Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee,	Arbitration Review Request
Petitioner ,	PERB Case No. 11-A-03
v.	Opinion No. 1238
District of Columbia Metropolitan Police Department,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Complainant") filed an Arbitration Review Request alleging the Arbitrator's award is contrary to law and public policy. Respondent filed an Answer denying the allegations.

II. Discussion

In the Complaint, Complainant states the following:

> **Arbitrator Mckissick's Award is Contrary to Law and Public Policy.** Both the law and Collective Bargaining Agreement require that MPD rule on a member's medical claim within 30-days of it being reported to a supervisor period. In this case it is undisputed by agency that Grievant filed his claim on February 9, 2009 and it

was not ruled on by the Medical Services Director until March 27, 2009. This was more than the thirty (30) days required by the law and (CBA).

Specifically, Article 15, Part 1 of the Agreement states that, "The department shall determine whether a member's injury or illness was sustained by the member in the performance of duty within 30 calendar days of a claim being reported to a supervisor." Part 2 of that same Article states that, "If the department fails to meet the 30-day deadline, there shall be a rebuttable presumption that the member's injury or illness was sustained in the performance of duty. Until the presumption is rebutted by a finding by the department that the injury or illness was not sustained in the performance of duty, the department shall be responsible for all treatment cost and disability compensation pay *(i.e.*, the department shall carry the member in a "POD" status) Attachment 2, Collective Bargaining Agreement. The language of the CBA is consistent with that of the law pertaining to this issue (Attachment 3, D.C. Code §5-708.01, POD Medical Claims).

What this means is that the MPD can deny a claim, however the rule requires that if this denial is not done within 30-days from a supervisor being notified of the illness or injury, all time being claimed during that period prior to the ruling shall be deemed POD in accordance with applicable law.

Once the MPD rules on the claim and establishes a rebuttable presumption that the injury did not occur in the performance of a member's duties, it can then stop the advancement of POD sick leave entitlement. MPD General Order 100.11 entitled Medical Services, supports the above conclusion's irrespective of the cited reasons for the initial denial. Page 5, Part 1V, Regulations, A. (1) states that, "Within thirty (30) calendar days from the date the member reports a claim of an injury/illness, make a determination whether the injury/illness is POD or non-POD. If the Department fails to make a ruling within thirty (30) days the claim shall be presumed to be a POD injury/illness, and the member will receive non-chargeable sick leave and will pay reasonable medical expenses supported by appropriate documentation until he/she receives a formal ruling on his/her claim. Even if the claim is eventually determined to be non-POD, the Department shall not "reach-back" to recover costs incurred as a result of the Department's failure to make a ruling within (30) days" (Attachment 4, MPD G.O 100.11).

In essence, what the rule requires is that the department rule on the initial claim within 30-days. The rational used by the department for denying this claim would be legitimate in denying the claim, but this does not negate the fact that the member was entitled to POD sick leave for all time prior to the ruling eventually made on March 27, 2009 well beyond the required 30-days established by law. It is undisputed the member filed his claim on February 9, 2009 and it was not ruled on until March 27, 2009 more than eighteen (18) days beyond the 30-day period for doing so.

MPD argues and Arbitrator McKissick agreed that the 30-day period in this case is not applicable. The arbitrator in her opinion and award concluded that the 30-day rule does not apply to the member as he chose to use optional sick leave in some instances and did not follow the department's guidelines in place for reporting such injuries, i.e., late filing, and requested optional sick leave at the time of his request (Award at 7-10).

D.C. Code § 5-708.01 which addresses the 30-day rule is clear and unambiguous. There are no stated exceptions noted in the law or CBA which would support the department's contention it does not have to comply with the rules and regulations established under the above provisions. There are also no stated exceptions cited in the legislative history or above stated law (Attachment 5, Legislative History, D.C. Code § 5-708.01).

Additionally, to set the record straight, member did not request optional sickleave for the entire period regarding this claim (Attachment 7). Moreover, as cited in the record member was not made aware that his sick leave was even being taken until early 2009, at which time he made the claim to recover his leave. Close examination of his time and attendance record indicates fourteen uses of sick leave where the member responded to the clinic according to policy, five (5) instances of leave where the member claimed optional, and two (2) instances of optional that should not have been claimed during the period of time between 2008 and 2009. The stomach viruses claimed were acknowledged mistakes. These occurred from 8-18 thru 8-20--08 and 8-27 thru 8-29-08 for 48 hours.

