

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:)
)

American Federation of Government Employees,)
Local 1403, AFL-CIO,)

Labor Organization,)

and)

District of Columbia Government,)

Respondent.)
)
)
)

PERB Case No. 05-CU-02
Opinion No. 806

FOR PUBLICATION

DECISION AND ORDER ON COMPENSATION UNIT DETERMINATION

I. Statement of the Case:

In Slip Op. No. 743, the Public Employee Relations Board ("Board"), determined that a city-wide unit consisting of all subordinate agency attorneys, was an appropriate unit.¹ As a result, the

¹ In Slip Op. No. 743 (PERB Case No. 02-RC-06) the Board noted that the multi-agency unit consists of "all attorneys within the Legal Service who come within the personnel authority of the Mayor . . . excluding attorneys employed exclusively by [either] the Office of the Corporation Counsel [or by the Public Service Commission] . . . [However, the city-wide multi-agency unit would include attorneys at the following subordinate agencies:] . . . Department of Consumer and Regulatory Affairs; the Office of Cable Television and Telecommunications; Department of Corrections; Department of Health; Department of Employment Services; Department of Public Works; Department of Insurance and Securities Regulation; Department of Human Services; Office of Contracts and Procurement; Office of Banking and Financial Institutions; Office of the Chief Medical Examiner; Alcoholic Beverage Regulation Administration, and the Department of Parks and Recreation." Slip Op. at n. 2. All of the attorneys in this city-wide unit are assigned to the General Counsels' offices of the various subordinate agencies; however, these still report to

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Board directed that an election be held. Subsequently, on April 19, 2005 the Board certified the American Federation of Government Employees ("AFGE"), Local 1403, as the exclusive representative for the following unit:

All attorneys within the Legal Service who come within the personnel authority of the Mayor of the District of Columbia, excluding attorneys employed exclusively by the Office of the Attorney General for the District of Columbia (formerly the Office of the Corporation Counsel), management officials, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

On April 25, 2005, AFGE, Local 1403 and the Office of Labor Relations and Collective Bargaining ("OLRCB"), filed a "Joint Petition for Compensation Unit Determination" ("Petition").² AFGE and OLRCB are seeking a determination of the appropriate unit for the purpose of negotiations for compensation, for the city-wide unit of subordinate agency attorneys. Notices concerning the Petition were issued in June 2005. These Notices were posted at the various agencies where these attorneys are employed. The Notices solicited comments concerning the appropriate compensation unit placement for this unit of employees. The Notices required that comments be filed in the Board's office no later than July 25, 2005. OLRCB confirmed that the Notices had been posted.

The parties' Petition is before the Board for disposition.

the Office of the Attorney General (formally the Office of the Corporation Counsel).

² Labor organizations are initially certified by the Board under the Comprehensive Merit Personnel Act ("CMPA") to represent units of employees that have been determined to be appropriate for purpose of non-compensation terms-and-conditions bargaining. Once this determination is made, the Board then determines the compensation unit in which these employees should be placed. Unlike the determination of a terms-and-conditions unit, which is governed by criteria set forth under D.C. Code § 1-617.09 (2001 ed.), unit placement for the purpose of authorizing collective bargaining over compensation is governed by D.C. Code § 1-617.16(b) (2001 ed.).

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II. Discussion

AFGE and OLRCB are seeking a determination of an appropriate unit for the purpose of negotiations for compensation, for a city-wide unit of subordinate agency attorneys.

In their Petition, both AFGE and OLRCB assert that the appropriate placement for compensation negotiations for this unit of employees is Compensation Unit No. 33.³ Specifically, the parties contend that the appropriate compensation unit should be a broad occupational group encompassing all attorneys employed pursuant to the Legal Services Establishment Act of 1998 ("Legal Services Establishment Act"), regardless of where in the District government they are employed. Furthermore, they claim that one of the bases for this argument is the uniqueness of this compensation unit. Finally, OLRCB and AFGE argue that Compensation Unit 33 is a "broad occupational group" and by placing the city-wide unit of subordinate agency attorneys in this unit, it will minimize the number of the pay systems for attorneys employed pursuant to the Legal Services Establishment Act. In view of above, OLRCB and AFGE propose that the following unit is the most appropriate unit for the purpose of negotiations for compensation pursuant to D.C. Code § 1-617.16 (2001 ed.):

All attorneys within the legal service who come within the personnel authority of the Mayor of the District of Columbia and who are currently represented by labor organizations certified as exclusive bargaining agents for non-compensation bargaining by the Public Employee Relations Board.

The standard under D.C. Code § 1-617.16(b) (2001 ed.) for determining the appropriate compensation unit expresses a strong preference for "broad units of occupational groups". Specifically, D.C. Code § 1-617.16 (b) (2001 ed.) provides in pertinent part as follows.

³ The description for Compensation Unit No. 33 is as follows:

All attorneys within the legal service who come within the personnel authority of the Mayor of the District of Columbia and who are currently represented by labor organizations certified as exclusive bargaining agents for non-compensation bargaining by the Public Employee Relations Board. Slip Op. No. 694, PERB Case No. 02-CU-01 (2002).

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In determining appropriate bargaining units for negotiations concerning compensation, the Board shall authorize broad units of occupational groups so as to minimize the number of different pay systems or schemes. The Board may authorize bargaining by multiple employers or employee groups as may be appropriate.

Furthermore, the Board has observed that D.C. Code § 1-617.16(b) (2001 ed.) has established the following two part test to determine an appropriate compensation unit:

- I. The employees of the proposed unit comprise broad occupational groups; and
- II. The proposed unit minimizes the number of different pay systems or schemes.

We believe that the first prong of the test is met by the proposed compensation unit, since AFGE, Local 1403, is seeking that the city-wide unit of subordinate agency attorneys be placed in an existing compensation unit comprised of a group of attorneys employed by the office of the Attorney General who possess certain general skills, are in classification DS-0905 and in grades 11-15. In addition, these attorneys are paid pursuant to the same unique compensation system that is used to pay the other attorneys who are currently in Compensation Unit No. 33.

The second prong of the test is also fulfilled. Simply put, a smaller number of compensation bargaining units would ultimately result in a smaller number of pay systems.

For the above-noted reasons, we find that placing the city-wide unit of all subordinate agency attorneys in Compensation Unit No. 33 effectuates the policies of the Comprehensive Merit Personnel Act of 1978. Therefore, we conclude that placing these employees in the unit set forth below is appropriate for collective bargaining over compensation:

All attorneys within the legal service who come within the personnel authority of the Mayor of the District of Columbia and who are currently represented by labor organizations certified as exclusive bargaining agents for non-compensation bargaining by the Public Employee Relations Board.

ORDER

IT IS HEREBY ORDERED THAT:

The unit of attorneys found appropriate for terms-and-conditions bargaining in Slip Opinion No. 743, is also authorized to be placed in the existing Compensation Unit No. 33 for the purpose of negotiations concerning compensation as follows:

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Compensation Unit No. 33

All attorneys within the legal service who come within the personnel authority of the Mayor of the District of Columbia and who are currently represented by labor organizations certified as exclusive bargaining agents for non-compensation bargaining by the Public Employee Relations Board.

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

August 12, 2005

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

 In the matter of:)
)
 American Federation of Government)
 Employees, Local 1403, AFL-CIO,)
)
 Labor Organization,)
)
 and)
)
 District of Columbia Government,)
)
 Agency.)

PERB Case No. 05-CU-02
Opinion No. 806

AMENDED AUTHORIZATION¹

Pursuant to the District of Columbia Merit Personnel Act of 1978, as codified in D.C. Code Sections 1-605.02 (2001 ed.) and 1-617.16 (b) (2001 ed.), the Public Employee Relations Board (Board) has determined that the Compensation Unit described below, which the Board has determined appropriate in Slip Opinion No. 694 issued October 30, 2002, shall be amended to include the city-wide unit of all subordinate agency attorneys. The city-wide unit of subordinate agency attorneys was found appropriate by the Board for non-compensation bargaining in Slip Opinion No. 743 issued on August 12, 2005. In light of the above, the two units found appropriate for non-compensation in Slip Opinion Numbers 694 and 743, shall therefore constitute a unit for the purpose of compensation bargaining:

¹ As amended, Compensation Unit 33 consists of "all attorneys within the Legal Service who come within the personnel authority of the Mayor" including attorneys employed exclusively by the Office of the Attorney General (formally the Office of the Corporation Counsel). In addition, the unit includes attorneys at the following subordinate agencies: Department of Consumer and Regulatory Affairs; the Office of Cable Television and Telecommunications; Department of Corrections; Department of Health; Department of Employment Services; Department of Public Works; Department of Insurance and Securities Regulation; Department of Human Services; Office of Contracts and Procurement; Office of Banking and Financial Institutions; Office of the Chief Medical Examiner; Alcoholic Beverage Regulation Administration, and the Department of Parks and Recreation. However, the attorneys employed by the Public Service Commission are excluded from this Compensation Unit.

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Compensation Unit No. 33:

All attorneys within the legal service who come within the personnel authority of the Mayor of the District of Columbia and who are currently represented by labor organizations certified as exclusive bargaining agents for non-compensation bargaining by the Public Employee Relations Board.

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

Julio A. Castillo
Executive Director

August 12, 2005

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
)	
District of Columbia Water and Sewer Authority,)	
)	
Complainant,	)	PERB Case No. 05-U-10
)	
v.	)	Opinion No. 807
)	
American Federation of Government Employees, Local 872,	)	MOTION FOR CONTINUANCE
)	
Respondent.	)	FOR PUBLICATION
)	
_____)	

DECISION AND ORDER

The District of Columbia Water and Sewer Authority ("Complainant" or "WASA"), filed a document styled "Unfair Labor Practice Complaint and a Motion for Preliminary Relief" in the above-referenced case. In addition, WASA filed a second document styled "Amended Unfair Labor Practice Complaint and Motion for Preliminary Relief." The Complainant alleges that the American Federation of Government Employees, Local 872 ("Union", "Respondent" or "Local 872"), has violated D.C. Code § 1-617.04(b)(1) and (3) (2001 ed.) by failing to pay arbitration fees for those cases that it loses, effectively cancelling the grievance resolution process in the parties' collective bargaining agreement ("CBA"). The Complainant requests that the Board: (1) grant its request for preliminary relief; (2) order the Respondent to cease and desist from failing to bargain; (3) order the Respondent to pay its share of all outstanding arbitration costs; and (4) order a make whole remedy.

