

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF THE ENVIRONMENT
WATER QUALITY DIVISION

PUBLIC NOTICE

The District of Columbia has prepared a Total Maximum Daily Load (TMDL) document under the requirement of the Clean Water Act, Section 303(d). This document, developed through a cooperative agreement between U.S. Environmental Protection Agency Region III (EPA), Maryland Department of the Environment and the Natural Resources Administration of the District of Columbia (DC) Department of the Environment, proposes to establish TMDLs of sediment in the non-tidal and tidal portions of the Anacostia River within the State of Maryland, and in the tidal segments of the river within DC to address DC's listings for total suspended solids (TSS). A TSS TMDL was established for the tidal Anacostia River in DC in 2002. The watershed-wide TMDLs developed in this report, when approved, replace the 2002 DC TSS TMDLs.

The public is invited to comment on the following TMDL document:

Draft Total Maximum Daily Loads of Sediment/Total Suspended Solids for the Anacostia River Basin, Montgomery and Prince George's Counties, Maryland and The District of Columbia

Copies of the document are on file and may be inspected at the Martin Luther King, Jr. Library, 901 G St., NW, Washington, D.C. 20001, during normal business hours. In addition, the document can be obtained by calling the Water Quality Division at (202) 727-9216 between the hours of 9:00 am and 3:00 pm.

Persons wishing to submit comments may do so by mail, within 30 days of this Public Notice to the above address, attention: Monir Chowdhury, Water Quality Division. Such written comments are to be clearly marked "Anacostia Sediment/Total Suspended Solids TMDL Comments" and received by May 7, 2007. The Water Quality Division will consider the comments received to finalize the draft documents for transmittal to the U.S. Environmental Protection Agency.

EPA will host a public meeting about the Anacostia River sediment/TSS TMDL for all interested parties from both Maryland and DC on April 25, 2007, at the offices of the Metropolitan Washington Council of Governments at 777 N. Capitol St. NE, Washington DC from 10:00 am – 12:00 noon.

Department of Housing and Community Development Notice of Funding Availability

Victor L. Selman, Interim Director, Department of Housing and Community Development (DHCD), announces a Notice of Funding Availability (NOFA) for \$50 million in funding under the Community Development Block Grant (CDBG), the Home Investment Partnerships (HOME), the Housing Production Trust Fund (HPTF) programs, administered by DHCD. CDBG, HOME, and HPTF funds for this NOFA are being made available from FY 2007 DHCD budget funds. This NOFA is being conducted pursuant to the FY 2007 (October 1, 2006 to September 30, 2007) Consolidated Annual Action Plan prepared for submission to the U.S. Department of Housing and Urban Development (HUD).

The District is interested in financing projects that focus on the following categories:

1) Elderly Housing; 2) Special Needs Housing; 3) Preservation of Housing Affected by Expiring Federal Subsidies; 4) New/Substantial Rehabilitation of Housing (5 or more units); 5) Homeownership; and 6) Community Facilities to Serve Low to Moderate Income Persons.

The competitive Request for Proposals (RFP) will be released on Friday, April 13, 2007 and the deadline for submission is Friday, June 15, 2007, at 4:00 p.m. E.S.T. The RFP package, including all application materials and the reference guidebook can be obtained from DHCD, Development Finance Division, 801 North Capitol Street, N.E., Washington, D.C. 20002, second floor reception desk. This material will also be available from the DHCD website, www.dhcd.dc.gov on or about Wednesday, April 24, 2007.

The reference guidebook contains technical information on the CDBG, HOME, and HPTF programs, as well as other information that may be useful in completing the application. **Proposals for the First Right To Purchase Assistance Program and HOME-Community Housing Development Organization (CHoDO) will also be accepted under this RFP; however, DHCD will continue to accept additional funding requests for these two programs until all of these program funds have been committed.** For additional information, contact DHCD's Development Finance Division at (202) 442-7280.

Completed applications must be delivered on or before 4:00 p.m. E.S.T., Friday, June 15, 2007, to DHCD, Development Finance Division, 801 North Capitol Street, N.E., Second Floor Reception Desk, Washington, D.C., 20002.

NO APPLICATIONS WILL BE ACCEPTED AFTER THE FILING DEADLINE FOR SUBMISSION

A Pre-Proposal Conference will be held on Tuesday, April 17, 2007, from 10:00 a.m. to 12:00 p.m., in the Community Room at Mount Airy Baptist Church, 1100 North Capitol Street, N.W., Washington, D. C.

NATIONAL CAPITAL REVITALIZATION CORPORATION

SELECTION OF SHORT LIST OF DEVELOPMENT TEAMS

MCMILLAN SAND FILTRATION PLANT REDEVELOPMENT PROJECT

The National Capital Revitalization Corporation (NCRC), an instrumentality of the District of Columbia, hereby provides notice of its selection of *Vision McMillan Partners, Republic Family of Companies, McMillan Center Partners* and *KSI-NREUV* to the short list of proposed development partners in connection with the redevelopment of the McMillan Sand Filtration Plant (the "McMillan Project"). The McMillan Site is bordered by Michigan Avenue NW, North Capitol Street NW, Channing Street NW and First Street NW.

On or about July 28, 2006, the NCRC issued *Phase I – Land Development: Solicitation for Land Development Partner* (the "Solicitation") to request responses from development teams that would be interested in partnering with NCRC to execute the land development phase of the McMillan Project. On or about September 28, 2006, five (5) proposals were received in response to the Solicitation.

NCRC staff reviewed all five (5) proposals and interviewed all five (5) development teams. Staff prepared a detailed confidential analysis of the comparative strengths and weaknesses of each of the proposals based on the evaluation criteria set forth in the *Solicitation*. Staff provided the analysis to the NCRC Board. Following its review of all the analysis, on or about January 24, 2007, the NCRC Board of Directors short listed the four (4) above-mentioned development teams.

Over the next several weeks, the short listed development teams will publicly present their proposals to the NCRC Board and the McMillan Community Advisory Group (MCAG), a stakeholder organization formed by NCRC that will represent the interests of the surrounding communities throughout the Project's development process. The presentations will allow each of the development teams to demonstrate their qualifications, experience and past performance to the NCRC Board and MCAG and address any questions related to their proposals.

For more information, please contact:

National Capital Revitalization Corporation
2025 M Street NW, Suite 600
Washington, D.C. 20036
Attn: McClinton Jackson III
Tel: (202) 530-5750

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:)	
)	
District of Columbia)	
Metropolitan Police Department,)	
)	
Petitioner,	)	PERB Case No. 06-A-07
)	
and	)	Opinion No. 863
)	
Fraternal Order of Police/Metropolitan	)	FOR PUBLICATION
Police Department Labor Committee)	
(on behalf of Edwin Santiago),)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter. The Arbitrator found that: (1) the Grievant did not waive the application of the 55-day rule and (2) MPD violated the 55-day rule contained in the parties' collective bargaining agreement ("CBA"). As a result, the Arbitrator rescinded the termination of Edwin Santiago ("Grievant"), a bargaining unit member.

MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

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

Decision and Order
PERB Case No. 06-A-07
Page 2

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 Albrect'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

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).

years, and the rule's implementation has been litigated in 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 Kravitz 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.

Decision and Order
PERB Case No. 06-A-07
Page 6

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 § 1-17.01 *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, 787.⁴

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

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:)
)
Fraternal Order of Police /Metropolitan)
Police Department Labor Committee,)
)
Complainant,)
)
v.)
)
District of Columbia)
Metropolitan Police Department,)
)
and)
)
Chief Charles Ramsey,)
)
)
Respondents.)

PERB Case No. 07-U-16
Opinion No. 864
Motion for Preliminary Relief

FOR PUBLICATION

I. Statement of the Case:

On December 22, 2006, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant" or "FOP"), filed an unfair labor practice complaint and a motion for preliminary relief against the Metropolitan Police Department and Chief Charles Ramsey ("Respondents" or "MPD"). FOP alleges that MPD has violated D.C. Code § 1-617.04 (a) (1) and (5) (2001 ed.) "by failing to provide information requested [by FOP] pursuant to Article 10 of the [parties'] Collective Bargaining Agreement (CBA)." (Motion at p. 1)

FOP claims that MPD's action prevented bargaining unit member Nosner to adequately prepare his appeal of a notice of adverse action. Consequently, the adverse action was sustained and Officer Nosner received a three-day suspension. FOP asserts that: (1) MPD's conduct is clear-cut and flagrant; (2) the effect of MPD's violation is widespread; (3) public interest is seriously effected because of the clear-cut, widespread effect of the violations; and (4) the ultimate remedy afforded by the Board will be inadequate. (See Motion at pgs. 2 and 3). Therefore, FOP contends that preliminary relief is appropriate.

Decision and Order concerning
Motion for Preliminary Relief
Page 2

The Respondents filed an opposition to the motion for preliminary relief ("Opposition") and an answer to the unfair labor practice complaint" denying that they have violated the Comprehensive Merit Personnel Act ("CMPA"). As a result, the Respondents have requested that the Board dismiss the Motion. The Complainant's Motion and the Respondents' opposition are before the Board for disposition.

II. Discussion

On or about March 9, 2006, Officer Nosner was involved in a motor vehicle accident while operating his police cruiser on Minnesota Avenue, S.E. in the District of Columbia. Based upon the recommendations of the Crash Review Board ("CRB"), Officer Nosner was served with a Notice of Proposed Adverse Action because of the accident. FOP claims that the CRB's recommendation was based on an internal point system devised to determine the level of punishment in accidents ruled preventable. Depending on the number of points assigned to an accident, an officer can be subject to either corrective action (lower number of points) or adverse action (higher number of points).

The CRB assigned five points to Officer Nosner's accident. Three of the five points were based on a finding that the total damage to the vehicles involved exceeded \$3,000. However, FOP contends that "MPD General Order 301.1 (Vehicle Operation and Maintenance), Part I (D) (3) requires the investigating body of a traffic accident involving a departmental vehicle 'to obtain three (3) written estimates of reported damages from authorized facilities'." (Compl. at p. 3) FOP asserts that Officer Nosner was not provided with evidence to show that MPD "complied with this general order, thereby calling into question the propriety of the number of points assigned to the accident and, thus, the level of penalty assessed to Officer Nosner." (Compl. at pgs. 3-4).

FOP claims that on August 31, 2006, it forwarded a written request for information to MPD pursuant to Article 10 of the CBA. (See Compl. at p. 4 and Exhibit 2).¹ The reason for the request was to assist FOP in preparing Officer Nosner's defense against the proposed adverse action.

FOP argues that MPD failed to provide the requested information, which prevented Officer Nosner to adequately prepare his appeal to the Notice of Adverse Action. Consequently, the adverse action was sustained and Officer Nosner received a three (3)-day suspension.

¹ In the August 31st letter FOP requested information regarding all estimates of damage to the police cruiser (a 2005 Ford Crown Victoria, Scout Car 664) as a result of the accident; all invoices, bills, or other documents that show the actual cost of repair to the cruiser; and all invoices, bills, or other documents that show the actual cost of repair to the other vehicle involved in the accident. (See Compl at p. 4). FOP claims that the intent of this request was to assist in the defense of Officer Nosner.

Decision and Order concerning
Motion for Preliminary Relief
Page 3

FOP claims that MPD's ongoing violations of the CMPA are clear-cut, flagrant and seriously effect public interest. (See Motion at p. 2) Also, FOP asserts that the Board's ultimate remedy will be inadequate. Therefore, FOP asserts that preliminary relief is appropriate in this case.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases is prescribed under Board Rule 520.15.

Board Rule 520.15 provides in pertinent part as follows:

The Board may order preliminary relief . . . where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy will be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. See, AFSCME, D.C. Council 20, et al. v. D.C. Government, et al., 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, this Board has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals-addressing the standard for granting relief before judgement under Section 10(j) of the National Labor Relations Act-held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." Id. at 1051. "In those instances where [this Board] has determined that the standard for exercising its discretion has been met, the basis for such relief [has been restricted to the existence of the prescribed circumstances in the provisions of Board Rule [520.15] set forth above." Clarence Mack, et al. v. FOP/DOC labor Committee, et al., 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In its response to the Motion, MPD disputes the material elements of the allegations asserted in the Motion. MPD asserts that the "Respondents have in fact responded to . . . the request for information. [Specifically,] [o]n October 17, 2006, Supervisory Labor Relations Specialist Anna McClanahan transmitted via facsimile and first class mail the response to [the] Complainant's . . . request." (Respondents' Opposition at p. 5)

In addition, the Respondents contend that the Motion should be denied because the issue in this case involves a contract interpretation; therefore, the Board lacks jurisdiction. Also, MPD asserts that if the Board determines that it has jurisdiction over this matter FOP has failed to satisfy the statutory requirements for preliminary relief. (Respondents' Opposition at p.5)

Decision and Order concerning
Motion for Preliminary Relief
Page 4

In light of the above, it is clear that the parties disagree on the facts in this case. In cases such as this, the Board has found that preliminary relief is not appropriate where material facts are in dispute. See, DCNA v. D.C. Health and Hospitals Public Benefit Corporations, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

In the present case, FOP's claim that the Respondents actions meet the criteria of Board Rule 520.15, are a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of the Respondents' actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. The Respondents' actions presumably affect FOP and its members. However, the Respondents' actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts.

While the CMPA asserts that the District is prohibited from engaging in unfair labor practices, the alleged violations, even if determined to be valid do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce compliance with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, FOP has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate if preliminary relief is not granted.

In view of the above, we believe that the Respondents' actions do not appear to be clear-cut and flagrant as required by Board Rule 520.15. The question of whether the Respondents' actions occurred as FOP claims or whether such actions constitute violations of the CMPA are matters best determined after the establishment of a factual record through an unfair labor practice hearing.

