Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee, (on behalf of Officer Dan James),	
Petitioner,	
and	PERB Case No. 10-A-10
	Opinion No. 1293
District of Columbia Metropolitan Police Department,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On December 18, 2009, the District of Columbia Metropolitan Police Department ("MPD", "Department," or Respondent") filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an arbitration award ("Award") that sustained the Fraternal Order of Police/Metropolitan Police Department Labor Committee's ("Union" or "FOP") grievance filed on behalf of Officer Dan James ("Grievant" or "Officer James") with MPD.[1] The Arbitrator ruled that MPD violated the collective bargaining agreement ("CBA" or "the Agreement") between the Union and MPD.

The issue before the Board is whether "the arbitrator was without, or exceeded his or her jurisdiction" and whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02(6) (2001 ed).

[1] The Union's grievance concerned the termination of Officer James' employment.

II. Discussion

The "Grievant was involved in an automobile accident while off-duty on October 17, 2003. After a field sobriety test revealed [a] blood alcohol content of 0.7 and 0.9, Grievant was arrested for driving while under the influence of alcohol. On May 12, 2004, Grievant pled guilty to a criminal charge of Operating While Impaired, before a District of Columbia Superior Court Judge. Grievant was sentenced to 30 days in jail (suspended) and seven months probation (suspended), and he was fined $200 and ordered to complete an alcohol traffic program." (Award at 1).

"While reviewing the matter for disciplinary action, the MPD Internal Affairs Department ("IAD") discovered that the tags on the automobile Grievant was driving on October 17, 2003, were stolen. After the completion of the investigation, on January 21, 2005[,] the Department issued to Grievant a Notice of Adverse Action, which set forth the following charges and notified Grievant that based on these charges the Department proposed to terminate his employment:

> Charge No. 1:
>
> Violation of General Order 1202.1, Part I-B1, which provides: "Drinking 'alcoholic beverage' or 'beverage' as described in Section 3, paragraph (e), 'District of Columbia Alcohol Beverage Act,' or being under the influence of 'alcoholic beverage' or 'beverage,' while on duty." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.
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> Specification No. 1:
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> In that, on October 17, 2003, by your own admission, you were under the influence of an alcoholic beverage while off duty, in the District of Columbia. Your Blood Alcohol Content was .09, which is over the legal limit in the District of Columbia.
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> Charge No. 2:
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> Violation of General Order 1202.1, Part I-B12, which reads: "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or agency's ability to perform effectively, or violations of any law of the United States, or District of Columbia." Further, you were in violation of DCMR Title 18, Chapter 411.1, which states, in part: "...no person shall drive or tow, nor shall an owner knowingly permit to be driven or towed, upon any highway of the District of Columbia, any vehicle of a type required to be

registered which is not registered." This misconduct is defined as cause in Title 1, Section 1603 of the D.C. Personnel Manual.

Specification No. 1:

In that, on October 17, 2003, you were operating a motor vehicle in the District of Columbia, while under the influence of alcohol. Additionally, the vehicle was not registered, which is in violation of DCMR Title 18, Chapter 411.1.

Specification No. 2:

In that, on October 17, 2003, you were operating a vehicle in the District of Columbia, which displayed stolen license plates. This is a violation of D.C. Code, Title 22-3232, "Receiving Stolen property."

Specification No. 3:

In that, on October 17, 2003, you were arrested by Officer Preston Proctor of the Metropolitan Police Department, and charged with "Driving While Intoxicated." This type of conduct is unacceptable for a member of the Metropolitan Police Department.

Charge No. 3:

Violation of General Order Series 1202,
Number 1, Part I-B-7, which provides:

"Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense or of any offense in which the member pleads guilty, receives a verdict of guilty or a conviction following a plea of *nolo contendere* or is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported to their commanding officers their involvement." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1:

In that, on May 12, 2004, while on trial in the D.C. Superior Court, you pled guilty to "Driving While Impaired." You were sentenced to thirty (30) days in jail (suspended), seven (7) months probation