The Union filed an answer denying the allegations. In addition, the Respondent filed a Verified Opposition to the Motion for Preliminary Relief. In its Opposition, the Union claims that all the arbitration bills that formed the basis of the original complaint have been paid. Therefore, the Union argues that the Complainant has not demonstrated that preliminary relief is warranted.

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In Slip Op. No. 801, the Board denied the Complainant's request for Preliminary Relief. In addition, paragraphs 3-6 of the Board's Order provide as follows:

* * *

(3) [That] the Board's Executive Director shall refer the unfair labor practice complaint to a Hearing Examiner and schedule a hearing under the expedited schedule set forth below.

(4) [That] a hearing shall be held in this case before August 29, 2005. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

(5) [That] following the hearing, the designated Hearing Examiner shall submit a report and recommendation to the Board no later than twenty-one (21) days following the conclusion of closing arguments or submission of the parties' post-hearing briefs.

(6) [That] the parties may file exceptions and briefs in support of the exceptions no later than seven (7) days after service of the Hearing Examiner's Report and Recommendation. A response or opposition to the exceptions may be filed no later than five (5) days after service of the exceptions.

* * *

Pursuant to paragraph three (3) of the Board's Order, a hearing was to be held before August 29, 2005. However, on August 3, 2005, the Respondent filed a document styled "Respondent's Unopposed Motion to Postpone the Hearing Ordered by the Board in its Decision of July 29, 2005."

In their motion, the Respondent claims that the individual who is responsible for this case is not available to participate in any hearing which is scheduled before August 29, 2005. As a result, the Respondent is requesting that the hearing in this case not be scheduled until after September 23, 2005. The Respondent's attorney claims that she contacted WASA's attorney and was informed that WASA does not object to the postponement.

After reviewing the Respondent's request for a continuance, we have concluded that the reasons noted in support of the request, are reasonable. In addition, the Complainant has not filed an objection to the Respondent's Motion for a Continuance. Therefore, we are granting the Respondent's request for a continuance. As a result, we are directing that the hearing in this case be scheduled the week of September 26, 2005.

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For the reasons discussed above, the Board: (1) grants the Respondent's request for a continuance; and (2) directs the development of a factual record through an unfair labor practice hearing which will be scheduled the week of September 26, 2005.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Respondent's Motion for a Continuance is granted.
- (2) The Board's Executive Director shall refer the unfair labor practice complaint to a Hearing Examiner and schedule a hearing under the expedited schedule set forth below.
- (3) A hearing shall be scheduled the week of September 26, 2005. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
- (4) Following the hearing, the designated Hearing Examiner shall submit a report and recommendation to the Board no later than twenty-one (21) days following the submission of written closing arguments or post-hearing briefs.
- (6) Parties may file exceptions and briefs in support of the exceptions no later than seven (7) days after service of the Hearing Examiner's Report and Recommendation. A response or opposition to the exceptions may be filed no later than five (5) days after service of the exceptions.
- (7) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

August 12, 2005

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 Ariel Mannes),)
)
 Respondent.)

PERB Case No. 04-A-23

Opinion No. 808

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 Ariel Mannes ("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.).

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II. Discussion:

By letter dated April 3, 2003, MPD notified the Grievant that it was proposing his termination for conduct unbecoming an officer. Specifically, MPD alleged that the Grievant obtained vehicle ownership information on Jason Cherkis from the Washington Area Law Enforcement System ("WALEs") without a legitimate law enforcement purpose, and then posted that information on an internet website with the suggestion that other MPD officers target the individual for law enforcement. The April 3rd letter advised the Grievant that if he desired a departmental hearing, one would be scheduled for May 29, 2003. The Grievant elected to have a hearing, which initially was convened on May 29th and then continued to June 11th. The Grievant testified at the hearing; however, before any other witnesses were heard, the Grievant pled guilty to all charges. (See Award at pgs. 2-3). On July 5, 2003, the hearing panel issued its findings accepting the Grievant's guilty pleas and unanimously recommending the Grievant's termination from the MPD. (See Award at p. 3). On August 5, 2003, MPD informed the Grievant of the final decision to terminate his employment, effective September 5, 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 was notified of the charges. (See Award at p. 7). 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. 4). FOP argued "that [the] Grievant was notified of the charges on April 4, 2003, but was not served with the final decision until August 5, [2003.]" (Award at p. 7). FOP claimed that this delay was in violation of the parties' CBA; therefore, 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).

MPD countered that the termination was appropriate because of the seriousness of the Grievant's offenses. (See Award at p. 8). Also, MPD claimed that it complied with the fifty-five day rule and that at no time prior to the arbitration did the Grievant raise the issue of an alleged violation of the fifty-five day rule. (See Award at p. 10). Finally, MPD asserted that even if a violation of the fifty-five day rule occurred, it was harmless error.

In an Award issued on August 9, 2004, Arbitrator Barry Shapiro 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. 13). Specifically, Arbitrator Shapiro noted the following:

[The] Grievant declared his wish for a hearing on April 4. Under the 55-day rule, a final decision on the proposal to terminate him would

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have been due on May 29. The hearing was continued with [the] Grievant's agreement until June 11. Under Article 12 Section 6 . . . the time taken up by the continuance automatically extended the date by which the final decision was due to June 11. Even if the two days of the hearing are excluded from the 55-day count, the decision would have been due on June 13. At the conclusion of the hearing the MPD was not yet in violation of the 55-day rule, and neither [the] Grievant or the Union was under any obligation to remind the MPD of the rapidly approaching deadline. (Award at pgs. 12-13).

In view of the above, the Arbitrator found that when the Adverse Action Panel issued their recommendation on August 2003, MPD was in violation of Article 12, Section 6 of the parties' CBA. 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:

In the instant matter, [the Grievant] was served with the Notice of Adverse Action on April 4, 2003. At that time, he responded with a letter requesting a hearing, thereby consenting to the hearing set by [MPD] for May 29, 2003. . . . Thereafter, on May 29, 2003, [the] Grievant appeared at the hearing with legal counsel and entered a guilty plea. . . . At no time prior to the commencement of the hearing did [the] Grievant raise the issue of timeliness and the fifty-five (55) day time provision of the Agreement. The hearing was concluded on June 11, 2003, after [the] Grievant entered a guilty plea. . . . [The] Grievant's participation, without objection, in the trial board proceeding constituted acquiescence to the timeliness of the hearing. Fifty-five days elapsed between the time of the Notice, April 4, 2003, and the beginning of the hearing, May 29, 2003. Therefore, it was obvious to [the] Grievant at the time he received Notice that the decision would not be issued within fifty-five (55) days. . . . [The] Grievant requested a recess and continuance on May 29, 2003. The hearing was continued until June 11, 2003. . . . The fifty-five (55) day time period began to run on June 12, 2003, the first day following the conclusion of the departmental hearing. Therefore, fifty-five (55) days elapsed between June 12, 2003 and August 5, 2003, the date the decision was issued. (Request at pgs. 5-6).

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In light of the above, MPD asserts that it is the Employer's position that it timely served the Grievant with the decision on August 5, 2003 and did not violate the fifty-five (55) day rule because the fifty-five day period only began to run from June 12, 2003 (the first day following the conclusion of the departmental hearing) and August 5, 2003 (the date the decision was issued). 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. 4-6).

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 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 Shapiro and he determined that MPD violated the 55-day rule. 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. 7-10).

We find that MPD's arguments are a repetition of the arguments 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. 755, PERB Case 02-A-07, *affirmed by Judge Kravtz of the*

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Superior Court in Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-18 (September 17, 2002), affirmed by the 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 Shapiro 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 Shapiro 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 Shapiro 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. Teamsters Union Local 246, 54 A2d 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 Award violates the "prejudicial error" rule specified in D.C. Code §2-510(b)(2001 ed.). We have previously considered and rejected this argument by

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.

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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. . . . 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). 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

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).

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(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)0(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 pgs. 8-9) 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 [if] Officer Fisher, instead of electing arbitration with the sanction of the FOP, [had] 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.

Decision and Order
PERB Case No. 04-A-23
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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, 787⁶

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 23, 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 parties’ CBA is directory, rather than mandatory.

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:

Psychologists Union, Local 3758 of the D.C.
Department of Mental Health, 1199 National
Union of Hospital and Health Care Employees,
American Federation of State, County and
and Municipal Employees, AFL-CIO,

Complainant,

v.

District of Columbia Department
of Mental Health,

Respondent.

PERB Case No. 05-U-41

Opinion No. 809

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case:

The Psychologists Union, Local 3758 of the District of Columbia Department of Mental Health, 1199 National Union of Hospital and Health Care Employees ("NUHHCE"), American Federation of State, County and Municipal Employees, AFL-CIO ("Complainant" or "Union"), filed a "Verified Unfair Labor Practice Complaint and Request for Judgment on the Pleadings", in the above-referenced case. The Complainant alleges that the District of Columbia Department of Mental Health ("DMH" or "Respondent") violated D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.) by refusing "to provide the information relevant and necessary for the Union to properly represent a bargaining unit member in the negotiated grievance process challenging [DMH's] termination of that bargaining unit member." (Compl. at p. 2).

In addition, the Complainant asserts that the "verified facts and documents provided . . . including [DMH's] own letters . . . establish that [DMH] has refused to provide information that it is required by law to provide to the Union, thereby violating D.C. Code § 1-617.04 (a)(1) and (5).

Decision and Order
PERB Case No. 05-U-41
Page 2

[Therefore, the Complainant claims that there] is thus no issue of fact to warrant a hearing." (Compl. at p. 7). As a result, the Complainant is requesting that the Board decide this case on the pleadings and order DMH to: (1) provide the requested information within ten days; (2) cease and desist from refusing to provide the requested information; and (3) pay attorney fees. (Compl. at p. 6).

