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 Kevin Whaley)	)	PERB Case No. 18-A-02
Petitioner	)	Opinion No. 1662
v.	)	
Metropolitan Police Department	)	
Respondent	)	

DECISION AND ORDER

I. Introduction

On November 3, 2017, the Fraternal Order of Police/District of Columbia Metropolitan Police Department Labor Committee ("Union"), filed this Arbitration Review Request ("Request") pursuant to the Comprehensive Merit Personnel Act ("CMPA"), D.C. Official Code § 1-605.02(6), seeking review of an Arbitrator's Opinion and Award ("Award"). The Award directed the Metropolitan Police Department ("Department") to set aside the termination of Master Patrol Officer Kevin Whaley ("Grievant") and ordered an alternative sanction of a 150-day suspension. The Union claims that the Award is, on its face, contrary to law and public policy.[1]

In accordance with the CMPA, the Board is permitted to modify or set aside an arbitration award in three narrow 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.[2] Having reviewed the Arbitrator's conclusions, the pleadings of the parties and applicable law, the Board concludes

[1] Request at 2.
[2] D.C. Official Code § 1-605.02(6).

that the Award, on its face is contrary to law and public policy. Therefore, the Board grants the Union's Request.

II. Statement of the Case

This case arises out of an off-duty incident involving the Grievant who caused an incident while visiting his wife at her place of employment. That incident was subsequently investigated by the Department's Internal Affairs Division. The Final Investigative Report sustained the allegations against the Grievant for violating departmental orders and directives by being under the influence of alcohol while off duty and in possession of a firearm.[3] The report also recommended sustaining the allegation that the Grievant knowingly carried an unregistered firearm as an off-duty weapon that was not approved by the Department to be utilized in that capacity.[4] The Grievant was served with a Notice of Proposed Adverse Action on November 23, 2010, which proposed a penalty of termination.[5] The Notice proposed the following charges: (1) failing to register a firearm; (2) being under the influence of alcoholic beverages when off duty; (3) being in possession of an unauthorized firearm and a personal non-issued pistol and holster that was not approved by the Department; (4) conduct unbecoming an officer; and (5) willfully and knowingly making an untruthful statement in the presence of a superior officer.

An Adverse Action Panel ("Panel") that consisted of three senior police officials was convened on May 19, 2011. After reviewing all of the witness testimony and documents submitted into evidence, the Panel found the Grievant guilty of conduct unbecoming an officer and accepted his guilty plea to the charge of being under the influence of alcohol. The Panel found the grievant not guilty of the three remaining charges and recommended a thirty (30) day suspension for each charge; a total suspension of sixty (60) days.[6]

The Director of the Office of Human Resource Management Division, Diana Haines-Walton ("Director"), considered the Panel's findings and conclusions and found the Grievant guilty of the three remaining charges and increased the penalty from suspension to termination. On August 22, 2011, the grievant was served with a Final Notice of Proposed Adverse Action which imposed a penalty of termination and his police powers were revoked.[7] The final decision was submitted to arbitration.

III. Arbitrator's Award

The first issue before the Arbitrator was whether the Department had the authority under D.C. law to increase the Trial Board's penalty from a sixty (60) day suspension to termination. The Arbitrator found, based on the overwhelming weight of precedent provided by the Union,

[3] Award at 5.
[4] Award at 5.
[5] Award at 5.
[6] Award at 9.
[7] Award at 9.

that neither the deciding official, the Director nor the Chief of Police has the authority to increase the Panel's recommended penalty of a 60-day suspension for the two sustained charges.[8]

The Union argued that there was insufficient evidence in the record to sustain the three charges that the Director sustained and the Panel did not sustain. Based on the record, the Arbitrator found there was sufficient evidence to sustain all three additional charges sustained by the Director.

As stated earlier, the Arbitrator found that the Director could not increase the penalty found by the Panel for the two charges. However, the Arbitrator further found that there was substantial evidence in the record for the Director to find the Grievant guilty of the additional charges.[9] Therefore, the Director could properly assess a penalty for the additional guilty charges sustained on review. The Arbitrator concluded that the Director did not reasonably weigh the relevant *Douglas* factors in assessing the penalty.[10] Rather than termination, the Arbitrator imposed an additional 30-day suspension for each of the charges the Director sustained; this resulted in an increase of the Grievant's total penalty from a 60-day suspension to a 150-day suspension.

IV. Discussion

The Union argues that the Arbitrator's Award violates 6-A DCMR section 1001.5 and the District of Columbia Court of Appeals' holding in *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations. Board*[11] Section 1001.5 provides that:

> upon receipt of a 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 may declare the board's proceedings void and refer the case to another regularly appointed trial board.

According to the Union, this provision provides no option for the Chief of Police (or designee) to disregard the findings of the panel and impose a more severe penalty. The Arbitrator found that the Director may impose a 30-day penalty for the additional charges she found. The Arbitrator did not point to any legal provision that authorized the Director to make her own guilty determinations of the charges on review nor did he distinguish this methodology from the penalty limitations in section 1001.5. The Union states that the statutory framework and well-defined public policy underlying section 1001.5 and the CMPA comes from *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on Behalf of Dunkins),*[12] which stated that a deciding official cannot increase

[8] Award at 12.
[9] Award at 21.
[10] Award at 22.
[11] 144 A.3d 14 (D.C. 2016).
[12] 60 D.C. Reg. 566, Slip Op. No. 1344, PERB Case No. 12-A-06 (2013).

the penalty recommended by a hearing officer by "whatever name."[13] The Union argues that to allow a reviewing official to make their own findings and/or increase a Hearing Panel's recommended penalty defeats the purpose of a hearing.[14]

The Department states that the Union has failed to point to any applicable law or definitive public policy that mandates that the Arbitrator arrive at a different result. The Union simply disagrees with the Arbitrator's legal conclusions based on relevant law and his interpretation of the collective bargaining agreement between the parties.

