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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
)	
Petitioner,)	PERB Case No. 04-A-01
)	
v.)	Opinion No. 1396
)	
District of Columbia)	
Metropolitan Police Department,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Petitioner Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Petitioner” or “FOP”) filed the above-captioned arbitration review request (“Request”), seeking review of Arbitrator Lois Hochhauser’s arbitration award (“Award”). Petitioner asserts that the Award is contrary to law and public policy promoting sound and effective labor-management relations, and that the Arbitrator exceeded her jurisdiction by issuing an award that fails to draw its essence from the parties’ collective bargaining agreement (“CBA”). (Request at 5-6). Respondent District of Columbia Metropolitan Police Department (“Respondent” or “MPD”) filed an Opposition to the Arbitration Review Request (“Opposition”), denying the Petitioner’s allegations.

The Request and Opposition are now before the Board for disposition.

II. Discussion

A. Award

The Award stems from a grievance filed by FOP on behalf of Detective Renee Holden (“Grievant”) as a result of MPD’s decision not to promote Grievant to the rank of Detective

Grade One. (Award at 1). The Arbitrator was asked to determine whether MPD violated the parties' CBA by failing to adhere to the appropriate procedures in the promotion process, and if so, what relief, if any, was appropriate. (Award at 2).

The Arbitrator found that on or about August 29, 2001, MPD issued a circular and special order announcing the Detective Grade One selection process. (Award at 3). In order to be eligible to apply for the promotion, employees were required to have a current in-service training and firearms certification.

Executive Assistant Chief of Police Gainer issued a memorandum to three assistant chiefs, advising them that thirteen (13) detectives on the first half of the promotional list for Grade One Detectives were not current on their in-service training and firearms certifications. (Award at 3). Gainer noted that forty-one (41) of the first sixty-five (65) names on the promotional list had not attended in-service training the previous year, despite the training being mandatory. (Award at 4). A handwritten note on the memorandum, initialed by Assistant Chief Broadbent, concluded that employees could not be elevated to Detective Grade One status without being current on their in-service training requirements. *Id.*

On July 28, 2002, Chief of Police Ramsey issued a memorandum announcing that fifty-five (55) Detective Grade Two candidates would be promoted to Detective Grade One. (Award at 4). The promoted detectives included members who were on the list of those who had not completed their in-service requirements. *Id.* The Grievant, who had completed her in-service training requirements, was placed 85th on the list and was not promoted. *Id.*

At arbitration, FOP alleged that MPD violated the parties' CBA by failing to adhere to its requirements regarding in-service training, and asserted that the Grievant should have been promoted. (Award at 4). As a remedy, FOP requested that the Grievant be promoted retroactive to July 2002, with back pay. FOP asked that the Arbitrator not invalidate any of the promotions which it argued were made in violation of the CBA. *Id.* MPD did not dispute that it did not follow the memorandum regarding the promotion process, but pointed to a recent arbitration award issued by Arbitrator Rosen ("Rosen Award") involving the same issues as the instant case. *Id.* In the Rosen Award, the arbitrator concluded that although MPD violated the CBA by promoting employees who had not satisfied the mandatory in-service requirement, an award granting the promotions requested by the union would violate the management rights clause of the parties' CBA. *Id.*

As an initial matter, the Arbitrator noted that she would afford the Rosen Award considerable weight because that matter involved the same promotion process and addressed the arbitrator's view on how the CBA should be interpreted under those circumstances. (Award at 5). Additionally, Arbitrator Rosen had the opportunity to consider testimonial evidence, which the parties in the instant arbitration hearing chose not to do¹. *Id.*

¹ The Arbitrator notes that she was "encouraged by the parties" to give the Rosen Award considerable weight. (Award at 5).

