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 Timothy Ketchum),	
Petitioner,	PERB Case No. 06-A-11
v.	Opinion No. 916
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 seeks review of an Arbitration Award ("Award") that found the FOP did not timely raise the issue of a 55-day rule violation.

Arbitrator Joan Parker was presented with the following issues:

(1) Whether the FOP timely raised its claim of a "55-day rule" violation;
(2) If so, did the Metropolitan Police Department ("MPD") violate the 55-day rule; and
(3) If so, what shall the remedy be?

(Award at 2).

Arbitrator Parker found that FOP did not timely raise the issue of the 55-day rule. Therefore, the Arbitrator concluded that portion of the grievance was not arbitrable. (Award at 12). FOP contends that the arbitrator was without authority to grant the Award and that the Award is contrary to law and public policy. (Request at 2). MPD opposes the Request.

II. Discussion

The facts as found by the Arbitrator are as follows. Timothy Ketchum ("Grievant"), a bargaining unit member, was hired by MPD on October 26, 1998, and assigned to the Second District. "On September 29, 2003, Grievant was issued a Notice of Proposed Adverse Action, charging him with conduct unbecoming an officer and willfully and knowingly making an untruthful statement. [MPD] alleged that Grievant had exposed the identities of several officers working in an undercover capacity, and lied in a subsequent Internal Affairs investigation. The September 29, 2003, Notice set a hearing date of November 13, 2003, should Grievant elect to have a departmental hearing on the charges." (Award at 3).

On October 8, 2003, Grievant elected to exercise his right to a departmental hearing. The hearing was not held until February 5 and March 2, 2004, rather than November 13, 2003. "Three senior police officials comprised the hearing panel, which subsequently made findings of fact, determined Grievant to be guilty of the charges, and recommended that Grievant be discharged. Assistant Chief of Police Shannon P. Crockett adopted the Panel's findings and recommendation, and on April 21, 2004, Grievant was issued a Final Notice of Adverse Action terminating him effective June 11, 2004." (Award at 2).

On May 3, 2004, Grievant appealed his termination to Chief of Police Charles Ramsey, who denied the appeal on May 14, 2004. Pursuant to the parties' collective bargaining agreement ("CBA"), FOP invoked arbitration on behalf of the Grievant on May 26, 2004.

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 Grievant filed his request for a departmental hearing. 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 4). FOP stated that in this case the "Grievant elected to have a departmental hearing [on] October 8, 2003,...and [MPD] served [Grievant with] the Final Notice of Adverse Action [on] April 21, 2004 – excluding the continued period of the hearing from February 5 to March 2 – 178 days passed." (Award at 5).

FOP asserted that the "Grievant's termination therefore should be rescinded, arguing that the 55-day rule has consistently been held as a strict deadline requiring rescission of discipline when violated. [FOP] argue[d] that although Article 12 establishes no specific remedy for § 6 violation, the Arbitrator is empowered to formulate a fair remedy, and the only remedy that will deter future violations is rescission of the discipline." (Award at 5).

MPD countered that "the 55-day period began on February 5, 2004, because 'Grievant, by not objecting to the selected date...elected February 5 as the date of his hearing'...In addition, Grievant has conceded that February 5 to March 2 is not included in the calculation. The [MPD] also assert[ed] that in these circumstances, no violation of Article 12, § 5, the '55-day rule,' occurred. [MPD indicated] that only fifty days passed prior to the issuance of a written decision in Grievant's case, between March 2, and April 21, the date of the Final Notice of Adverse Action." (Award at 7).

Additionally, MPD argued that even if, assuming arguendo, it violated the 55-day rule, such violation "constituted harmless error because Grievant was not denied due process and the decision to discharge him was not affected by the delay in the departmental hearing and subsequent Final Notice of

Adverse Action." (Award at 8). Relying on Article 19, Section E.5.2[1] of the parties' CBA, MPD contended that the "Grievant waived his right to raise an objection based on the 55-day rule by failing to raise it prior to the commencement of the departmental hearing on February 5, 2004." (Award at 7).

