GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Teamsters Local Union No. 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (on behalf of Jean Harrod),	
Petitioner,	PERB Case No. 87-A-11 Opinion No. 296
and	
District of Columbia Department of Corrections,	
Respondent.	

DECISION AND ORDER ON REMAND

Once again, this case is before the Public Employee Relations Board (Board) following the D.C. Superior Court's Order granting the District of Columbia Department of Corrections' (DOC) Petition for Review of our Decision and Order on Remand in Opinion No. 284. [1] / District of Columbia Department of Corrections v. the Public Employee Relations Board, Civil Action Nos. 91 MPA 15, 88 MPA 14 and 88 MPA 15 (J. Levie). [2] / The Court remanded this case to the Board for further proceedings on issues that were originally remanded to the Board by the D.C. Court of Appeals in Teamsters Local Union 1714 v. PERB, 579 A.2d 706 (1990).

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[1] / Teamsters Local Union No. 1714, et al. and D.C. Dept. of Corrections, 38 DCR 5080, Slip Op. No. 284, PERB Case No. 87-A-11 (1991).

[2] / The Superior Court's Order reversed the Board's ruling that section 1604.38 of the District Personnel Manual (DPM) is mandatory. The Court found the Board's conclusion "inconsistent with the statutory purpose and policy" in finding that conformance with the 45-day time period in D.C. Code Sec. 1-617.3(a)(1)(D) was directory rather than mandatory. Id., Slip Op. at 14. The Court further held that the Board's conclusion was at odds with Vann v. D.C. Board of Funeral Directors and Embalmers, 551 A.2d 246 (1982), which found a regulation --in all significant respects, to be similar to DPM 1604.38-- was not mandatory.

The background of this matter can be briefly stated as follows. On September 28, 1987, Teamsters Local Union No. 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (Teamsters), on behalf of Jean Harrod (Grievant), filed an Arbitration Review Request with the Board. The Request asserted that an arbitration award concerning the grievance was, on its face, contrary to law and public policy, and that the Arbitrator exceeded his jurisdiction because the Award improperly placed the burden on the Grievant to establish any prejudice as a consequence of DOC's failure to render a final decision on a proposed adverse action within the 45-day period required by D.C. Code Sec. 1-617.3(a)(1)(D) and District Personnel Manual (DPM) Sections 1604.30 and 1604.38. On October 14, 1987, DOC filed an Opposition to the Arbitration Review Request. On November 2, 1988, the Board issued Opinion No. 189.

We held in Opinion No. 189 that "the Arbitrator's Award, by placing on the Union the burden of establishing that the Grievant was harmed or prejudiced by DOC's failure to comply with the law and its regulations, was on its face contrary to law and public policy." Teamsters, Local Union 1714 and the Department of Corrections, 35 DCR 8173 at 8176, Slip Op. No. 189 at 4, PERB Case No. 87-A-11 (1988). On that basis, we reversed and remanded the Award to the Arbitrator for further proceedings consistent with our Opinion. Petitions for Review were filed in the D.C. Superior Court by both DOC and the Teamsters challenging the Board's ruling as clearly erroneous. The Superior Court affirmed the Board's decision and dismissed the Petitions. Both DOC and the Teamsters appealed this ruling to the D.C. Court of Appeals, which remanded the case to the Board for further discussion and explanation regarding the mandatory versus directory nature of the statutory and regulatory provisions and the respective burdens of proof. That remand resulted in our Decision and Order in Opinion No. 284.

This Opinion is being issued in compliance with the Order of the D.C. Superior Court which, once again, remanded this matter back to the Board for our "view on the issue of burdens of pleading or production in relation to the burden of persuasion" and, in this context, to consider "whether the employee [Grievant] affected by the delay [,i.e., DOC's imposition of the adverse action beyond the 45-day time period set forth in DPM 1604.38,] suffered any prejudice...." DOC v. PERB, supra, Slip

Op. at 14. [3]/ For the reasons that follow we now hold, upon reconsideration, that the Arbitrator's conclusion that the Grievant bore the initial burden of proof was not on its face contrary to law and public policy.

Generally, in allocating the burdens of proof, a distinction is consistently made "between the constituent elements of a promise or a statutory command, which must be proved by the party who relies on the...statute, and matters of exception, which must be proved by his adversary." E. McCormick on Evidence, Section 337 at 951 (3rd ed. 1984) ("Allocating the Burdens of Proof") Since the directory nature of both the governing DPM regulation (as found by the Superior Court) and statutory provision allows a District agency to act beyond the prescribed time period, the existence of a basis for precluding such actions, i.e., prejudice to the employee, cannot be presumed. Therefore, we conclude that relief from tardy District agency actions does not rest on proving the constituent elements of this statute or regulation, but rather on proving whatever exception(s), e.g., prejudice, that may exist. Any prejudice that is experienced by an aggrieved employee falls within the exception to a District agency's authority to act beyond the designated time period that is directed by the CMPA and the applicable DPM regulatory provisions. [4]/

Thus, in the case of a directory statute or regulation, it is not improper for the agency to bear the burden of pleading the absence of prejudice (which the Arbitrator found DOC had done, Arb. Award at 9) and, as a result, the attending burdens of

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[3]/ A determination of whether the Arbitrator's actions established any of the alleged statutory bases for our review required the resolution of a threshold issue concerning the mandatory versus directory nature of the invoked statutory and regulatory provisions noted in the text. In Opinion No. 284 we found that the 45-day time period contained in D.C. Code Sec. 1-617.3(a)(1)(D) was directory; however, our determination that an agency's compliance with the time period in DPM 1604.38 was mandatory obviated the need to address the issues of prejudice and burdens of proof, for the reasons there discussed. See, Teamsters, Local 1714 and the Department of Corrections, supra at fn. 1. The Superior Court's reversal of this latter determination has revived this issue for our consideration on remand.