Under the facts of this case, the alleged violations and their impact do not satisfy any of the criteria prescribed by Board Rule 520.15. Specifically, we conclude that FOP has failed to provide evidence which demonstrates that the allegations, even if true, are such that remedial purposes of the law would be served by pendent lite relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to FOP following a full hearing. Therefore, we find that the facts presented do not appear appropriate for the granting of preliminary relief. In view of the above, we deny FOP's Motion for Preliminary Relief.

We note that the FOP has also filed another unfair labor practice complaint (PERB Case No. 07-U-12) involving the same issue. Since that case (PERB Case No. 07-U-12) and the present case (PERB Case No. 07-U-16) involve common issues of fact and law, we are consolidating the two cases.

For the reasons discussed above, the Board: (1) denies FOP's request for preliminary relief; (2) directs the development of a factual record through an unfair labor practice hearing and (3) consolidates PERB Case No. 07-U-16 and PERB Case No. 07-U-12.

Decision and Order concerning
Motion for Preliminary Relief
Page 5

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Labor Committee's ("FOP") Motion for Preliminary Relief is denied.
2. PERB Case No. 07-U-16 and PERB Case No. 07-U-12 are consolidated.
3. The Board's Executive Director shall: (a) schedule a hearing; and (b) refer FOP's unfair labor practice complaint to a Hearing Examiner for disposition.
4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
5. 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 8, 2007

Decision and Order concerning
Motion for Preliminary Relief
Page 6

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
)	
District of Columbia)	
Metropolitan Police Department,)	
)	
Petitioner,	)	PERB Case No. 06-A-06
)	
and	)	Opinion No. 866
)	
Fraternal Order of Police/Metropolitan	)	FOR PUBLICATION
Police Department Labor Committee)	
(on behalf of Toledo Kelley),)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter, which rescinded the termination of Toledo Kelley ("Grievant"), a bargaining unit member. Specifically, the Arbitrator found that MPD violated the 55-day rule contained in the parties' collective bargaining agreement ("CBA").

MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

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

Decision and Order
PERB Case No. 06-A-06
Page 2

II. Discussion

“Beginning around November 20, 2000 and continuing to October 2, 2003, the Grievant was employed as a part-time counselor for the Edgemoade Center in Upper Marlboro, Maryland, where she counseled abused adolescents. On March 22, 2002, she fell off a chair while on police duty and injured herself. While on paid leave from MPD, she worked a full shift on March 24 and March 29, 2002, at the Edgemoade Center. . . Since she had never obtained permission to be employed outside of MPD, she was charged with being employed without prior authorization. She pleaded guilty to this charge. In addition, since she continued to work while on paid leave from MPD, she was charged with malingering, which she denied.” (Award at p. 6). On July 30, 2004, the Grievant received a Notice of Proposed Adverse Action. The Grievant had been employed by MPD for approximately 15 years when she received the Notice of Proposed Adverse Action. Prior to July 30, 2004 there is no indication that she had been subject to any disciplinary action.

On August 3, 2004, the Grievant filed a response to the Notice of Proposed Adverse Action and requested a departmental hearing. On August 24, 2004 a hearing was held before a three-member panel. At the hearing an additional charge of “conduct unbecoming an officer” was added to the other two charges. (See Award at p. 2 and Request at p. 3).

The panel recommended the Grievant’s termination. On October 6, 2004, the Grievant was advised that she would be terminated by MPD effective on November 12, 2004. The Grievant appealed the decision by invoking arbitration pursuant to the parties’ 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 her request for a departmental hearing. 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. 2.). FOP argued that in this case the Grievant requested “a [d]epartmental hearing by memo of August 3, 2004.” (Award at p. 3). Therefore, MPD “had until on or about September 27, 2004, or fifty-five (55) from her request for a hearing, to issue a written decision. [However, the written decision was not issued] until October 6, 2004, nine (9) days after the due date.” (Award at p. 3). FOP argued that “numerous arbitral decisions, PERB rulings and a D.C. Superior Court ruling mandate that the case against [the Grievant] be dismissed because of this violation.”¹ *Id.* In addition, FOP contended that “the penalty . . . assessed [against the Grievant was] per se arbitrary and inappropriate.” (Award at p. 4).

¹FOP also claimed that MPD violated the D.C. Personnel Manual by: (1) adding an additional charge during the hearing; and (2) allowing Assistant Chief Cockett to propose the adverse action and to serve as the deciding official. FOP argued that these procedural violations were grounds for reinstating the Grievant.

Decision and Order
PERB Case No. 06-A-06
Page 3

MPD acknowledged that its final decision was issued more than 55 days after the date the Grievant elected to have a hearing before the three member panel. However, MPD argued that the violation of the 55-day rule constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained.² 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 an Award issued on February 6, 2006, Arbitrator Michael Murphy rejected MPD's argument by noting the following:

Article 12 Section 6, directs that the Employer must notify an employee in writing of any disciplinary decision no later than 55 days after the employee requests a Departmental hearing. . . . The record reflects that the grievant made her request for a Departmental hearing by memo dated August 3, 2004. The fifty-five (55) days for the MPD to provide her with written notification would have been up on or about September 27, 2004. . . [t]he grievant was not notified in writing that she was to be terminated until October 6, 2004. . . . This notification occurred 9 days after the expiration of the 55 day notice period commonly referenced as the fifty-five (55) day rule. The Employer candidly acknowledges that it is in violation of the rule. What remains to be determined are the consequences, if any, that follow from the admitted violation. The Union contends that this should lead to a reversal of the disciplinary action. The Employer contends that it is harmless error which should have no impact on the outcome of the case. . . . (Award pgs. 6-7) Judge [] Albrecht's opinion, . . . would be far more compelling if this was ruling on a federal sector case, instead of a D.C. case. . . . The Supreme Court made it clear that, in the federal sector, in light of the express language of 5 USC §7701 (c) of the CSA, an arbitrator may overturn an agency disciplinary action on procedural grounds only for "harmful error", which in fact can be shown to have substantially affected the outcome of the case. . . . Procedural matters regarding D.C. employees are not governed by 5 USC §7701 (c) of the CSA. . . . (Award pgs. 12-13) Consistent with the discussion set forth above, the arbitrator holds that the grievant's discharge was violative of the procedural rights guaranteed to the grievant by Article 12, Section 6 of the CBA and her termination was, therefore, not for cause as required by Article

²MPD also asserted "that the charge that Assistant Chief Cockett impermissibly acted in dual capacities . . . [could not be] raise[d] at arbitration [because it had] not [been] previously raised on appeal." (Award at p. 5). In addition, MPD argued that the charge of conduct unbecoming an officer was properly added because the MPD Trial Board Handbook allows charges to be added based on evidence presented.

Decision and Order
PERB Case No. 06-A-06
Page 4

4.5 and Article 12.1(b) of the CBA. In light of this finding. . . [the grievant] shall be returned to employment with full back pay and benefits and without any loss of seniority. (Award at p. 18).

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. 4) MPD "submits . . . that the decision of Judge Abrecht should have been followed and not that of Judge Kravitz." (Request at p. 6)

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 she remained in a pay status." (Award at p. 6).

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. 6). Also, MPD claims that the "Grievant's misconduct compromised her integrity and honesty. Consequently, her value as a police officer was lost." (Award at pgs. 6-7). 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. (See Request at p. 7).

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.

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 pgs. 5-6).

Decision and Order
PERB Case No. 06-A-06
Page 5

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), 51 DCR 4173, Slip Op. No. 738, 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 Murphy 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 Murphy acted within his authority.

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 led astray by our own (or anyone else's) concept of 'public policy' no matter how

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.

Decision and Order
PERB Case No. 06-A-06
Page 6

tempting such a course might be in any particular factual setting.” District of Columbia Department of Corrections v. Teamster Union Local 246, 54 A.2d 319, 325 (D.C. 1989).

MPD contends that the award violates the “harmless error” rule found in the Civil Service Reform Act, 5 U.S.C. §7701(c)(2)(A). 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, 787.⁴

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.

Decision and Order
PERB Case No. 06-A-06
Page 7

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 either of 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.

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

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:)
)
 Fraternal Order of Police /Metropolitan)
 Police Department Labor Committee,)
)
 Complainant,)
)
 v.)
)
 District of Columbia)
 Metropolitan Police Department,)
)
 and)
)
 Chief Charles Ramsey,)
)
 and)
)
 Assistant Chief Peter J. Newsham,)
)
 and)
)
 Commander Hilton Burton,)
)
 Respondents.)

PERB Case No. 07-U-15

Opinion No. 867

Motion for Preliminary Relief

FOR PUBLICATION

DECISION AND ORDER CONCERNING MOTION FOR PRELIMINARY RELIEF

I. Statement of the Case:

On December 18, 2006, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant" or "FOP"), filed an unfair labor practice complaint and a Motion for Preliminary Relief (Motion) against the Metropolitan Police Department ("Respondents" or "MPD"). FOP alleges that MPD has violated D.C. Code § 1-617.04 (a) (1) and (4) (2001 ed.) by "interfering with Officer Anderson's rights and by taking reprisals against him." (Complaint at p. 6).

Decision and Order Concerning
Motion for Preliminary Relief
PERB Case No. 07-U-15
Page 2

The Respondents filed an Opposition to the Motion for Preliminary Relief ("Opposition") and an Answer to the Unfair Labor Practice Complaint ("Answer") denying that they have violated the Comprehensive Merit Personnel Act ("CMPA"). As a result, the Respondents have requested that the Motion be denied. The Complainant's Motion and the Respondents' Opposition are before the Board for disposition.

II. Discussion

On or about March 18, 2006, Officer Anderson was involved in a discussion with Sergeant Serena Muse after roll call. Sgt. Muse alleged insubordination by Officer Anderson. She held a Resolution Conference with Officer Anderson on July 12, 2006 and offered Anderson a reduced penalty which he refused. The reduced penalty included that Officer Anderson would be removed from the "vehicle take home program." On July 24, 2006, Officer Anderson received notice of a proposed ten-day suspension. He appealed the proposed discipline on August 14, 2006. (See Complaint at p. 4).

On August 20, 2006, Officer Anderson received notice that he was being removed from the motor vehicle take home program. The notice was prepared on August 9. It states that the Vehicle Take Home Board reviewed Officer Anderson's conduct and made the recommendation for his removal from the vehicle take home program. (See Complaint at p. 5). The Union alleges that "the Vehicle Take Home Board did not meet and the Respondents summarily removed Officer Anderson from the . . . program without obtaining the Take Home Board's approval because he asserted his union rights and denied . . . [an] offer of [reduced] discipline and demanded an appeal to the Department's proposed adverse action." (Complaint at p. 5).

The Union asserts that the Respondents "engaged in unfair labor practices by disciplining Officer Anderson by removing him from the Motor Vehicle Take Home Program in retaliation [for] engaging in union activities and asserting his union rights under the collective bargaining agreement." (Motion at para. 1). As a result, the Union seeks that the Board order the Respondents to cease and desist from disciplining Officer Anderson and reinstate him to the Motor Vehicle Take Home Program. (See Motion at ¶ 2).

FOP claims that MPD's violation of the CMPA is clear-cut, flagrant and seriously affects the public interest. (See Motion at ¶ 5). Also, FOP asserts that the Board's ultimate remedy will be inadequate. Therefore, FOP asserts that preliminary relief is appropriate in this case.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15.

Decision and Order Concerning
Motion for Preliminary Relief
PERB Case No. 07-U-15
Page 3

Board Rule 520.15 provides in pertinent part as follows:

The Board may order preliminary relief ... where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy will be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. See, *AFSCME, D.C. Council 20, et al. v. D.C. Government, et al.*, 42 DCR 3430, Slip Op. No. 330 at p. 4, n.1, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, this Board has adopted the standard stated in *Automobile Workers v. NLRB*, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals - addressing the standard for granting relief before judgement under Section 10(j) of the National Labor Relations Act - held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by *pendente lite* relief." *Id.* at 1051. "In those instances where [this Board] has determined that the standard for exercising its discretion has been met, the basis for such relief [has been restricted to the existence of the prescribed circumstances in the provisions of Board Rule [520.15] set forth above." *Clarence Mack, et al. v. FOP/DOC Labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In its response to the Motion, the Respondents deny the material elements of the allegations asserted in the Motion. They assert that the Vehicle Take Home Board voted concerning Officer Anderson and that there is no evidence of retaliation against Officer Anderson for union activities or asserting his union rights. Therefore, the Respondents conclude that there is no unfair labor practice and preliminary relief should not be awarded. Furthermore, the Respondents assert that even if the removal of Officer Anderson from the Vehicle Take Home Program were based on his misconduct, the collective bargaining agreement between the parties contains provisions for the resolution of disciplinary matters. Therefore, the Respondents conclude that the alleged violation is contractual in nature and the Board lacks jurisdiction. (Opposition at p. 2). Also, MPD asserts that if the Board determines that it has jurisdiction over this matter FOP has failed to satisfy the statutory requirements for preliminary relief. (Opposition at p.5).

It is clear that the parties disagree on the facts in this case. In cases such as this, the Board has found that preliminary relief is not appropriate where material facts are in dispute. See, *DCNA v. D.C. Health and Hospitals Public Benefit Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Decision and Order Concerning
Motion for Preliminary Relief
PERB Case No. 07-U-15
Page 4

In the present case, FOP's claim that the Respondents' actions meet the criteria of Board Rule 520.15, is a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of the Respondents' actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. The Respondents' actions presumably affect FOP and its members. However, the Respondents' actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts.

While the CMPA states that the District is prohibited from engaging in unfair labor practices, the alleged violations, even if determined to be valid do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, FOP has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate if preliminary relief is not granted.

In view of the above, we believe that the Respondents' actions do not appear to be clear-cut and flagrant as required by Board Rule 520.15. The questions of whether the Respondents' actions occurred as FOP claims or whether such actions constitute violations of the CMPA are matters best determined after the establishment of a factual record through an unfair labor practice hearing.