In an Award issued on March 14, 2006, the Arbitrator rejected FOP's arguments regarding the timeliness of its claim regarding the 55-day rule by noting the following:

> Grievant was issued a Notice of Proposed Adverse Action on September 29, 2003, which set a hearing date of November 13, 2003. On October 8, 2003, Grievant elected to exercise his right to a departmental hearing on the charges against him. The hearing was not held until February 5 and March 2, 2004, and the Employer's subsequent Final Notice of Adverse Action dismissing Grievant (effective June 11, 2004) was not issued until April 21, 2004. Article 12, § 6 of the parties' Agreement requires a written decision to be issued within 55 days after either (1) the employee is given written notice of the charges, or (2) the date the employee elects to have a departmental hearing.
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> Fifty-five days from the date Grievant elected a hearing, October 8, 2003, was December 2, 2003. While the 55-day period permitted by Article 12, § 6 may be extended by party request, there is no evidence that any such extension was requested by either party in the instant case. By the terms of the parties' Agreement, therefore, a written decision regarding the charges against Grievant was due December 2, 2003. The Employer's assertion that because Grievant did not object to the hearing date of February 5, 2004, February 5 became the date he "elected" the hearing is without merit. The plain meaning of Article 12, § 6 is that the 55-day period begins to toll on the date the employee notifies the Employer of his choice to exercise his right to a departmental hearing – in the instant case, October 8, 2003.
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> When the departmental hearing finally commenced on February 5, 2004, therefore, the 55-day period provided by Article 12, § 6 had long expired. The Employer contends that Grievant waived his right under § 6 to a written decision on the charges within fifty-five days, by failing to raise the issue before the February 5 hearing commenced. The Arbitrator disagrees. Article 12, § 6 imposes an affirmative obligation on the Employer to issue its written decision regarding charges against an employee within a particular time frame. Nowhere in the parties' Agreement is an obligation imposed on the charged employee to warn the Employer when it appears the Employer may fail to meet this time frame. An employee's lack of warning to the Employer of a potential violation does not constitute a waiver of the employee's right to have the written decision issued within fifty-five days of his election of a departmental hearing.

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[1] Article 19, Section E.5.2 of the parties' CBA provides as follows:

> The parties to the grievance or appeal shall not be permitted to assert in such arbitration proceeding any ground or to rely on any evidence not previously disclosed to the other party.

> The Arbitrator's ruling on the meaning of Article 12, § 6, does not, however, fully resolve the timeliness issue before her. There are additional contractual provisions bearing on the issue of whether Greivant's raising of the 55-day rule in the instant case was timely. Article 12, § 8 provides that while an employee may appeal to arbitration as provided in Article 19 after appeal to the Chief of Police, "where a Departmental hearing has been held, any further appeal shall be based solely on the record established in the Departmental hearing." Article 19, § E.5.2 provides, "the parties to the grievance or appeal shall not be permitted to assert in such arbitration proceedings any ground or to rely on any evidence not previously disclosed to the other party."
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> * * *
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> In the instant case, Grievant cited as grounds for his appeal to the Chief of Police "1) the insufficient evidence contained in the trial record to prove Officer Ketchum's guilt; 2) the mitigating evidence presented at the hearing; and 3) the subsequent misconduct of officer Michael Mentzer, a key witness against Officer Ketchum." After the Chief of Police denied Grievant's appeal on May 14, 2004, demand for arbitration in the instant case was submitted, citing as the issue that "Officer Ketchum is being terminated in violation of Article 12, Section 1 of the Agreement in that the discipline is not for cause." This is not a case where the Union was unaware of the alleged procedural violation at the time the appeals in question were made. The asserted 55-day rule violation in the instant case existed as of December 2, 2003. To be timely raised under the parties' Agreement, the Union was required to invoke the 55-day rule at least in the demand for arbitration. Because it was not, the Arbitrator finds that Grievant missed the window of opportunity for raising the 55-day rule.
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> The Arbitrator finds that because the 55-day rule was not asserted as a ground in the demand for arbitration in the instant case, the issue of the Employer's asserted violation of such rule is not arbitrable.

