GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: Metropolitan Police Department, Petitioner, and Fraternal Order of Police, MPD Labor Committee (On behalf of Detective Richard A. Green), Respondent.	PERB Case No. 89-A-02 Opinion No. 228

DECISION AND ORDER

On November 8, 1988 the District of Columbia Metropolitan Police Department (MPD) filed an Arbitration Review Request with the District of Columbia Public Employee Relations Board (Board). MPD alleged that an arbitration award issued on an appeal of an adverse action filed by the Fraternal Order of Police, MPD Labor Committee (FOP) is on its face contrary to law and public policy and that the Arbitrator exceeded his authority. FOP filed a Response to Arbitration Review Request on November 23, 1988, arguing that the request should be denied.

We hold that the Award is not on its face contrary to law and public policy, and that the Arbitrator did not exceed his authority. Therefore the Arbitration Review Request is denied.

The pertinent background of this matter is as follows.

An adverse action proceeding which resulted in the discharge of Detective Richard A. Green (Grievant) was appealed to arbitration by the FOP. The adverse action proceeding had been initiated by MPD after the Grievant was found guilty of an assault and battery and of a fourth degree sex offense by the District Court of Maryland for Prince Georges County. The Grievant was discharged for being under the influence of an alcoholic beverage when off-duty, conduct unbecoming an officer, and a conviction for criminal offenses, which MPD concluded constituted just cause for termination under D.C. Code Sections 1-617.1(d),(4),(5), (10) and

(16). (Arbitration Review Request, Attachment 6). [1]

The Arbitrator, though finding that the facts called for "significant discipline," mitigated the penalty of discharge to suspension without pay for the approximately one-year period between the date of discharge and date of the Award, and ordered reinstatement on the basis of the Grievant's previous unblemished and "highly regarded" seventeen (17) years of service with MPD and his successful efforts at alcohol rehabilitation. (Award at 19).

The Arbitrator also retained jurisdiction for thirty (30) days "for the sole purpose of resolving any disputes which may arise out of the implementation of [the] Award." (Id. at 24).

In the Arbitration Review Request, MPD alleges that the Award is contrary to law and public policy because the Arbitrator mitigated the penalty of discharge to suspension without pay. MPD also argues that the Arbitrator exceeded his jurisdiction or was without authority under the collective bargaining agreement by retaining jurisdiction over the matter for thirty days after issuance of the Award.

Under the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Section 1-605.2(6), the Board is authorized to, inter alia, "[c]onsider appeals from arbitration awards pursuant to a grievance procedures: Provided, however, that such awards may be reviewed only if the arbitrator was without, or exceeded, his or her jurisdiction, the award on its face is contrary to law and public policy."

The issues before the Board are two:

1. Whether the decision of the Arbitrator, which mitigated the discharge penalty determined by an adverse action panel to a suspension without pay, is on its face contrary to law and public policy?

2. Whether the Arbitrator exceeded his authority and jurisdiction by retaining jurisdiction of the matter for thirty days subsequent to issuance of the Award?

MPD cited a number of decisions for the established proposition that an arbitrator's decision is unenforceable if the award is contrary to a well-defined public policy as set forth in

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[1]/ See Appendix for pertinent provisions of the D.C. Code.

law and legal precedent,[2] or if the award seeks to cause unlawful action.[3] However, as the Union points out, the D.C. Circuit has ruled that the public policy exception is to be construed extremely narrowly. United States Postal Service v. National Association of Letter Carriers, 258 U.S. App. D.C. 260, 810 F.2d. 1239 (1987). While the cited decisions may be relevant in some respects, it should be noted that they were decided pursuant to statutes other than the CMPA.

The gravamen of MPD's argument is that the taking of an adverse action against the Grievant was permissible under D.C. Code Section 1-617.1(d)(10) and (16), once cause was established, and that the actual discipline imposed (discharge) was in accordance with the MPD Table of Penalties. Thus, goes the argument, the Arbitrator acted contrary to law and public policy by mitigating the penalty of discharge.

The above-cited provisions of the CMPA, however, only set forth the grounds for the taking of an adverse action and do not themselves specify the types of discipline. The issue, therefore, is whether the collective bargaining agreement required the Arbitrator to apply the MPD Table of Penalties.