DMH filed a document styled "Answer to Verified Un[fair] Labor Practice Complaint, Opposition to Request for Judgment on the Pleadings and Verified Counterclaim." In their submission, DMH denies that it has violated the Comprehensive Merit Personnel Act ("CMPA"). In addition, DMH claims that "it is clear that there are issues of fact warranting a hearing in this case to address the validity of the Union's allegations and its own unlawful conduct in filing the present frivolous complaint." (Answer at p. 10).

The Complainant's motion for a decision on the pleadings and DMH's opposition are before the Board for disposition.

II. Discussion

The Complainant claims that on February 14, 2005,¹ bargaining unit member Dr. John Bruce received a Form 533 (Recommendation for Disciplinary Action and Investigative Report) from DMH. The Complainant notes that this "document alleged that Dr. Bruce had violated certain DMH policies and stated that Carroll Parks, Director of Adult Services at the CSA, was 'recommending that disciplinary action be taken against [Dr. Bruce].'" (Compl. at p. 3) Subsequently, Dr. Bruce submitted a response to the Form 533, in which it is alleged that he responded to each of the allegations and set forth arguments as to why he had not violated any policy and should not be disciplined. Thereafter, on March 17th, Dr. Bruce received an "Advance Notice of Discipline-Removal" from DMH. The Complainant contends that the [A]dvance Notice contained some of the same allegations and charges found in the initial Form 533 as well as other allegations and charges." (Compl. at p. 3).

The Complainant asserts that the time limit for responding to the Advance Notice was extended to April 11, 2005. The Complainant alleges that on March 29th, a letter was faxed to Brendolyn McCarty-Jones, DMH Human Resources Specialist, informing her that, in order to respond to the Advance Notice of Discipline, Dr. Bruce and the Union's attorney needed to review certain relevant items. The Complainant notes that the March 29th letter listed those items which were being requested.

The Complainant claims that on March 31st, Ms. McCarty-Jones responded to the Complainant's request stating that "[the Complainant's] request is better suited for arbitration related matters and not any agency administrative review." (Compl. at p. 4) In addition, the Complainant

¹ Unless otherwise noted, all dates referred to in this decision are to the year 2005.

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PERB Case No. 05-U-41
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contends that in their response, "[DMH] refused to provide any of the requested information except for a copy of CMHS Policy #500000.482.1 and the missing pages of another document." (Compl. at p. 4).

On April 11th, the Complainant's attorney submitted Dr. Bruce's written response to DMH's Advance Notice of Discipline. The Complainant asserts "that [Dr. Bruce's] response was prepared without the benefit of reviewing the materials that had been requested on March 29th and which [DMH] had refused to provide." (Compl. at p. 4).

The Complainant claims that on May 12th, DMH issued a "Final Notice of Termination", in which it removed Dr. Bruce from employment effective May 13th. The Final Notice stated that it "incorporated by reference" the written report of findings and recommendations made by a DMH-assigned hearing officer. (See Compl. at p. 4).

Pursuant to Article 18, Section 3 of the parties' collective bargaining agreement ("CBA"), the Complainant filed a grievance on May 31st challenging DMH's termination of Dr. Bruce. The Complainant claims that the grievance alleged that DMH's actions violated due process, the CMA and the parties' CBA. (See Compl. at p. 5).

The Complainant alleges that on June 16th, it submitted an information request to DMH in connection with its representation of Dr. Bruce in the negotiated grievance procedure. The Complainant claims that the June 16th "[information] request sought most of the same information that had initially been sought from [DMH] on March 29th, when the [Complainant's attorney] was trying to respond [on behalf of Dr. Bruce, to DMH's] advance Notice of Termination - information which [DMH] at that time said was 'better suited for arbitration related matters'." (Compl. at p. 5). The Complainant contends that the June 16th request "also sought some additional information, which the Union needed in order to investigate statements about the basis for termination that were contained in [DMH's] Final Notice of Termination and the hearing officer's report that was incorporated into the Final Notice by [DMH]." (Compl. at p. 5).

The Complainant asserts that on June 20th, their attorney received a letter from Ivy McKinley, DMH Director of Human Resources, notifying the Complainant that DMH was refusing to provide any of the information requested by the Complainant. The Complainant claims that DMH "refused to provide the information on the stated grounds that the parties' CBA 'does not require . . . [DMH] to furnish such information during the grievance process'." (Compl. at p. 5).

The Complainant claims that their function as exclusive bargaining representative includes representing bargaining unit members in the negotiated grievance process. The Complainant contends that the information requested by the Complainant is necessary and relevant to the Union's representation of Dr. Bruce in the grievance process challenging his termination.

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The Complainant alleges that by the conduct described above, DMH is violating D.C. Code § 1-617.04(a)(1) and (5).²

The Complaint alleges that “[o]n June 16, the Union submitted an information request to DMH in connection with its representation of Dr. Bruce in the negotiated grievance procedure.”³ (Compl. at p. 5). However, to date, DMH has not provided the requested sixteen items. DMH does not dispute the factual allegations in the Complaint. Instead, DMH claims that the Union has requested “a whole host of information in an effort to delay the termination of Dr. Bruce and for the purpose of harassing and preventing [DMH] . . . from asserting and carrying out its rights under D.C. Code § 1-617.08.” (Answer at p. 6). In addition, DMH asserts that: (1) the requested information is not relevant to the basis for Dr. Bruce’s termination; (2) some of the requested information has previously been provided to the Union and its representatives; (3) some of the requested information is available on-line through a number of websites including the District of Columbia’s website, Lexis and Westlaw; (4) DMH policy #482.1 is available on the DMH intranet which is available to all DMH employees; (5) the Union’s request for information concerning all disciplinary actions taken by DMH for violation of DMH policy 482.1 and violation of D.C. Mun. Regs., Title 6, Sec. 1803.1, is overly broad and unduly burdensome; and (6) the Union’s request for all Client Services Management Reports for 2004 and all quarterly “Productivity Reporting” documents for 2004, is overly broad, unduly burdensome and not relevant. (See Answer at pgs. 6-7).

Also, DMH contends that “the documents sought by the union are documents regarding matters other than those used by [DMH] in making its decision. [Furthermore, DMH argues that such] discovery is not part of the grievance process outlined in the CBA between the parties.” (Compl. at p. 3).

Finally, DMH contends that the Complainant’s request for information concerning complaints submitted to DMH by DMH consumers between January 2003 and February 2005, is overly broad

² D.C. Code § 1-617.04(a)(1) and (5) provide as follows:

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

* * *

(5) Refusing to bargain collectively in good faith with the exclusive representative.

³ In their June 16th information request, the Union listed in numerical sequence the sixteen items it was requesting.

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and unduly burdensome. (See Answer at p. 8). Furthermore, DMH asserts that “with respect to the medical files and reports of other consumers ... there are great concerns and issues regarding HIPAA⁴ protected information which should not be divulged to Dr. Bruce ... and [his] legal representatives for the mere purpose of engaging in their desperate fishing expedition.” (Answer at p. 8).

For the above-noted reasons, DMH requests, among other things, that the Board: (1) find that the Complainant has committed an unfair labor practice; (2) deny the Complainant’s request for a decision on the pleadings; (3) order a hearing; and (4) issue a protective order in which it finds that DMH is not required to produce the information being sought by the Union in its letter of June 16, 2005. (See Answer at pgs. 10-11).

With respect to requests number 3, 4 and 6, DMH has raised no defense concerning its failure to produce these documents.⁵ As a result, we must decide whether DMH has an obligation to produce these documents. This Board has previously considered the question of whether an agency has an obligation to provide documents in response to a request made by a union. In University of the District of Columbia v. University of the District of Columbia Faculty Association, 38 DCR 2463, Slip Op. No. 272 at p. 4, PERB Case No. 90-U-10 (1991), we determined that “the employer’s duty under the CMPA includes furnishing information that is ‘both relevant and necessary to the Union’s handling of [a] grievance’ ...” Also, see Teamsters, Locals 639 and 730 v. D.C. Public Schools, 37 DCR 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989). Moreover, the Supreme Court of the United States had held that an employer’s duty to disclose “unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” NLRB v. Acme Industrial Co., 385 U.S. 32, 36 (1967).

Furthermore, “[w]e have held that it is not the Board’s role to determine the merits of a grievance as a basis for determining the relevancy or necessity of information requested by a union in the processing of a grievance.” Doctors’ Council of the District of Columbia v. Government of the District of Columbia, et al., 43 DCR 5391, Slip Op. No. 353 at p. 5, PERB Case No. 92-U-27 (1996); University of the District of Columbia v. University of the District of Columbia Faculty Association *supra*, Slip Op. No. 272 at n. 6. DMH contends that the requested information regarding productivity and the discipline of other employees, is not relevant or necessary because “the termination of Dr. Bruce is based on his own conduct as admitted by him and there is no issue of

⁴Although DMH does not provide a citation or text for HIPAA, we believe that they are referring to the Health Insurance Portability and Accountability Act of 1999, 45 CFR Part 164. These regulations were issued by the U.S. Department of Health and Human Services pursuant to the Secretary’s authority to prescribe standards under part C Title XI of the Social Security Act, and Section 264 of P.L. 104-191, 42 U.S.C. 1320d-1320d-8, for maintaining the confidentiality of “individually identifiable health information.”

⁵ See DMH’s letter to the Board’s Executive Director dated August 5, 2005.

