DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
District of Columbia Metropolitan Police Department,	
Petitioner,	PERB Case No. 10-A-21
and	Opinion No. 1122
National Association of Government Employees, Local R3-05,	Arbitration Review Request
Respondent.	**CORRECTED COPY**

DECISION AND ORDER

I. Introduction

The District of Columbia Metropolitan Police Department ("Petitioner" or "MPD") filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks the review of Arbitrator Robert T. Simmelkjear's award of August 30, 2010, which rescinded the termination of Librarian Christopher Forney ("Grievant"). MPD contends that the Arbitrator exceeded his authority. (*See* Request at pgs. 5-7). The National Association of Government Employees, Local R3-05 ("AFGE" or "Union") opposes the Request.

The issue before the Board is whether the Arbitrator exceeded his jurisdiction. (See D.C. Code § 1-605.02 (6) (2001)). The parties' pleadings and the Arbitrator's Award are before the Board for disposition.

II. Background

Christopher Forney has been a Librarian, working in MPD's Institute of Police Science ("Academy"), since the year 2000. His duties and responsibilities include providing "comprehensive reference, research, advisory, evaluative and instructional services to the staff of

IPS." He is responsible for "identifying the information needs of different users and designing, implementing, [and] maintaining mechanisms to communicate with, train, and provide reference services to those user groups." (Award at pgs. 4-5). The Grievant's supervisor is John Foust, Director of Academic Services at the Academy.

On August 27, 2007, Supervisor Foust conducted a staff meeting and discussed "maintenance and distribution of instructional material for recruits." He explained that there were non-secured instructional materials located throughout the building, that the Grievant would need to take the materials to the library storage room, and that he should establish procedures for distribution. (*See* Award at p. 5). The Grievant replied that he did not think that it was something the library could do, but he asked Supervisor Foust to "Give me a proposal on what you want." (Award at p. 5). Mr. Foust responded that he would provide a directive indicating that the Grievant was responsible for completing the assignment. Accordingly, on August 28, 2008, Mr. Foust had recruits deliver materials to the library and place them on a table and on the floor by the storage room door. (*See* Award at p. 5).

When the Grievant arrived at the library on August 28, Mr. Foust handed him a written directive instructing him to place the books and other information in the storage room. (Award at p. 6). After Mr. Foust showed him where the materials should be placed, the Grievant began pushing the boxes into the storage room with his foot and did not stop when Mr. Foust instructed him to stop. Mr. Foust then directed the Grievant to walk with him upstairs to look at the rest of the materials so that the Grievant could accurately assess the volume of material for storage purposes. The Grievant refused to accompany him, saying that he was busy. Mr. Foust repeated the instruction and the Grievant refused. The third time he gave the instruction, Mr. Foust asked the Grievant if he was disobeying the order. The Grievant replied, "Yes." (*See* Award at p. 6).

On October 14, 2008, Lieutenant Byron Hope submitted his investigation on this incident and concluded that the Grievant should be exonerated. Lieutenant Hope concluded that personality conflicts between Mr. Foust and the Grievant were at the root of the problem. The investigation was remanded to Lieutenant Hope with direction to ask the Grievant further questions to ascertain whether he: (1) refused to stop pushing boxes with his foot after being directed to stop; (2) said he was too busy to walk upstairs to review the volume of the training material; and (3) said "Yes" when asked if he was disobeying Mr. Foust's direct order. The Grievant responded that he stopped pushing the boxes, did not say that he was too busy to go upstairs, and did not remember whether he responded "yes" when asked if he was disobeying a direct order. (*See* Award at p. 7).

On January 5, 2009, the Grievant received an advance notice of a proposal to terminate him for cause. He was charged with two specifications of insubordination, one specification of false statement, and a specification identifying three previous instances of insubordination sustained against him, all within the previous year. (*See* Award at p. 8). On January 26, 2009, the Union President, Michael Patterson, submitted a written reply to Hearing Officer Commander Robert

Contee. "On February 11, 2009, Commander Contee concurred with the Disciplinary Review Branch's recommendation of termination and notified the Grievant." The Union President submitted a written reply to Assistant Chief Diane Groomes, the Deciding Official. Assistant Chief Groomes sustained the charges against the Grievant, as well as the recommended termination. (Award at p. 9). "On April 28, 2009, the Grievant was served with a Notice of Final Decision authorized by Assistant Chief Groomes and dated April 14, 2009, sustaining his termination. [The notice stated that] 'You admitted that you have received three (3) separate sustained disciplinary actions in 2008 for insubordination.'" (Award at p. 10). The Union Executive Vice President, Ms. WanDer Banks, submitted an appeal of the Final Decision to Chief of Police Cathy Lanier. On May 1, 2009, the Grievant was terminated from his position. On June 9, 2009, Chief Lanier denied the appeal. The Union appealed the termination to arbitration. A hearing was held on December 18, 2009 and May 25, 2010. (See Award at pgs. 2 and 11).

