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-08
and	Opinion No. 865
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Nicole Lindsey),	
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. The Arbitrator found that: (1) the Grievant did not waive the application of the 55-day rule and (2) MPD violated the 55-day rule contained in the parties' collective bargaining agreement ("CBA"). As a result, the Arbitrator rescinded the termination of Sargent Nicole Lindsey ("Grievant"), a bargaining unit member.

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 July 6, 2004, [the Grievant] was served with [a] Notice of Proposed Adverse Action, proposing her termination for making untruthful statements, neglect of duty, receipt of valuable consideration contrary to MPD rules and falsification of official records. All of the charges stemmed from the essential allegation that, on August 20, 2003, [the Grievant] improperly obtained four hours of administrative leave by falsely claiming that, earlier in the day, she had donated blood." (Award at p. 2) On July 7, 2004, the Grievant responded and an initial hearing date was set for July 29, 2004. "Following mutually agreed to continuances of the hearing date, to September 28, 2004, and then to October 13, 2004, to explore revision of the charges and possible settlement, [the Grievant] appeared before an MPD Adverse Action Panel, or Trial Board, on October 13, and pleaded guilty to certain of the charges against her, and not guilty as to others."[1] (Award at p. 2)

Before the Trial Board, the Grievant testified that prior to August 20, 2003, she had engaged a fertility clinic to aid her in becoming pregnant. Unexpectedly, on August 20th during her tour of duty, the fertility clinic contacted the Grievant and informed her that her treatment required that she needed to provide a blood sample within the ensuing hours. The Grievant asserted that she contacted her supervisor Lieutenant Ricki Leonard in order to request four hours of leave. However, the Grievant claimed that Lieutenant Leonard was unwilling to grant her either annual or sick leave. MPD alleged that at that point, the Grievant falsely told Leonard that she had given "blood [that] morning, [and wanted] to take. . . administrative [leave]. On that basis, Leonard granted . . . [The Grievant]. . . requested four hours of administrative leave." (Award at p. 3) Later that day, and prior to her departure, the Grievant was given an assignment by Inspector Alton Bigelow. The Grievant informed Bigelow that Leonard had granted her leave. Bigelow threatened to cancel the leave but was told by the Grievant that she had donated blood earlier that day and, therefore, was entitled to administrative leave. On that basis, Bigelow, apparently, relented. "Before leaving, [the Grievant] entered four hours of administrative leave for herself into the time and attendance system, which she maintained for her shift."[2] (Award at p. 3)

The Trial Board found the Grievant "guilty" of three of the charges and "not guilty" of one charge. The Trial Board recommended that the Grievant be terminated. On November 19,

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[1] On September 28, Lindsey's attorney informed the Trial Board that she agreed to waive the contractual "55-day rule" for purposes of a continuance until October 13th.

[2] The Arbitrator noted that "Leonard's version of the events of August 20, as related to the Trial Board, differed from Lindsey's in certain material respects. Thus, according to Leonard, she granted Lindsey's August 20 request for leave; however, Lindsey did not request, and Leonard did not grant, administrative leave. When Bigelow inquired, Leonard so informed him and she further told the inspector that she, Leonard, did not know anything about the donation of blood. Bigelow told Leonard to investigate and that investigation revealed, inter alia, that Lindsey falsely had told Leonard and Bigelow of the blood donation." (Award at p. 3, n. 2)

2004, Assistant Chief Shannon P. Cockett (Director, Human Services) served the Grievant with a Final Notice of Adverse Action advising her that she would be terminated by MPD effective January 7, 2005. The Grievant appealed the decision to the Chief of Police. The Chief of Police denied the appeal and FOP invoked arbitration pursuant to the parties' CBA.

