GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: International Brotherhood of Teamsters, Local 1714 (on behalf of Jean Harrod), Petitioner, and District of Columbia, Department of Corrections, Respondent.	PERB Case No. 87-A-11 Opinion No. 189

DECISION AND ORDER

On September 28, 1987 the International Brotherhood of Teamsters, Local 1714 (Union), on behalf of Jean Harrod (Grievant), filed an Arbitration Review Request with the Public Employee Relations Board (Board). The request asserts that the Arbitration Award is 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 prejudicial harm as a consequence of the Agency's failure to render a final decision on a proposed adverse action within the forty-five day period required by D.C. Code Sec. 1-617.3(a)(1)(D).

On May 1, 1986 the Grievant received an "Advance Notice of Proposed Suspension," advising her of a recommended suspension of five (5) days for insubordination. A final decision, imposing the five (5) day suspension, was issued to the Grievant on July 1, 1986. The Union grieved the suspension.

I. The Arbitration Award

In denying the Union's grievance, the Arbitrator found that while D.C. Code Section 1-617.3(a)(1) and DPM Section 1-604.30 are applicable and "mandatory," the Department of Corrections' (DOC) failure to issue a final decision suspending the Grievant within forty-five (45) days after receiving notice of the proposed suspension did not result in an automatic forfeiture of the Agency's right to implement the action; rather, in the Arbitrator's view, the Union must show harmful error. 1/ The Arbitrator concluded that since the Union did not assert that any actual harm resulted from the procedural error nor demonstrate that the Agency would have reached a different decision if not for the delay, the Union's procedural argument could not be sustained.

II. Issues

The issues before the Board are 1) whether the Arbitrator exceeded his jurisdiction by applying a harmful error standard and placing on the Grievant the burden of establishing that harm was caused by DOC's failure to comply with applicable law, rule or regulation; and 2) whether the Award on its face is contrary to law and public policy. 2/

III. The Award is Contrary to Law and Public Policy

Section 1-605.2(6) of the D.C. Code authorizes the Board to consider appeals from arbitration awards pursuant to a grievance procedure if, inter alia, the Arbitrator was without, or exceeded, his or her jurisdiction, or the award on its face is contrary to law and public policy.

1/ D.C. Code Sec. 1-617.3(a)(1) and DPM Sec. 1-604.30(d) and 1-604.38 are set forth in the attached Appendix.

2/ After considering the parties' initial pleadings, the Board, pursuant to Board Interim Rule 107.7, requested that the parties brief the issue of the proper allocation of the burden of proof as to the existence or lack of harmful procedural error or substantial prejudice.

The Board has reviewed the Award, the pleadings of the parties, and applicable law and finds that the Award is contrary to law and public policy. Accordingly, we grant the Arbitration Review Request and reverse and remand the Arbitration Award to the Arbitrator with directions to issue an award in accordance with this decision.

D.C. Code Sec. 1-617.3(a)(1) and DPM sec. 1604.30(d) and 1604.38 require the deciding official to issue a final decision on a proposed adverse action within 45 days of the notice of the proposed action. DOC did not comply with this requirement when it issued a decision to suspend the Grievant.

We find consistent with law the Arbitrator's ruling that DOC's failure to issue a timely decision does not automatically forfeit the Agency's right to implement a decision. However, the Arbitrator's finding that the Union bears the burden of establishing prejudicial harm suffered by the Grievant is contrary to law.

It has been established in the District of Columbia that a "statute specifying a time within which a public official is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer." JBG Properties, Inc. v. D.C. Office of Human Rights, 364 A.2d 1183, 1185 (D.C. 1976); Accord, Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights, 527 A.2d 282 (D.C. 1987); and Vann v. D.C. Board of Funeral Directors and Embalmers, 441 A.2d 246 (D.C. 1982). For this reason the Board rejects the Union's contention that Sec. 1-617.3(a)(1)(D) of the D.C. Code requires an agency to rescind a personnel action if the final decision on any action is not issued within the specified time. As in JBG Properties, Inc., 364 A.2d at 1185, the regulations in this case do not contain a specific limitation curtailing the power of the agency for failure to act within a certain time period. Therefore, the regulations, which require DOC to act within a specified time, are directory rather than mandatory.