The Arbitrator concluded that MPD's violation of the parties' CBA was not harmless error, as the Grievant may have been reached for promotion but for MPD's failure to adhere to its own eligibility criteria. (Award at 5). Notwithstanding, the Arbitrator refused to order the immediate promotion of the Grievant, for several reasons. *Id.* The Arbitrator held that such a remedy would violate the management rights provision of the parties' CBA. (Award at 5). She noted that Article 4 of the CBA gives MPD the right to promote and assign employees, and the CBA states that those management rights are not subject to arbitration. *Id.* The Arbitrator stated that MPD determined that fifty-five (55) detectives should be promoted to Detective Grade One, and that because the parties did not want to invalidate any of the current promotions, awarding a promotion to the Grievant would expand the number of detectives in violation of the management rights provision of the CBA. *Id.*

The Arbitrator determined that her Award should be limited to the same remedy awarded by Arbitrator Rosen in the Rosen Award, and that because "[t]he event giving rise to the arbitration is the same one that was before Arbitrator Rosen," MPD could not be faulted for additional violations or for ignoring the Rosen Award. (Award at 6). Further, the Arbitrator held that without further evidence on whether the forty-one (41) candidates mentioned in the Gainer memorandum should have been disqualified, it would be premature to order the Grievant's promotion. *Id.* "In any event," concluded the Arbitrator, "the management rights clause gives [MPD] the exclusive right to determine the number of Detective Grade One officers," and that since FOP did not want any officers to be demoted as a result of the arbitration, the Grievant's promotion exceed the number of Detective Grade One positions that MPD deemed necessary. *Id.*

Instead, the Arbitrator found that directing MPD to "cease and desist from failing to adhere to its requirements for promotion to Detective Grade One" would be consistent with the CBA's purpose of promoting and improving the efficiency and quality of the service provided by MPD. (Award at 6; *citing* CBA Article 1, Section 4). The Arbitrator held that should MPD ignore her Award and the Rosen Award by promoting individuals who did not meet its own requirements, "more broadly fashioned relief should be awarded in the future." (Award at 6).

B. Position of FOP before the Board

In its Request, FOP first alleges that the Award violates the "well-established public policy embodied in Article 1, Section 2" of the CBA, which provides that the parties "agree to establish and promote a sound and effective labor-management relationship in order to achieve mutual understanding of practices, procedures and matters affecting conditions of employment." (Request at 4). Specifically, FOP asserts that refusing to issue a remedy for MPD's violation "fails to promote a sound and effective labor-management relationship in order to achieve a mutual understanding of the practices and procedures." (Request at 5). FOP states that the Arbitrator's "mere suggestion of more severe penalties in the future depending on the circumstances does nothing to cure the lack of an award in the instant case," and that the Award damages the relationship between the parties. *Id.*

Additionally, FOP alleges that the Arbitrator exceeded her authority in issuing the Award because it fails to draw its essence from the parties' CBA. (Request at 6). FOP argues that Article 1 of the parties' CBA requires that the parties "agree to honor and support the commitments contained herein," and that Article 4 requires that MPD's exercise of its management rights be "in accordance with applicable laws, rules, and regulations." (Request at 6-7). FOP asserts that when MPD failed to adhere to its own regulations, "the protection afforded under Article 4 is lost." (Request at 8). By failing to issue a remedy despite MPD's breach of the CBA, the Award did not draw its essence from the parties' CBA. (Request at 7).

Next, FOP contends that the Board has previously determined that awards concerning the future conduct of parties exceed an arbitrator's authority by imposing additional requirements not expressly provided for in the parties' CBA. (Request at 7, citing *D.C. Water and Sewer Authority v. American Federation of Government Employees, Local 631*, 49 D.C. Reg. 11123, 11128, Slip Op. No. 687, PERB Case No. 02-A-02 (2002); *MPD v. FOP/MPD Labor Committee*, 49 D.C. Reg. 810, 813-14, Slip Op. No. 669, PERB Case No. 01-A-02 (2001)). FOP asserts that the Award in the instant case "merely threatens future penalties" without providing specific details on those penalties or binding a future arbitrator. (Request at 7).

Finally, FOP asserts that MPD "is fully aware that Article 4 does not protect it from this type of breach," based upon a prior arbitration awards. (Request at 8). FOP cites to *Sulieka Brooks Award*, FMCS Case No. 00-12001, stating:

In that award, and there are several others, [MPD] violated the contract and failed to promote Sergeant Brooks to Lieutenant. If the arguments advanced by both arbitrators had merit, then [MPD] could have under Article 4 advanced the argument that it did not have to promote her as this is a protected right of management. This argument could not be advanced, however, because there is no management right when the applicable rules, regulations and procedures of the Agency are not followed.