> (suspended), and fined $200.00. You were also ordered to complete an alcohol traffic program.
>
> After reviewing the Above Charges and Specifications listed on the Notice of Proposed Adverse Action, the Panel determined that an error was made regarding Charge No. 1. Charge No. 1 [which] cited General Order 1202.1, Part I-B-1, but should have cited General Order 1202.1, Part I-B-2. Although Specification No 2 . . . remained the same, Charge No. 1 was amended to read:
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> Charge No. 1:
>
> Violation of General Order 1202.1, Part I-B2, which reads: Drinking alcoholic beverage or beverage as described in Section 25-103, subsection 5, of the District of Columbia Code, District of Columbia Alcoholic Beverage Control Act, "while in uniform off duty"; or being under the influence of "alcoholic beverage" when off duty. This misconduct is defined as cause in Section 1603, of the District of Columbia Personnel Manual."

(Award at 2-4) (citations omitted).

In response to the charges in the Notice of Adverse Action, the Grievant requested a departmental hearing. (Award at 5).[2]

> On March 14, 2005, Grievant appeared in a hearing before an Adverse Action Panel (Panel), where he pled not guilty to Charge No. 2, Specification No. 2 and guilty to all other charges set forth in the Notice of Adverse Action. On April 8, 2005 . . . MPD issued to Grievant a Final Notice of Adverse Action, notifying him: that the Panel had found him guilty of all the Charges and Specifications against him; that Assistant Chief and Director of Human Services Shannon Cockett concurred with the Panel's decision; and that he would be removed from the force effective May 27, 2005. Grievant filed an appeal which was denied by Chief of Police Charles H. Ramsey, and the Union submitted the matter to arbitration pursuant to Article 19, Part E, Section 2 of the parties' collective bargaining agreement.

(Award at 5) (citations omitted).

[2] The Grievant made the request for a Departmental hearing on February 10, 2005.

In addressing the parties' positions, the Arbitrator determined that three issues were before her for resolution:

> 1. Whether the District of Columbia Metropolitan Police Department violated the 55-day Rule as set forth in Article 12, Section 6 of the parties' Collective Bargaining Agreement, when it failed to provide the Grievant with its Final Decision until the 57th day after he had requested a hearing?
>
> 2. Whether the evidence presented by the Department was sufficient to support the alleged charges?
>
> 3. Whether removal was an appropriate penalty?

(Award at 5-6).

Concerning the first issue, the Arbitrator found that the FOP argued "that the MPD violated the "55-day rule," as set forth in Article 12, Section 6 of the CBA, when it failed to provide Grievant with its final decision until the 57th day after Grievant requested a hearing." (Award at 6). Specifically, FOP argued that "since Grievant requested a Departmental hearing on February 10, 2005, under Article 12, Section 6 the MPD was required to serve him with the Final Notice of Adverse Action no later than April 6, 2005. The Final Notice is dated April 8, 2005, which indicates that the earliest it could have been served is that day, which is two days after the contractual deadline of 55 days." (Award at 8). Moreover, FOP argued that "[t]his failure to comply with the 55-day rule is a clear violation of Article 12, Section 6 of the CBA." (Award at 9-10). The Arbitrator also observed that "[t]he FOP assert[ed] that, as supported by the great weight of arbitral and legal precedent, the only suitable remedy for the Department's violation of Grievant's substantive right is his reinstatement to his position with the Department, with full back pay. Because Grievant's substantive right was violated, it is unnecessary to consider the merits of this case." (Award at 10).

As to MPD's position on the first issue, the Arbitrator stated that MPD refuted FOP's claims, and claimed that:

> the FY 2004-FY 2008 CBA governs this case. The relevant language of Article 12, Section 6 of this CBA provides:
>
> > The employee shall be given a written decision and the reasons therefore no later than fifty-five (55) business days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing, where applicable....

> In this case, the adverse action was commenced against Grievant on January 21, 2005, and he requested a Departmental hearing on February 10, 2005. Therefore, the MPD had 55 business days from the date Grievant requested a hearing, extended by the period of the granted continuance and the day of the hearing, to issue a written decision. According to the MPD, the April 8, 2005 Final Notice of Adverse Action was issued within the required timeframe; thus, there was no violation of Article 12, Section 6.

(Award at 10).

In addition, MPD contended that "even if the predecessor CBA is found to control in this case, its violation of the 55-day rule was *de minimis*[3] and therefore harmless. On this score . . . MPD assert[ed] that the Final Notice of Adverse Action [which] was issued to Grievant on April 8, 2005, [was] only one day after the 55-day period expired."