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PERB Case No. 05-U-41
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'productivity' with respect to the reason behind his termination." (Answer at p. 7). We have stated that these issues present "an initial question for the arbitrator to decide. . . . "American Federation of State County and Municipal Employees, D.C. Council 20, AFL-CIO v. District of Columbia General Hospital, et al., 36 DCR 7101, Slip Op. No. 227 at p. 5, PERB Case No. 88-U-29 (1989). In addition, we find nothing in the pleadings to suggest that the requested information is not necessary and relevant to the Complainant's representational responsibilities with respect to Dr. Bruce's grievance.⁶ In light of the above, we find that DMH must produce the documents identified in requests number 3, 4 and 6.⁷

In the present case, DMH claims that they do not have to provide requests number 1, 2, 5 and 9 because that information has either been previously provided and/or is available to the Union from other sources (i.e. the District of Columbia government website, Westlaw, Lexis and DMH's intranet). In American Federation of State, County and Municipal Employees, Council 20 v. District of Columbia General Hospital and District of Columbia Office of Labor Relations, 36 DCR 7101, Slip Op. No. 227 at p. 3, PERB Case No. 88-U-29 (1989), we indicated that this "Board agrees with the private sector holdings that a union should not be forced to undertake a time-consuming and potentially fruitless effort to look elsewhere each time it seeks information when the information sought is in the employer's possession, and especially when such a search is a poor substitute for employer records in terms of accuracy and completeness. Cf., ACF Industries Inc., 231 NBLRB No. 20 (1977), enf'd. ACF Industries, Inc v. NLRB, 592 F. 2nd 422 (8th Cir. 1971); C&P Telephone Cop. v. NLRB, 687 F. 2d 633, n. 3 (2nd cir. 1982)." After reviewing the parties' pleadings, we believe that the information requested by the Complainant in requests number 1, 2, 5 and 9, are readily available to responsible DMH officials. In addition, we find that the requested information is both relevant and necessary to a legitimate collective bargaining function to be performed by the

⁶ DMH asserts that the Union's request for information was made in bad faith and therefore, DMH has no statutory duty to provide the information. Specifically, DMH claims that "in a bad faith attempt to delay [DMH's] termination of Dr. Bruce, and to harass [DMH], the Union proceeded to file a Step 3 grievance . . . alleging that [DMH] has violated the parties' CBA by improperly placing [the] grievant Dr. John Bruce on administrative leave." (Answer at p. 9) DMH argues that the Union's conduct constitutes an unfair labor practice. As a result, DMH has filed a counterclaim against the Union. However, the Union filed an answer denying the counterclaim. Thus, we believe that issues of fact exist with respect to DMH's counterclaim. Therefore, we can not decide DMH's counterclaim on the pleadings. In view of the above, DMH's counterclaim that the Union's actions violated the Comprehensive Merit Personnel Act, is a matter best determined after the establishment of a factual record through an unfair labor practice hearing.

⁷ All references to requests numbers, refer to the sixteen numbered items noted in the Union's June 16th letter to DMH and in the Union's July 28, 2005 letter addressed to the Board's Executive Director.

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PERB Case No. 05-U-41
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Union, *i.e.* the investigation, preparation and processing of a grievance under the negotiated grievance procedure. Moreover, DMH has failed to show any substantial countervailing concerns which outweigh its duty to disclose the requested information. Therefore, consistent with our holding in American Federation of State, County and Municipal Employees, Council 20 v. District of Columbia General Hospital and District of Columbia Office of Labor Relations, *supra*, we find that DMH's asserted defense, lacks merit. Therefore, we conclude that DMH has to produce requests number 1, 2, 5 and 9. With respect to requests number 10, 11, 14 and 15, DMH asserts that these requests are "overly broad and unduly burdensome." (Answer at p. 7). We recognize that beyond the mere question of the employer's duty, however, are the more factual questions of availability and burdensomeness to the employer in supplying information which the law says they should provide. In this regard, we note that the National Labor Relations Board has indicated that the extent of the employer's duty to disclose must be determined on a case by case basis in instances where bad faith bargaining is, as here, alleged. See, NLRB v. Tritt Mfg. Co., 351 U.S. 149 (1956). DMH claims that some of the information requests are overly broad and burdensome. The question concerning whether the scope of the information requested in requests number 10, 11, 14 and 15 is too broad or that disclosure would put an undue burden on DMH, is a matter best determined after the establishment of a factual record through an unfair labor practice hearing. Therefore, requests number 10, 11, 14 and 15 do not have to be produced at this time.

DMH contends that the information noted in requests number 13 and 16 concerns medical files and reports of other consumers. DMH asserts that this is HIPAA protected information which can not be divulged to Dr. Bruce and his legal representatives. We believe that the issue concerning whether requests number 13 and 16 are protected by HIPAA is a matter best determined after the establishment of a factual record through an unfair labor practice hearing. In view of the above, requests number 13 and 16 do not have to be produced at this time.

With respect to requests number 7, 8 and 12, DMH contends that this information was not provided because it either does not exist or is not available. DMH's defense involves an issue of fact that can best be determined after the establishment of a factual record through an unfair labor practice hearing. Therefore, requests number 7, 8 and 12 do not have to be produced at this time.

The Board, having reviewed this matter, concludes that by the failing and refusing to produce requests number 1, 2, 3, 4, 5, 6 and 9, DMH failed to meet their statutory duty of good faith bargaining, thereby violating D.C. Code § 1-617.04(a)(5). In addition, we have held that "a violation of the employer's statutory duty to bargain [under D.C. Code § 1-617.04(a)(5)] also constitutes derivatively a violation of the counterpart duty not to interfere with employees' statutory rights to organize a labor union free from interference, restraint or coercion; to form, join or assist any labor organization or to refrain from such activity; and to bargain collectively through representatives of their own choosing." American Federation of State, County and Municipal Employees, Local 2776 v. D.C. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245 at p. 2, PERB Case No. 89-U-02 (1990); also see, University of the District of Columbia v. University of the District of Columbia Faculty Association, *supra*.

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Concerning the Complainant's request for attorney fees, this Board has held that D.C. Code § 1-617.13 does not authorize it to award attorney fees. See, International Brotherhood of Police Officers, Local 1446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); and University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 91-U-10 (1991). Therefore, the Complainant's request for attorney fees is denied.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Psychologists Union, Local 3758 of the District of Columbia Department of Mental Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State, County and Municipal Employees' Motion for a Decision on the Pleadings is granted in part and denied in part.
- (2) The District of Columbia Department of Mental Health ("DMH"), its agents and representatives shall cease and desist from refusing to furnish the Psychologists Union, Local 3758 of the D.C. Department of Mental Health, 1199 National Union of Hospital and Health Care Employees ("NUHHCE"), American Federation of State, County and Municipal Employees, AFL-CIO, with copies of the documents requested in paragraphs number 1, 2, 3, 4, 5, 6 and 9 NUHHCE's June 16, 2005 letter.
- (3) DMH shall provide NUHHCE with the documents requested by NUHHCE in paragraphs number 1, 2, 3, 4, 5, 6 and 9 of NUHHCE's June 16, 2005 letter. These documents shall be provided to NUHHCE no later than fourteen (14) days from the service of this Decision and Order.
- (4) DMH, its agents and representatives shall cease and desist from interfering, restraining or coercing its employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter XVII Labor-Management Relations" of the Comprehensive Merit Personnel Act to bargain collectively through representatives of their own choosing.
- (5) The issue concerning whether requests number 13 and 16 are protected by HIPAA, is referred to a Hearing Examiner in order to determine the relevance and application of HIPAA to the documents noted in requests number 13 and 16.
- (6) The question concerning whether the scope of the information requested in requests number 10, 11, 14 and 15 is too broad or that disclosure would put an undue burden on DMH, is referred to a Hearing Examiner for disposition.

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PERB Case No. 05-U-41
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- (7) DMH's claim that the information noted in requests number 7, 8 and 12 was not provided because it either does not exist or is not available, is referred to a Hearing Examiner for disposition.
- (8) DMH's counterclaim concerning NUHHCE's alleged unfair labor practice is referred to a Hearing Examiner for disposition.
- (9) NUHHCE's request for attorney fees is denied for the reasons stated in this Decision and Order.
- (10) NUHHCE's request for a protective order is denied.
- (11) DMH shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
- (12) Within fourteen (14) days from the issuance of this Decision and Order, DMH shall notify the Public Employees Relations Board ("Board"), in writing, that the Notice has been posted accordingly. Also, DMH shall notify the Board of the steps it has taken to comply with paragraphs 3 and 11 of this Order.
- (13) The Board's Executive Director shall: (a) refer the issues noted above in paragraphs 5, 6, 7 and 8 of this Order to a Hearing Examiner and (b) schedule a hearing under the expedited schedule set forth below.
- (14) A hearing shall be held in this case before October 14, 2005. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
- (15) Following the hearing, the designated Hearing Examiner shall submit a report and recommendation to the Board no later than twenty-one (21) days following the conclusion of closing arguments or submission of the parties' post hearing briefs.
- (16) The parties may file exceptions and briefs in support of the exceptions no later than seven (7) days after service of the Hearing Examiner's report and recommendation. A response or opposition to the exceptions may be filed no later than five (5) days after service of the exceptions.

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PERB Case No. 05-U-41
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(17) Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

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

September 9, 2005



Public
Employee
Relations
Board

Government of the
District of Columbia

717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
Fax: [202] 727-9116



DISTRICT OF COLUMBIA REGISTER

MAR 23 2007

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 809, PERB CASE NO. 05-U-41 (September 9, 2005)

WE HEREBY notify our employees that the Public Employee Relations Board has found that we violated the law and has ordered us to post this Notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 809.

WE WILL cease and desist from refusing to bargain in good faith with the Psychologists Union, Local 3758 of the District of Columbia Department of Mental Health, 1199 National Union of Hospital and Health Care Employees ("NUHHCE"), American Federation of State, County and Municipal Employees, AFL-CIO, by failing to provide information to NUHHCE.

WE WILL NOT in any like or related manner interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management Subchapter of the District of Columbia Comprehensive Merit Personnel Act.

DISTRICT OF COLUMBIA DEPARTMENT OF
MENTAL HEALTH

DATE: _____

BY: _____

Director

The Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may contact the Public Employees Relations Board at 717 14th Street, N.W., Suite 1150, Washington, D.C. 20005. Phone (202) 727-1822.

2654

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

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
)	
American Federation of Government)	
Employees, Locals 631, 872 and 2553;)	
American Federation of State, County and)	
Municipal Employees, Local 2091; and)	
National Association of Government)	
Employees, Local R3-06,)	
)	
	Complainants,	)	PERB Case Nos. 03-U-34 and
		)	03-N-04
	v.)	
		)	Opinion No. 810
District of Columbia Water and Sewer)	
Authority,)	
)	
	Respondent.	)	FOR PUBLICATION
_____)	

DECISION AND ORDER

I. Statement of the Case:

The American Federation of Government Employees, Locals 631, 872 and 2553; the American Federation of State, County and Municipal Employees, Local 2091; and the National Association of Government Employees, Local R3-06 ("Complainants" or "Unions"), filed an Unfair Labor Practice Complaint ("Complaint") in the above-referenced case.¹ This case was assigned PERB Case No. 03-U-34.² The Complainants allege that the District of Columbia Water and Sewer Authority ("WASA" or "Respondent") violated D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.) by refusing to bargain with the Unions over a matter affecting terms and conditions of employment.