A. The Award is Contrary to Law

The Board has previously found that under section 1001.5 the Department does not have the authority to impose a sanction greater than that recommended by the Panel.[15] The Board has further stated that neither section 1001.5 nor 6-B DCMR section 1613 permit a deciding official to increase the recommended penalty. Section 1613 provides:

> 1613.1 The deciding official, after considering the employee's response in the report and recommendation of the hearing officer pursuant to section 1612, when applicable, shall issue a final decision
>
> 1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty.

If section 1613.2 did not preclude increasing the penalty, then section 1001.5 would supersede it and still preclude a deciding official from increasing the penalty.[16] In *Dunkins*, the Court of Appeals stated that it found no basis to conclude that the Board's application of section 1001.5 in this manner is unreasonable.[17]

Since the Board's decision in *Dunkins*, Chapter 16 of Title 6-B has been revised to implement a new disciplinary and grievance program effective February 3, 2016.[18] The new regulation uses similar language regarding a final agency decision. The regulation now states:

> In making the final decision, the deciding official shall:

[13] Request at 10-11.
[14] Request at 11.
[15] *Dunkins,* 60 D.C. Reg. 566, Slip Op. No. 1344, PERB Case No. 12-A-06 (2013).
[16] *Id.*
[17] *MPD v. D.C. Pub. Emp. Rels. Bd.*, 144 A.3d 14 (D.C. App. 2016).
[18] 63 D.C. Reg. 1265

> (a) Consider the notice of proposed or summary action and supporting materials, the employee's response (if any), and any report and recommendation of a hearing officer, and
>
> (b) Either sustain or reduce the proposed summary action, remand the action to the proposing official with instructions for further consideration, or dismiss the action. A copy of any remand decision shall be served on the employee.[19]

The Board has limited authority to overturn an arbitration award.[20] In order for the Board to find the Award contrary to law and public policy, the asserting party bears the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result."[21] A misinterpretation of law by the arbitrator must be apparent on the face of the Award.[22] In this case, the Arbitrator explicitly stated that he agreed with the Board's established precedent that the Director does not have the authority to increase the Panel's recommended penalty. However, he then ignored that precedent and stated that the Director does have the authority to increase the charges which then led to an increase in the penalty. The plain language of section 1001.5 and section 1623.2 give a deciding official three options in acting upon a disinterested designee's recommendation, none of which includes the right to increase the penalty recommended by the disinterested designee. The plain language of section 1001.5 states that the Department may (1) confirm the findings, (2) reduce the penalty, or (3) declare the proceedings void. The plain language of section 1623.2 states that the Department may (1) sustain or reduce, (2) remand, or (3) dismiss the action. It is clear and unmistakable that neither regulation allows the Department to increase the penalty. The Arbitrator's misinterpretation of the law is apparent on the face of the Award. Allowing the Director to increase the penalty is contrary to the plain meaning of 6-A DCMR section 1001.5, 6-B DCMR section 1623.2, and the Board's precedent as established by *Dunkins*.

B. <u>The Award is Contrary to Public Policy</u>

The Board has followed the U.S. Court of Appeals for the District of Columbia Circuit's holding that a violation of public policy "must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest."[23] The D.C. Circuit went on to explain that the "exception is designed

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[19] 6-B DCMR § 1623.2
[20] *FOP/Dep't of Corr. Labor Comm. v. D.C. Pub. Emp. Rels. Bd.*, 973 A.2d 174, 177 (D.C. 2009).
[21] *MPD and FOP/Metro. Police Dep't Labor Committee*, 47 D.C. Reg. 717, Slip Op. 633 at 2, PERB Case No. 00-A-04 (2000); *See also D.C. Pub. Sch. v. AFSCME., District Council 20*, 34 D.C. Reg. 3610, Slip Op. 156 at 6, PERB Case No. 86-A-05 (1987).
[22] *MPD v. FOP/Metro. Police Dep't Labor Comm.*, 64 D.C. Reg. 10115, Slip Op. No. 1635 at p.9, PERB Case No. 17-A-06 (2017).
[23] *FOP/Dep't of Corr. Labor Comm. v. D.C. Dep't of Corr.*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at p. 2, PERB Case No. 10-A-20 (2012) (*citing American Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy."[24]

The Award in this case, violates the Grievant' s right to have the Department comply with the 6-A DCMR section 1001.5 and 6-B DCMR § 1623.2 and violates the well-defined public policy underlying these regulations. The regulations explicitly state what actions a reviewing official can take when reviewing the panel's decision. A reviewing official is not permitted to override the findings of a hearing tribunal. It is the hearing tribunal, not the reviewing official, who is present at the hearing and in the best position to determine the facts, the credibility of the witnesses and a penalty. It would be contrary to the underlying policy of these regulatory provisions to allow the Department to disregard the explicit actions stated in the regulation.

V. Conclusion

Based on the foregoing, the Board finds that the Arbitrator's Award is contrary to law and public policy. Accordingly, the Award is reversed and remanded to the Arbitrator, with instructions to issue an Award consistent with this decision.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby granted.

2. The matter is remanded to Arbitrator Garvin Lee Oliver, with instructions to issue an Award consistent with this decision.

3. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Members Mary Ann Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

March 23, 2018

Washington, D.C.

[24] *Id.*

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-02, Op. No. 1662 was transmitted to the following parties on this the 6th day of April, 2018.

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