

II. Discussion

Beginning in 2002, the Grievant and several other police officers were hired to direct traffic outside the Maret School, a private school in the northwest section of Washington, D.C. The traffic work was performed both in the morning and afternoon at the beginning and end of the school day. The School paid the officers \$25 per hour. The Grievant played a central role in recruiting police officers for this work, scheduling the program, dropping by to make sure the school was being covered, and collecting payments from the school and making disbursements to the officers. Although [the] Grievant performed an oversight role, there is no evidence suggesting he received any extra payment for organizing the activity. To the extent Grievant received income from the Maret School activity, it was payment for time he personally spent performing traffic control work." (Award at p. 2)

Pursuant to General Order 201.17, Part I-C, all police officers are required to obtain advance approval from the MPD for any outside employment; however, the Grievant did not seek such approval. "In addition, under the General Orders police officers may not 'in their official capacity solicit or act as referral agents between other members seeking police related outside employment and potential employers'; this prohibition on referring or brokering outside employment also is expressly banned by D.C. statute." (Award at p. 2)

On June 8, 2004, MPD served the Grievant with a Notice of Proposed Adverse Action indicating MPD's intention to terminate him for his participation in the crossing guard operation at the Maret School. The same day (June 8, 2004), the Grievant responded to the Notice and requested that a Trial Board be convened.

The Trial Board proceeding was scheduled for June 29 through July 1, 2004. On June 22, 2004, the Grievant's counsel noted a schedule conflict for the first hearing day (June 29th), and asked that the proceeding begin on June 30, 2004.

The Trial Board convened on June 30, 2004, to hear the charges against the Grievant and two other officers who were also engaged in unauthorized outside employment at the Maret School. The Trial Board issued a single report and recommendation which addressed the charges against the three officers. The Grievant pled "guilty" to several aspects of the charges, and "not guilty" to others. In addition, at the conclusion of the hearing the Trial Board amended the charges and specifications to include a "neglect of duty" allegation.

The Trial Board found the Grievant "guilty" of three of the charges and "not guilty" of one charge. On August 20, 2004, Assistant Chief Shannon P. Cockett (Director, Human Services) sent a letter to the Grievant's counsel invoking the "automatic extension" clause of the labor agreement's "55-day rule" and advising him that MPD's final decision would be delayed.

The Trial Board recommended that the Grievant be terminated and that the other two officers be suspended. On September 22, 2004, the Grievant was advised that he would be terminated by MPD effective on November 5, 2004. The Grievant appealed the decision by

invoking arbitration pursuant to the parties' collective bargaining agreement ("CBA"). (See Award at p. 1)

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within 55 days of the date that the Grievant filed his request for a departmental hearing. (See Award at p. 1) Article 12, Section 6 of the parties' CBA provides in pertinent part, that an employee "shall be given a written decision and the reasons therefore no later than ... 55 days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing." (Award at p. 7.) FOP argued that in this case the Grievant requested "a trial hearing [on] June 8, 2004." (Award at p. 8) Therefore, MPD was required to provide a written decision no later than August 2, 2004. However, MPD "issued its final decision ordering [the] Grievant's termination [on] September 22, 2004-106 days later." (Award at p. 8) FOP argued that because of this violation the termination should be rescinded."¹

MPD countered that if violation of the 55-day rule occurred it constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained.² (See Award at p. 10) In support of its position, MPD cited Judge Abrecht's decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002). In addition, MPD asserted that when "FOP asked for a one-day continuance of the hearing before the Trial Board, its continuance request resulted in a complete waiver of the 55-day time limitation in Article 12 §6." (Award at p. 10).

In an Award issued on February 18, 2006, Arbitrator Paul Greenberg rejected MPD's argument regarding "harmless error" by noting the following:

This Arbitrator does not find the [MPD's] reliance on Judge Albrecht's decision in Case No. 01-MPA-19 persuasive . . . [A]lthough it appears the '55-day rule' and its antecedents have been in the collective bargaining agreement for more than 20 years, and the rule's implementation has been litigated in

¹FOP also claimed that MPD violated the D.C. Personnel Manual by adding an additional charge of "neglect of duty" during the hearing. FOP argued that this procedural violation was ground for dismissing this charge. In addition, FOP asserted that "the evidence did not support the [Trial] Board's finding." and that the penalty imposed was disproportionate. (Award at p. 8)