At arbitration, MPD argued that there was cause for termination and that the Grievant had prior disciplinary actions. MPD also alleged that the Grievant knew that refusal to comply with directions or instructions from his supervisor would constitute insubordination. (See Award at p. 12).

The Union argued that "[MPD] did not have cause to terminate the Grievant and that [MPD] failed to conduct a fair investigation[.] [The Union also alleged that MPD] failed to demonstrate by a clear and convincing standard that [the Grievant] had been insubordinate on or about August 28, 2008, particularly because [MPD] did not define insubordination, and 'improperly considered past discipline of [the Grievant], which was not served in support of the decision to terminate [him]'." (Award at p. 22).

With respect to Specification No. 1,[1] Arbitrator Simmelkjaer found, that "[MPD] proved most, but not all, of the elements necessary to sustain a charge of insubordination based on non-compliance with a direct order." (Award at p. 29). However, the Arbitrator also found that the Grievant had received no warning of what the consequences would be if he failed to comply with the order to stop kicking the boxes. He stated that "warning the employee about the disciplinary consequences constitutes an indispensable element in proving insubordination based on non-compliance with a direct order.... [Therefore, he concluded that the Agency] has not sustained its burden of proof on this aspect of Specification [No.] 1." (Award at p. 32). The Arbitrator made a similar analysis regarding Specification No. 2 which alleged "Mr. Foust directed you to follow him upstairs in order to access the remaining recruit materials and you refused, stating that you were too busy. Furthermore, when Mr. Foust asked you if you were disobeying a direct order, you replied 'Yes.'" (Award at p. 29). The Hearing Examiner found the Agency proved these allegations against the Grievant, but the Agency did not give notice of the

[1] "Specification 1:...On August 27, 2008, as the Librarian, you were given written instructions regarding an assignment explaining the storing of Metropolitan Police Academy training material in the library from your supervisor Mr. John Foust. During the discussion on what the assignment entailed, you began to push boxes of recruit material with your feet and continued after being told multiple times by Mr. Foust to stop."

consequences of these actions. (See Award at p. 33-35). The Arbitrator thus concluded that the specifications "were proven, in part, and mitigated for the reasons discussed." (Id., pgs. 33, 35).

III. Discussion

MPD alleges that the Arbitrator exceeded his authority by reducing the Grievant's penalty. (See D.C. Code § 1-605.02 (6) (2001)). The Board has held, as has the Court of Appeals for the Sixth Circuit, that:

> we will consider the questions of 'procedural aberration'.... [And ask] [d]id 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.
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> The Court's repeated insistence that the federal courts must tolerate "serious" arbitral errors suggests that judicial consideration of the merits of a dispute is the rare exception not the rule. At the same time we cannot ignore the specter that an arbitration decision could be so "ignor[ant]" of the contract's "plain language," [citation omitted] ... as to make implausible any contention that the arbitrator was construing the contract.... Such exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that.... [Citation omitted.]
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> This view of the "arguably construing" inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes....

See *Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M*, 475 F. 3d 746, 753 (2007) (overruling *Cement Divisions, Nat. Gypsum Co. (Huron) v. United Steelworkers of America*, AFL-CIO-CLC, Local 135, 793 F.2d 759).

The Board finds nothing in the record that suggests that fraud, a conflict of interest or dishonesty infected the Arbitrator's decision or the arbitral process. No one disputes that the collective bargaining agreement committed this grievance to arbitration and the Arbitrator was mutually selected by the parties to resolve the dispute. (See *Michigan*, 754). Therefore, the Board rejects the argument that the Arbitrator exceeded his authority.

We have held and the District of Columbia Superior Court has affirmed, "[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]." *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract." *Misco, Inc.*, 484 U.S. at 38. We have explained that: "[by] submitting a matter to arbitration "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based." *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D.C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004). In the present case, the Board finds that 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 of the arbitration provision in the parties' CBA. This we will not do.

In effect, MPD requests that we limit the equitable power of the arbitrator. The Board has 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.[2] 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). Here, MPD disagrees with the arbitrator's reduction of the Grievant's penalty. However, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that there were mitigating circumstances, he also had the authority to determine the appropriate remedy. The Arbitrator merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, the Arbitrator acted within her authority. The Board finds that MPD's request that this Board adopt its interpretation of the CBA and reinstate the termination merely represents a disagreement with the Arbitrator's interpretation. As stated above, the Board will not substitute its, or MPD's, interpretation of the CBA for that of the Arbitrator. Thus, MPD has not presented a ground establishing a statutory basis for review.

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[2] We note that if MPD had cited a provision of the parties' CBA that limits the Arbitrator's equitable power, that limitation would be enforced.

In view of the above, we find no merit to MPD's argument. 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' CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Request filed by the Metropolitan Police Department in hereby **DENIED.**

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

August 31, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.10-A-21 was transmitted via U.S. Mail to the following parties on this the 25th day of August 2011.

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