(Request at 8).

C. MPD's Position before the Board

In its Opposition, MPD rejects FOP's assertion that Article 1 of the parties' CBA constitutes a public policy, as defined by Board precedent. (Opposition at 2). In support of its position, MPD cites to *MPD v. FOP/MPD Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000), in which the Board held that reference to D.C. domestic violence laws "did not satisfy the 'specific public policy that has been violated' standard." (Opposition at 2). MPD contends that "merely referring to a general provision in the Preamble to a CBA cannot meet the standard of a 'specific public policy that has been violated.'" *Id.* MPD concludes that FOP has failed to identify a specific public policy, and thus there is no violation of public policy. *Id.*

Next, MPD alleges that the Arbitrator did not exceed her authority by awarding a cease and desist order. (Opposition at 3). MPD contends that FOP simply disagrees with the Arbitrator's construction of the CBA's language, which is not a basis for review of an arbitrator's award. *Id.* Further, MPD states that disagreement with an arbitrator's choice of remedy does not render an award contrary to law and public policy. (*Id.*; citing *D.C. Housing Authority v. Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999)). According to MPD, FOP seeks "to maximize the number of promotions by not demanding that unqualified promotes be demoted," which placed the Arbitrator in the "untenable position of having to violate the contract if she were to grant the remedies requested." (Opposition at 3).

MPD asserts that FOP "erroneously attributes 'subsequent similar violations by the Agency could warrant more serious action' to Arbitrator Hochhauser, when in fact it was Arbitrator Rosen who made such an assertion," and therefore FOP's "contention in this instance should be dismissed." (Opposition at 4). MPD acknowledges that Arbitrator Hochhauser adopted a similar position regarding future violations, but notes that the language "is clearly *obiter dicta*, and just as clearly not a part of the Award." *Id.*

Regarding FOP's allegation that the Award does not bind future arbitrators, MPD states that the argument "ignores the practice and principle that arbitral decisions are not binding as judicial precedents are." (Opposition at 4). Further, MPD contends that "[FOP] itself" distinguished the arbitration award in the Sulieka Brooks arbitration from the instant case by noting that in the Sulieka Brooks arbitration, MPD did not raise management rights as a bar to the desired promotion. (Opposition at 5). Therefore, the *Brooks* arbitrator had no opportunity to rule on the issue, and is not applicable to this case. *Id.*

Finally, MPD dismisses FOP's allegation that the Award failed to enforce the CBA because it did not award a remedy. (Opposition at 5). MPD states that [t]he fact is Arbitrator Hochhauser granted the actual remedy of a cease and desist order," and "[t]he fact that [FOP] was disappointed that it did not receive its requested remedy does not mean that an award was not granted." *Id.* MPD notes that cease and desist awards are routinely ordered by the Board. *Id.* Further, MPD disagrees with FOP's contention that the Award was based on equitable considerations, in violation of the test set forth by the Sixth Circuit in *Cement Division, National Gypsum Co. v. United Steelworkers for America, AFL-CIO, Local 135*, 793 F.2d 759, 765 (6th Cir. 1986). *Id.* Instead, MPD states that the Award is based solely upon the CBA, and should not be disturbed. (Opposition at 5-6).

D. Analysis

The Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award 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).

In the instant case, FOP contends that the Arbitrator exceeded her authority because the Award did not award an actual remedy, and thus did not draw its essence from the CBA. (Request at 5). An arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions." *D.C. Dep't of Public Works v. AFSCME Local 2091*, 35 D.C. Reg. 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). By submitting a matter to arbitration, the parties agree to be bound by the arbitrator's interpretation of the parties' CBA, related rules and regulations, and evidentiary findings and conclusions. *See MPD v. FOP/MPD Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000). It is the arbitrator's interpretation, not the Board's, which the parties have bargained for. *See University of the District of Columbia v. University of the District of Columbia Faculty Association*, 39 D.C. Reg. 9628, Slip Op. No. 320 at p. 2, PERB Case No. 02-A-04 (1992).