²In addition, MPD denied that the Trial Board erred in its application of the Douglas factors in this case. "With regard to the penalty imposed on Grievant (termination), [MPD claimed that the] Grievant was not treated disparately, because (a) one of the jointly-charged officers also was terminated and (b) unlike the Grievant, the second officer had not been charged with brokering outside employment and had not been charged with making untruthful statements to [MPD's] investigators." (Award at p. 9) Also, MPD argued that the charge of "neglect of duty" was properly added because the MPD Trial Board Handbook allows charges to be added based on evidence presented. (See Award at p. 9)

grievance arbitration on multiple occasions. . . .MPD has not provided a single example of an arbitration award concluding that a violation of the '55-day rule' by [MPD] is harmless error, but instead violates a substantive right under the collective bargaining agreement. . . . (Award at pgs. 11-12). . . .[MPD] shall reinstate Grievant with back pay an benefits, less any interim wages Grievant earned subsequent to his discharge. (Award at p. 16)

In addition, the Arbitrator determined that the Grievant and the FOP "did not waive application of the 55-day time limit when a one-day continuance of the Trial Board hearing was requested and granted. Instead, per the text of §6(a) [of the parties' CBA], the 55-day time limit was extended by the length of the delay (one day) plus the length of the hearing (one day)." (Award at p. 15)

MPD takes issue with the Award. Specifically, MPD argues that the: (1) Arbitrator was without authority to grant the Award and (2) Award is contrary to law and public policy. (See Request at p. 2)

MPD asserts that the Arbitrator was presented with two decisions of the District of Columbia Superior Court regarding a remedy for violations of the CBA's fifteen-day rule and fifty-five day rule. In both instances the cases were before the Superior Court on review of arbitration decisions that reversed the discipline imposed by MPD due to missed contractual time limits. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-19 (September 10, 2002), Judge Abrecht reversed the decision of the arbitrator. In the other case, Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-18 (September 17, 2002), Judge Kravitz upheld the decision of the arbitrator. MPD argues that in the present case, "the Arbitrator was guided by Judge Kravitz's decision and, therefore, concluded that he had the authority to fashion a remedy for the failure of [MPD] to comply with the 55-day rule. . ." (Request at p. 8) MPD "submits . . . that the decision of Judge Abrecht should have been followed and not that of Judge Kravitz." (Request at p. 8)

In addition, MPD contends that "[t]he failure to comply with the fifty-five day period was harmless in that [the] Grievant was not denied any due process protections. Moreover, the Grievant was not prejudiced by the delay because during the period he remained in a pay status." (Award at p. 8)

MPD notes that it should not be ignored that the Grievant was found guilty of committing serious acts of misconduct, and that determination has not been contested or otherwise challenged. (See Award at p. 8) Also, MPD claims that "[i]t is beyond question that the suitability of a person employed as a police officer is an important public policy. Grievant committed his misdeeds while employed as a police officer and [MPD] decided that he was no longer suitable to function in that capacity." (Award at p. 8) Finally, MPD asserts that a remedy of reinstatement returns to MPD an individual "unsuitable to serve as a police officer. Clearly such a remedy would violate public policy." (Request at p. 8).

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 and remedy for its violation of the above-referenced provision of the CBA. This we will not do.

MPD suggests that the plain language of Article 12, Section 6 of the CBA does not impose a penalty for noncompliance with the 55-day rule. Therefore, by imposing a penalty where none was expressly stated or intended, MPD asserts that the Arbitrator added to and modified the parties' CBA. (See, Request at p. 7)

In cases involving the same parties, we have previously considered the question of whether an arbitrator exceeds his authority when he rescinds a Grievant's termination for MPD's violation of Article 12, Section 6 of the parties' CBA. In those cases we rejected the same argument being made in the instant case and held that the Arbitrator was within his authority to rescind a Grievant's termination to remedy MPD's violation of the 55-day rule. (See MPD and FOP/MPD Labor Committee (on behalf of Jay Hang), Slip Op. No 861, PERB Case No. 06-A-02 (2007), MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez), Slip Op. No 814, PERB Case No. 05-A-03 (2006) and MPD and FOP/MPD Labor Committee (on behalf of Angela Fisher) Slip Op. No., PERB Case 02-A-07, *affirmed by Judge Kravtz of the Superior Court in Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 01-MPA-18 (September 17, 2002), *affirmed by District of Columbia Court of Appeals in Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 901 A.2d 784 (D.C. 2006). In addition, we have 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.³ 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).