(Award at 10) (footnote added).

In Issue 2, the Arbitrator examined the parties' positions on whether MPD had presented sufficient evidence to support the alleged charges. (Award at 12). The Arbitrator remarked that FOP rejected MPD's argument that the parties CBA[4] precluded the Grievant from challenging the sufficiency of the evidence supporting Charge 2, Specification 2. (Award at 12). Specifically, FOP disagreed with MPD's assertion that FOP's challenge to Charge 2, Specification 2 had not been specifically addressed in his written appeal to the Chief of Police. (Award at 12, 14).

As to the merits of Issue 2, regarding Charge 2, Specification 2[5], FOP argued that "[MPD] failed to provide substantial evidence of the required element of fraudulent intent." (Award at 13). FOP also maintained that, "the Panel specifically credited Grievant's testimony that he was unaware that he had possessed stolen property." (Award at 13). Disputing FOP's position, MPD asserted that "the Panel's findings regarding Charge 2, Specification 2 were based upon credible, substantial evidence and that the Panel's decision was in no way arbitrary, capricious or an abuse of discretion." (Award at 14).

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[3] "In denying grievances, arbitrators sometimes apply the rule of *de minimis non curat lex*, under which trifling or immaterial matters will not be taken into account. Often in applying this principle the arbitrator concludes that the action complained of is such a slight departure from what is generally required by the agreement that the action must be viewed either as a permissible exception or as not creating any injury at all." Elkouri and Elkouri, How Arbitration Works, at pgs. 1214-1215 (Sixth Ed. 2003).

[4] The Arbitrator indicated that FOP disagreed with MPD's application of Article 12, Section 8 and Article 19, Section E.5.2 of the parties' CBA.

[5] Charge 2, Specification 2 concerned the charge that the Grievant had displayed conduct unbecoming of an officer for, in part, receiving stolen property as defined by D.C. Code, Title 22-3232.

The Arbitrator observed that FOP's view on Issue 3 was that: (1) the Panel failed to apply the *Douglas*[6] factors in determining the appropriate penalty for the Grievant's alleged misconduct; and (2) removal of the Grievant was an unwarranted penalty. (Award at 13). MPD refuted FOP's position, and asserted that based upon its consideration of the *Douglas* factors and the recommendation of the Panel, termination was the appropriate penalty. (Award at 15).

Taking into account the parties' positions, the Arbitrator found that:

> The undisputed evidence in this record shows that after the MPD issued Grievant a Notice of Adverse Action on January 21, 2005, he requested a Departmental hearing on February 10, 2005. The MPD's Final Notice of Adverse action is dated April 8, 2005, but by excluding the date of the March 14, 2005 hearing, the MPD counts the contractual period of 55 days as ending on April 7, 2005, thus claiming that it missed this deadline by only one day. But Article 12, Section 6 includes no language excluding the hearing day from the 55-day count, and the MPD has presented no evidence that this provision has been applied to include this exclusion. I agree with the FOP's contention that the Final Notice dated April 8, 2005 reflects that the MPD missed the 55-day contractual deadline for issuing this decision by two days.

(Award at 17).

Whereas the Arbitrator determined that MPD failed to adhere to the contractual 55-day rule provided in the parties' CBA, she determined "the outstanding issue to be decided under Issue 1 concerns remedy." (Award at p. 17). After reviewing prior arbitral awards involving the parties in the present case and concerning the 55-day rule, as well as the District of Columbia Court of Appeals' opinion in *Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 901 A.2d 784 (D.C. 2006) (*Fisher*), the Arbitrator observed that "[w]hile the [prior] arbitration decisions . . . are not binding in the same sense that judicial decisions are, they provide persuasive authoritative guidance. And, as the FOP correctly asserts, the cited reasoning from Senior Judge Schwelb's concurrence appears in *dicta*, and it is the majority opinion in that Court of Appeals case which controls." (Award at 20).[7]

The Arbitrator found that "MPD [did] not specif[y] the public policy which would be violated; nor [did] it identif[y] any statute, regulation, or other source in which the asserted public policy [was] articulated." (Award at 20). In conclusion, the Arbitrator determined:

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[6] *Douglas v. Veterans Administration*, 5 MSPR 280 (1981).