As previously noted, the reasons given by the agency for denying this claim are legitimate ones if determined to be true. Irrespective of this, it is inconsequential given the fact that in order for their findings to negate the fact that under the law and CBA the member is not entitled to non-chargeable sick leave for all periods claimed up to the time MPD failed to rule within 30-days, the law must cite

such an exemption supporting its claim. Remember, neither the MPD General Order, law or CBA supports it's rational for denying non-chargeable sick leave for the periods in question (Attachment 6, Union Brief).

. . .

Policy dictates that the grievant in this matter be granted non-chargeable sickleave in this case up until the department made its ruling in conjunction with the 30-day rule governing this issue. The policy has been and still is that agency must rule within 30-days of a member's claim for benefits. Two previous decisions governing this issue have been submitted for your review. In both instances the department eventually denied the claim, however, because it did not rule on the claims in time, benefits were given to the members for all time claimed prior to the ruling as required by law, policy and department guidelines (Attachments 8-9. Prior arbitration decisions).

. . .

Petitioner is requesting that MPD restore 428 hours to the grievant consistent with guidelines established in G.O. 100.11, CBA and the Law as it relates to agency's failure to rule on member's sick leave claim within 30-calendar days as required.

(Request at pp. 4, 5, 6, 7, 8, 9)

Respondent states in its opposition:

The ARR was untimely.

PERB rule 538.1 requires that an ARR be filed "not later than twenty (20) days after service of the award." PERB Rule 504.1 adds five days to the date of service if service is by mail, as it was in this case. The date of the award is December 8. Award at 1. However, it was mailed to the parties on December 9, 2010. See Attachment 1, Copy of transmittal envelope reflecting postage cancellation date of December 9, 2010. Thus, Petitioner was required to file its ARR no later than 25 days after the service date. Since it is clear that the Award was mailed by the arbitrator on December 9, 2009, Petitioner was required to submit its pleading no later than January 3, 2011. However, it was not filed until January 4, 2011, thus rendering it untimely.

. . .

The arbitrator's award was not contrary to law or public policy.

Even if the ARR had been timely filed and the Board had jurisdiction over this case, the arbitrator's award is not contrary to law or public policy. In its request, Petitioner repeats arguments made to and rejected by the arbitrator in her decision, claiming that since the Department failed to issue a determination on Officer Espinosa's request for retroactive reclassification within 30 days, he is entitled to have all of the past instances where he sought to use the Department's optional sick leave program deemed to have occurred in the performance of duty. ARR at 5. Petitioner's position amounts to no more than disagreement with the arbitrator's interpretation of the parties' labor agreement, and as such must be dismissed.

As noted in her decision, the arbitrator applied and interpreted the relevant provisions of the parties' labor agreement, the applicable law, and the Respondent's General Orders. Award at 4-5. In evaluating all of these sources of authority, she reasonably determined that Officer Espinosa was not covered by the Code provision applicable to new injuries and illnesses petitioner references in its ARR. Award at 7-8. She made this determination based on her findings that for the incidents in question, Officer Espinosa had eschewed any request that they be classified as "POD" and had instead elected to utilize the Respondent's "Optional Sick Leave Program," a program described in the applicable General Order as typically applicable to "common illnesses which occur frequently, such as the common cold, influenza, virus, nausea, cough, sore throat, headache, upset stomach and diarrhea." Award at 7. She noted that the same General Order specifically provided "Once a member has chosen to use chargeable sick leave, they may NOT at a later time change it or request it to be changed to illness incurred in the performance of duty." Award at 8, emphasis in original. The arbitrator noted that Officer Espinosa's decision to utilize the optional sick leave program was not imposed upon him by Respondent's physicians, but rather was at his discretion, and that as a 20-year member of the Department, he was aware of the consequences of his decisions. Award at 9. Critically, the arbitrator found that by availing himself of this benefit, Officer Espinosa had knowingly and voluntarily precluded himself from later requesting that his injuries/illnesses be retroactively reclassified. Award at 8. Further supporting her conclusion was the dissimilarity between Officer Espinosa's 2006 POD injury and the types of illnesses for which Officer Espinosa sought retroactive reclassification. *Id.*