Under the facts of this case, the alleged violations and their impact do not satisfy the criteria prescribed by Board Rule 520.15. Specifically, we conclude that FOP has failed to provide evidence which demonstrates that the allegations, even if true, are such that remedial purposes of the law would be served by *pendente lite* relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to FOP following a full hearing. Therefore, we find that the facts presented do not appear appropriate for the granting of preliminary relief. In view of the above, we deny FOP's Motion for Preliminary Relief.

For the reasons discussed above, the Board: (1) denies FOP's request for preliminary relief, and (2) directs the development of a factual record through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Labor Committee's (FOP) Motion for Preliminary Relief is denied.

Decision and Order Concerning
Motion for Preliminary Relief
PERB Case No. 07-U-15
Page 5

2. The Board's Executive Director shall: (a) schedule a hearing, and (b) refer FOP's unfair labor practice complaint to a Hearing Examiner for disposition.
3. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
4. 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

Government of the District of Columbia
Public Employee Relations Board

_____)
 In the Matter of:)
)
 Thomas J. McRae,)
)
 Complainant,)
)
 v.)
)
 District of Columbia Department of Corrections,)
)
 Respondent.)
 _____)

PERB Case No. 02-U-09

Opinion No. 868

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case

This matter involves an Unfair Labor Practice Complaint ("Complaint") filed by Thomas J. McRae ("Mr. McRae" or "Complainant") against the District of Columbia Department of Corrections ("DOC" or "Respondent"). The Complaint alleges that DOC violated the Comprehensive Merit Personnel Act ("CMPA") and the the parties' collective bargaining agreement ("CBA") by denying the Complainant his right to appeal his termination from employment as a correctional officer. (See Complaint at p. 6). As a remedy, the Complainant requests that: (1) his removal be rescinded; (2) he be given notice of the proposed removal and the opportunity to respond to the advance notice of proposed removal; (3) he be afforded an appeal hearing should the proposed removal be upheld; and (4) DOC pay costs and attorney's fees. (See Complaint at p. 6). DOC denies the allegations ("Answer") and contends that the Complaint was not timely filed. (See Answer at p. 9).

A hearing was held in this matter. At the hearing, DOC submitted a Motion to Dismiss, contending that the Complaint was untimely filed; and that even if it were timely, the Complaint failed to state a statutory cause of action. The Hearing Examiner denied DOC's Motion and proceeded with the hearing. In his Report and Recommendation ("R&R"), the Hearing Examiner found that the Complaint was "not timely filed" and recommended that the Complaint be dismissed. (See R&R at p. 10). The Complainant filed exceptions to the Hearing Examiner's R&R. DOC filed an Opposition to the Complainant's Exceptions.

The R&R, the Complainant's Exceptions and DOC's opposition are before the Board for disposition.

Decision and Order
PERB Case No. 02-U-09
Page 2

II. Background

Mr. McRae began his employment with DOC on September 9, 1991. The Hearing Examiner found that: (1) in October of 1995, Mr. McRae stopped reporting for work; (2) Mr. McRae claimed that he requested advance leave or leave without pay; and (3) according to DOC, Mr. McRae requested advance leave on January 9, 1999, but the request was denied. (See R&R at p. 3). Based on these findings, the Hearing Examiner concluded that the parties' disagreed as to the Complainant's status between 1995 and the date of his termination. (See R&R at p. 3).

As a result of Mr. McRae's absence from work, Deputy Warden Washington prepared a form entitled "Notification of Charge of Leave of Absence Without Official Leave (AWOL)". (R&R at p. 3). On February 26, 2000, March 11, 2000, and April 26, 2000, DOC sent by certified mail a notice to Mr. McRae at his last address of record, 3300 Sherman Avenue, N.W., Washington D.C. (See R&R at pgs. 3-4). The notice indicated that as of January 12, 1996, Mr. McRae had been on AWOL status. Mr. McRae alleges that he never received these notices. (See R&R at p. 4).

On June 5, 2000, DOC also sent Mr. McRae an advance notice proposing his removal. This notice was sent via certified mail to the Sherman Avenue address. (See R&R at p. 4). The notice informed Mr. McRae that he had a right to an administrative hearing, but that the request for the hearing must be received within ten calendar days from receipt of the notice of proposed removal. (See R&R at p. 4). On or about June 8, 2000, Mr. McRae provided DOC with a new mailing address at P.O. Box 3094, Washington, D.C. (See R&R at p. 7). The advance notice was sent to both the post office box and the Sherman Avenue address; however, Mr. McRae did not respond. (See R&R at p. 7).

On December 11, 2000, DOC prepared a notice of final decision to remove Mr. McRae from his position. This notice was sent by certified mail to Mr. McRae's post office box. (See R&R at p. 5). The notice advised Mr. McRae that he had the right to appeal the decision through the grievance process set forth in the parties' CBA. In addition, the notice informed Mr. McRae that his appeal should be forwarded to DOC's Director no later than ten days from receipt of the notice. (See R&R at p. 5). The December 11, 2000, notice was returned as unclaimed. (See R&R at p. 5). DOC alleges that it considers December 18, 2000, to be the official date of Mr. McRae's termination. (See R&R at p. 6).

Approximately eleven months later, on November 30, 2001, Mr. McRae filed an appeal of DOC's December 2000 decision to terminate his employment. (See R&R at p. 6). In the appeal, Mr. McRae asserted that he never received either DOC's notices concerning his proposed removal or the final decision. (See R&R at p. 6). On January 7, 2002, DOC responded to the appeal and informed Mr. McRae that the aforementioned notices had been sent to him, that the ten-day period for filing an appeal of the final decision had lapsed, and that his appeal was denied. (See R&R at p. 7).

Decision and Order
PERB Case No. 02-U-09
Page 3

Mr. McRae filed the instant Complaint on January 24, 2002, asserting that he was first informed of his removal in mid-October of 2001. (See Complaint at p. 3). Prior to this time, the Complainant contends he had never received any notices from DOC. (See Complaint at p. 4). The Complainant argues that because he did not receive any notices, he had not been afforded the opportunity to have an administrative hearing on the matter, or to utilize the grievance procedure. (See Complaint at p. 5). Thus, the Complainant asserts that DOC's denial of his appeal is a violation of his rights under the parties' CBA. (See Complaint at p. 6). In addition, he contends that DOC is in violation of the CMPA by interfering with his rights guaranteed under: D.C. Code § 1-617.04(a)(1), (2) and (5); and D.C. Code § 1-617.06(a)(2). (See Complaint at p. 6).

In its Answer, DOC denies the allegations that the Complainant did not receive or have notice of either his proposed removal or DOC's final decision. (Answer at p. 4). In addition, DOC contends that the Complaint: (1) was not timely filed; (2) was moot; and (3) failed to state a cause of action. Also, DOC claims that the documentary evidence adequately demonstrates that the Complainant's allegations were false. (See Answer at p. 9).

III. The Hearing Examiner's Report

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified one issue for resolution. This issue, his findings and recommendations, the Complainant's Exception to the Hearing Examiner's R&R ("Exceptions") and DOC's Opposition to the Complainant's Exceptions ("Opposition") are as follows:

1. *Did Mr. McRae file a timely Complaint?* (See R&R at p. 10).

In considering this question, the Hearing Examiner noted that Board Rule 520.4, provides that "[u]nfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." (R&R at p. 2).

The Hearing Examiner indicated that the parties presented conflicting accounts. However, the Hearing Examiner found Mr. McRae's testimony to be less reliable. (See R&R at p. 12). As a result, the Hearing Examiner determined that the Complainant knew, or should have known, of DOC's notice of removal when DOC sent the December 11, 2000, notice of final decision to remove him from his position. (See R&R at p. 12). Specifically, the Hearing Examiner determined that DOC had sent the aforementioned notices to the Complainant's correct addresses, and that the Complainant knew the notices had been sent to him. (See R&R at p. 12). In addition, the Hearing Examiner ascertained that Mr. McRae's Complaint was not filed until January 24, 2002, over a year after the final notice of his removal was mailed. In light of the above, the Hearing Examiner concluded that the Complaint was not timely filed in accordance with Board Rule 520.4. (See R&R at p. 12). As a result, the Hearing Examiner is recommending that the Complaint be dismissed as untimely. The Complainant filed Exceptions to the R&R and DOC filed an Opposition.

Decision and Order
PERB Case No. 02-U-09
Page 4

The Complainant's first exception concerns the Hearing Examiner's admission of Respondent's Exhibit's 1 through 5. (See Exceptions at p. 5). The Complainant's exception does not elaborate on why he excepts to the admission of these exhibits. Instead, the Complainant states that the reasons for his objection to the admission of these documents were explained during the hearing. (See Exceptions at p. 5).¹

DOC filed an opposition to this exception arguing that the Complainant failed to provide a specific argument regarding his exception to the Hearing Examiner's admission of Respondent's Exhibits 1 through 5. (See Opposition at p. 4). In support of this argument, DOC cites Board Rule 556.3, which provides in relevant part that "any party may file precise, specific, written exceptions with the Board." (Opposition at p. 4). In addition, DOC cites *Pratt v. District of Columbia Administrative Services*, 43 DCR 1490, Slip Op. No. 457 at p. 2, PERB Case No. 95-U-06 (1996), in which the Board stated it "shall consider only those exceptions to the findings specifically identified by the Complainant". Finally, DOC notes that all objections relating to the admissibility of evidence were fully argued at the hearing and ruled on by the Hearing Examiner. (See Opposition at p. 4).

Board Rules provide the Hearing Examiner with broad authority to conduct hearings. (See Board Rules 550.12-550.14). In the present case, the Hearing Examiner considered and rejected the Complainant's argument regarding the admission of these exhibits. (See R&R at p. 2, n. 2). Ultimately, the Hearing Examiner received Respondent's Exhibits 1 through 5 into evidence. (See R&R at p. 2, n. 2). In his exceptions, the Complainant asserts that the Hearing Examiner erred by admitting the exhibits. However, the Complainant cites no authority or support for the inadmissibility of the exhibits. Instead, the Complainant merely refers to his previous objection made before the Hearing Examiner. We believe, therefore, that the Complainant's exception only involves a disagreement with the Hearing Examiner's decision to admit these exhibits. As a result, we conclude that the Complainant has not provided a basis for reversing or modifying the Hearing Examiner's ruling. Thus, we deny the Complainant's exception.

In the Complainant's second exception, he asserts that the record supports his claim that he

¹At the hearing, the Complainant cited Board Rules 550.7 and 550.8, in making his objection to Respondent's Exhibits 1 through 5. (See R&R at p. 2, n. 2). Board Rules 550.7 and 550.8 provide as follows:

Any party intending to introduce documentary exhibits at a hearing shall make every effort to furnish a copy of each proposed exhibit to each of the parties at least five (5) days before the hearing.

Board Rule 550.8 provides:

Where a copy of an exhibit has not been tendered to the other parties because it was not available prior to the opening of the hearing, a copy of such exhibit shall be furnished to each of the other parties at the outset of the hearing.

Decision and Order

PERB Case No. 02-U-09

Page 5

did not receive either the proposed notice of removal or the notice of DOC's final decision of removal. In support of this argument, the Complainant restates his version of the facts presented to the Hearing Examiner.

The Complainant's exception consists of a challenge to the factual findings of the Hearing Examiner. We have previously stated that "issues of fact concerning the probative value of the evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracey Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (2000). We have also held that "[c]hallenges to [a Hearing Examiner's] evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's finding." *Id.* at p. 4. In addition, this Board has determined that it is the Hearing Examiner that is in the best position to assess the probative value of evidence. *See Pratt* at p. 3, n. 3; and *Mack, Lee and Butler v. FOP/DOC*, 47 DCR 6539, Slip Op. No. 421 at p. 2, PERB Case No. 95-U-24 (2000). We find that the Hearing Examiner's finding that the Complainant knew, or should have known, of DOC's notice of removal, is reasonable and supported by the record. Therefore, we adopt the Hearing Examiner's finding that the Complainant knew, or should have known, of his removal upon receipt of DOC's notices.

The Complainant's third exception is that the Hearing Examiner erred in concluding that the Complaint was not timely. This exception is based on the Complainant's assertion that he did not receive the notice of final decision of removal. As stated above, the Board concurs with the Hearing Examiner's finding that the Complainant knew, or should have known, of his removal upon receipt of the December 11, 2000, advance notice. This Board has held that the deadline date for filing a complaint is "120 days after the date Petitioner admits he actually became aware of the event giving rise to [the] complaint allegations." *Hoggard v. District of Columbia Public Schools*, 43 vDCR 1297, Slip Op. No. 352 at p. 3, PERB Case No. 93-U-10 (1996). See also, *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997). Also, the Board has noted that "the time for filing a complaint with the Board concerning alleged violations [which may provide for] . . . statutory causes of action, commence when the basis of those violations occurred However, proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiation of a cause of action before the Board. The validation, i.e. proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

Since we have concluded that the Complainant knew, or should have known, of DOC's action on or about December 11, 2000, the Complainant had 120 days from that date to file his Complaint. However, the Complainant did not file his Complaint until January 24, 2002, which was over a year after the alleged violation took place. Therefore, we find the Complaint was untimely filed.

Decision and Order
PERB Case No. 02-U-09
Page 6

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, *Hoggard v. District of Columbia Public Employee Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995). Therefore, the Board cannot extend the time for filing an unfair labor practice complaint. As a result, this exception is denied.

A fourth exception restates the argument, made in the Complaint, that DOC's actions were in violation of the CMPA. (See Exceptions at p. 7). This exception does not present an argument alleging that the Hearing Examiner erred in any manner. Instead, the Complainant's exception simply contends that DOC violated the CMPA. The Hearing Examiner, however, concluded that the Complaint was untimely. As stated above, the Board has adopted the Hearing Examiner's conclusion. Therefore, we cannot consider this allegation because the Complaint was not timely filed.