One of the tests used by the Board to determine whether an arbitrator has exceeded her jurisdiction is "whether the Award draws its essence from the collective bargaining agreement." *D.C. Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). The Board adopted the Sixth Circuit's analysis of "essence of the agreement" issues:

Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract?" So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made "serious," "improvident," or "silly" errors in resolving the merits of the dispute.

Nat'l Ass'n of Government Employees, Local R3-07 v. D.C. Office of Communications, 59 D.C. Reg. 6832, Slip Op. No. 1203, PERB Case No. 10-A-08 (2011) (citing *Michigan Family Resources, Inc. v. SEIU Local 517M*, 475 F.3d 746, 753 (2007)).²

In the instant case, the Board finds that the Award did not exceed the Arbitrator's jurisdiction. The Arbitrator was asked to determine whether MPD violated the CBA by failing to adhere to the appropriate procedures in the promotion process, and if so, what relief (if any) was appropriate. (Award at 2). The Arbitrator determined that MPD violated the CBA, but chose not to award FOP's requested remedy of a promotion for the Grievant without demotions for any other detectives in that grade. (Award at 5-6). Instead, the Arbitrator directed MPD "to cease and desist from failing to adhere to its requirements for promotion to Detective Grade One." (Award at 7). There is no evidence or allegation that the Arbitrator committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the Award.

² *Cement Division*, 793 F.2d 759, was overruled by *Michigan Family Resources, Inc.* after the instant Request was filed with the Board.

The remaining question is whether the Arbitrator was “arguably construing or applying the contract.” The Board has held, and the D.C. Superior Court has affirmed, that “[i]t is not for [this Board] or a reviewing court... to substitute their view for the proper interpretation of the terms used in the [CBA].” *D.C. Gen. Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super. Ct., May 24, 1993). The CBA was presented to the Arbitrator in its entirety, and the Award quoted and analyzed the contract provisions she found relevant to the dispute. (Award at 2-3, 5-6). While FOP may not approve of the Arbitrator’s interpretation of the CBA provisions, particularly Article 4, it cannot be said that the Arbitrator did not arguably construe or apply the contract. Therefore, FOP’s allegation that the Arbitrator exceeded her jurisdiction by issuing an award that failed to draw its essence from the CBA is dismissed.

Additionally, FOP contends that the Award “merely threatens future penalties against [MPD],” violating the Board’s previous determination that awards concerning future conduct exceed an Arbitrator’s authority. (Request at 7). The Arbitrator noted in the “Analysis, Findings and Conclusions” portion of the Award that if MPD “ignores these awards and again promotes individuals who do not meet its own requirements, then more broadly fashioned relief should be awarded in the future.” (Award at 6). Notwithstanding, under the section of the Award entitled “Award,” the Arbitrator stated only that “[MPD] is directed to cease and desist from failing to adhere to its requirements for promotion to Detective Grade One.” (Award at 7). MPD contends that the language in the “Analysis, Findings and Conclusions” section of the Award “is clearly *obiter dicta*, and just as clearly not a part of the Award.” (Opposition at 4). The Board agrees. The relief ordered by the Arbitrator was an order for MPD to cease and desist its failure to adhere to its promotion requirements for Detective Grade One. (Award at 7). The “future conduct” language FOP objects to does not appear at all in the order, nor does it outline any details or mechanism for achieving the “more broadly fashioned relief.” (Award at 6). This language does not form part of the Award’s remedial order, and therefore does not exceed the Arbitrator’s authority. *See Metropolitan Police Dep’t v. National Ass’n of Government Employees, Local R3-5*, 59 D.C. Reg. 2983, Slip Op. No 785 at p. 5, PERB Case No. 03-A-08 (2006) (arbitrator’s discussion unrelated to her conclusion is *dicta* and does not constitute grounds for review of the award).

