GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
District of Columbia Metropolitan Police Department, Petitioner,	
and	PERB Case No. 89-A-01 Opinion No. 218
Fraternal Order of Police/ MPD Labor Committee (on behalf of Grievant Gary E. Roberts), Respondent.	

DECISION AND ORDER

On October 31, 1988 the District of Columbia Metropolitan Police Department (MPD) filed an Arbitration Award Review Request with the D.C. Public Employee Relations Board (Board). MPD alleged that an Arbitration Award issued on October 11, 1988, on its face is contrary to law and public policy, and that the Arbitrator was without authority and exceeded the jurisdiction granted. The Fraternal Order of Police/MPD Labor Committee (FOP) filed, on behalf of Grievant, its opposition to the arbitration review request on November 10, 1988.

The Board holds that the Award is not on its face contrary to law and public policy, and that the Arbitrator did not exceed his authority or jurisdiction for the reasons set forth below. The Arbitration Award Review Request is therefore denied.

The pertinent background of this matter is as follows.

The Grievant was hired by the Petitioner on April 27, 1987 to a career position contingent on the completion of a one year probationary period. On April 22, 1988 MPD informed the Grievant of his termination, which was effective close of business on April 25, 1988. The April 25, 1988 date was the three hundred and sixty fifth day of the Grievant's employment tenure. A grievance was filed alleging that the employee had completed the probationary period, so that his termination violated the Collective Bargaining Agreement between the parties. The grievance was denied by MPD and ultimately proceeded to arbitration.

The Arbitrator found the Grievance arbitrable, and that the Grievant had completed his probationary period and was therefore a career service employee, and ordered MPD either to restore the Grievant to a non-probationary position or to conduct an arbitration hearing on the merits of the Grievant's termination within a forty-five (45) day period.

Under the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Section 1-605.2(6), the Board has the power to "[c]onsider appeals from arbitration awards pursuant to a grievance procedure: Provided, however, that such awards may be reviewed only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy..."

The issues presented in this case are:

1. Whether the Arbitrator exceeded his authority and jurisdiction by finding the grievance of the arbitrability of the discharge of an alleged probationary employee?

2. Whether the Arbitrator exceeded his authority and jurisdiction by finding the grievance of an alleged probationary employee arbitrable?

3. Whether the Arbitrator exceeded his authority and jurisdiction by imposing a remedy allegedly outside the scope of the Collective Bargaining Agreement?

4. Whether the Award is contrary to law and public policy?

MPD contends that "[u]nless the parties clearly and unmistakably provide otherwise the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator, "citing, AT&T Technologies, Inc v. C.W.A., 475 U.S. 634, 649 (1986); the D.C. Uniform Arbitration Act, D.C. Code Section 16-4302(b), and the Steelworkers Trilogy. [1]/

The flaw in MPD's argument is that the Collective Bargaining Agreement "clearly and unmistakably" provides that questions of arbitrability are properly before the arbitrator within the meaning of AT&T. Article 19(E), Section 3 of the contract states:

> If the Department believes the issue is not arbitrable and the Union disagrees or if agreement cannot be reached on a joint stipulation of the issue, each party shall submit its own statement of the issue to arbitration under the voluntary labor arbitration rules of the American Arbitration Association. The arbitrator shall be selected by the parties from a panel or panels submitted by the American Arbitration Association.

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[1]/ United Steelworkers of America v. American Mfg. Co. 363 U.S. 569 (1960), United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960), United Steelworkers of America 363 U.S. 593 (1960).

We find this contractual provision controlling and thus the Arbitrator did not exceed his authority and jurisdiction under the parties' agreement by ruling on the question of arbitrability.

MPD next took issue with the Arbitrator's determination that the subject matter is indeed arbitrable, since MPD did not agree to arbitrate disputes involving the termination of probationary employees. This assertion misstates the underlying issue, which is not whether MPD agreed to arbitrate the termination of a probationary employee, but rather "whether the Grievant had or had not completed his probationary period prior to his April 29, 1988 termination, and was or was not a probationary employee." (Award at p.15). Once the Arbitrator found that the Grievant was not a probationary employee he concluded that a grievance concerning the termination was arbitrable and thus ordered either reinstatement or that a hearing be conducted on the merits. Under the provisions of the parties' Collective Bargaining Agreement, Article 19A, which provides for a broad definition of grievances, the Arbitrator was well within his authority and jurisdiction in considering this matter to be arbitrable.