For the reasons discussed, we adopt the Hearing Examiner's recommendations that the Complaint should be dismissed because it was not timely filed.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Complainant's Unfair Labor Practice Complaint is dismissed with prejudice because it was not timely filed.
- (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.**

January 30, 2007

Decision and Order
PERB Case No. 06-A-10
Page 2

II. Discussion:

On November 16, 2002 the Grievant was involved in an automobile accident while on duty. He reported that he was injured. On November 18th the Grievant visited the Medical Services Division ("MSD") for treatment where he was examined by "Physician's Assistant ("P.A.") Gabriel Fayomi who placed him in a sick leave status and instructed him to return for a follow up appointment in one week." (Award at p. 1) On November 25th the Grievant returned to the Medical Services Division ("MSD") and was again examined by P.A. Fayomi. MPD alleged that Fayomi filled out three forms which directed the Grievant to return to limited duty one week later on December 2, 2002 and to report back to the MSD in three weeks (December 16, 2002) for further examination. Fayomi gave the Grievant two of the forms which were to be given to the checkout clerk upon the Grievant's departure. According to the MPD, "prior to delivering the forms to the clerk the Grievant altered the date on the . . . form from December 2, 2002 to December 12, 2002 by adding the numeral '1' before the number '2' in the date to return to limited duty." (Award at p. 1). The Grievant reported to sick call at MSD on December 12th the alleged altered date, and again on December 16th as originally ordered. On December 23rd (the date to which his sick leave was eventually extended) the Grievant reported for limited duty.

MPD's Office of Professional Responsibility conducted an investigation that resulted in formal charges against the Grievant. On October 30, 2003, MPD informed the Grievant that it was preparing an adverse action against the Grievant. The October 30th notice advised the Grievant that if he desired a departmental hearing, one would be scheduled on December 9, 2003. On November 5, 2003, the Grievant filed a request for a departmental hearing, (also known as a Trial Board or Adverse Action Panel). The hearing was conducted on December 9, 2003. The hearing was continued and concluded on January 13, 2004. The hearing panel found the Grievant guilty and unanimously recommended that the Grievant be terminated from the MPD. (See Award at p. 1). On March 31, 2004, MPD informed the Grievant of the final decision to terminate his employment, effective May 28, 2004. FOP appealed the matter to the Chief of Police. The Chief of Police denied the grievance and FOP invoked arbitration pursuant to the parties' collective bargaining agreement ("CBA").

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within fifty-five (55) days of the date that the Grievant requested a hearing. (See Award at p. 2). 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. 3). FOP argued that the Grievant was notified of the charges on October 30, 2003 and filed his request for a departmental hearing on November 5, 2003. However, he was not served with the final decision until March 31, 2004. (See Award at p. 5). FOP claimed that because of this violation the termination should be rescinded. Also, FOP contended that the penalty of termination was too severe and should be mitigated to a lesser penalty. (See Award at p. 5).

Decision and Order
PERB Case No. 06-A-10
Page 3

MPD countered that termination was appropriate. Also, MPD claimed that it complied with the fifty-five day rule. Finally, MPD asserted that even if a violation of the fifty-five day rule occurred it was harmless error.

In an Award issued on March 14, 2006, Arbitrator Donald Wasserman concluded that MPD violated Article 12, Section 6 of the parties' CBA when it failed to issue a written decision within the fifty-five (55) day time limit. Specifically, the Arbitrator determined that February 2, 2004 was the 55th day after the Grievant's request for a hearing. Also, he found no evidence in the record to support MPD's waiver argument. (See Award at p. 5). As a result, the Arbitrator rescinded the termination and ordered that the Grievant be reinstated with full back pay and benefits. (See Award at p. 14).

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).

In support of this argument, MPD states the following:

The hearing was commenced on December 9, 2003, and subsequently continued, to January 13, 2004. The hearing was continued for the convenience of the panel and both parties and there was no objection by [the Grievant]. Accordingly, [the Grievant] originally elected to have the hearing on December 9, 2003, at which time the 55 day time period began to run. The time between December 9, 2003 and January 13, 2004, was time that was consumed by the hearing and thus excluded from the 55 day requirement of the CBA. The 55 days began to run on January 14, 2004, the day after the hearing was completed, and would have expired on March 9, 2004. However, Employer availed itself of the 30-day automatic extension (CBA, Art. 12 Sec. 6(c)) and therefore, the 55 day time limit was extended to April 8, 2004. (Request at pgs. 5-6).

In light of the above, MPD asserts that "the decision of March 31, 2004, was issued eight (8) days before the deadline and was timely." (Request at p. 6). Therefore, MPD suggests that the Arbitrator's ruling that the Grievant did not waive the 55-day rule, is an incorrect interpretation of Article 12, Section 6 of the parties' CBA. (See Request at pgs. 5-6).

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 Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). In

Decision and Order
PERB Case No. 06-A-10
Page 4

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 Wasserman. Neither MPD's disagreement with the Arbitrator's interpretation of Article 12, Section 6, 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).

Also, MPD suggests that the plain language of Article 12, Section 6 of the parties' 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 pgs. 7-9).

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.

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), 51 DCR 4173, Slip Op. No. 738, 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.¹ 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).

¹ 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.

Decision and Order
PERB Case No. 06-A-10
Page 5

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 Wasserman 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 Wasserman 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 Wasserman acted within his authority.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (See 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 A.2d 319, 325 (D.C. 1989).

In the present case, MPD asserts that the Award is on its face contrary to law and public policy. Specifically, MPD argues that the Award violates the "prejudicial error" rule specified in D.C. Code §2-510(b)(2001 ed.). (See Request at pgs. 6-7). We have previously considered and rejected this argument by stating the following:

MPD relies on D.C. Code §2-510(b) which permits a reviewing court to apply the "prejudicial error" rule. D.C. Code §2-510(b)(2001 ed.). However, the Arbitrator's Award does not compel the violation of this section of the D.C. Code. MPD's cited section is outside the Comprehensive Merit Personnel Act ("CMPA") which governs this case. The CMPA itself has no provision requiring or permitting this Board to apply the "prejudicial error" rule. See, D.C. Code § 1-601(2001 ed.) et seq.

Decision and Order
PERB Case No. 06-A-10
Page 6

As such, the Award does not violate D.C. Code 2-510(b) or the CMPA which does not contain a "prejudicial error" rule.

Additionally, MPD relies on Schapansky v. Dep't of Transp., FAA² and Shaw v. Postal Service³ which apply a "procedural error" requirement regarding the Civil Service Reform Act ("CSRA")⁴. MPD argues that only "harmful procedural errors may vitiate an agency action." 5 U.S.C. §7701(c)(2)(A), (Request at p. 6). However, the CSRA's "procedural error" requirement is not applicable to this case because this requirement applies to federal employees who are covered by the CSRA and not employees of the District of Columbia.⁵ Having no application to employees of the District of Columbia, section 7701 cannot be violated by the arbitrator's Award, and thus, the Award is not contrary to Schapansky, Shaw, or section §7701(c)(2)(A) of the Civil Service Reform Act.

Furthermore, the Arbitrator had authority to interpret the parties' Agreement, and thus the Board must view the Arbitrator's interpretation of the contract as if the parties had included that interpretation in their agreement. See, Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17, 531 U.S. 57, 62 (2000). With no showing that the Agreement, as interpreted by the Arbitrator, would run contrary to D.C. Code 2-510(b), Schapansky and Shaw, or section 7701(c)(2)(A) of the Civil Service Reform Act, MPD's argument fails to provide a basis to vacate the Arbitrator's Award. MPD and FOP/MPD Labor

² 735 F. 2d 477 (Fed. Cir. 1984).

³ 697 F.2d 1078 (Fed. Cir. 1983).

⁴ U.S.C. §7701(c)(2)(A).

⁵ 5 U.S.C. §7701 is not included among the provisions listed in D.C. Code §1-632.02 and thus does not apply to employees of the District of Columbia. See Newsome v. District of Columbia, 859 A.2d 630, 633 (D.C. 2004)(provisions of the CSRA not listed in D.C. Code §1-632.02 do not apply to employees of the District of Columbia hired prior to or after the effective date of the CMPA).

Decision and Order
PERB Case No. 06-A-10
Page 7

Committee (on behalf of Miguel Montanez), Slip Op. No 814 at pgs. 8-9, PERB Case No. 05-A-03 (2006).

In addition, MPD asserts that even if a violation of the 55-day rule occurred it constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. (See Award at pgs. 6-9). In support of its position, MPD cites Judge Abrecht's decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002). 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

Decision and Order
PERB Case No. 06-A-10
Page 8

misinterpretation of law by the arbitrator that was apparent “on its face.” 901 A.2d 784, 787.⁶

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’ 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.

February 9, 2007

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

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:)
)
 District of Columbia)
 Metropolitan Police Department,)
)
 Petitioner,)
)
 and)
)
 Fraternal Order of Police/Metropolitan)
 Police Department Labor Committee)
 (on behalf of Stanley Barker),)
)
 Respondent.)

PERB Case No. 06-A-18

Opinion No. 870

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the case:

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an arbitration award ("Award") which rescinded the termination of Stanley Barker ("Grievant") a bargaining unit member. MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

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

Decision and Order
PERB Case No. 06-A-18
Page 2

II. Discussion:

The circumstances that gave rise to this action occurred in the early morning hours of April 5, 2002. The Grievant, assigned to the First District, was off duty and driving his personal vehicle on New York Avenue. "He maintained he was on his way to a 'gentleman's club.' While stopped at the intersection of New York and Florida Avenue, he was approached by an individual asking for a ride home to the 200 block of N Street, Northwest. He asserted that he believed this individual was female. In fact, the individual was a male transvestite prostitute, and the area is frequented by such types." (Award at p. 2).

"The Grievant maintained that he drove the individual (hereafter referenced by the male pronoun, or by his name, Kelvin Jackson) to the requested block because of the late hour and the unsafe neighborhood. When they arrived, the grievant pulled into an ally behind the block, as he maintained, at Mr. Jackson's request." (Award at p. 2).

While the Grievant's car was parked in the alley, Officer Alec Corapinski was on routine patrol in the area and spotted the car. He testified that he noticed the two in the car apparently engaged in sexual activity. At this point, Officer Corapinski did not yet know the identity of the driver, or that he was a police officer. "Officer Corapinski [pointed] his spotlight [at] the car and saw the front seat passenger pick his head up from the area of the driver's lap and begin wiping his mouth, while the driver removed a condom from his lap area." (Award at p. 2).

The driver then got out of his car and began walking toward Officer Corapinski while reaching into his pocket. At this point, Officer Corapinski ordered the driver to get back in his car and remove his hand from his pocket. Instead of complying, the driver continued toward him, whereupon Officer Corapinski ordered the driver to place his hands on the hood of the car. Officer Corapinski testified that he asked the driver if he was a Police Officer, and he replied "No." (See Award at p. 3) Officer Corapinski claimed that he became fearful for his safety, drew his gun and called for backup. When backup officers arrived, one of them recognized the driver, who then identified himself as a police officer. (See Award at p. 3). The Grievant was not charged with a criminal offense and was released.

Following an investigation of this incident, the Grievant was charged with conduct unbecoming a police officer and knowingly making an untruthful statement. (See Award at p. 3).

On April 3, 2003, MPD informed the Grievant that it was preparing an adverse action against the Grievant. The April 3rd notice advised the Grievant that if he desired a Departmental hearing, one would be scheduled on May 22, 2003. (See Award at p. 5). On the same day he was served with the notice of proposed adverse action, April 3, 2003, the Grievant requested a Departmental hearing. He requested and was granted a continuance of the May 22, 2003 hearing, and the hearing was convened on June 19, 2003. (See Award at p. 5). Additional hearings were conducted on July 22 and August 6, 2003.

Decision and Order
PERB Case No. 06-A-18
Page 3

The hearing panel found the Grievant guilty and unanimously recommended that the Grievant be terminated from the MPD. (See Award at p. 1). On September 16, 2003, MPD informed the Grievant of the final decision to terminate his employment, effective October 17, 2003. FOP appealed the matter to the Chief of Police. The Chief of Police denied the grievance and FOP invoked arbitration pursuant to the parties' collective bargaining agreement ("CBA").

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within fifty-five (55) days of the date that the Grievant requested a hearing. (See Award at p. 5). 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. 6). FOP argued that the Grievant was notified of the charges on April 3rd, but was not served with the final decision until September 16, 2003. (See Award at pgs. 7-8). FOP claimed that because of this violation the termination should be rescinded. Also, FOP contended that the evidence did not establish the Grievant's guilt. (See Award at pgs. 5-6).

MPD countered that termination was appropriate. Also, MPD claimed that it complied with the fifty-five day rule. (See Award at p. 6) Finally, MPD asserted that even if a violation of the fifty-five day rule occurred "the appropriate remedy would be to award back pay, if any, that the grievant lost owing to the delay in the issuance of the decision." (Award at p. 6).

In a Award issued on May 15, 2006, Arbitrator Steven Wolf concluded that MPD violated Article 12, Section 6 of the parties' CBA when it failed to issue a written decision within the fifty-five (55) day time limit. (See Award at p. 8). Specifically, the Arbitrator noted the following:

The facts reveal . . . [that] [t]he hearing was originally scheduled for May 22, 2003 but was continued at the grievant's request. The hearing actually commenced on June 19, 2003. Thus, under Article 12, Section 6(a), the time limit was at that point extended by twenty-eight (28) days. The hearing was again convened on July 22, 2003, an additional thirty three (33) days after the first hearing date. A third hearing date was needed, that date being August 6, 2003, extending the time limit an additional fifteen (15) days. Therefore, the total number of days by which postponements or continuances extended the 55-day time limit was seventy six (76) days. Adding the three days actually consumed by the hearings makes the grand total seventy-nine (79) days. If seventy-nine (79) days is added to the "base" 55-day time limit expiration date of May 28, 2003, that makes the date by which the Department's written decision was due as August 15, 2003. In fact, that decision was issued on September 16, 2003, which was thirty-two (32) days beyond the contractual deadline

Decision and Order
PERB Case No. 06-A-18
Page 4

[of August 15, 2003]. . . . I am left, therefore, with the conclusion that the Department's September 16, 2003 Final Notice of Adverse Action was untimely filed. (Award at pgs. 7-8).