At arbitration FOP asserted 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 her request for a departmental hearing. (See Award at p. 6) Article 12, Section 6(a) 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 asserted that in this case the Grievant elected to have "a hearing on July 7, 2004, but was not served with the decision, the Final Notice of Adverse Action, until November 19, 2004, one hundred and thirty-five days later, her contractual rights were violated, even after exclusion of the days for continuances taken from July 29 to October 13, 2004 (from the initially scheduled hearing date through the date the hearing concluded). Thus, the [FOP] argue[d], [that the Grievant] was entitled to receive the written decision on November 15, 2004, but was not served with it until November 19, 2004." (Award at p. 6) FOP claimed that because of this violation the termination should be rescinded.[3]

MPD countered that when FOP asked the Trial Board for a continuance of the hearing until October 13th , its continuance request resulted in a complete waiver of the 55-day time limitation provided in Article 12 §6. (See Award at p. 7) Therefore, FOP asserted that it complied with the 55-day rule. Also, FOP claimed if a technical violation of the 55-day rule occurred it constituted harmless error as the Grievant was not prejudiced by the delay. As a result, MPD argued that the termination should be sustained.[4] (See Award at p. 7)

In an Award issued on February 24, 2006, Arbitrator Irwin Socoloff rejected MPD's arguments that the Grievant waived the "55-day rule" and that MPD's failure to comply with the 55-day contractual mandate constituted "harmless error". Specifically, the Arbitrator noted the following:

> The time limitation set forth in the collective-bargaining agreement, and at issue here, is clear and unambiguous. The

[3]FOP also claimed that MPD violated the D.C. Personnel Manual and MPD's Memorandum of Agreement with the Justice Department by allowing: (1) Assistant Chief Cockett to propose the adverse action and to serve as the deciding official and (2) Lieutenant Leonard to conduct MPD's internal investigation and to serve as MPD's primary witness. In addition, FOP asserted that termination in this case was unduly harsh and arbitrary. (See Award at p. 7, n. 6)

[4]In addition, MPD denied that the Trial Board erred in its application of the Douglas factors in this case. With regard to the penalty imposed on Grievant (termination), MPD claimed that the penalty imposed was neither arbitrary or capricous. (See Award at p. 7)

> employee against whom charges are preferred is to receive a written decision, and the reasons therefore, from the Department within fifty-five days of his or her election to have a departmental hearing, excluding agreed-to continuances from the initially scheduled hearing date to the date that the hearing is concluded. This was not done in the case of Sergeant Lindsey. While the contract does not specify a remedy for violation of this provision, it likewise does not prohibit the arbitrator from imposing rescission of discipline as a clearly appropriate remedy for the violation of this bargained for contractual right. In reaching the conclusion that the termination of the grievant should be rescinded, I reject MPD's arguments that [the Grievant] waived the "55-day rule" and, or that the Department's failure to comply with this contractual mandate constituted harmless error. . . .(Award at p. 8)

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 time provisions contained in the parties' CBA. 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 suggests 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. (See Request at p. 5) MPD submits that the decision of Judge Abrecht should have been followed and not that of Judge Kravitz. (See Request at p. 7)

In addition, MPD contends that "[t]he failure to comply with the fifty-five day period was harmless in that [the] Grievant was not denied any due process protections. Moreover, the Grievant was not prejudiced by the delay because during the period she remained in a pay status." (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. (See Award at p. 7) Also, MPD claims that "[i]f the Grievant is reinstated, the nature of her misdeeds makes it unlikely that she would be returned to a full-day status. Under the circumstances, a remedy of reinstatement would violate. . .public policy in that [the] Grievant would be unable to provide the services to the public as are set forth in D.C. Official Code 2001 Edition. . . It is beyond question that the suitability of a person employed as a police officer is an important public policy. [The] Grievant committed her misdeeds while employed as

a police officer and [MPD] decided that she was no longer suitable to function in that capacity." (Request at p. 7) 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." (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 p. 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 Jay Hang), Slip Op. No 861, PERB Case No. 06-A-02 (2007), MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez, Slip Op. No 814, PERB Case No. 05-A-03 (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 (D.C. 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.[5] 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 Socoloff 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 Socoloff 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.

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[5] 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.

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). As the Court of Appeals has stated, we must "not be lead 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. Teamster Union Local 246, 54 A2d 319, 325 (D.C. 1989).

MPD suggests that the award violates the "harmless error" rule found in the Civil Service Reform Act, 5 U.S.C. §7701(c)(2)(A) and is not consistent with Judge Abrecht's decision in Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-19 (September 10, 2002). We have previously considered and rejected this argument. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 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[6]

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.

In view of the above, we find no merit to 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.

February 13, 2007

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

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-08 was transmitted via Fax and U.S. Mail to the following parties on this the 13th day of February 2007.

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