> The arbitrator found further support for her conclusion that D.C. Official Code § 5-708.01 did not apply to Officer Espinosa's request for retroactive reclassification within the request itself. Specifically, she noted that his claim was not the result of any new or aggravation of pre-existing injuries. Award at 10. Indeed, a review of the claim reveals that the last incident described occurred on January 15-16, 2009, nearly a month before Officer Espinosa filed his retroactive claim. On this point, the arbitrator found that Officer Espinosa admitted that he had been "less than truthful on the issue of his continuing failure to seek timely medical attention as required." Award at 9.
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> Both Article 15 of the parties' labor agreement and D.C. Official Code § 5-708.01 are designed to ensure that members' claims for injuries and illnesses are processed in a timely manner. Neither the labor agreement, the statute, nor the legislative history cited by Petitioner contemplate in any way the scenario created by Officer Espinosa, wherein a member would seek retroactive reclassification of injuries and illnesses that the member himself had already deemed to have been occurred outside the performance of duty. There is no applicable law or public policy governing such an irregular request, much less a law or public policy that that would compel the "violation of an explicit, well-defined, public policy grounded in law or legal precedent." *DCMPD and FOP/MPD (Singleton)*, PERB Case No. 06-A-04, Slip Op. 910 at 3, (internal citations omitted). Given this dearth of applicable statutory requirements, the arbitrator was well within her authority to conclude that the circumstances contemplated by the statute and labor agreement were inapplicable to Officer Espinosa's situation, and thus was within her bargained-for authority to deny Officer Espinosa's grievance.

(Opposition at pgs. 3, 4, 5, 6)

In reviewing FOP's Arbitration Review Request, the Board first considers respondent's allegation that the request is untimely. As the Board has previously held, "Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action." See *AFGE Local 872 (Hawthorne) and DCWASA*, PERB Case No 04-A-12, Slip Op. 828 at 4, citing *Public Employee Relations Board v. D.C. Metropolitan Police Department*, 593 A2d 641 (D.C. 1991).

Since Petitioner's ARR in this matter is demonstrably untimely, it is dismissed.

Notwithstanding the basis of untimeliness for dismissal, the Board will also discuss Complainant's assertion that the Award violates public policy.

The Court of Appeals stated that:

> [N]o one disputes the importance of this governmental interest; the question remains whether it suffices to invoke the *"extremely narrow"* public policy exception to enforcement of arbitrator awards. *Am. Postal Workers,* 252 U.S. App. D.C. at 176, 789 F.2d at 8 (emphasis in original). Construing the similar exception in federal arbitration law, the Supreme Court has emphasized that a public policy alleged to be contravened "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." *W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L.Ed.2d 298 (1983) (citation and internal quotation marks omitted); *see E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17,* 531 U.S. 57, 63, 121 S. Ct. 462, 148 L.Ed.2d 354 (2000) (for exception to apply, the arbitrator's interpretation of the agreement must "run contrary to an explicit, well-defined, and dominant public policy"). Even where, in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.,* 484 U.S. 29, 108 S. Ct. 364, 98 L.Ed.2d 286 (1987), an employer invoked a "policy against the operation of dangerous machinery [by employees] while under the influence of drugs" a policy judgment "firmly rooted in common sense" the Supreme Court reiterated "that a formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award ... entered in accordance with a valid collective-bargaining agreement." *Id.* at 44, 108 S. Ct. 364.

Id. at pgs. 789-790.

We find that FOP has not cited any specific law or public policy that was violated by the Arbitrator's Award. We decline FOP's request that we substitute the Board's judgment for the arbitrator's decision for which the parties bargained. FOP 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). Instead FOP repeats the same arguments considered and rejected by the Arbitrator.

We have held that a disagreement with the Arbitrator's interpretation does not render an award contrary to law. See *DCPS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 49 DCR 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. FOP's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. See *University of the District of Columbia and UDC Faculty Association*, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02

(1991).

Furthermore, the Board has held, as has the Court of Appeals for the Sixth Circuit, that "questions of procedural aberration, asking whether the arbitrator acted outside his authority by resolving a dispute not committed to arbitration, whether the arbitrator committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award, and whether the arbitrator, in resolving any legal or factual disputes in the case, was 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." 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).

We have held and the District of Columbia 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]." *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 FOP'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 the parties' CBA. FOP merely requests that we adopt its interpretation and remedy for its violation of the above-referenced provision of the parties' CBA. This we will not do.

ORDER

IT IS HEREBY ORDERED THAT:

1. This Arbitration Review Request is dismissed as untimely pursuant to Board Rule 538.1.

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.

Jan. 4, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-A-03 was transmitted via Fax and U.S. Mail to the following parties on this the 4th day of January 2012.

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