(Award at 8-12).

Having concluded that the issue of the 55-day rule violation was not arbitrable because the Union did not raise it in a timely manner, the Arbitrator stated that this was not the end of this matter. Specifically, she indicated that in the demand for arbitration, the Grievant's dismissal was challenged on the basis of just cause. As a result, she invited the parties to brief their respective positions regarding the issue of just cause. (Award at 12). In view of the above, Arbitrator Parker's ruling concerning the merits of this case will be dealt with in another decision.

FOP claims that: (1) the arbitrator was without authority to grant the Award and (2) the award on its face is contrary to law and public policy. (Request at 2).

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award only in 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).

FOP asserts that "the Arbitrator ignored a guiding District of Columbia Office of Employee Appeals ("OEA") decision when formulating her decision and exceeded her authority as a result. Also, the decision was outside the express terms of the CBA." (Request at 4). In support of its position, FOP argues the following:

> When rendering her decision concerning the waiver issue, the Arbitrator refused to consider guiding OEA analysis when it was presented to her by Petitioner...Petitioner asked that *Adamson v. Metropolitan Police Department*, Office of Employee Appeals No. 1601-0041-04 (February 14, 2006), be considered in this matter and did not request the record be reopened nor offered additional argument. Petitioner offered no additional arguments concerning the merits of the case. With little discussion, the Arbitrator refused.
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> The OEA is bound by the terms of the CBA and must follow the procedures outlined therein. *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86, 91 (D.C. 2002). Further, a CBA that "establishes guiding principles and nondiscretionary policy for a government agency...has the effect of regulation, and...[the OEA] has jurisdiction to interpret any provision of the agreement which pertains to an issue under review." *Rousey and Jones v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1602-0114-90, and 1602-0115-90...The OEA is the agency responsible for handing District of Columbia government employee appeals concerning employment related matters.
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> Art. 4 of the CBA expressly incorporates all laws, rules, and regulations in the District of Columbia...OEA decisions are likewise included. However, the Arbitrator completely ignored Art. 4. Arbitration is controlled by the CBA. Any action taken outside of the CBA exceeds the [A]rbitrator's authority. By refusing to consider *Adamson*, the Arbitrator implicitly exceeded her authority and created new precedent that does not comport with

> OEA decision[s]. It would be a violation of public policy to allow arbitrators to render decisions antithetical to OEA decisions.

(Request at 4-5).

FOP's analysis is based on its interpretation and application of D.C. Code §§ 1-606.01 and 606.03 (2001 ed.)[2], which relate to the OEA. The OEA is a quasi-judicial body empowered to review finally agency decisions affecting, *inter alia*, performance ratings which result in terminations, adverse actions for cause that result in removal, suspensions of 10 days or more, and reductions-in-force. By contrast, this Board is a quasi-judicial, independent agency entrusted, *inter alia*, with review of arbitration awards affecting employees of the District of Columbia. See D.C. Code § 1-605.2(6).

FOP conflates OEA's standard of review concerning an agency's decision to terminate an employee with the power that this Board has to overturn an award which sustained a termination. The standard of review for the reversal of an arbitrator's decision differs significantly from OEA's review of a managerial decision. While this Board may only overturn an arbitrator's award under limited circumstances, see D.C. Code § 1-605.02(6), the Act that created the OEA does not define the standards by which the OEA is to review management decisions. *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).[3] As a result, OEA defers to management decisions unless such decisions are not supported by substantial evidence. It is clear that OEA and this Board are two distinct independent agencies with separate and distinct jurisdiction. Also, in the present case, the Arbitrator's review of MPD's termination of Officer Timothy Ketchum arises out of the parties' CBA and not D.C. Code §§ 1-606.01 and 606.3.

In view of the above, FOP's claim that Arbitrator Parker exceeded her authority by not relying on OEA precedent lacks merit. Therefore, FOP has failed to state a statutory basis for reversing the Award.

