rule at issue in this case differs in critical respects from the 15-day rule considered by the Superior Court in 01-MPA-19. The 55-day rule includes provisions extending the deadline for a final decision by the Department, but only in situations in which a *grievant* has caused the delay (or in the event either party has asked for an automatic 30-day extension). Thus under the 55-day rule, when a *grievant* has requested a delay in the discipline proceedings, the *Department* is given additional time for issuing its final notice of adverse action. In contrast, the 15-day rule provision implicitly allows for a tolling of the procedural time frame when the *Department* decides it needs additional time; however, the benefit of the delay goes to the *grievant*. In this Arbitrator's view, the comparison advocated by the Department is a poor fit.
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> * * *
>
> Although this Arbitrator does not view himself in this case as strictly bound by the analysis and conclusions of prior arbitrators who have interpreted the 55-day rule, their decisions are influential both for their persuasive value and because they inform the parties' expectations of their respective obligations under the collective bargaining agreement. If the analysis in these earlier 55-day rule cases was clearly wrong, this Arbitrator would not hesitate to disagree and reach a different conclusion. However, where (as here) the analysis of the disputed contract language is reasonable and has been affirmed repeatedly by arbitrators, the PERB and the Superior Court, I am persuaded it is right and sensible to follow established precedent. Consistent with prior arbitrators on this issue, I conclude that the Department's violation of the 55-day rule denied Grievant of his substantive rights under the collective bargaining agreement and therefore his discharge shall be reversed. (Award at pgs. 8-10)

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).

MPD asserts that the Arbitrator was presented with two decisions of the District of Columbia Superior Court regarding a remedy for violations of the CBA's fifteen-day rule and 55-day rule. In both instances the cases were before the Superior Court on review of arbitration

decisions that reversed the discipline imposed by MPD due to missed contractual time limits: In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-19 (September 10, 2002), Judge Abrecht reversed the decision of the arbitrator. In the other case, Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-18 (September 17, 2002), Judge Kravitz upheld the decision of the arbitrator. MPD argues that in the present case, "the Arbitrator was guided by Judge Kravitz's decision and, therefore, concluded that he had the authority to fashion a remedy for the failure of [MPD] to comply with the 55-day rule. . ." (Request at p. 4) MPD "submits . . . that the decision of Judge Abrecht should have been followed and not that of Judge Kravitz." Id.

In addition, MPD contends that the Grievant was not prejudiced by the alleged 55-day rule violation. In fact, it contends he benefitted by the delay because he was able to remain on the MPD payroll for an additional period of time awaiting the decision of his adverse action hearing. (See Request at p. 7) Furthermore, MPD suggests that there is nothing in the instant record that would show that the Grievant's rights were impaired by MPD issuing a decision in violation of the 55-day rule. Accordingly, MPD argues that the rule of harmless error should apply and the Arbitrator's decision to rescind the termination should be set aside. (See Request at p. 7)

MPD notes that it should not be ignored that the Grievant was found guilty of committing serious acts of misconduct, and that determination has not been contested or otherwise challenged. Also, MPD claims that if the Grievant is reinstated, the nature of his misdeeds makes it is unlikely that he would be returned to full-duty status. Finally, MPD asserts that a remedy of reinstatement returns to MPD an individual unsuitable to serve as a police officer. Clearly such a remedy would violate public policy. (See Request at p. 7).

MPD's arguments are a repetition of the positions 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.

MPD suggests that the plain language of Article 12, Section 6 of the 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. 4-5)

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 Miguel Montanez, Slip Op. No 814, PERB Case No. 05-A-02 (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 (DC Cir. 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 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 Greenburg 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 Greenburg 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. (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).

MPD argues that the Award in this case violates the "harmless error" rule specified in D.C. Code 2-510(b), case law interpreting the Civil Service Reform Act, and the Civil Service Reform Act itself. (Request at p. 6-7) We have previously considered and rejected this argument by stating that:

> 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

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

> ("CMPA") which governs this case. The Board's jurisdiction and review of arbitration awards is limited by the CMPA. The CMPA itself has no provision requiring or permitting this Board to apply the "prejudicial error" rule." See, D.C. Code §1-601(2001 ed.) et seq. As such, the Award does not violate D.C. Code 2-510(b) or the CMPA which does not contain a "prejudicial error rule."

In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (DC Cir 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 had Officer Fisher, instead of electing arbitration with the sanction of the FOP, 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[2]

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

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.

We find no merit to either of 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' collective bargaining agreement. 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.

January 3, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-02 was transmitted via Fax and U.S. Mail to the following parties on this the 3rd day of January 2007.

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