In light of the above, the Arbitrator rescinded the termination and ordered that the Grievant be reinstated with full back pay and benefits. (See Award at p. 11).

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).

In support of this argument, MPD states the following:

In the instant matter, [the] Grievant was served with the notice of adverse action on April 3, 2003 stating that a hearing was set for May 22, 2003. On April 3, 2003, he responded with a letter requesting a hearing, thereby consenting to the hearing already set by the employer for May 22, 2003. Thereafter, [the] Grievant requested a postponement to June 19, 2003. The second continuance was to August 6, 2003, at which time the hearing concluded. Accordingly, [the] Grievant originally elected to have the hearing on May 22, 2003. However, the time between May 22, 2003, and August 6, 2003 was time during which [the] Grievant consented to the continuances, or time that was consumed by the hearing and thus excluded from the 55 day requirement of the CBA. . . . Thus, the fifty-five (55) day period began to run on August 7, 2003, the day after the hearing was completed, and expired on October 4, 2003. (Request at pgs. 6-7).

In view of the above, MPD asserts that the "decision of September 16, 2003, was issued within forty (40) days of the hearing and was timely." (Request at p. 7). Therefore, MPD suggests that the Arbitrator's ruling that the Grievant did not waive the 55-day rule, is an incorrect interpretation of Article 12, Section 6 of the parties' CBA. (See Request at pgs. 5-7).

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 Association, 39 DCR 9628, Slip Op. No. 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

Decision and Order
PERB Case No. 06-A-18
Page 5

No. 87-A-02 (1987). In the present case, the parties submitted their dispute to Arbitrator Wolf. Neither MPD's disagreement with the Arbitrator's interpretation of Article 12, Section 6, 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).

Also, MPD suggests that the plain language of Article 12, Section 6 of the parties' 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 pgs. 8-10).

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.

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.¹ 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 Wolf 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 Wolf 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 Wolf acted within his authority.

¹ 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.

Decision and Order
PERB Case No. 06-A-18
Page 6

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (See 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. Teamsters Union Local 246, 54 A. 2d 319, 325 (D.C. 1989).

In the present case, MPD asserts that the Award is on its face contrary to law and public policy. Specifically, MPD argues that the Award violates the "prejudicial error" rule specified in D.C. Code §2-510(b)(2001 ed.). (See Request at p 7). We have previously considered and rejected this argument by stating the following:

MPD relies on D.C. Code §2-510(b) which permits a reviewing court to apply the "prejudicial error" rule. D.C. Code §2-510(b)(2001 ed.). However, the Arbitrator's Award does not compel the violation of this section of the D.C. Code. MPD's cited section is outside the Comprehensive Merit Personnel Act ("CMPA") which governs this case. The CMPA itself has no provision requiring or permitting this Board to apply the "prejudicial error" rule. See, D.C. Code § 1-601(2001 ed.) et seq. As such, the Award does not violate D.C. Code §2-510(b) or the CMPA which does not contain a "prejudicial error" rule.

Additionally, MPD relies on Schapansky v. Dep't of Transp., FAA²

² 735 F. 2d 477 (Fed. Cir. 1984).

Decision and Order
PERB Case No. 06-A-18
Page 7

and Shaw v. Postal Service³ which apply a “procedural error” requirement regarding the Civil Service Reform Act (“CSRA”)⁴. MPD argues that only “harmful procedural errors may vitiate an agency action.” 5 U.S.C. §7701(c)(2)(A). . . . However, the CSRA’s “procedural error” requirement is not applicable to this case because this requirement applies to federal employees who are covered by the CSRA and not employees of the District of Columbia.⁵ Having no application to employees of the District of Columbia, section 7701 cannot be violated by the arbitrator’s Award, and thus, the Award is not contrary to Schapansky, Shaw, or §7701(c)(2)(A) of the Civil Service Reform Act.

Furthermore, the Arbitrator had authority to interpret the parties’ Agreement, and thus the Board must view the Arbitrator’s interpretation of the contract as if the parties had included that interpretation in their agreement. See, Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17, 531 U.S. 57, 62 (2000). With no showing that the Agreement, as interpreted by the Arbitrator, would run contrary to D.C. Code §2-510(b), Schapansky and Shaw, or section 7701(c)(2)(A) of the Civil Service Reform Act, MPD’s argument fails to provide a basis to vacate the Arbitrator’s Award. (MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez), Slip Op. No 814 at pgs. 8-9, PERB Case No. 05-A-03 (2006).

In addition, MPD asserts that even if a violation of the 55-day rule occurred it constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. (See Request at p. 7). In support of its position, MPD cites Judge Abrecht’s decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002). We have previously considered and rejected this argument. In

³ 697 F.2d 1078 (Fed. Cir. 1983).

⁴ U.S.C. §7701(c)(2)(A).

⁵ 5 U.S.C. §7701 is not included among the provisions listed in D.C. Code §1-632.02 and thus does not apply to employees of the District of Columbia. See Newsome v. District of Columbia, 859 A.2d 630, 633 (D.C. 2004)(provisions of the CSRA not listed in D.C. Code §1-632.02 do not apply to employees of the District of Columbia hired prior to or after the effective date of the CMPA).

Decision and Order
PERB Case No. 06-A-18
Page 8

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, 787.⁶

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

Decision and Order
PERB Case No. 06-A-18
Page 9

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' 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.

February 12, 2007

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:)	
)	
Fraternal Order of Police /Metropolitan)	
Police Department Labor Committee,	)	PERB Case No. 07-U-12
)	
Complainant,	)	Opinion No. 871
)	
v.	)	Motion for Preliminary Relief
)	
District of Columbia)	
Metropolitan Police Department,)	
)	
and)	
)	
Chief Charles Ramsey,	)	FOR PUBLICATION
)	
Respondents.)	
)	

I. Statement of the Case:

On December 7, 2006, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant" or "FOP"), filed an unfair labor practice complaint and a motion for preliminary relief against the Metropolitan Police Department and Chief Charles Ramsey ("Respondents" or "MPD"). FOP alleges that MPD has violated D.C. Code § 1-617.04 (a) (1) and (5) (2001 ed.) "by failing to provide information requested [by FOP] pursuant to Article 10 of the [parties'] Collective Bargaining Agreement (CBA)." (Motion at p. 1).

The Respondents filed an opposition to the motion for preliminary relief ("Opposition") and an answer to the unfair labor practice complaint denying that they have violated the Comprehensive Merit Personnel Act ("CMPA"). As a result, the Respondents have requested that the Board dismiss the Motion. The Complainant's Motion and the Respondents' opposition are before the Board for disposition.

II. Discussion

On or about August 3, 2006, MPD served Officer Henderson with a "Notice of Proposed Adverse Action, alleging, among other things, that she failed to obey orders or directions of the

Decision and Order Concerning
Motion for Preliminary Relief
PERB Case No. 07-U-12
Page 2

department.” (Compl. at p. 3).

FOP claims that on August 10, 2006, it forwarded a written request for information to MPD pursuant to Article 10 of the parties’ CBA. (See Compl. at p. 3 and Exhibit 2).¹ The reason for the request was to assist FOP in preparing Officer Henderson’s defense against the proposed adverse action.

FOP argues that MPD’s failure to provide the requested information has prevented FOP from adequately preparing a defense for Officer Henderson concerning the proposed adverse action. FOP asserts that MPD’s ongoing violations of the CMPA are clear-cut, flagrant and seriously effect public interest. (See Motion at p. 2). Also, FOP contends that the Board’s ultimate remedy will be inadequate. Therefore, FOP asserts that preliminary relief is appropriate in this case.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15, which provides in pertinent part as follows:

The Board may order preliminary relief ... where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board’s processes are being interfered with, and the Board’s ultimate remedy will be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. See, AFSCME, D.C. Council 20, et al. v. D.C. Government, et al., 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, this Board has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals-addressing the standard for granting

¹ In the August 10th letter FOP requested information regarding: (1) the log books and other accounting methods for keys to the property office Major Narcotics Branch during the 2003 calendar year; (2) the log books or other means of recording the names of the individuals who had been provided keys to the property office during the 2003 calendar year; (3) the log books or other means of recording the names of the individuals who had been provided with the combination to the safe located in the property office during the 2002 and 2003 calendar years; and (4) any documents promulgated by the Major Narcotics Branch describing its policies for obtaining keys and/or access to the property office and property office safe that were in effect during the 2003 calendar year. (See Compl. at pgs. 3-4). FOP claims that the intent of this request was to assist in the defense of Officer Henderson. (See Compl. 4).

Decision and Order Concerning
Motion for Preliminary Relief
PERB Case No. 07-U-12
Page 3

relief before judgement under Section 10(j) of the National Labor Relations Act-held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." *Id.* at 1051. "In those instances where [this Board] has determined that the standard for exercising its discretion has been met, the basis for such relief [has been restricted to the existence of the prescribed circumstances in the provisions of Board Rule [520.15] set forth above." *Clarence Mack, et al. v. FOP/DOC labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

MPD disputes the material elements of the allegations asserted in the Motion. MPD asserts that the "Respondents have in fact responded to . . . the request for information. [Specifically,] [o]n October 18, 2006, Supervisory Labor Relations Specialist Anna McClanahan transmitted via facsimile and first class mail the response to [the] Complainant's . . . request." (Respondents' Opposition at p. 5). In addition, MPD claims that FOP acknowledged receipt of the requested information. (See Respondents' Opposition at p. 5).

In addition, the Respondents contend that the Motion should be denied because the issue in this case involves an issue of contract interpretation; therefore, the Board lacks jurisdiction. (Respondents' Opposition at pgs. 2-5). Also, MPD asserts that if the Board determines that it has jurisdiction over this matter the Complaint should be dismissed because MPD has complied with FOP's August 10th request for information. (See Respondents' Opposition at p. 5). Therefore, MPD suggests that FOP has failed to satisfy the statutory requirements for preliminary relief.

It is clear that the parties disagree on the facts in this case. The Board has found that preliminary relief is not appropriate where material facts are in dispute. See, *DCNA v. D.C. Health and Hospitals Public Benefit Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

In the present case, FOP's claim that the Respondents' actions meet the criteria of Board Rule 520.15, are a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of the Respondents' actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. The Respondents' actions presumably affect FOP and its members. However, the Respondents' actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts.

While the CMPA prohibits the District from engaging in unfair labor practices, the alleged violations, even if determined to be valid do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce compliance with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, FOP has failed to

Decision and Order Concerning
Motion for Preliminary Relief
PERB Case No. 07-U-12
Page 4

present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate if preliminary relief is not granted.

In view of the above, we believe that the Respondents' actions are not clear-cut and flagrant as required by Board Rule 520.15. The question of whether the Respondents' actions occurred as FOP claims or whether such actions constitute violations of the CMPA are matters best determined after the establishment of a factual record through an unfair labor practice hearing.

We note that the FOP has also filed another unfair labor practice complaint (PERB Case No. 07-U-16) involving the same issue. Since that case (PERB Case No. 07-U-16) and the present case (PERB Case No. 07-U-16) involve common issues of fact and law, we are consolidating the two cases.

For the reasons discussed above, the Board: (1) denies FOP's request for preliminary relief; (2) directs the development of a factual record through an unfair labor practice hearing; and (3) consolidates PERB Case No. 07-U-12 and PERB Case No. 07-U-16.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Labor Committee's (FOP) Motion for Preliminary Relief is denied.
2. PERB Case No. 07-U-12 and PERB Case No. 07-U-16 are consolidated.
3. The Board's Executive Director shall: (a) schedule a hearing, and (b) refer FOP's unfair labor practice complaints (PERB Case Nos. 07-U-12 and 07-U-16) to a Hearing Examiner for disposition.
4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

February 8, 2007

Decision and Order Concerning
Motion for Preliminary Relief
PERB Case No. 07-U-12
Page 5

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Metropolitan Police Department,)	
)	
Petitioner,	)	PERB Case No. 07-A-02
)	
and	)	Opinion No. 872
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee (on behalf of	)	FOR PUBLICATION
Anthony Hector),)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case:

On November 22, 2006, the Metropolitan Police Department ("Agency" or "MPD") filed an Arbitration Review Request ("Request"). MPD seeks review of an Arbitration Award ("Award") that rescinded the termination of Anthony Hector ("Grievant") and found that the appropriate discipline should be a suspension "from the date of ... termination to the date of ... reinstatement." (Leahy Award at p. 13).

MPD is seeking review of the Award on the ground that the Award on its face is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

The issues before the Board are whether the Request is timely and whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02 (6) (2001 ed.).

Decision and Order
PERB Case No. 07-A-02
Page 2

II. Discussion

“Officer Anthony Hector (Grievant) was terminated from the Metropolitan Police Department . . . based upon acts of misconduct . . . on January 26, 2003. The [MPD] charged [the] Grievant with committing misconduct when he forced two individuals who he observed urinating in public to wipe up their urine with their clothing and put the wet clothing back on their bodies. On March 1, 2005 . . . [the] Grievant was afforded an evidentiary hearing regarding the charges before a three-member panel (panel) comprised of three senior police officials. Following the hearing, the [p]anel found [the] Grievant not guilty of one specification each of conduct unbecoming an officer, neglect of duty, and unnecessary use of force. The panel recommended that he be suspended for sixty (60) days. On April 27, 2005, the Assistant Chief for Human Services (“ACHS”) issued [the] Grievant a Final Notice of Adverse Action. The Grievant was further notified that the ACHS found the recommended penalty of a sixty (60) day suspension to be inconsistent with the facts and circumstances of the case and [ordered that] the Grievant would be removed from the Department, effective June 10, 2005.” (Request at pgs. 2-3).