[7] The Arbitrator makes reference to the following arbitral decisions: FMCS Case No. 1109-13941, Arbitrator Strongin; FMCS Case No. 04-5153, Arbitrator Shapiro; FMCS Case No. 04-53437-A, Arbitrator Hochhauser; FMCS Case No. 05-58130, Arbitrator Wolf; and FMCS Case No. 05-50907, Arbitrator Hochhauser.

> that the MPD violated the 55-day rule codified in Article 12, Section 6 when it issued the decision to Grievant on April 8, 2005, on the 57th day after he requested a Departmental hearing. Accordingly, the grievance will be sustained below, in an Award which will direct the MPD to reinstate Grievant to his employment with full back pay and benefits lost as a result of his removal, offset by any compensation and benefits earned during his separation from the MPD; The Award also will specify that the MPD, as the losing party, shall bear the fees and expenses of the Arbitrator, under Article 19, GRIEVANCE PROCEDURE, Section E, ARBITRATION, paragraph 5.7, which provides: "....The fee and expenses of the arbitrator shall be borne by the losing party, which shall be determined by the Arbitrator."

(Award at 21).[8]

MPD filed the instant review of the Award, contending that: "(1) the award is contrary to law and public policy and (2) the arbitrator was without authority to grant the award." (Request at 2).

When a party files an arbitration review request, the Board's scope of review is extremely narrow.[9] Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. If "the arbitrator was without, or exceeded his or her jurisdiction";
2. If "the award on its face is contrary to law and public policy"; or
3. If the award "was procured by fraud, collusion or other similar and unlawful means." D.C. Code § 1-605.02(6) (2001 ed.).

As to MPD's claim that the Award is on its face contrary to law and public policy, we disagree for the reasons discussed below.

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[8] The Arbitrator also denied the Union's request for attorney fees. (Award at 21).

[9] In addition, Board Rule 538.3 - Basis For Appeal - provides:

> In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:
>
> (a) The arbitrator was without authority or exceeded the jurisdiction granted;
> (b) The award on its face is contrary to law and public policy; or
> (c) The award was procured by fraud, collusion or other similar and unlawful means.

As stated above, the Board's scope of review, particularly concerning the public policy exception, is extremely narrow. Furthermore, the U.S. Court of Appeals, District of Columbia Circuit, observed that "[i]n *W.R. Grace*, the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question "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.' " Obviously, the 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).[10] 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 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). *See also, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 D.C. Reg. 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 led 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. Teamsters Union Local 246*, 54 A.2d 319, 325 (D.C. 1989).

MPD acknowledges that in the recent Court of Appeals case, *District of Columbia Metropolitan Police Department v. District of Columbia Public Relations Board*, 901 A.2d 784 (D.C. App. 2006), the Court upheld the Board's decision sustaining an arbitrator's award that rescinded a Grievant's termination due to MPD's failure to issue a decision within 55 days as required by Article 12, Section 6 of the parties' CBA. (Request at 5). However, MPD asserts "that its violation of the 55-day provision by one (1) day is a minor or technical violation." (Request at 8). Therefore, MPD is requesting that the Board reverse the Arbitrator's Award. In support of its position, MPD notes that "in his concurring opinion, Senior Judge Schwelb stated:

> If the MPD panel's written decision had been issued within 56 days, instead of about 600, and if reinstatement with back pay had nevertheless been ordered by the arbitrator, by the PERB, and by the trial court, I might well conclude otherwise. Contracts must be construed to avoid irrational results, and an interpretation of the collective bargaining agreement in this case as meaning that the slightest imperfection in the process requires the reinstatement of an officer, however culpable, with back pay, notwithstanding the absence of any demonstrable prejudice, strikes me as so irrational that the parties should not be deemed to have intended such a result. (Footnote omitted.) . . . [T]he parties bargained for a decision by the arbitrator, and that is what they got. At some point,

[10] *See W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 2176, 76 L. Ed. 2d 298 (1983).

> however, a ruling even by an arbitrator becomes so unreasonable that its enforcement would be contrary to public policy.

(Request at 9; *citing* 901 A. 2d 784, 790).

