GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: Metropolitan Police Department Petitioner, and Fraternal Order of Police, Metropolitan Police Department Labor Committee (On behalf of Officer Juan Espinal) Respondent.	PERB Case No. 93-A-04 Opinion No. 378

DECISION AND ORDER

On September 16, 1993, the District of Columbia Metropolitan Police Department (MPD) filed an Arbitration Review Request with the Public Employee Relations Board (Board). MPD requests that the Board review an arbitration award (Award) that decided a grievance filed by the Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP) on behalf of Officer Juan Espinal, the Grievant. MPD's Request is based on its contention that the Arbitrator exceeded his jurisdiction and was without authority to adopt the standard of proof he applied in deciding the Award. FOP filed an Opposition to the Arbitration Review Request on October 1, 1993, arguing that the Arbitrator's Award was a proper exercise of authority within his jurisdiction.

The issue before the Board is whether or not there is a statutory basis for our review of the Award. Under the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-605.2(6), the Board is authorized to "[c]onsider appeals from arbitration awards pursuant to grievance procedures: Provided, however, that such awards may be reviewed only if the Arbitrator was without, or exceeded his jurisdiction...." Upon review of the Award, the pleadings of the parties and applicable Board law, the Board concludes that the reasons presented in MPD's Arbitration Review Request do not present a statutory basis for

our review.

The Arbitrator decided a grievance of an adverse action by MPD that removed the Grievant from service, The Award, in the main, reduced the Grievant's termination to a suspension. MPD's appeal of the Award turns on its contention that the Arbitrator used a standard of proof, i.e., beyond a reasonable doubt, that is different than that "mandated by adverse action procedures for Department disciplinary actions", i.e., preponderance of the evidence. Therefore, MPD argues, the Arbitrator was without authority to use the standard and the resulting Award "flowing from an analysis based on the higher standard of proof was inappropriate." (Req. a 3.)

There is no question that the Arbitrator applied a beyond-a reasonable-doubt standard of proof, in his assessment of the evidence, to determine whether MPD had met its burden of proof. (Award at 21.) MPD's argument, however, that a lesser standard of proof, i.e., preponderance of the evidence, is mandated consists of a citation to an inapplicable District Personnel Manual (DPM) provision and a rule of a D.C. agency which has no jurisdiction over this arbitration proceeding.[1/]

[1/] Although we recognize that DPM regulations have the force of law under the CMPA, the regulation cited by MPD has no application to the proceeding before the Arbitrator. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works, ___ DCR _____, Slip Op. 365 at n. 1, PERB Case No. 93-A-03 (1993). Under Sec. 1603 entitled "Cause: Corrective and Adverse Actions" of the DPM, MPD cited subsection 1603.6 which provides the following:

> If the employee disputes the evidence used by the agency under subsection 1603.6, the burden of proof then rests with the employee against whom the action is proposed, based on a preponderance of the evidence, to show that he or she did not engage in the conduct which resulted in the conviction, finding of guilt, or plea.

This provision concerns disciplinary actions for cause under subsection 1603.6, which concerns employees "convict[ed] of a misdemeanor when the conviction is based on conduct that would affect adversely the employee's or the agency's ability to perform effectively." The Grievant was disciplined for being absent without leave, disobeying orders and inefficiency. (Award at 1.) Moreover, this standard of proof applies to the evidentiary burden of the employee, not the agency.

(continued...)

MPD also cited to two provisions of the parties' grievance-arbitration procedure as restrictions on the Arbitrator's jurisdiction to apply the beyond the reasonable doubt standard to the issue before him. Our review of these provisions reveals no such restrictions on the Arbitrator's authority with respect to the standard of proof he could apply to the evidence in deciding the issues before him. [2]/

Finally, MPD contends that "the [A]rbitrator clearly exceeded his authority as set forth in the Collective Bargaining Agreement when he ordered Grievant's reinstatement, and thus

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[1](...continued)
MPD also cited to Rule 632.1 of the D.C. Office of Employee Appeals. Under the CMPA, D.C. Code Sec. 1-606.2(b), adverse actions grieved under the provisions of a collective bargaining agreement are not subject to the jurisdiction of the Office of Employee Appeals.

[2]/ These provisions of the parties' contractual grievance-arbitration procedure, as set forth by MPD, provide:

Article 19

E. Arbitration

Section 5.1- The arbitrator shall hear and decide only one grievance or appeal in each case.

Section 5.4- The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision on the issue presented and shall confine his decision solely to the precise issue submitted for arbitration.

MPD asserts that by adopting the beyond the reasonable doubt standard to assess whether MPD had met its burden of proof, the Arbitrator added an issue not before him. We cannot equate, however, the method by which an arbitrator arrives at a decision with the issue being decided. We find his standard of proof election to be the former.

We have held that unless expressly restricted by contract or law to the contrary, the vehicle of analysis adopted to arrive at evidentiary conclusions that an arbitrator has determined necessary to make the award does not give rise to a statutory basis for disturbing the Award. University of the District of Columbia and University of the District of Columbia Faculty Association, 37 DCR 5666, Slip Op. No. 248, PERB Case No. 90-A-02 (1990).

usurped the authority of the Department to terminate an employee it had determined, based on the lesser preponderance standard, had engaged in misconduct that warranted removal for cause." (Req. at 6.) We have on numerous occasions held that an arbitrator does not exceed his authority by exercising his equitable powers (unless it is expressly restricted by the parties' contract) to decide that mitigating factors warrant a lesser discipline than that imposed. See, e.g., District of Columbia Metropolitan Police Department and Fraternal Order of Police, MPD Labor Committee, 39 DCR 6232, Slip Op. No. 87-A-04 (1991) and the cases cited therein, 39 DCR at 6235.[3]/

In view of the above, we can find no basis for MPD's contention that the Arbitrator was without, or exceeded his jurisdiction for the reasons stated, or that the Award otherwise met the statutory criteria under the CMPA for our review.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Review Request is denied.

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

February 24, 1994

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[3]/ If MPD's contention is that the appropriateness of the discipline imposed was not arbitrable, it should have made this argument before the arbitrator. Issues not raised before the arbitrator cannot be subsequently raised before the Board as a basis for vacating the award. See, Department of Public Works and American Federation of State, County and Municipal Employees, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988).