The Grievant appealed the termination to the Chief of Police. The Chief denied it and pursuant to the collective bargaining agreement (“CBA”), the Union invoked arbitration. In presenting the matter, the Grievant argued that the termination penalty should be rescinded because the: (1) ACHS lacked the authority to increase the recommended penalty, or in the alternative that (2) removal was inappropriate under the *Douglas* factors. MPD countered that the ACHS has the authority to impose the penalty and termination was appropriate. (See Request at p. 3).

“In a decision dated October 30, 2006, the Arbitrator concluded: (1) ACHS Shannon Cockett had authority to exceed the penalty recommended for Officer Hector by the Adverse Action Panel; (2) ACHS Cockett reasonably applied the *Douglas* factors in reaching her decision; (3) Assistant Chief Cockett’s finding that the offenses committed by Officer Hector warranted a penalty more severe than a sixty day suspension was reasonable; and (4) the penalty of termination was excessive because neither Assistant Chief Cockett, nor Chief Ramsey gave sufficient, if any, consideration to significant mitigating facts within the ‘just cause’ standard of the Parties’ Agreement, before reaching termination as the final decision for the Department. . . . The Arbitrator concluded that the D.C. Metropolitan Police Department did not have just cause to terminate the employment of Officer Anthony Hector. The Arbitrator’s Award reinstated Grievant to his position without back pay. . . .” (Request at p. 4).

The FOP asserts in its Opposition that the Request was untimely filed. The FOP contends that “the time limit for which the Petitioner may request a review of the arbitration decision has expired, and therefore the Board must deny its review request. Pursuant to the [CBA], ‘[e]ither party may file an appeal from an arbitration award to the PERB, not later than twenty (20) days after the award is served . . .’ See Article 19 § 6. . . . [T]he Arbitrator’s award was received at the Office of the

Decision and Order
PERB Case No. 07-A-02
Page 3

Attorney General (OAG) on November 1, 2006. . . . [The] arbitration review request [was filed] on November 22, 2006. . . . Thus, [MPD] filed its arbitration review request two (2) days after the deadline for filing such requests.” (Opposition at p. 3).

Board Rules 538.1, 501.4 and 501.5 provide in relevant part as follows:

538.1 - Filing

A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board **not later than twenty (20) days after service of the award** (emphasis added).

501.4 - Computation - Mail Service

Whenever a period of time is **measured from the service of a pleading and service is by mail, five (5) days shall be added to the prescribed period.** (emphasis added).

501.5 - Computation - Weekends and Holidays

In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included. . . . **Whenever the prescribed time period is eleven (11) days or more, [Saturdays, Sundays and District of Columbia Holidays] shall be included in the computation.** (emphasis added).

In the present case, Arbitrator Leahy issued his Award on October 30, 2006. (See Award at p. 13). There is no dispute that the Award was served on the parties by mail. However, FOP argues that the Award was received by MPD on November 1, 2006 and that pursuant to Board Rule 538.1, MPD was required to file the Request within twenty days of the receipt date, or November 21, 2006. MPD did not file their Request until November 22, 2006. Thus, FOP claims that MPD’s November 22nd filing was not timely.

MPD’s timeliness argument is based on their belief that the receipt date is the operative factor which triggers the computation of the twenty-day filing requirement noted in Board Rule 538.1. However, Board Rule 538.1 states that an arbitration review request must be filed “not later than twenty (20) days after *service* of the award.” (Emphasis added.) Pursuant to Board Rule 501.4, five days must be added to the prescribed twenty-days if *service is by mail*, as it was in this case. In view of the above, MPD was required to file their Request no later than *twenty-five (25) days* after the service date. Since it is undisputed that the Award was *mailed* by the arbitrator on October 30, 2006, MPD was required to submit their pleading no later than November 25, 2006. Therefore, we find that MPD’s November 22nd filing was timely.

Decision and Order
PERB Case No. 07-A-02
Page 4

We now turn to FOP's claim that the Award on its face is contrary to law and public policy. When a party files an arbitration review request, the Board's scope of review is extremely narrow. 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).

In the present case, MPD claims that the Award on its face is contrary to law and public policy because "the standard relied upon by the Arbitrator, i.e., just cause, to reduce the penalty of removal was inappropriate and therefore the award is contrary to law and public policy." (Request at p. 5).

MPD asserts that the "[a] remedy of reinstatement would violate . . . public policy in that a remedy of reinstatement would violate D.C. Code 2001 Edition § 5-101.03.¹ MPD argues that "a

¹D.C. Code § 5-101.03 (2001 ed.) provides as follows:

§ 5-101.03 General duties of Mayor [formerly § 4-115]

It shall be the duty of the Mayor of the District of Columbia at all times of the day and night within the boundaries of said Police District:

- (1) To preserve the public peace;
- (2) To prevent crime and arrest offenders;
- (3) To protect the rights of persons and of property;
- (4) To guard the public health;
- (5) To preserve order at every public election;
- (6) To remove nuisances existing in the public streets, roads, alley, highways, and other places;
- (7) To provide a proper police force at every fire, in order that thereby the firemen and property may be protected;
- (8) To protect strangers and travelers at steamboat and ship landings and railway stations;
- (9) To see that all laws relating to the observance of Sunday, and regarding pawnbrokers, mock auctions, election, gambling, intemperance, lottery dealers, vagrants, disorderly persons, and the public health, are promptly enforced; and
- (10) To enforce and obey all laws and ordinances in force in the District,

Decision and Order
PERB Case No. 07-A-02
Page 5

remedy of reinstatement returns to the Employer an individual unsuitable to serve as a police officer. Clearly, such remedy would violate public policy.” (Request at p. 7).

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 interpretation of the contract. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). “[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.’” *Id.* Also, a petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well-defined, public policy grounded in law or legal precedent. See *United Paperworkers International Union, AFL-CIO v. Misco, Inc.* 484 U.S. 29, 43; *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234, 1239 (D.C. Cir. 1971). Moreover, the violation must be so significant that the law or public policy “mandates that the Arbitrator arrive at a different result.”² Furthermore, MPD has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

MPD contends that the Award violates D.C. Code § 5-101.03. However, none of the provisions identified by MPD mandate removal. Instead, they list the duties of the police force. Since termination is not mandatory under any of the above-referenced provisions, we find that MPD has not cited any specific law or public policy that was violated by the Award. It is clear that MPD’s argument involves a disagreement with the Arbitrator’s ruling. This Board has held that a “disagreement with the arbitrator’s interpretation . . . does not make the award contrary to law and public policy.” *AFGE Local 1975 and Dept. of Public Works*, 48 DCR 10955, Slip Op. No. 413 at pgs. 2-3, PERB Case No. 95-A-02 (1995).

MPD also claims that “[t]here is absolutely no support in law or regulations for the use of a “just cause” standard in assessing a penalty. [MPD asserts that] [w]hile the Arbitrator made reference to the just cause standard of the parties’ agreement he failed to identify any provision in the collective bargaining agreement that sets forth that standard. [A] close reading of the agreement clearly

or any part thereof, which are properly applicable to police or health, and not inconsistent with the provisions of this title. The police shall, as far as practicable, aid in the enforcement of garbage regulations.

²*MPD v. FOP/MPD Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing *AFGE, Local 631 and Dep’t of Public Works*, 45 DCR 6617, Slip Op. 365 at p. 4, PERB Case No. 93-A-03 (1998); see *District of Columbia Public Schools and the 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).

Decision and Order
PERB Case No. 07-A-02
Page 6

demonstrates that no such [explicit] standard exists. Thus, [MPD asserts that] in relying on a just cause standard to reduce the penalty imposed by Assistant Chief Cockett, the Arbitrator violated Article 19E, Section 5, provision 4 of the collective bargaining agreement which forbids an arbitrator from, *inter alia*, adding [a] provision [to] the agreement. Thus, [MPD argues that] the award, in reinstating an officer who was found to have committed acts of misconduct that rendered him unfit to continue employment as a police officer, is contrary to law and public policy.” (Request at pgs. 5-6).

Further, MPD cites *Stokes, v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985) for the proposition that the reviewing tribunal may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. The Board has previously considered this argument. In *Metropolitan Police Department and National Association of Government Employees, Local R3-5 (on behalf of Angela Burrell)*, __ DCR __, Slip Op. No. 785 at pgs. 4-5, PERB Case No. 03-A-08 (2006), we stated as follows:

MPD asserts that the Arbitrator is not free to substitute her judgment for that of the MPD when it legitimately invoked and exercised its managerial discretion. . . .

The gravamen of MPD’s Request is based on its interpretation and applicability of *Stokes* to this Award. In *Stokes*, an Administrative Law Judge . . . of the District of Columbia Office of Employee Appeals (“OEA”) mitigated the disciplinary termination of an electrical foreman at the District of Columbia Department of Corrections Youth Center (“DOC”) to a 60-day suspension. DOC appealed OEA’s decision to the Superior Court of the District of Columbia. The Superior court reversed the OEA’s decision and concluded that the DOC’s discharge of the employee was reasonable. The employee appealed to the District of Columbia Court of Appeals. The Court of Appeals concluded, based on D.C. Code §§ 1-606.1 and 1-606.3 (1981), that:

[a]lthough the Act does not define the standards by which the OEA is to review these decisions, it is self evident from both the statute and its legislative history that the OEA is not to substitute its judgement for that of the agency and its role . . . is simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.” Although the OEA has a “marginally greater latitude of review” than a court, it may not substitute its judgment for that of the agency

Decision and Order
PERB Case No. 07-A-02
Page 7

in deciding whether a particular penalty is appropriate. The "primary discretion" in selecting a penalty has been entrusted to agency management, not the [OEA]. (Citations omitted). (*Stokes*, 1009-1010 and 1011).

Thus, the Court of Appeals' analysis in *Stokes* is based on the court's interpretation and application of D.C. Code §§ 1-606.1 and 1-606.3 (1981) which created the OEA as "a quasi-judicial body empowered to review final agency decisions affecting, *inter alia*, performance ratings, adverse actions, and employee grievances." (*Stokes*, 1009).

In the present case, the Arbitrator's review of the MPD's termination of [the grievant] arises out of the parties' CBA and not D.C. Code §§ 1-606.1 and 1-606.3 (1981 ed.).

Similarly, in this case, the Arbitrator's review of the MPD's termination of Anthony Hector arises out of the parties' CBA and not D.C. Code §§ 1-606.1 and 1-606.3 (1981 ed.). In this regard, this Board has held that by 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. See, *University of the District of Columbia and University of the District of Columbia Faculty Association*, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). 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.* "[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 an Arbitrator and MPD's disagreement with the Arbitrator's interpretation of the language in Article 17 of the parties' collective bargaining agreement is not grounds for reversing the Arbitrator's Award. See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008 (May 13, 2005) and *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 01 MPA 18 (September 17, 2002).

We find that the Arbitrator was within his authority to rescind the Grievant's termination. We have held 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

³We 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.

Decision and Order
PERB Case No. 07-A-02
Page 8

6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Furthermore:

[the] Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.* 363, U.S. 593, 597 (1960), that arbitrators bring their “informed judgment” to bear on the interpretation of collective bargaining agreements, and that is “especially true when it comes to formulating remedies.” [Also,] [t]he . . . courts have followed the Supreme Court’s lead in holding that arbitrators have implicit authority to fashion appropriate remedies . . . (See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6, (May 13, 2005).

In the present case MPD does not cite any provision of the parties’ collective bargaining agreement that limits the Arbitrator’s equitable power. Therefore, once the Arbitrator concluded that MPD did not have just cause to terminate the employment of Officer Hector he had the authority to determine the appropriate remedy.

In view of the above, we find no merit to MPD’s arguments. Also, we believe that the Arbitrator’s conclusions are based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law or public policy. Therefore, no statutory basis exists for setting aside this Award. As a result, we deny MPD’s Arbitration Review Request.

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 7, 2007

Motion for Preliminary Relief
PERB Case No. 07-U-03
Page 2

The Respondent filed an Answer to the Unfair Labor Practice Complaint ("Answer") denying the unfair labor practice allegations. In addition, the Respondent filed a document styled "Response to Complainant's Motion for Preliminary Relief" ("Opposition") claiming that this matter is moot because: (1) the Respondent has already provided 70 parking spaces; (2) the Board can fashion a monetary remedy if the MRDDA has incurred any liability; and (3) there is a dispute regarding a material fact. (Opposition at pgs. 2-3). Therefore, the MRDDA is requesting that the Motion be denied.

The Complaint's Motion and the Respondent's Opposition are before the Board for disposition.

II. Discussion

The MRDDA was scheduled to relocate to 1125 - 15th Street, NW on October 10, 2006. The Union claims that on October 4, 2006, the MRDDA informed Union representatives that the new building had a parking garage with 101 available spots and the MRDDA intended to offer 60 parking spaces to be shared by the MRDDA union and non-union staff. The 60 spaces would be shared by employees who would take turns using the same space on alternate days. Twenty-five spaces would be reserved for management. (Motion at p. 6). The Union asserts that the parking garages near the new location are cost prohibitive for the bargaining unit members and do not allow patrons to exit and enter without paying again for parking. Also, the affected employees must use their vehicles on a daily basis to visit clients who are mentally retarded or developmentally disabled and "these employees may not be able to fully serve MRDDA's vulnerable public clientele." (Motion at p. 2).

Article 12, Section E of the parties' collective bargaining agreement provides that "[e]mployees required as a condition of employment to use their personal vehicle in the performance of their official duties may be provided a parking space or shall be reimbursed for non-commuter parking expenses, which are incurred in the performance of their official duties." The Union claimed that for the past 20 years, the MRDDA has provided parking spaces for employees who are required to use their vehicles as a condition of employment. Therefore, the Union argued that management must bargain over the new parking plan and requested bargaining.