FOP also suggests that the Arbitrator exceeded her authority by not adhering to other arbitral and Board decisions concerning the issue of harmless error. (Request at 4). In support of this position FOP states the following:

> Examining the remaining issues, the Arbitrator, applying harmless error, dismissed Grievant's claim without mentioning thereby completely ignoring District of Columbia law provided to her. In a recent Decision and Order, the PERB considered *and rejected* the same arguments considered by the Arbitrator in the context of another Arbitration Review Request brought by the Respondent and opposed by the Petitioner. See *D.C. Metropolitan Police*

[2] Prior codification at D.C. Code §§ 1-606.1 and 1-606.3 (1981 ed.).

[3] The District of Columbia Court of Appeals concluded, based on D.C. Code §§ 1-606.1 and 1-606.3, that:

> [a]lthough the Act does not define the standards by which the OEA is to review these decisions, it is self-evident from both the statute and its legislative history that the OEA is not to substitute its judgment for that of the agency and its role..is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised. ..Although the OEA has a marginally greater latitude of review than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. The primary discretion in selecting a penalty has been entrusted to agency management, not the [OEA]. (citations omitted).

> *Department v. Fraternal Order of Police, Metropolitan Police Department Labor Committee*, PERB Case No. 01-A-08, Op. No. 738 (2001)...Because the Arbitrator relies on no authority that was unavailable to and not considered by the Board at the time of the PERB Case No. 01-A-08, the [A]rbitrator's decision ought to be *summarily reversed* in accordance with general principles of *stare decisis*.

(Request at 6) (emphasis in original).

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." *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 901 A.2d 784, 789 (D.C. 2006). Contrary to FOP's contention, Arbitrator Parker was not bound by precedent. Thus, Arbitrator Parker acted within her authority.

As a second basis for review, FOP claims that the Award on its face is contrary to law and public policy. (Request at 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. Misco, Inc.*, 484 U.S. 29 (1987). 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 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). *See also District of Columbia Public Schools and American Federation of State, County, and Municipal Employees, District Council 20*, 34 D.C. Reg. 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 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. Teamsters Local 246*, 554 A.2d 319, 325 (D.C. 1989).

In the present case, FOP asserts that the Award is on its face contrary to law and public policy. Despite this, FOP does not specify any "applicable law" and "definite public policy" that mandates that the Arbitrator arrive at a different result. Instead, FOP argues that the Arbitrator's decision contradicts the terms of the CBA. (Request at 5). Specifically, FOP contends that:

> [t]he CBA does not mandate when all issues for arbitration must be asserted so long as the issues are disclosed. Petitioner, pursuant to Art. 19 § E.5.2 of the CBA, disclosed the 55-day rule as the only issue in arbitration when it requested a panel of arbitrators from the Federal Mediation and Conciliation Services...The arbitrator when on to state "[t]here is no evidence that the [Respondent] either noticed or fully understood [Petitioner's] reference"...However, the arbitrator's statement lacked support.

(Request at 5).

FOP's argument is a repetition of the argument considered and rejected by the Arbitrator. Therefore, we believe that FOP's ground for review only involves a disagreement with the Arbitrator's interpretation of Article 19, § E.5.2 of the parties' CBA. FOP merely requests that we adopt its interpretation of Article 19, § E.5.2 of the parties' CBA.

We have held that a "disagreement with the Arbitrator's interpretation of the parties' contract does not render the award contrary to law and public policy." *AFGE Local 1975 and Dept. of Public Works*, 48 D.C. Reg. 10955, Slip Op. No. 413 at pgs. 203, PERB Case No. 95-A-02 (1995).[4] In the present case, the parties submitted their dispute to the Arbitrator. FOP's disagreement with the Arbitrator's interpretation of the parties' CBA and her findings and conclusions, is not a ground 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). 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 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the instant case, FOP failed to do so.

In light 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.

June 15, 2012

[4] *See also Teamsters Local Union 1714 a/w IBTCWHA, AFL-CIO and D.C. Department of Corrections*, 41 D.C. Reg. 1753, Slip Op. No. 304, PERB Case No. 91-A-06 (1994).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-11 was transmitted via Email and U.S. Mail to the following parties on this the 15th day of June 2012.

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