The Board’s scope of review in arbitration review requests is extremely narrow, particularly in the case of the public policy exception. *See MPD v. FOP/MPD Labor Committee*, 60 D.C. Reg. 3052, Slip Op. No. 1365 at p. 5, PERB Case No. 11-A-02 (2013). A petitioner must demonstrate that the award “compels” the violation of an explicit, well-defined public policy grounded in law or legal precedent. *See United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29 (1987). Absent a clear violation of law evident on the face of the arbitrator’s award, the Board lacks authority to substitute its judgment for that of the arbitrator. *Fraternal Order of Police/Dep’t of Corrections Labor Committee v. Public Employee Relations Board*, 973 A.2d 174, 177 (D.C. 2009). Disagreement with an arbitrator’s findings is not a sufficient basis for concluding that an award is contrary to law or public policy. *MPD v. FOP/MPD Labor Committee*, 31 D.C. Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A-05 (1984).

FOP contends that the Award is contrary to law and public policy because it “is contrary to the well-established public policy embodied in Article 1, Section 2 of the parties’ CBA, wherein the parties ‘agree to establish and promote a sound and effective labor-management relationship in order to achieve mutual understanding of practices, procedure, and matters affecting conditions of employment.’” (Request at 4). Specifically, FOP asserts that “the lack of an award in the instant case” damages the labor-management relationship established by Article 1, Section 2 of the parties’ CBA. (Request at 4-5).

As discussed above the Award does contain a remedy for MPD’s violation of its promotion policies – the order “to cease and desist from failing to adhere to its requirements for promotion to Detective Grade One.” (Award at 7). Further, the Board has noted with approval the U.S. Court of Appeals for the District of Columbia Circuit’s holding that “in order to provide the basis for an exception, the public policy in question ‘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 interests.’” *Fraternal Order of Police/Dep’t of Corrections Labor Committee v. D.C. Dep’t of Corrections*, 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)). The D.C. Circuit went on to explain that the “exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of ‘public policy.’” *Id.* at 8. As the D.C. Court of Appeals has noted, we must “not be led astray by our own (or anyone else’s) concept of ‘public policy,’ no matter how tempting such a course of action may be in any particular factual setting.” *D.C. Dep’t of Corrections v. Teamsters Union Local 246*, 54 A.2d 319, 325 (D.C. 1989).

As cited by the Arbitrator, Article 1, Section 2 of the parties’ CBA states:

The parties to this Agreement hereby recognize that the collective bargaining relationship reflected in this Agreement is of mutual benefit. Further, both parties agree to establish and promote a sound and effective labor-management relationship in order to achieve mutual understanding of practices, procedures and matters affecting conditions of employment and to continue working towards this goal.

(Award at 2). This preamble to the parties’ CBA falls short of the demanding requirement that the Award compels the violation of an explicit, well-defined public policy grounded in law or legal precedent. *See Misco, Inc.*, 484 U.S. 29. Further, FOP’s public policy cannot be ascertained “by reference to the laws and legal precedents” instead of from “general considerations of supposed public interests.” *See Fraternal Order of Police/Dep’t of Corrections Labor Committee* Slip Op. No. 1271 at p. 2. FOP merely disagrees with the Arbitrator’s conclusions, and the Board cannot disturb the Award on that basis. *MPD*, Slip Op. No. 85. Therefore, this allegation is denied.

Finally, FOP asserts that when MPD failed to “adhere to its own rules and directives, then the protection afforded under Article 4 is lost.” (Request at 8). However, FOP cites no

authority for this allegation, nor is this outcome mandated by the text of Article 4. (*See Award at 2-3*). FOP disagrees with the Arbitrator's Award, and the Board will not overturn or modify the Award on this basis. *MPD, Slip Op. No. 85*. Therefore, this allegation is denied.

In light of the above, we find no merit to FOP's request. The Arbitrator's ruling cannot be said to be contrary to law or public policy, in excess of her authority, or procured by fraud, coercion, or other unlawful means. Therefore, no statutory basis exists for setting aside the Award, and the Request is dismissed.

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.

July 1, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 04-A-01 was transmitted via U.S. Mail and e-mail to the following parties on this the 1st day of July, 2013.

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