The Union asserts that in response to its bargaining request, the MRDDA stated that the plan to share spaces was to be implemented, but later stated that this was merely a bargaining offer concerning the parking issue. On October 5th, 2006, as a temporary solution, the Union made a counterproposal that the MRDDA provide 80 of the 101 total parking spaces to those members of the bargaining unit who are required to use their personal vehicle to perform their duties. The Union claims that on October 5, 2006, management sent an e-mail offering 60 shared spaces for non-management employees, but never responded to the specific counterproposal made by the Union.

Motion for Preliminary Relief
PERB Case No. 07-U-03
Page 3

In light of the above, on October 6, 2006, the Union filed an unfair labor practice complaint and a motion for preliminary relief in this matter. (Opposition at pgs. 6-8). Specifically, the Union states that by relocating and failing to provide free parking at the new location for all of its employees who are required to use their vehicles to perform their official duties - the MRDDA is violating D.C. Code § 1-617.04(a)(1) and (5). As a basis for its Motion, the Union asserts that: (1) many employees had not received parking passes prior to reporting to work on October 10, at the time of the filing of the Motion; (2) bargaining unit employees must make home visits and respond to emergencies; (3) the Union "fears that it will be physically impossible for the bargaining unit members to get a week's worth of visits crammed into two or three days a week (Motion at p. 9); and (4) public parking garages in the area are cost prohibitive for the bargaining unit members and do not allow patrons to exit and enter without paying again for parking. (Motion at pgs. 8-9).

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15.

Board Rule 520.15 provides in pertinent part as follows:

The Board may order preliminary relief . . . where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy may be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. See *AFSCME, D.C. Council 20, et al. v. D.C. Government, et al.*, 42 DCR 3430, Slip Op. No. 330 at p. 4, n. 1, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, this Board has adopted the standard stated in *Automobile Workers v. NLRB*, 449 F.2d 1046 at 1051 (CA DC 1971). There, the Court of Appeals - addressing the standard for granting relief before judgment under Section 10(j) of the National Labor Relations Act - held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by *pendente lite* relief." *Id.* at 1051. "In those instances where the Board has determined that the standard for exercising its discretion has been met, the bases for such relief were restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." *Clarence Mack, et al. V. FOP/DOC Labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

The Respondent contends that the Motion should be denied because the Union has failed to meet the requirements for preliminary relief. In support of this claim, the Respondent asserts that: (1) the Board's processes have not been frustrated because "the Board can calculate the

Motion for Preliminary Relief

PERB Case No. 07-U-03

Page 4

amount of past harm as money damages . . . after the [unfair labor practice] proceedings have been concluded"; (2) the alleged violation is not widespread or flagrant; and (3) there are material facts in dispute. (Opposition at p. 3).

The Respondent also contends that preliminary relief has been rendered moot by events which have taken place after the filing of the Complaint. Specifically, the Respondent asserts that it made available 70 non-shared parking spaces to bargaining unit members, thus substantially complying with the Union's request for 80 spaces. The Respondent asserts that the parties merely disagree as to the number of spaces needed.

The Complainant's claim that the Respondent's actions meet the criteria of Board Rule 520.15, is a repetition of the allegations contained in the Complaint. (See Compl. pgs. 5-6). Even if the Complaint is ultimately found to be valid, it does not appear that any of the Respondent's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. The Respondent's alleged actions presumably stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts. While the Comprehensive Merit Personnel Act (CMPA) asserts that "the District, its agents, and representatives are prohibited from interfering, restraining or coercing any employee in the exercise of the rights guaranteed by [the CMPA],"² the alleged violations, even if determined to be valid do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, the Complainant has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate if preliminary relief is not granted.

Under the facts of this case, the alleged violations and their impact do not satisfy any of the criteria prescribed by Board Rule 520.15. Specifically, we conclude that the Union has failed to provide evidence which demonstrates that the allegations, even if true, are such that remedial purposes of the law would be served by *pendente lite* relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Union following a full hearing. Therefore, we find that the facts presented do not appear appropriate for the granting of preliminary relief. Furthermore, the parties dispute whether: (1) the MRDDA bargained with the Union; (2) the MRDDA provided parking spaces to the bargaining unit; and (3) how many employees are entitled to a parking space. Therefore, a hearing is warranted in order to resolve these facts. In view of the above, we deny the Union's Motion for Preliminary Relief.

²D.C. Code § 1-617.04(a)(1) (2001).

Motion for Preliminary Relief
PERB Case No. 07-U-03
Page 5

For the reasons stated above, the Board denies the Complainant's request for preliminary relief and directs the development of a factual record through an unfair labor practice hearing.¹

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

January 11, 2007

¹ See Decision and Order dated December 20, 2006, denying the Complainant's Motion, attached.

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 2

**Union's Position on the Amendment at D.C. Official Code § 1-617.08(a-1)
(Supp. 2005)**

The Union asserts that “[i]n drafting proposals for this current round of collective bargaining, the Union was guided by the subjects the parties had negotiated in their 1989 and 1992 negotiations. Also, the Union notes that it patterned several proposals based on subjects found in the International Association of Firefighters (IAFF) Local 36, 2004 collective bargaining agreement and that OLR CB represented the agency in negotiations for that agreement as well as the current agreement. (See Reply to Negotiability Appeal, “Reply” at p. 3).

The Union argues that the proposals which OLR CB finds objectionable are based on proposals that have been previously discussed and agreed to during previous negotiations. Therefore, the Union asserts that OLR CB’s position that the proposals are illegal, is inconsistent with its prior conduct. In addition, the Union maintains that OLR CB’s position is inconsistent with District law, which allows for permissive subjects of bargaining. (See Reply at p. 4).

The Union asserts that the Comprehensive Merit Personnel Act (“CMPA”) has always contained the following language at D.C. Code § 1-617.08(b): “all matters shall be deemed negotiable except those that are proscribed by this subchapter.” Further, the Board “has interpreted the CMPA as creating three distinct subjects of bargaining, ‘mandatory’, ‘permissive’ and ‘illegal’. A mandatory subject is one over which the parties must bargain; permissive subjects are those over which the parties may bargain and illegal subjects are those over which the parties may not bargain. See *D.C. Public Schools and Teamsters Local 639 and 730*, 38 DCR 2487, PERB Case No. 91-N-01 (1991)”. (Reply at p. 3). The Union further cites *Teamsters Local 639 v. District of Columbia et al.*, 631 A.2d 1205 at pgs. 1208, 1211 (D.C. 1993), noting that the D.C. Court of Appeals upheld the Board’s finding that various bargaining proposals did not violate the CMPA and were permissive subjects of bargaining.² (See Reply at p. 4).

With regard to the amendment to the CMPA, the Union asserts that OLR CB’s legislative agenda included “two distinct attacks on the rights of employees: . . . [1] eliminating permissive subjects of collective bargaining; and [2] expanding subjects of collective bargaining the are proscribed by statute.” (Reply at p. 5). However, the City Council did not adopt the sweeping legislative proposals. . . .” (Reply at p.7). The Union contends, therefore, that “the very issues [OLR CB] now declares as nonnegotiable, [and over which] it has negotiated [in the past] . . . were not then and are not now proscribed. . . . Indeed, . . . the current state of the law must be that any subject that is not proscribed, such as subjects the parties have bargained over in the past, must be mandatory. See § 1-617.08(b).” (Reply at p. 8).

² The Union states that “[t]he issues in dispute [in that case] involved: (1) grievance procedures; (2) safety and health; (3) inclement weather work; (4) protection of rights; (5) work force changes; (6) hours of work for cafeteria managers; (7) hours of work for cafeteria workers; (8) hours of work for former eight-hour workers; and (9) holidays. 631 A.2d at 1208.” (Reply at p. 4).

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 3

The Union concludes that "in light of the City Council's refusal to adopt OLRCB's expansion of those subjects of bargaining that can be classified as 'proscribed,' any argument for nonnegotiability premised upon the allegation that negotiation over an issue would 'interfere with the exercise of a management right' simply has no credence. Rather, [the Union contends that] the appropriate inquiry as to [the negotiability of] each subject matter in dispute is: when the OLRCB negotiated over the issue or subject matter in the past, was such an issue a mandatory or permissive subject of collective bargaining." (Reply at p. 8).

The Agency's Position on the Amendment at D.C. Official Code § 1-617.08(a-1)
(Supp. 2005)

The Agency counters in its Response to the Union's Reply to the Negotiability Appeal ("Opposition") that the Supreme Court in *Allied Chemical & Alkali Worker, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), settled the issue of whether parties are bound by past practice to continue to bargain over permissive subjects. The Court stated that, "[b]y once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining." The Agency concludes, therefore, that "a party cannot be forced to negotiate a permissive subject of bargaining. The fact that an entity has negotiated regarding a subject in a former round of bargaining is irrelevant. In new negotiations, the Agency can declare that it will not engage in negotiations regarding permissive subjects of bargaining." (Opposition at p. 4). Further, the Agency asserts that the Board's precedent supports this position. Citing *inter alia*, *International Association of Firefighters and D.C. Fire Department*, 35 DCR 118; Slip Op. No. 167; PERB Case No. 87-N-01 (1987).

Regarding the amendment to the CMPA, the Agency notes that D.C. Code § 1-617.08(a-1) (Supp. 2005) renders any agreement that infringes on management rights void. As a result, the Agency claims that, regardless of past practice, it cannot bargain regarding the subjects proscribed by D.C. Code § 1-617.08(a). Further, the Agency notes that prior to the statute's amendment, an agency could choose to bargain regarding these subjects because, at the time, the Board recognized the doctrine of permissive bargaining. However, the Agency claims that the amendment has abolished the permissive category of bargaining subjects, concluding that "an agency cannot bargain away the management rights reserved [by statute] nor could any agreement in which it did so be enforced." (Opposition at p. 5).

The Agency contends that even before the statutory amendment to the CMPA, the Board and the courts had repeatedly ruled that various issues were nonnegotiable or not mandatory.³ The Agency maintains that the amendment to the CMPA "abolished the permissive category of

³ Including, for example: (1) basic work week; (2) promotions; (3) voluntary and involuntary assignment and transfer of employees; (4) reductions in force; (5) agency's right to evaluate employee's performance; (6) decision to discipline; (7) establishment of drug testing programs; and (8) staffing. (See Opposition at p. 6).

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 4

bargaining [and] this could only have affected management rights, since bargaining regarding all other subjects is mandatory by [statute]. . . . As a result, any subject of bargaining formerly held to be permissive is now prohibited by statute regardless of past practice [and] [t]he Agency cannot bargain regarding these issues." (Opposition at p. 7).

II. Discussion Re: 2005 Amendment to the CMPA: D.C. Code § 1-617.08(a-1)

This case represents one of the first negotiability appeals considered by the Board after the April 2005 amendment to the CMPA found at D.C. Code § 1-617.08(a-1) (Supp. 2005). Therefore, it is appropriate to review our prior holdings under the CMPA and consider what impact, if any, the 2005 amendment has on the instant negotiability appeal.

When considering a negotiability appeal, the Board has adopted certain principles concerning: (1) mandatory, (2) permissive; and (3) illegal subjects of bargaining. In *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982), the Board stated as follows:

It is a critical question in collective bargaining whether particular contract proposals are to be considered (i) mandatory, (ii) permissive, or (iii) illegal subjects of bargaining. The U.S. Supreme Court established and defined in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342 (1975), these three categories of bargaining subjects as follows: mandatory subjects over which the parties must bargain; permissive subjects over which the parties may bargain; and illegal subjects over which the parties may not legally bargain. The court held further that mandatory subjects are those which are determined to be within the scope of wages, hours and terms and conditions of employment and that the parties may bargain on these subjects to the point of impasse. Bargaining on permissive subjects, however, was held to be discretionary and neither party is required to negotiate in good faith to agreement or impasse. . . ."

The CMPA at D.C. Code § 1-617.08(a) (2001 ed.), defines management rights as follows:

(a) The respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations:

- (1) To direct employees of the agencies;
- (2) To hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 5

- action against employees for cause;
- (3) To relieve employees of duties because of lack of work or other legitimate reasons;
 - (4) To maintain the efficiency of the district government operations entrusted to them;
 - (5) To determine:
 - (A) The mission of the agency, its budget, its organization, the number of employees,⁴
 - (B) The number, types, and grades of positions of employees assigned to an agency's organizational unit, work project, or tour of duty;
 - (C) The technology of performing the agency's work; and
 - (D) The agency's internal security practices; and
 - (6) To take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

Regarding the issue of negotiability, D.C. Code § 1-617.08(b) provides in pertinent part as follows:

- (b) All matters shall be deemed negotiable except those that are proscribed by this subchapter. . . .

A reading of the CMPA prior to 2005, reveals nothing in the statute that specifically proscribes or prohibits bargaining over the management rights listed in D.C. Code § 1-617.08(a) (2001 ed). Therefore, the Board has held that:

D.C. Code § 1-61[7].08(b), which provides that "[a]ll matters shall

⁴ *And to establish the tour of duty; [new language in 2005].*

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 6

be deemed negotiable except those that are proscribed by this subchapter”, establishes a presumption of negotiability.⁵ While [the Board] start[s] with this presumption, we have stated that in view of specific rights reserved solely to management under this same provision, i.e., D.C. Code § 1-617.08(a), ‘the Board must be careful in assessing proffered broad interpretations of either subsection (a) or (b)’.⁶ Notwithstanding the rights reserved to management, a limited right to bargain nevertheless exists with respect to matters concerning the exercise of management rights, i.e., its impact and effect on terms and conditions of employment, and procedures concerning how these right are implemented.⁷ (Citation omitted) We are mindful of these competing statutory rights and interests as we consider the negotiability of the proposals that are the subject of this appeal.” (emphasis added) *Washington Teachers’ Union and District of Columbia Public Schools*, Slip Op. No 450 at p. 4, PERB Case No. 94-N-01 (1995).