The Board has previously addressed an arbitrator's authority to mitigate a penalty. In The District of Columbia Metropolitan Police Department and The Fraternal Order of Police, Metropolitan Police Department Labor Committee (On behalf of Detective Norman A. Hill), 31 DCR 4156, Opinion No. 84, PERB Case No. 84-A-04 (1984), the Board found "that the Agreement does not restrict the Arbitrator's exercise of equitable powers. The Agreement contains no table of penalties. The Award takes into consideration the context in which the incident occurred and the absence of a contractual limitation on penalties in arriving at the appropriate remedial award." (Slip Op. at 2). While the ruling in that case addressed a claim that the Arbitrator exceeded his authority by mitigating a penalty, it is nonetheless applicable to MPD's present claim that the Award at issue is on its face contrary to law and public policy. The collective bargaining agreement that is controlling in the instant case also does not contain a table of

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[2]/ W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, 461 U.S. 757 (1983).

[3]/ American Postal Workers Union v. United States Postal Service, 252 U.S. App. D.C. 169, 789 F.2d. 1 (1986).

penalties, and does not incorporate by reference MPD's regulations pertaining to discipline. Nor does it in any other way "restrict the Arbitrator's exercise of equitable powers." Thus the Arbitrator was not restricted by the collective bargaining agreement from mitigating the discipline imposed by MPD.

MPD also claimed that the Arbitrator acted in violation of public policy by substituting his judgment for that of a panel of MPD officials when he mitigated the discipline. In support of this claim, MPD urged that because there is such a limitation on the D.C. Office of Employee Appeals (OEA); See Stokes v. District of Columbia, 502 A.2d. 1006 (D.C. 1985); by analogy the same limitation should be imposed on the Arbitrator.

The proposed analogy fails. In Stokes the court observed that OEA cannot substitute its judgment for that of the employing agency because of the applicable provisions of the CMPA, its legislative history and the plain wording of OEA's own regulations (OEA Regulation 614.4). However, no such language is contained in the applicable provisions of the CMPA, its legislative history contains no such suggestion, nor is there anything in the parties' collective bargaining agreement that places such a restriction on an arbitrator. As FOP observes, nothing in the CMPA sets forth a requirement of consistency or conformity between decisions of OEA and contractual arbitral determinations. These are two completely separate procedures with two different bodies of authorities.

MPD's public policy argument relies solely on "general considerations of supposed public interest," W.R. Grace and Co., supra note 2, at 3, and not a well-defined policy or legal precedent. Thus MPD has failed to point to any clear public policy which the Award contravenes.

As a second basis for review, MPD asserted that the Arbitrator exceeded his authority and jurisdiction by retaining jurisdiction over the matter for thirty days. In support of this contention, MPD pointed to the collective bargaining agreement and the Voluntary Labor Arbitration Rules of the American Arbitration Association. The referenced language, however, does no more than require that an Award be issued by an Arbitrator within thirty (30) days after the conclusion of the hearing. This does not prevent the Arbitrator from retaining jurisdiction after issuing an award. The Arbitrator retained jurisdiction for thirty (30) days "for the sole purpose of resolving any disputes which may arise out of the implementation of [the] Award." (Award at 24). In the absence of express limitation on such an action contained in the collective bargaining agreement, a routine retention of jurisdiction does not exceed the Arbitrator's authority or jurisdiction. Cf. Washington-Baltimore Newspaper Guild, Local 36 v. Washington Post Co., 621 F.Supp. 998 (D.C. 1985) (arbitrator granted parties sixty (60) days

in which to fashion their own remedy, after which time either party could seek a binding remedy from the arbitrator).

For the foregoing reasons, the Board finds that there is no basis upon which to conclude that the Arbitrator exceeded his authority or that the Award is contrary to law and public policy.

ORDER

IT IS ORDERED THAT:

This Arbitration Award Review Request is hereby denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C
June 13, 1989

APPENDIX

D.C. Code Section 1-617.1 Adverse Actions.

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(d) For the purposes of this section, cause shall be defined as follows:

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(4) Inexcusable neglect of duty;
(5) Insubordination;

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(10) Conviction of a felony. A plea or verdict of guilty, or a conviction following a plea of nolo contendere, to a charge of a felony is deemed to be a conviction within the meaning of this section. Notwithstanding the foregoing, cause under this paragraph with regard to uniformed members of the Metropolitan Police Department is deemed to be the commission of any act which would constitute a crime;

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(16) Other failure of good behavior during duty hours which is of such a nature that it causes discredit to his

or her agency or his or her employment. Notwithstanding the foregoing, the provisions of this paragraph shall be applicable to uniformed members of the Metropolitan Police Department during both on-duty and off-duty hours....