In determining whether an agency's failure to comply with a directory rule or regulation warrants dismissal of its action, "the agency bears the burden of demonstrating that its delay did not substantially prejudice the complaining party." Vann, 441 A.2d at 248. Therefore, the Arbitrator's finding that the Union should carry the burden of establishing that the Grievant was substantially prejudiced by DOC's failure to issue a timely decision is contrary to law.

We also find that the Award is contrary to public policy. Under Section 1-617.1(a) and 1-617.3(a)(1) of the D.C. Code, the Grievant has a right 1) to have a final decision within forty-five days of the notice of the proposed adverse action; and 2) to have the agency comply with its rules and regulations when it implements an adverse action. 3/ An agency that has failed to comply with its regulations must show that its failure to do so did not prejudice the employee. To require the Union to establish that the Grievant was prejudiced by DOC's failure to comply with its rules and regulations as required by the CMPA and DPM would thus be contrary to the policy requiring agencies to comply with regulations governing adverse actions. 4/

Thus, 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, is on its face contrary to law and public policy.

IV. The Arbitrator Did Not Exceed His Jurisdiction

Contrary to the Union's contention, the Board finds that the Arbitrator did not exceed his jurisdiction. By the parties' agreement, the Arbitrator was empowered to answer the question whether the Grievant's suspension was proper under the law. In

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3/ D.C. Code Sec. 1-617.1(a) requires compliance with Sec. 1-617.3(a)(1) of the D.C. Code and futher requires the issuance of, and compliance with, rules and regulations governing procedures involving adverse actions. These rules and regulations are set forth in the DPM. DPM Sec. 1604.1 (a) and (b) require each agency to ensure 1) that actions covered under the chapter are taken in accordance with the chapter and 2) that employees are afforded the rights and protection provided therein. DPM Sec. 1-604.30, which requires the issuance of a final decision within forty-five days, provides employees with procedural safeguards.

4/ DOC's reliance on court decisions, arbitral awards, and decisions by the D.C. Office of Employee Appeals (OEA) which place the burden on the employee to demonstrate prejudice is misplaced. The court decisions cited by DOC involve decisions by the Merit Systems Protection Board (MSPB) under a statute which, unlike the CMPA, specifically places the burden of showing harmful error on the employee. See, 5 U.S.C. Sec. 7701(c)(2)(A). The Board has no obligation to follow or agree with OEA interpretations. Moreover, grievance arbitration awards are private decisions that cannot establish the meaning of statutes.

support of its argument that the suspension was not proper, the Union argued before the Arbitrator, to which DOC argued to the contrary, that the suspension was inconsistent with applicable provisions of the CMPA and DPM. Accordingly, the Arbitrator only resolved those issues raised before him by the parties. The Union's disagreement with the Arbitrator's interpretation of the applicable law does not by itself provide a basis for the Board to find that the Arbitrator exceeded his jurisdiction.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Award is reversed and remanded to the Arbitrator, with instructions to issue an Award in accordance with this decision. 5/

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

November 2, 1988

5/ In reversing the Award and remanding it to the Arbitrator, the Board expresses no opinion as to the existence or lack of harmful procedural error. This is a matter left to the Arbitrator.

APPENDIX

D.C. Code Section 1-617.3 (a)(1)(D) provides in pertinent part:

> (a)(1) An individual in the Career and Education Services against whom an adverse action is recommended in accordance with this subchapter is entitled to the reasons, in writing, and to the following:
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> * * *
>
> (D) A written decision on the answer within forty-five (45) calendar days of the date the charges are preferred.

District Personnel Manual (DPM) Section 1604.30 states in pertinent part:

> If a corrective or adverse action is proposed in connection with circumstances described in subsection 1604.27 above, the notice period shall be waived and the employee shall be given all of the following:
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> * * *
>
> (d) A written decision on the proposed action by a deciding official and specific reasons therefor at the earliest practicable date, but not later than forty-five (45) days from the date of receipt of notice of proposed action.

DPM Section 1604.38 states:

> The decision shall be rendered no more than forty-five (45) days from the date of delivery of the notice of proposed corrective or adverse action; provided that the period may be extended when the employee does the following:
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> (a) Requests and is granted an extension of the time allotted for answering the notice of the proposed action; or
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> (b) Agrees to an extension of time requested by the agency.