¹The Complaint was filed on May 8, 2003.

²The Complainants also filed a Motion for Preliminary Relief ("Motion") in PERB Case No. 03-U-34. In Slip Op. No. 721 dated June 6, 2003, we denied the Complainants' Motion and referred the case to a Hearing Examiner.

Decision and Order

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Specifically, the Complainants assert that the Respondent "refused to bargain over the implementation of new employee identification cards and new electronic time clocks that will be used for time and attendance." (Complaint at p. 3). The Complainants are requesting that the Board order the Respondent to: (1) cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); (2) bargain with the Complainants; (3) cease implementation of the electronic time clock system; (4) make whole any employee who has suffered a loss or been denied benefits; (5) pay the Complainants' costs and attorney fees; and (6) post a notice to employees. (See Complaint at p. 5).

In its Answer to the Unfair Labor Practice Complaint ("Answer"),³ WASA denies that it committed an unfair labor practice. Specifically, WASA claims that it exercised a management right that was subject only to impact and effects bargaining. On June 6, 2003, the Complainants filed an Amended Complaint alleging that the Respondent dealt directly with employees while refusing to bargain with the Unions. In its Answer to the Amended Complaint,⁴ WASA admits the underlying factual allegations but denies that it violated the CMPA.

On May 14, 2003, WASA notified the Complainants that it was going to implement the new time clocks for time and attendance. On May 20, 2003, the Complainants responded to WASA by submitting two proposals which they wanted to be considered by WASA in negotiations pertaining to the time clock system.⁵ Subsequently, on June 30, 2003, the Complainants filed a Negotiability Appeal ("Appeal").⁶ In the Appeal, the Complainants assert that they were unable to make substantive written proposals concerning the electronic time clock system because WASA refused to provide information that was relevant and necessary to carrying out their function as the exclusive representatives. In response, WASA filed a document styled "Answer to the Negotiability Appeal" ("Response") arguing that the Appeal is not properly before the Board because it does not meet the Board's procedural requirements.⁷ Specifically, WASA claims that it never declared in writing that the Unions' proposals were non-negotiable as required by Board Rule 532.2(c). Furthermore, WASA contends that the Appeal was not filed within 30 days as required by Rule 532.3. In addition, WASA

³The Answer was filed on May 28, 2003.

⁴The Answer to the Amended Complaint was filed on June 24, 2003.

⁵The first proposal submitted by the Unions is entitled "Electronic Time Clocks" and provides as follows: "Employer agrees that bargaining unit employee[s] will be exempt from using electronic time clocks for time and attendance." The second proposal is entitled "Identification Badges" and states as follows: "Employer agrees not to use bargaining unit employee identification/facility access cards for time and attendance purposes." (Appeal at p. 3).

⁶The Unions' Appeal was assigned PERB Case No. 03-N-04.

⁷The response to the Negotiability Appeal was filed on November 14, 2003.

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asserts that the decision to implement the time clock system is a management right that is not subject to negotiation.⁸

On March 18, 2004, the Hearing Examiner issued a Report of Findings and Recommendations ("R&R") in which she found that the Respondent did not violate the CMPA. Therefore, she recommended that the unfair labor practice complaint and the negotiability appeal be dismissed. The Complainants filed "Exceptions to the Hearing Examiner's R&R" ("Exceptions").⁹ Also, the Respondent filed an Opposition to the Complainants' Exceptions.¹⁰

The Hearing Examiner's R&R, the Complainants' Exceptions and the Respondent's Opposition are before the Board for disposition. For the reasons noted below, the Board adopts the Hearing Examiner's findings and recommendations that both the unfair labor practice complaint and the negotiability appeal should be dismissed.

II. Background:

In 1999, WASA was removed from the District of Columbia payroll system and established its own payroll and personnel system. The data for time and attendance was gathered and compiled manually by clerks employed by WASA. On October 8, 2002, WASA announced to the Complainants its plan to: (1) install an electronic time clock system for the purpose of time and attendance and (2) issue new employee identification cards that interface with the time clocks for the purpose of collecting data. The new system utilized identification badges, also known as facility access cards. These access cards are "swiped" by employees at data collection terminals which automatically record time and attendance every time they are swiped. There is also a security component. The card has the employee's picture, which serves as an identification badge, and also controls access into certain areas. The Hearing Examiner stated that the system is agency-wide and affects bargaining unit employees as well as non-union employees. WASA made its first presentation to the Unions concerning the time clock system at a labor-management meeting held in November 2002. (See R&R at p. 7).

⁸PERB Case Nos. 03-U-34 and 03-N-04 were consolidated by the Board's Executive Director on October 30, 2003. (The Complainants also filed a "Notice of Impasse and Request for Impasse Resolution" on May 29, 2003. The impasse case was assigned PERB Case No. 02-I-08. However, the impasse case was withdrawn at the Complainants' request on June 23, 2003.)

⁹The Executive Director granted the Complainants' request for an extension of time. As a result, the parties' Exceptions were filed on May 13, 2004.

¹⁰See document styled "Respondent's Opposition to Complainant's Exceptions to the Hearing Examiner's R&R" ("Opposition") filed on June 2, 2004.

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The Unions identified the use of electronic time clocks and identification cards as new working conditions because their function is to record data for the purpose of employee compensation and benefits. Therefore, the Unions sought to bargain with WASA over WASA's decision to implement the new system. On November 26, 2002, the Unions wrote to WASA requesting information concerning the new system and requesting to bargain over the new identification card/electronic time clock system. Subsequently, on March 31, 2003, the Unions made a second request to bargain. (See Complaint p. 4). At management-labor meetings held in February and May 2003, the parties held discussions concerning the issue of time clocks and WASA answered questions posed by the Unions. (See R&R at p. 8). Throughout this time, WASA claimed that the new system was merely a new technology and that management had the right to implement the new technology because it did not change any term or condition of employment. In support of its position, WASA asserted that this type of new technology was contemplated by the parties in the "Management Rights" provision of the collective bargaining agreement.¹¹

In view of WASA's position that implementation of the time clock system was a reserved management right, the Unions filed an unfair labor practice complaint. In their Complaint, the Unions assert that WASA committed an unfair labor practice by refusing to bargain over the implementation of new employee identification cards and new electronic time clocks. WASA countered that at every labor-management meeting held between January and May 2003, management had discussions with the Unions concerning the data collection terminals. Also, WASA claimed that at meetings held on January 30, 2003, and May 14, 2003 it provided information to the Unions by responding to their questions concerning the time clock system.

By letter dated May 14, 2003, WASA informed the Unions that the electronic time clock system would be installed by the end of July 2003. The Unions responded by letter dated May 20, 2003, that they "consider[ed] the clocks . . . [to be] a change in the methods of keeping time and attendance and a mandatory subject of bargaining under the law." (Appeal at Exh. 2). Consistent with their position, the Unions made two proposals which they wanted to be considered in negotiations.¹²

By letter dated May 27, 2003, WASA announced to its employees that it was going to implement the electronic clock system in July 2003. Subsequently, the Unions amended their Complaint claiming that WASA dealt directly with bargaining unit members when it announced to employees on May 27, 2003, that it was going to install the electronic time clock system.

¹¹WASA relied on Article 4, "Management Rights" of the collective bargaining agreement which states in pertinent part as follows: "[WASA] shall retain the sole right, in accordance with applicable laws and rules and regulations: . . . [t]o determine . . . the technology of performing its work." This provision mirrors the language of D.C. Code § 1-617.08(a)(5).

¹²The Unions' proposals are set forth in footnote 5.

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In a letter dated June 9, 2003, and captioned "Request for Impact and Effects Bargaining Concerning Automated Time and Attendance Data Collection", WASA declared that it was "prepared to meet with [the Unions] to discuss [their] proposals regarding [the electronic time clock issue]." (Appeal, Exh. 5). In response to this letter, the Unions rejected WASA's offer by: (1) requesting "full bargaining" over WASA's decision to install electronic time clocks, and (2) filing a Negotiability Appeal.

III. The Hearing Examiner's Report and Recommendation and the Unions' Exceptions

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified four issues for resolution. Her findings and recommendations are as follows:

1. *Did WASA have a duty to bargain with the Unions prior to the implementation of the new time clock system or was the decision a "management right" (requiring only impact and effect bargaining)?*

Before the Hearing Examiner, "[t]he Unions argued that, with the exception of the security component of the new system which they agree[d] was a management right, WASA was obligated to bargain before implementing the new time clock system because it was a significant change from the prior procedures and changed the terms and conditions of employment." (R&R at p. 14). For example, the Unions argued that the time clock system would result in substantial changes to the manner in which salaries are paid and would establish a new basis for disciplinary action, resulting in a change in terms and conditions of employment. WASA countered that implementation of the electronic time clocks was a management right, not subject to bargaining. Furthermore, WASA maintained that the new time clock system would not result in a substantial change in terms and conditions of employment.

In order to determine whether WASA's implementation of the new time clock system was a management right, and therefore not subject to bargaining, the Hearing Examiner relied on the provisions of D.C. Code § 1-617.08 (2001), "Management [R]ights",¹³ and reviewed National Labor Relations Board (NLRB) case law cited by the parties.¹⁴ (See R&R at pgs. 14-15). The Hearing

¹³This section of the Code provides that "all matters shall be deemed negotiable, except those that are proscribed by this subchapter" and lists the management rights which are not subject to collective bargaining. Among the rights reserved to management are: "the technology of performing its work" and "its internal security practices".

¹⁴The Hearing Examiner noted that in their closing briefs both parties cited *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 65 (1976) and *Bureau of National Affairs, Inc.*, 235 NLRB 8 (1978). In both of those cases, the employers had installed time clocks without bargaining with the Union.