In the present case, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that MPD violated Article 12, Section 6 of the parties' CBA, he also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator Greenberg did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator Greenberg acted within his authority.

With respect to the waiver issue, MPD asserts that the facts in this case do not support the Arbitrator's conclusion that the Grievant did not waive application of the 55-day rule. (See Request at p. 4)

We have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty

³ We note that if MPD had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

Association, 39 DCR 9628, Slip op. N. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ agreement. . . as well as his evidentiary findings and conclusions. . . “ Id. Moreover, “[this] Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator.” District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). In the present case, the parties submitted their dispute to Arbitrator Greenberg. Neither MPD’s disagreement with the Arbitrator’s interpretation of Article 12, Section 6(a), nor MPD’s disagreement with the Arbitrator’s findings and conclusions, are grounds for reversing the Arbitrator’s Award. See MPD and FOP/MPD Labor Committee (on behalf of Keith Lynn), Slip Op. No 845, PERB Case No. 05-A-01 (2006).

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (Request at p. 2). For the reasons discussed below, we disagree.

The possibility of overturning an arbitration decision on the basis of public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to an arbitrator’s ruling. “[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy.” American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F. 2d 1, 8 (D.C. Cir. 1986). A petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See, United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must “not be lead astray by our own (or anyone else’s) concept of ‘public policy’ no matter how tempting such a course might be in any particular factual setting.” District of Columbia Department of Corrections v. Teamster Union Local 246, 54 A2d 319, 325 (D.C. 1989).

MPD suggests that the award violates the “harmless error” rule found in the Civil Service Reform Act, 5 U.S.C. §7701(c)(2)(A) and is not consistent with the Supreme Court’s opinion in Cornelius v. Nutt, 472 S.S. 648 (1985).. We have previously considered and rejected this argument. In Metropolitan Police Dep’t v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 2006) MPD appealed our determination that the “harmless error rule” was not applicable in cases such as the one currently before the Board. The District of Columbia Court of Appeals rejected MPD’s argument that a violation of the CBA’s 55-day rule was subject to the “harmless error” rule by stating the following:

The Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-617.01 *et seq.*. (2001), regulates public employee labor-management relations in the District of Columbia, and, as MPD

concedes, the CMPA contains no provision requiring harmful (or harmless) error analysis before reversal of erroneous agency action is permitted. Neither do PERB's rules impose such a review standard on itself or on arbitrators acting under its supervision. MPD points out that had Officer Fisher, instead of electing arbitration with the sanction of the FOP, chosen to appeal her discharge to the Office of Employee Appeals (OEA), *see* D.C. Code § 1-606.02, she would have been met with OEA's rule barring reversal of an agency action "for error . . . if the agency can demonstrate that the error was harmless," 6 DCMR § 632.4, 46 D.C. Reg. 9318-19; and MPD, again citing *Cornelius*, warns of the forum-shopping and inconsistency in decisions that could result if PERB (and arbitrators) were not held to the same standard. *See Cornelius*, 472 U.S. at 662 ("If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim . . . would tend to select the forum - - the grievance and arbitration procedures - - that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid."). But, as the quotation from *Cornelius* demonstrates, Congress made its intent to avoid these evils "clear" in the Civil Service Reform Act. *Id.* at 661 ("Adoption of respondents' interpretation . . . would directly contravene this clear congressional intent.") Since MPD can point to no similar expression of legislative intent here, it cannot claim a misinterpretation of law by the arbitrator that was apparent "on its face." 901 A.2d 784, 787⁴

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. MPD had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, MPD failed to do so.

In view of the above, we find no merit to MPD's arguments. Also, 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' collective bargaining agreement. Therefore, no statutory basis exists for setting aside the Award.

⁴The Court of Appeals also rejected MPD's argument that the time limit imposed on the agency by Article 12, Section 6 of the parties' CBA is directory, rather than mandatory.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department'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.

February 9, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-07 was transmitted via Fax and U.S. Mail to the following parties on this the 9th day of February 2007.

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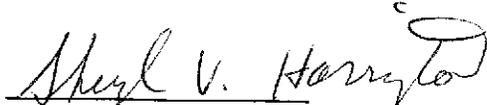
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