[4]/ Notwithstanding the directory nature of the statute or rule, relief is still available to an aggrieved party if after applying a balancing test a finding is made of prejudice to the party caused by the agency's delay. JBG Properties, Inc. supra, at 1186 and Vann, supra at 248.

proof, i.e., production and persuasion. Id. However, "[i]f proof of the facts is inaccessible or not persuasive it is usually fairer to act as if the exceptional situation did not exist and place the burdens of proof and persuasion on the party claiming its existence." Id. [5]/ Here, however, there is no dispute concerning the Arbitrator's conclusion that the Teamsters did not assert that any actual harm or, as here, prejudice, resulted from DOC's noncompliance with the "45-day rule" nor demonstrate that DOC would have reached a different decision if not for the delay. [6]/

Though we stand by our earlier ruling that in accordance with the policy of the CMPA, "[a]n Agency that has failed to comply with its [directory] regulations must show that its failure to do so did not prejudice the employee", Slip Op. No. 189 at 4, we add that this showing is the agency's ultimate burden of persuasion to "demonstrat[e, i.e., prove,] that its delay did not substantially prejudice the complaining party." JBG Properties, Inc. supra, 364 A.2d at 1186 and Vann, supra, 441 A.2d at 248. This burden of proof, however, would not

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[5]/ This is rooted in the doctrine that "the party pleading a negative need not prove it when the facts are peculiarly within the knowledge of the other party." E.McCormick on Evidence, supra, at 949-950 and n.8.

[6]/ Generally, the party seeking "to change the present state of affairs" or to benefit from a given fact, e.g., prejudice, "has the burden of pleading [the] fact [and] will have the burdens of producing evidence and of persua[sion]" with respect to its existence. E. McCormick on Evidence, Section 337 at 948-940 (3rd ed. 1984) ("Allocating the Burdens of Proof"). Since there was no assertion of either actual harm or even the existence of prejudice, the Court's Order directing consideration of whether the Grievant suffered any prejudice is obviated. Moreover, we note that the role of the Board in reviewing arbitration awards pursuant to D.C. Code Sec. 1-605.2(6) is appellate in nature and not de novo. Our review is restricted to a narrow scope as set forth therein. The Board does not act as a finder of fact nor does it substitute its judgment for that of the arbitrator on credibility determinations and the weight attributed evidence. See, American Federation of State, County and Municipal Employees, District Council 20, Local 2743, AFL-CIO v. District of Columbia Department of Consumer and Regulatory Affairs, 38 DCR 5076, Slip Op. No. 281, PERB Case No. 90-A-12 (1991) and the cases cited therein at fn. 3. Thus, if our statutory criteria for review warrants that additional issues of fact be considered, such issues are properly remanded for further proceedings before an arbitrator.

necessarily arise unless the complaining party, i.e., Teamsters or Grievant produced some evidence of prejudice. 1/ As noted, this did not occur. In view of our revised conclusion concerning the parties' burdens of proof with respect to establishing prejudice, no basis exists for the Arbitrator to revisit his finding in this regard.

Based on the foregoing, we cannot find that by assigning to the Grievant, or the Teamsters in her behalf, the initial burden of demonstrating that the Grievant was prejudiced by the agency's delay, the Arbitrator exceeded his jurisdiction or that the Award on its face is contrary to law and public policy. Therefore, our previous Decision and Order in Opinion No. 189 is now vacated and superseded by our Decision and Order on Remand in Opinion No. 284 (as reviewed by the Superior Court) and the instant Decision and Order on Remand.

1/ Consider the following discussion on shifting burdens of proof in E. McCormick on Evidence, supra, Section 337 at 951-52:

> ...the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party. Usually each is assigned but once in the course of the litigation and a safe prediction of that assignment can be made at the pleading stage. However, the initial allocation of the burden of producing evidence may not always be final. The shifting nature of that burden may cause both parties to have the burden with regard to the same issue at different points in the trial. Similarly, although the burden of persuasion is assigned only once - when it is time for a decision - a prediction of the allocation of that burden, based upon the pleadings, may have to be revised when evidence is introduced at trial. Policy considerations similar to those that govern the initial allocation of the burden of producing evidence and tentatively fix the burden of persuasion govern the ultimate assignment of those burdens as well. (Citations omitted)

ORDER

IT IS HEREBY ORDERED THAT:

The Order in Opinion No. 189 granting the Arbitration Review Request and remanding the Award to the Arbitrator is vacated.

The Arbitration Review Request is denied.

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

March 12, 1992

CERTIFICATE OF SERVICE

I hereby certify that the attached Decision and Order on Remand in PERB Case No. 87-A-11 was hand-delivered, sent via facsimile transmission and/or mailed (U.S. Mail) to the following parties on this 12th day of March, 1992:

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