MPD disagreed with the Arbitrator's ultimate conclusion that the Grievant had completed his probationary period prior to termination and was therefore subject to the protections of the Collective Bargaining Agreement. Contrary to MPD's assertion, the Arbitrator in reaching this conclusion certainly did not exceed his jurisdiction and authority (Arbitration Review Request at p.17), since this was the central issue of the grievance before him.

MPD's major contention appears to be that the Arbitrator's decision as to the employment status of the Grievant was contrary to law. MPD asserted that because the District of Columbia Code, and personnel and MPD regulations all provide that a probationary period shall last for one year and the termination of Grievant's appointment "was effective at the close of business on the 365th day of a leap year" (Arbitration Review Request at p.18) the employee was terminated before the completion of his probationary period.

The Board is not persuaded by this "leap year" argument that the Award on its face is contrary to law and public policy. As MPD has conceded, its General Order 201.7, Part I C.4(c)(4) defines the conclusion of the probationary period as the "365th day on the force." (Arbitration Review Request at p. 17). [1/] It is axiomatic that an Agency is bound by its own Rules. The

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[1/] MPD General Order 201.7, Part I C.4(c)(4):

> To separate an employee prior to the completion of the probationary period, the department must separate him before the end of his tour of duty in the last day of probation, that is prior to the end of his 365th day on the force.

Board is similarly not persuaded by MPD's secondary claim that D.C. Code Section 1-633.5(b) supersedes or repeals this General Order. [3]/ In the Board's view, MPD's General Order is not inconsistent with the statute requiring that probationers serve a one year probationary term.

D.C. Code Section 1-605.2(b) grants the Board authority to consider arbitration award review requests if the award on its face is contrary to law and public policy. MPD's public policy argument rests solely on the claim that the Grievant was a probationary employee. Since the Arbitrator's ruling that the Grievant was a probationary employee is not contrary to law, nor did he exceed his authority in so finding, there is no ground for a public policy concern that the Award expanded the rights of probationary employees.

MPD's final claim is that the Arbitrator exceeded his authority and jurisdiction by the remedy imposed. MPD argued that the Arbitrator fashioned a remedy not contained in the contract, thereby exceeding his authority and jurisdiction by adding to or modifying contractual terms in contravention of the Collective Bargaining Agreement. MPD maintains that the only permissible arbitral order was a remand to the Agency so that the procedural requirements for adverse actions against permanent employees could be complied with.

In United Steelworkers v. Enterprise Wheel and Car Corp., supra n.1, the Supreme Court emphasized the flexibility accorded an arbitrator in fashioning a remedy. In District of Columbia Metropolitan Police Dept. and Fraternal Order of Police, Metropolitan Police Department Labor Committee (on behalf of Detective Norman A. Hill), 31 DCR 4156, Opinion No. 84, PERB Case No. 84-A-04 (1984), the Board rejected a similar assertion that in fashioning a remedy the Arbitrator exceeded his authority and jurisdiction, observing "that the Agreement does not restrict the Arbitrator's exercise of equitable powers." Here too the contract does not restrict the Arbitrator's equitable powers.

The Arbitrator's first alternative remedy, an arbitration hearing on the merits of the Grievant's discharge within forty-five (45) days, is not inconsistent with the Collective Bargaining Agreement or MPD Regulations. It merely takes the parties to that step in the grievance and arbitration procedure where the

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[3]/ D.C. Code Section 1-633.5. Miscellaneous Provisions:

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(b) Any law rule and regulation, Commissioner's Order, Mayor's Order, Mayor's Memorandum or any administrative rule and regulation which is inconsistent with or contrary to the provisions of this chapter is repealed or superseded to the extent of such inconsistency on or after the effective date of this Chapter.

parties would have been as a result of a procedurally correct adverse action proceeding. The second alternative remedy, reinstatement, also does no more than restore the status quo that would have existed but for the employer's action in contravention of the Collective Bargaining Agreement. Reinstatement of an employee subjected to a defective termination is a commonplace remedy in cases such as the instant matter. See Elkouri & Elkouri, How Arbitration Works, p. 674 n.121 (4th Edition 1985).

IT IS ORDERED THAT:

The request for review of the arbitration award is hereby denied.

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

April 6, 1989