Relying on Judge Schwelb's concurring opinion, MPD contends that "[t]he period of the violation here, 1 day past the 55-day deadline, should be deemed to be a slight imperfection in the process. [The Grievant] pled guilty to all charges except Charge 2, Specification 2, thereby acknowledging his culpability. Also, the Grievant failed to demonstrate any prejudice as a result of the 1-day violation. As such, the Arbitrator's ruling is 'so unreasonable that its enforcement would be contrary to public policy." (Request at 8). We disagree.

The majority opinion rejected MPD's assertion that some harmless error analysis is required in the interpretation of the parties' CBA. See, 901 A.2d 784, 787-788. No such requirement governs this case under the CMPA. *Id.* at 787. The majority also rejected MPD's argument that the time limit imposed on MPD by Article 12, Section 6 of the parties' CBA is directory, rather than mandatory. Specifically, the majority concluded that "the arbitrator's interpretation of Article 12, Section 6 as mandatory and conclusive was not contrary 'on its face' to any law." *Id.* at 788. Furthermore, the majority noted the following:

> When construction of the contract implicitly or directly requires an application of the "external law," i.e., statutory or decisional law [such as the mandatory-directory distinction MPD cites], the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the "contract reader," his interpretation of the law becomes *part of the contract* and thereby part of the private law governing the relationship between the parties to the contract. . . .Here the parties bargained for the arbitrator's interpretation of Article 12, Section 6, and absent a clear violation of the law - one evident 'on the face' of the arbitrator's award - neither PERB nor 'a court has . . . authority to substitute its judgment for [the arbitrator's].

901 A2d 784, 789.

MPD also argues 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 Employer decided that he was no longer suitable to function in that capacity. A remedy of reinstatement returns to the Employer an individual unsuitable to serve as a police officer. Clearly, such a remedy would violate public policy." (Request at 9). The Board, however rejects this argument, and finds the Court of Appeals' *Fisher* decision, to provide guidance. In *Fisher*, MPD argued that the award was contrary to law and public policy because of "the strong public interest in insuring the competence and honesty of public employees, especially armed police officers. . . ." 901 A. 2d 784 at 789.

However, the Court of Appeals stated that:

> no 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 MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. We decline MPD's request that we substitute the Board's judgment for the arbitrator's decision for which the parties bargained. 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 D.C. Reg. 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Instead MPD repeats the same arguments considered and rejected by the Arbitrator; this time asserting that the Arbitrator misinterpreted the Court of Appeals' *Fisher* decision.

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 D.C. Reg. 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. MPD'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 D.C. Reg. 5024, Slip Op. No. 276, PERB Case

No. 91-A-02 (1991).

In the present case, MPD also contends that the CBA does not expressly grant the Arbitrator the authority to issue a remedy for a violation of the 55-day rule. (Request at 6). 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. (Request at 7). In addition, MPD argues that by adding to, subtracting from or otherwise modifying provisions of the agreement in adjudicating cases, the Arbitrator's Award did not draw its essence from the agreement. (Request at 7).

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).

In light of the above, the Board finds that there is no claim that 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. Therefore, the Board rejects this argument.

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 D.C. Reg. 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 D.C.Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004). In the present case, the Board finds that 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 parties' CBA. This we will not do.

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.[11] *See District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Here, MPD states that the Arbitrator is prohibited from issuing an award that would modify, or add to, the CBA. However, 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, she also had the authority to determine the appropriate remedy. Contrary to MPD's contention, the Arbitrator did not add to or subtract from the parties' CBA but merely used her equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, the Arbitrator acted within her authority. The Board finds that MPD's argument asks that this Board adopt its interpretation of the CBA and merely represents a disagreement with the Arbitrator's interpretation. As stated above, the Board will not substitute its, or MPD's, interpretation of the CBA for that of the Arbitrator. Thus, MPD has not presented a ground establishing a statutory basis for review.

In view of the above, we find no merit to MPD's argument. 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' CBA. Therefore, no statutory basis exists for setting aside the Award.

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.

July 11, 2012

[11] We note that if MPD had cited a provision of the parties' CBA that limits the Arbitrator's equitable power, that limitation would be enforced.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-10 was transmitted via U.S. Mail and e-mail to the following parties on this the 11th day of July, 2012.

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