Further, the Board has acknowledged that by electing to bargain over the management rights listed in the statute, management was making these subjects *permissive* subjects of bargaining. See *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982).

When bargaining over a successor agreement in cases where management had previously bargained over a management right, labor organizations have argued that a matter which is designated a management right was rendered negotiable because the parties had previously bargained over it. We have routinely rejected this argument and found that although the parties had previously bargained over a management right, the management right reverted back to management after the collective bargaining agreement expired.⁸ Nonetheless, in *Washington Teachers’ Union and District of Columbia Public Schools*,⁹ and *International Brotherhood of Police Officers, Local*

⁵ *International Association of Firefighters, Local 36 and D.C. Fire Department*, 35 DCR 118, Slip Op. No. 167, PERB Case No. 87-N-01 (1988).

⁶ *Teamsters Local Union. No. 639 and 730, a/w IBTCWHA, AFL-CIO and D.C. Public Schools*, 38 DCR 1586, Slip Op. No. 263, at 2-3, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1991).

⁷ *Id.*

⁸ See *Washington Teachers’ Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 8, PERB Case No. 95-N-01 (1995).

⁹ *Id.*, at p. 9.

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 7

No. 445, *AFL-CIO v. District of Columbia Department of Administrative Services*,¹⁰ the Board also held that when “there is a close question of whether or not a particular matter is a proper subject of bargaining, ‘it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures’.”¹¹ However, the new amendment to the CMPA impacts on this finding.

On April 13, 2005, the CMPA was amended at D.C. Code § 1-617.08(a-1) (Supp. 2005). The following language was added at subsection (a-1):

(a-1) An act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section. (emphasis added)

The Board will now consider the impact of the 2005 Amendment. The Board notes that at first glance, the above amendment could mean that the management rights found in D.C. Code § 1-617.08(a) may no longer be a subject of permissive bargaining. However, it could also be interpreted to mean that the rights found in § 1-617.08(a) may be subject to permissive bargaining, if such bargaining is not considered as a permanent waiver of that management right or any other management right. As a result, we believe that the language contained in the statute is ambiguous and unclear. Therefore, in order to determine the intent of the City Council, the Board reviewed the legislative history of the 2005 amendment.

¹⁰ 43 DCR 1484, Slip Op. No. 401 at n.3, PERB Case No. 94-U-13 (1994).

¹¹ Citing, *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 2977, Slip Op. No. 43 at 3, PERB Case No. 82-N-01 (1982), where the Board considered “the close relationship of whatever is meant by ‘workload’ to ‘hours of work’ and ‘work scheduling’ in light of the D.C. Code § 1-613.1(a)(2) (1981), and found that “where there is a close question regarding a particular issue and the statutory dictate is unclear, it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures”. Therefore, the Board looked at the prior bargaining history of the parties and found that the ‘workload’ concerned ‘basic work scheduling’ (not ‘basic work week’), and was therefore negotiable.

Also, in *IBPO, Local 445 and D.C. Dept. of Administrative Services*, 43 DCR 1484, Slip Op. No. 401 at p. 3, PERB Case No. 94-U-13 (1994), the Board stated at p. 3 that “when there is a close question of whether or not a particular matter is a proper subject of bargaining, ‘it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures’.” Citing *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 2977, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982) and *International Association of Firefighters, Local 6 and D.C. Fire Department*, 35 DCR 118, Slip Op. 167, PERB Case No. 87-N-01 (1988).

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 8

The Board notes that the section-by-section analysis prepared by the Subcommittee on Public Interest, chaired by Councilmember Mendelson, states as follows:

Section 2(b) also protects management rights generally by providing that no "act, exercise, or agreement" by management will constitute a more general waiver of a management right. *This new paragraph should not be construed as enabling management to repudiate any agreement it has, or chooses, to make. Rather, this paragraph recognizes that a right could be negotiated. However, if management chooses not to reserve a right when bargaining, that should not be construed as a waiver of all rights, or of any particular right at some other point when bargaining.* (emphasis added).

In view of the above, the Board makes the following observations regarding management rights under the 2005 amendment:

- (1) if management has waived a management right in the *past* (by bargaining over that right) this does not mean that it has waived that right (or any other management right) in any subsequent negotiations;
- (2) management may not repudiate any previous agreement concerning management rights during the term of the agreement;
- (3) nothing in the statute prevents management from bargaining over management rights listed in the statute if it so chooses; and
- (4) if management waives a management right *currently* by bargaining over it, this does not mean that it has waived that right (or any other management right) in future negotiations.

The Board finds that D.C. Code § 1-617.08(a-1) (Supp. 2005), as clarified by the legislative history, does nothing more than codify the Board's prior holdings with respect to management rights being permissive subjects of bargaining.

However, under D.C. Code § 1-617.08(a-1) (Supp. 2005), the Board may no longer rely on the bargaining history of the parties in determining the negotiability of an issue "when there is a close question of whether or not a particular matter is a proper subject of bargaining." (See n. 11, above). This is based on the fact that the 2005 amendment provides that "an act, exercise or

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 9

agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section." D.C. Code § 1-617.08(a-1) (Supp. 2005).

The Union's proposals in the Last Best Final Offer are set forth below. The proposals are followed by the: (1) Agency's arguments in support of nonnegotiability; (2) Union's argument in support of negotiability; and (3) Board's determination. Some of the text in the Union's proposals has been highlighted in order to provide more clarity as to the exact language at issue.

ARTICLE V

Section D. *When a bargaining unit employee's excessive absenteeism or performance deficiencies are suspected to be due to alcoholism, drug abuse or an emotional disorder, the Department shall refer the employee, in writing, to a counseling or treatment program. If the employee accepts the Department's referral and participates in the counseling or treatment program, the Department WILL give the employee a reasonable period of time after completion of the treatment program to recover and to improve his or her performance and/or attendance.*

District of Columbia Fire and Emergency Medical Services Department: The Agency asserts that this proposal is nonnegotiable arguing that it is contrary to the provisions of D.C. Code § 1-617.08(a) and (a-1) of the CMPA. Specifically, this proposal violates § 1-617.08(a)(2); § 1-617.08(a)(5)(C); § 1-617.08(a)(5)(D); and § 1-617.08(a-1). The Agency argues that the Union's proposal requires the Agency to provide an employee "a reasonable period of time after completion of the treatment program to recover and to improve his or her performance and/or attendance" in all circumstances. There is no exception made for egregious conduct warranting summary discipline, including termination. As a result, the Agency maintains that the language would interfere with the Agency's ability to determine discipline and establish and maintain its own security practices as required by § 1-617.08(a).

Further, the Agency further contends that the Union seeks to bind the Agency regarding the technology employed in performing its work by requiring that the notices be either "written" or "in writing." Section 1-617.05(a)(5)(C) grants management the sole right to determine the technology of performing its work. The Agency contends that management has the authority to determine the technology employed to carry out its human resource functions such as providing employees notice via telephone, e-mail, in person, or in writing. (See Appeal at p. 4).

American Federation of Government Employees, Local 3721: The Union argues that the language of this proposal that OLRCB finds objectionable comes from language that was discussed and agreed upon by the parties during their 1992 negotiations. Therefore, the Union asserts that OLRCB's position that the proposal is illegal - is inconsistent with its prior conduct. In addition, the Union claims that the OLRCB's position is inconsistent with District law, which allows for

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 10

permissive subjects of bargaining. (See Reply at pgs. 5-9). Therefore, the Union maintains that its proposal is negotiable.

The Board: The Board finds that Article V, Section D is **non-negotiable** because it requires the Agency to allow an insulated "period of time . . . to recover and improve performance and attendance" without safeguards allowing management to exercise its right to discipline employees for cause. Regarding the Union's argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section." Thus, Article V, Section D is nonnegotiable.

ARTICLE V

Section E. *If the employee refuses to seek counseling and/or there is not an adequate improvement in work performance and/or attendance, as determined by the supervisor, disciplinary action or appropriate administrative action shall be initiated as warranted. Employees accepting direct referral in appropriate circumstances WILL be provided reasonable time prior to adverse action being taken to improve work performance and/or complete the requirements of the employee consultation and counseling service.*

District of Columbia Fire and Emergency Medical Services Department: The Agency argues that the Union seeks to bind the Agency, in all circumstances, to "provide reasonable time prior to adverse action being taken to improve work performance and/or complete the requirements of the employee consultation and counseling service," for all "[e]mployees accepting direct referral in appropriate circumstances." Such language provides no exceptions for egregious conduct that warrants summary discipline including termination. As a result, the language would interfere with the Agency's ability to determine discipline and establish and maintain its own security practices as required by D.C. Code § 1-617.08(a). (See Appeal at p. 4).

American Federation of Government Employees, Local 3721: The Union counters that the language of the proposals that OLRCB finds objectionable comes from language that was discussed and agreed upon during their 1992 negotiations. Therefore, the Union asserts that OLRCB's position that the proposals are illegal - is inconsistent with its prior conduct. In addition, the Union claims that the OLRCB's position is inconsistent with District law, which allows for permissive subjects of bargaining. (See "Reply" at pgs. 5-9). Therefore, the Union maintains that its proposal is negotiable.

The Board: The Board finds that Article V, Section E is **nonnegotiable** because it *requires* management to allow an insulated "period of time . . . to recover and improve performance and attendance" and contains no safeguards allowing management to exercise its right to discipline

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 11

employees for cause at all times. Regarding the Union's argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section". Thus, Article V, Section E is nonnegotiable.

ARTICLE V

Section H. *The Department shall give written referrals to the D.C. Employee Assistance Program to an employee who is experiencing personal problems which are causing an adverse affect on his/her job performance and/or attendance when such a referral is requested.*

If the employee accepts the Department's referral and participates in the Program, the Department WILL give the employee a reasonable opportunity to improve his/her performance and/or attendance. The Department may initiate disciplinary action against the employee for cause in accordance with Article [intentionally left blank] of this Agreement and applicable D.C. laws and regulations.

District of Columbia Fire and Emergency Medical Services Department: The Agency asserts that the Union seeks to require that the Agency, in all circumstances, "give the employee a reasonable opportunity to improve his/her performance and/or attendance" if "the employee accepts the Department's referral and participates in the [treatment] Program." Such language provides no exceptions for egregious conduct that warrants summary discipline including termination. As a result, the language would interfere with the Agency's ability to determine discipline and establish and maintain its own security practices as required by D.C. Code § 1-617.08(a).

The Agency further asserts that the Union seeks to bind the Agency regarding the technology employed in performing its work by requiring that the notices be either "written" or "in writing." D.C. Code § 1-617.05(a) (5) (C) grants management the sole right to determine the technology of performing its work. Management claims that it has the statutory authority to determine the technology employed to carry out its human resource functions, such as providing notice to employees via telephone, e-mail, in person, or in writing. (See Appeal at pgs. 4-5).

American Federation of Government Employees, Local 3721: The Union argues that the language of the proposals that OLR CB finds objectionable on this topic comes from language that was discussed and agreed to by the parties during prior negotiations (1992). Therefore, the Union asserts that OLR CB's position that the proposal is illegal - is inconsistent with its conduct in prior negotiations. In addition, the Union claims that OLR CB's position is inconsistent with District law, which allows for permissive subjects of bargaining. (See Reply at pgs. 5-9). Therefore, the Union maintains that the above proposal is negotiable.

Decision and Order on Negotiability Appeal
PERB Case No. 06-N-01
Page 12

The Board: The Board finds that Article V, Section H is negotiable because it addresses a procedure for referring employees to a treatment program allowing for a recovery period. It does not infringe on management's right to discipline for cause within the described period of time. While the proposal allows for "a reasonable opportunity to improve", it clearly states that management may discipline the employee for cause.

Management's argument that it has the sole right to determine its technology stretches the meaning of that right. The statute reserves to management the right to determine the "technology of performing the agency's work." Here, the parties are merely negotiating a procedure for giving a notice to an employee.

ARTICLE VI

Section C – Annual Leave. *To contribute to overall work efficiency and to enable approval of leave to the employee's convenience, annual leave shall be requested at least twenty-four (24) hours in advance by employees on form SF-71, "Application for Leave", from their immediate supervisor. The Employer agrees to provide each employee in the bargaining unit an opportunity to use all accrued annual leave. Denial of the use of annual leave will be based on factors which are reasonable and equitable. The supervisor will notify the employee of the disposition of his/her request as soon as possible. The supervisor will not cancel or reschedule leave previously approved except for emergency reasons. The reasons for such action will be explained to the employee.*

District of Columbia Fire and Emergency Medical Services Department: The Agency asserts that Section C is nonnegotiable because this section interferes with management's rights under D.C. Official Code § 1-617.08 (2001 ed.). D.C. Code § 1-617.08(a)(1) gives the agency the right to *direct* employees of the Agency. Section 1-617.08(a)(2) gives management the right to *assign* employees of the Agency. Section 1-617.08(a)(4) gives management the right "to maintain the efficiency of the District Government operations entrusted to [it]." (Appeal at p. 5). Each of these provisions indicates that management has the right to refuse to approve, or cancel approved leave, depending on the demands of the Agency. The Union, however, seeks to bind the Agency to a provision that insures that such leave will be granted in all cases barring emergency.

American Federation of Government Employees, Local 3721: The Union maintains that in crafting this proposal it was guided by what subjects OLRCB has negotiated in the past with the Union itself as well as other unions. The proposal at issue is word for word from a proposal that was discussed and agreed to by OLRCB in the 1992 negotiations. Furthermore, the Union claims that "the statutory language describing what subjects of bargaining were proscribed in 1992 is no different today, after the amendment to D.C. Code § 1-617.08 (Supp. 2005)." (Reply at pgs. 10-11). The Union asserts that these subjects are not proscribed by statute and there can be no interference with management rights. Therefore, the Union concludes that this proposal is negotiable.