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Examiner noted that in cases pertaining to management's installation of time clocks, the finding of a duty to bargain generally turns on whether implementation of the time clocks results in changes to working conditions that are significant and substantial in nature.¹⁵ (See R&R at p. 14). The Hearing Examiner determined that, in the present case, WASA's installation of the electronic time clock system was not a substantial change from either the existing practice of the parties, or the provisions contained in the parties' collective bargaining agreement. This determination was based on her finding that Article 37, Section L of the collective bargaining agreement is "replete with provisions regarding work hours, lunch breaks and rest breaks". (R&R at p. 14) Also, Article 37, Section L provides for disciplinary action in the event of: "[t]he failure of an employee to follow the provisions of this subsection". (R&R pgs. 14-15). In addition, the Hearing Examiner relied on the statutory management rights provision of D.C. Code § 1-617.08(a)(5),¹⁶ which mirrors the management rights clause in Article 4 of the collective bargaining agreement. In view of the above, the Hearing Examiner rejected the Unions' argument and found that no substantial change in terms and conditions of employment resulted from implementation of the electronic time clock system. Therefore, she concluded that WASA was not required to bargain over its decision to implement the new time clock system.

The Complainants also argued that the parties did not contemplate this type of technology when negotiating over management's right to implement new technology during negotiations for a successor agreement. However, the Hearing Examiner found that WASA was not prevented from implementing the electronic time clock system simply because this was not specifically discussed during contract negotiations concerning the definition of new technology. (See R&R at p. 16). Having concluded that by implementing the time clock system, WASA was exercising management's right to determine the technology of performing its work, the Hearing Examiner found that WASA did not violate the CMPA by refusing to bargain over its decision to implement the electronic time clock system. (See R&R pgs. 15-16).

The NLRB inquired as to whether a timekeeping system had existed before the time clocks were installed and found that in both cases employees had previously been required to keep track of their time informally. Specifically, employees were required to punch in "on arrival at their workplace, on departure and return from lunch, and on departure from the workplace at the end of the workday." (*Bureau of National Affairs* at p. 3). As a result, the NLRB held that the employers in these cases did not commit an unfair labor practice by installing time clocks without bargaining because there was no significant or substantial change in the terms and conditions of employment. (See *Bureau of National Affairs*, at p. 10).

¹⁵See *Murphy Diesel Company*, 184 NLRB 757 (1970).

¹⁶D.C. Code § 1-617.08(a)(5) provides "[management] shall retain the sole right . . . to determine . . . the technology of performing its work." (R&R at p. 13).

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The Complainants filed exceptions to the above findings. Specifically, the Complainants argue that the time clock system will: (1) result in substantial changes to the manner in which salaries are paid and (2) establish a new basis for disciplinary action. (See Exceptions at pgs. 2-3). The Complainants also assert that the parties did not contemplate this kind of technology (the electronic time clock system) when negotiating management's right to implement new technology. (See Exceptions at p. 3).

After reviewing the Complainants' exceptions, we find that the arguments contained in the exceptions are the same arguments considered and rejected by the Hearing Examiner. Thus, we believe that the Complainants are requesting that we adopt their interpretation of the evidence presented at the hearing. Furthermore, we conclude that their exceptions amount to a mere disagreement with the Hearing Examiner's findings. We have held that a mere disagreement with the Hearing Examiner's findings is not a basis for setting aside the Hearing Examiner's findings when they are fully supported by the record. See *American Federation of Government Employees, Local 872 v. District of Columbia Department of Public Works*, 38 DCR 6693, Slip Op. No. 266 at p. 3, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Also, we have held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton and Fraternal Order of Police Department of Corrections Labor Committee*, 47 DCR 796, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995). In the present case, we find that the Hearing Examiner's findings are reasonable and fully supported by the record. As a result, we conclude that the Complainants' exceptions lack merit.

2. *Did WASA commit an unfair labor practice by refusing to engage in good faith impact and effects bargaining?*

"We have held that D.C. Code § 1-617.08(a) (2001 ed.)¹⁷ exempts from the duty to bargain the decision to implement rights retained solely by management." *Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990).¹⁸ Furthermore, we have held that "the effects or impact of a non-bargainable management decision upon the terms and conditions of employment are bargainable upon request."¹⁹ (emphasis added). In view of the above, the Hearing Examiner determined that although

¹⁷Prior codification at D.C. Code § 1-618.8(a) (1981 ed.)

¹⁸*Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990).

¹⁹*Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia General Hospital*, Slip Op. No. 322 at p. 3, PERB Case No. 91-U-14 (1992), and cases cited therein.

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WASA was exercising a management right, it was required to bargain over the impact and effects of exercising this right, but only upon the request of the Unions. Once she made this determination, the Hearing Examiner focused on whether there was a request by the Unions to engage in impact and effects bargaining. The Hearing Examiner noted that:

[T]he refusal to bargain alleged in the Complaint refers to the full bargaining requested by the Unions, not the impact or effects bargaining. [The testimony of the Unions' witness] supports WASA's position that WASA offered to bargain on impact and effects and that some bargaining took place. . . . [I]n response to the request by the Unions for bargaining over WASA's decision to implement the time clock system, WASA agreed to bargain only over "impact and effect[s]" [A]t the June 13, 2003 meeting, [the Unions] told [WASA that] they were entitled to engage in full bargaining over WASA's decision to implement the new system. . . . WASA stated that the Unions 'were limited' to impact and effects bargaining." (R&R at p. 18).

The Hearing Examiner further stated that "[t]here was no evidence presented that the Unions changed their position and agreed to engage in impact and effects bargaining. However, if [the Unions] did change their position . . . additional efforts should have been made." (R&R at p. 19) In light of the above, the Hearing Examiner concluded that "the Complainants did not meet the[ir] burden of proving that [WASA violated the CMPA] by refusing to engage in impact and effects bargaining, upon demand". (R&R at p. 20).

The Complainants took exception to the Hearing Examiner's: (1) "reasoning and conclusion [concerning their] allegation that WASA failed to engage in impact and effects bargaining" and (2) conclusion that "the Complainants did not meet their burden of proving that WASA violated the CMPA by failing to engage in impact and effects bargaining *because the Unions did not demand bargaining twice*". (Exceptions at p. 3). (emphasis added).²⁰

With regard to the Complainants' first exception, the Hearing Examiner concluded that "[t]here was no evidence that WASA ever refused to engage in impact and effects bargaining." (R&R at p. 19) Therefore, we find that the Complainants are merely disagreeing with the Hearing Examiner's findings. With regard to the second exception, the Hearing Examiner found that WASA had no duty to bargain based on the Unions' written refusal to engage in impact and effects bargaining. Further, we believe that the Complainants are mis-characterizing the Hearing Examiner when she stated as follows: "*However, if [the Unions] did change their position . . . additional*

²⁰In the statement cited, the Hearing Examiner addressed what the Unions should have done if they "changed their position and agreed to engage in impact and effects bargaining." (R&R at p. 19).

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efforts should have been made." (R&R at p. 19). (emphasis added). Specifically, we believe that this statement addresses what the Unions should have done *if they changed their position* and agreed to engage in impact and effects bargaining.

After reviewing the exceptions, we conclude that the Unions are merely disagreeing with the Hearing Examiner's findings that they refused to engage in impact and effects bargaining. As noted above, we have found that a mere disagreement with the Hearing Examiner's findings is not a basis for setting aside those findings where, as here, they are fully supported by the record. Therefore, we find that this is not a sufficient basis for setting aside the findings of the Hearing Examiner.

Furthermore, we find that the Hearing Examiner's findings are reasonable, in keeping with Board precedent and fully supported by the record. Therefore, we adopt the Hearing Examiner's finding that the Unions did not meet the burden of proving that WASA failed to bargain over the impact and effects of implementing a management right. As a result, we conclude that WASA's actions did not violate the CMPA.

3. *Did WASA commit an unfair labor practice by dealing directly with employees about the implementation of the new system while refusing to bargain with the Unions? Did WASA refuse to provide information?*

No exceptions were filed by the parties concerning the above issue. Nonetheless, we shall consider the Hearing Examiner's findings and conclusions.²¹

The Complainants alleged that WASA violated the CMPA by contacting employees directly while refusing to bargain with the Unions. (See Amended Complaint, at pgs. 3-4). However, the Hearing Examiner found no credible evidence that WASA unlawfully circumvented the Unions by informing its employees of the upcoming installation of time clocks. As a result, she concluded that WASA did not violate the CMPA. (See R&R at p. 20).

Where there is an allegation that an Employer has dealt directly with employees, the Board considers whether the Employer has "disparaged the union, [or] undermined the union to its members, or interfered or coerced its employees in the exercise of their right to bargain collectively". *AFSCME, Council 20 et al v. District of Columbia et al*, 36 DCR 427, Slip Op. No. 200 at p. 5, PERB Case No. 88-U-32 (1988). Absent such indications, communicating with employees concerning the status of negotiations is not a violation of the CMPA. In the present case, the Hearing Examiner found that WASA's May 27, 2003 letter did not disparage or undermine the Unions. Instead, the Hearing Examiner found that WASA just informed its employees when the time clock

²¹See *American Federation of Government Employees, Local 872 v. District of Columbia Water and Sewer Authority*, 48 DCR 9551, Slip Op. No. 660, PERB Case No. 00-U-24 (2001), where we considered an issue that was not the subject of exceptions by the parties.

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system was going into effect. We have reviewed the Hearing Examiner's finding concerning the May 27 letter and find that it is reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's finding and conclude that the Complainants did not establish that WASA circumvented the Unions by sending a letter to its employees. As a result, we find that WASA's actions do not violate the CMPA.

Finally, the Complainants alleged that WASA refused to provide information requested by the Unions that was necessary to their role as the exclusive bargaining agents. We have held that the failure to provide information that is relevant and necessary to a union's role as the exclusive bargaining agent is a violation of the CMPA.²² In the present case, the Hearing Examiner found no evidence of WASA's alleged refusal to provide information. (R&R at p. 21). As a result, we believe that the Hearing Examiner's finding is reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's findings in this regard. As a result, we find no violation of the CMPA on this basis.

4. *Negotiability Appeal - PERB Case No. 03-N-04*

In their Appeal, the Complainants are seeking that the Board make a determination that the following two issues are negotiable: (1) the decision to implement the time clock system as opposed to using other methods, and (2) the decisions pertaining to the policies and procedures for implementation of time clocks. (See Appeal at p. 2).²³ In the Response, WASA countered that the Appeal was not timely and did not comply with Board rules. Therefore, WASA argued that the Appeal should be dismissed.

The Hearing Examiner found that the Appeal was timely filed. However, she concluded that:

[the negotiability appeal] should be dismissed for several reasons. First, [she] concluded . . . that the subject of this negotiability appeal came within the definition of management rights and did not require bargaining before implementation. Alternatively, she concluded that the subject of this appeal involved new technology within the

²²See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, Slip Op. No. 835 at p. 9, PERB Case No. 06-U-10 (2006); see also, *Psychologists Union, Local 3758 of the D.C. Department of Health*, *1199 National Union of Hospital and Health Care Employees*, *American Federation of State County and Municipal Employees, AFL-CIO v. District of Columbia Department of Mental Health*, Slip Op. No. 809, PERB Case No. 04-U-41 (2005).

²³(This is not the specific language contained in the Unions' proposals. See footnote 5 for the specific language contained in the Unions' proposals dated May 20, 2003.)

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definition of the [collective bargaining agreement] and did not require bargaining before implementation. (R&R at p. 21).

In light of the above, the Hearing Examiner opined that the negotiability appeal should be dismissed because WASA was not required to engage in bargaining concerning its decision to implement time clocks. No exceptions were filed by the parties concerning the Hearing Examiner's conclusions.

For the reasons previously noted, we adopted the Hearing Examiner's findings that: (1) the issue of the time clock system was a management right and (2) WASA was not required to bargain over its decision to implement the time clock system. Consistent with these findings, we concur with the Hearing Examiner that the negotiability appeal should be dismissed because WASA was not required to bargain over its decision to implement the time clock system. Therefore, we adopt the Hearing Examiner's recommendation that the Appeal in PERB Case No. 03-N-04 be dismissed.

Pursuant to D.C. Code §1-605.02(3) and (5) (2001 ed.) and Board Rules 520.14 and 532, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's findings and conclusions concerning both the unfair labor practice and the negotiability appeal. As a result the unfair labor practice complaint in PERB Case No. 03-U-34 and the negotiability appeal in PERB Case No. 03-N-04 are dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint in PERB Case No. 03-U-34 is dismissed in its entirety.
2. The Negotiability appeal in PERB Case No. 03-N-04 is dismissed.
3. Pursuant to Board Rules 559.1, this Decision and Order is final upon issuance.

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

May 5, 2006

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
)	
American Federation of Government Employees,)	
Local 631,)	
)	
	Complainant,	)	PERB Case No. 05-N -02
)	
	and	)	Opinion No. 811 (See also # 877)
)	
District of Columbia Water and Sewer Authority,		)	<u>CORRECTED COPY</u>
)	
	Respondent.	)	FOR PUBLICATION
)	
_____)	

DECISION AND ORDER

On July 23, 2005, the American Federation of Government Employees, Local 631 ("Complainant" or "Union") filed a Negotiability Appeal ("Appeal") in the above-captioned matter.¹ The Complainant and the District of Columbia Water and Sewer Authority ("WASA") have been engaged in negotiations for a successor agreement. The Complainant claims that it submitted a

¹PERB Rule 532.1, 532.2 and 532.3 provide in relevant part:

- 532.1 If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board. . . ."
- 532.2 A negotiability appeal shall . . . include . . . the following: . . .
 - (b) A statement of the negotiability issues(s), including a copy of the proposal(s) at issue . . . [and]
 - (c) Any written communication from the other party to the negotiation asserting that a proposal is nonnegotiable.
- 532.3 A negotiability appeal shall be filed within thirty days.

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proposal concerning job descriptions, a non-compensation matter, to the Respondent. Subsequently, the Respondent informed the Union that the proposal concerning job descriptions was non-negotiable. As a result, the Union filed this negotiability appeal. The Union seeks that the Board declare Article 23 in its entirety, to be negotiable.

In their submission, the Union indicated that WASA has declared the proposal as non-negotiable. The Union did not state why it believes the proposal is negotiable.

In its "Answer to the Negotiability Appeal" (Answer), WASA asserts that certain sections of the Union's proposal pertain to management rights and are, therefore, non-negotiable.² Specifically,

²WASA claims that the following portions of the Union's proposal are non-negotiable:

Section A Job Descriptions

1. Each employee covered by this Agreement shall be supplied with a copy of his/her job description. Employees are entitled to accurate job descriptions. The Local Unions shall be supplied with a copy of each job description upon request. The Local Unions shall be given the opportunity to review A and bargain over changes in job descriptions prior to implementation.

2. The phrase "other duties as assigned" shall not be used to regularly assign work to an Employee that is not reasonably related to his/her position description. Work assignments shall normally reflect the grade level, classification, and performance required of an Employee. Higher level duties and responsibilities, as documented in an established position description, may not be assigned to an Employee on a continuing basis if not assigned in accordance with merit principles.

Section D Involuntary Job Audit And/or Evaluation

1. If a classification of a position action results in a reduction in grade or pay to the employee, the employee shall be allowed to contest the action by filing a Step 3 general grievance.

2. An employee will be notified whenever his/her position is to be audited or evaluated. As part of the audit or evaluation process, the employee may submit additional written material in addition to the questionnaire, to the classifier concerning the duties and responsibilities of his/her position.

Section E Notice to the Union

1. The Human Resources Department shall provide the affected Local Union with advanced written notice of five (5) workdays of the Authority's decision to change, evaluate, reclassify, or create a new job description. The notice shall be given to the Union within five (5) workdays of the Authority's decision to change, evaluate, reclassify, or

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WASA claims that management has the right to: (1) determine the types and grades of positions within the agency, (2) assign its employees to positions; and (3) direct its employees and maintain the efficiency of government operations. WASA argues that these rights would be improperly limited to the extent that:

(1) Section A of the proposal would impermissibly require WASA to bargain over any *changes in job descriptions or job duties* for a specific position; (2) Section A.2 would impermissibly limit WASA's ability to *assign duties and responsibilities to its employees*; (3) Section D would impermissibly allow an employee to *submit to the grievance procedure* and ultimately to an arbitrator, any *decision by WASA* to exercise its management rights to *alter the duties, grades or classifications of job positions*; (4) Section E.1 would impermissibly require WASA to surrender its management rights and bargain over any *changes to job descriptions or job classifications*; (5) Section E.2 would impermissibly require WASA to surrender its management rights and bargain over the *grade of any newly created position or "reclassified" job description that includes any new requirements, duties or responsibilities*; and (6) Section F would impermissibly require WASA to surrender its management rights and *allow arbitrators to ultimately review and decide the appropriate grade and/or classification of any job position at any time*. (emphasis added). (Answer at pgs. 2-3).

Section E (con't)

create a new a (sic) job description. The notice shall identify the proposed changes with a copy of the existing job description and proposed new job descriptions. The affected Union shall have the opportunity to bargain over the changes to the job description, job classification or evaluation process, prior to implementation.

2. The Union shall be allowed to bargain over grade and pay of newly created position (job descriptions) or reclassified job descriptions that add additional requirements, duties and responsibilities.

Section F Appeals

Employees are free to grievance (sic) the grade and/or classification of their positions at any time without fear of reprisal or prejudice.

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Pursuant to Board Rule 532.1 and 532.4, the Board has the authority to consider this negotiability appeal.³ The specific issue presented in the Negotiability Appeal concerns whether the Union's proposals regarding job descriptions are negotiable.

In the present case, the Union has failed to present any argument and/or authority in support of its claim that Article 23 is negotiable. As a result, we believe that there is insufficient information upon which to make a ruling as a matter of law. Therefore, pursuant to Board Rule 532.4(b), we are requesting that the parties submit briefs in support of their respective positions on the narrowly tailored issues that follow:

1. Whether the Union's proposal regarding Article 23 is negotiable.
Why or why not?

a) In your brief, you should identify those parts of the proposal that are negotiable and those that are not negotiable and state why.

b) In your brief cite any law, rule, regulation or cases that support your position.

2. The Management Rights provision of the Comprehensive Merit Personnel Act can be found at D.C. Code § 1-617.08. That section of the Code has recently been amended by adding a new subsection (a-1). Subsection (a-1) provides as follows: "*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.*" In your brief, state whether the recent amendment to D.C. Code § 1-617.08(a-1) impacts on the issue of negotiability in this case. Why or why not?

The briefs will provide both parties with an equal opportunity to present their views on the issue. Moreover, it will provide the Board with sufficient information upon which to make a determination.

³Board Rule 532.4 outlines the Board's options for resolving a Negotiability Appeal once it is filed. This rule provides, in pertinent part, that the Board may: (1) issue a decision on the Appeal; (2) order the submission of written briefs and/or oral arguments; (3) order a hearing, which may include briefs and arguments; or (4) direct the parties to an informal mediation or conference concerning the issue.

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ORDER

IT IS HEREBY ORDERED THAT:

1. The parties shall submit briefs concerning this matter. The briefs shall be filed fifteen (15) days from the service of this Decision and Order.
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.

December 1, 2005

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
))	
District of Columbia Water & Sewer)	PERB Case No. 05-U-10
Authority,)	
))	
Complainant,)	Opinion No. 813
))	
v.)	MOTION FOR DECISION
))	
American Federation of Government)	ON THE PLEADINGS
Employees, Local 872,)	
))	
Respondent.)	FOR PUBLICATION
))	
_____)	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Water and Sewer Authority ("Complainant" or "WASA"), filed a document styled "Amended Unfair Labor Practice (ULP) Complaint and Motion for Preliminary Relief." The Complainant alleged that the American Federation of Government Employees, Local 872 ("Union", "Respondent" or "Local 872"), violated D.C. Code § 1-617.04(b)(1) and (3) (2001 ed.) by failing to pay arbitration fees for those cases that it lost, effectively cancelling the grievance resolution process in the parties' collective bargaining agreement (CBA). The Complainant requested that the Board: (1) grant its request for preliminary relief; (2) order the Respondent to cease and desist from failing to bargain; (3) order the Respondent to pay its share of all outstanding arbitration costs; and (4) order a make whole remedy.

The Union filed an answer denying the allegations. In addition, the Union filed an Opposition to the Motion for Preliminary Relief. In its Opposition, the Respondent claimed that all the arbitration bills that formed the basis of the original complaint had been paid. Therefore, the Union argued that WASA had not demonstrated that preliminary relief was warranted.

Motion for Decision on the Pleadings

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The Union also filed a document styled "Respondent's Motion to Dismiss Amended Unfair Labor Practice Complaint" on June 17, 2005.¹ Pursuant to Board Rule 553.2, the Complainant's Opposition was due on June 29, 2005, the day that the Board was scheduled to have its regular meeting. However, the Board meeting was rescheduled and held on July 5, 2005. Unfortunately, in a letter dated June 27, 2005, the Board's staff informed the Complainant that the Opposition to the Motion to Dismiss was due on July 8, 2005. As a result, the Board meeting was held prior to the date that the opposition was due. Therefore, the Board could not consider the Motion to Dismiss at the July 5th meeting. Instead, we referred the Motion to Dismiss to a Hearing Examiner.

In Slip Op. No. 801, dated July 29, 2005, the Board denied WASA's request for preliminary relief. In denying WASA's request for preliminary relief, we noted that there were material facts in dispute. As a result, this case was referred to a Hearing Examiner. Subsequently, on August 4, 2005, the Respondent filed a "Motion for Decision on the Pleadings". In light of our holding in Slip Op. No. 801, we believe that the Respondent's current motion amounts to a motion for reconsideration. After reviewing the pleadings, we find that there are still issues of fact in this case. Therefore, we are denying the "Motion for Decision on the Pleadings".

In view of the above, the "Motion for a Decision on the Pleadings" is denied and the "Respondent's Motion to Dismiss Amended Unfair Labor Practice Complaint" is referred to a Hearing Examiner.

¹In the Respondent's June 17, 2005 Motion to Dismiss, the Union claims that the arbitration bills in question have been paid. Further, the Union argues that where there is only an alleged violation of the parties' contract, the PERB must dismiss the Complaint for lack of jurisdiction. The Union asserts that in the present case, WASA's claims are based entirely on its assertion that the Union violated the collective bargaining agreement by not paying arbitral fees. (Motion to Dismiss at p. 4). In addition, the Union asserted that WASA had no legally protected interest in negotiated arbitration and therefore, no standing to file a claim. (Motion to Dismiss at p. 5).

In its Opposition to the Motion to Dismiss, WASA stated that it was not only the Union's violation of the collective bargaining agreement, but the failure of the Union to resolve this matter through negotiation that resulted in the parties' inability to proceed with further arbitrations involving the Union. WASA also argues that none of the cases cited by the Union involved allegations of a refusal to bargain concerning the possible resolution of problems that were raised by the original contract violation of the opposing party. (As explained above, this Opposition was filed on July 8, 2005).

Motion for Decision on the Pleadings
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ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 872's Motion for Decision on the Pleadings is denied.
2. The American Federation of Government Employees, Local 872's Respondent's Motion to Dismiss Amended Unfair Labor Practice Complaint is referred to a Hearing Examiner.
3. 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.

November 23, 2005

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At arbitration FOP argued 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 elected to have a departmental hearing. FOP indicated that 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, emphasis in original.) FOP asserted that "[i]n this case [the] Grievant was notified of the proposed action on September 29 and was advised that the departmental hearing, if sought, would be held on November 4. [Furthermore, FOP claimed that by] letter dated October 1, 2003, [the] Grievant, through counsel, notified [MPD] that he elected to have a departmental hearing. At the close of the November 4 proceeding, Chairman Dandridge stated that the transcript would be available on November 12 and that findings were due on December 12. . . . The final notice of adverse action was issued on December 18, 2003. . . . The notice provided [that the] Grievant could appeal the action to the Chief of Police within ten days. By letter dated December 28, [the Grievant] submitted his appeal. [Thereafter,] on January 12, 2004, Chief of Police Ramsey acknowledged receipt of the final appeal on December 29 and denied the appeal." (Award at p. 6). Consistent with Article 12, Section 6 of the parties' CBA, FOP asserted that MPD was required to issue its final decision by November 25th which is 55 days from October 1st, the date of the Grievant's letter to MPD in which he elected to have a departmental hearing. In view of the above, FOP claimed that MPD committed harmful procedural error because the notice of final decision was issued on December 18th. Specifically, FOP argued that the notice of final decision was issued 78 days from the October 1st notification. As a result, FOP opined that the Grievant should be reinstated with full back pay and benefits.

MPD countered "that the day after the hearing, November 5, should be recognized as the first day of the 55 day limit, requiring a decision by December 29, which would result in the issuance of a timely final decision. In the alternative, [MPD asserted] that [the] Grievant waived his rights to the 55 day limit when he did not state an objection to [MPD's] statement that findings were due December 12, recognizably after the 55 day limit by the Grievant's counting. In addition, [MPD argued] that any potential violation caused harmless error, limiting an arbitrator's authority to providing only back pay or a delay in termination." (Award at p. 7). In an Award issued on December 27, 2004, the Arbitrator rejected MPD's argument by noting the following:

In reviewing Article 12 as a whole, and Section 6 in particular, as well as the arguments of the parties, the Arbitrator concludes that the phrase 'the date the employee elects to have a departmental hearing' is the date that the employee requests a hearing, in this case on October 1. The employee did not choose or elect the hearing date of November 4. That date was set by the Agency. If the language of the provision had been 'agreed' to a hearing date or 'confirmed' a hearing date, the outcome might be different. But here, the provision requires that the time begins to run when the employee 'elects' to have a departmental hearing. . . Accordingly, the starting date for the 55 day limit is October 1, which requires

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that a final decision [be] issued by November 25. . . [Also,] the Agreement states that "[t]he employee shall be given a written decision ...". [Therefore,] the question becomes whether the word 'shall' is mandatory or directory. The word 'shall' has been interpreted numerous times, and although there have been some exceptions, 'shall' has most often been defined as 'mandatory'. . . [For the reasons noted above,] the decision, issued on December 18, was not within the required time limit. (Award at p. 8).

Having concluded that MPD was required to issue a decision by November 25th, the Arbitrator considered MPD's claim "that even if the Arbitrator accepts the Union's interpretation of when the decision was to be issued, the Grievant waived his right to have the decision issued in that time frame because he did not object to Chairman Dandridge's statement that the findings were due on December 12, a date beyond the 55 days as calculated by the Union and determined upheld by the Arbitrator." (Award at p. 8). Relying on Huron County, Mich., Bd. of Commissioner & Sheriff, 114 LA 487 (Sugerman, 2000), the Arbitrator indicated that "[u]nder the circumstances in this matter, there must be . . . 'clear evidence' of a waiver. [However, she found that FOP] gave no such waiver, and therefore [the] Grievant cannot be penalized for failing to assert his objection to the December 12 date at the proceeding" (Award at p. 9). Therefore, the Arbitrator determined that MPD's claim that the Grievant waived his right to have a decision issued within 55 days, lacked merit.

Finally, the Arbitrator addressed MPD's assertion that the delay in issuing the decision amounted to harmless error. The Arbitrator ruled that "[t]he [CBA's] language renders the requirement to notify [the] Grievant of its decision within 55 days from the date he requested the hearing as mandatory. Under these circumstances, the question of whether [the] Grievant was harmed by the delay need not be determined. It is not required by the parties' Agreement." (Award at p. 10).

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 cites the Notice of Adverse Action which the Grievant received on September 30, 2003. MPD claims that the September 30th Notice provides as follows:

Upon receipt of this notice, you have 21 days to submit, in writing, a response to this proposal. Your response must indicate whether you desire to have a departmental hearing. Should you elect to have a hearing, a three member Panel will hear the evidence in support of the charge(s) on November 4, 2003, 0900 hour, in Room 5064, 300 Indiana Avenue, N.W., in the District of Columbia. (Request at p. 5).

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represents a disagreement with the interpretation of Article 12, Section 6 of the parties' CBA and does not provide a sufficient basis for concluding that the Arbitrator exceeded her jurisdiction.²

Also, MPD argues that the Arbitrator exceeded her authority in finding that FOP did not waive its objection that MPD violated the 55-day rule. (Request at 5-6). MPD contends that FOP's failure to object to the December 12, 2003 date that "findings of fact" would be due, constituted a waiver of FOP's 55-day rule argument. (Request at 5). However, MPD's argument merely reflects a disagreement with the Arbitrator's interpretation of Article 19, Section 5(2) of the parties' CBA. Article 19, Section 5(2) states that:

The parties to the grievance or appeal shall not be permitted to assert in such arbitration proceeding any ground or to rely on any evidence not previously disclosed to the other party. (Award at p. 3).

Arbitrator Hochhauser interpreted this provision to require "only that all issues that will be raised at an arbitration be disclosed prior to arbitration" (Award at p. 9). The Arbitrator found that FOP satisfied this provision because "the Union notified [the] Agency in writing of its intention to raise [the 55 day violation] prior to the arbitration." *Id.* The Arbitrator also found that there must be "clear evidence of a waiver" by the FOP, of which none existed. (Award at p. 9). Once again MPD merely disagrees with the Arbitrator's interpretation of the CBA and requests that we substitute their interpretation for that of the Arbitrator's. We decline to do. The Arbitrator was within her authority to find that FOP did not waive its objection to the 55-day rule violation.

MPD further argues that the arbitrator exceeded her authority in rescinding the Grievant's termination for MPD's violation of Article 12, Section 6. Specifically, MPD contends 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 at least one provision of the CBA in violation of Article 19 E, Section 5, Subsection 4 of the parties' CBA. (See, Request at p. 7). In addition, MPD claims that the Arbitrator issued an award that not only conflicts with the express terms of the agreement, but also imposes additional requirements not expressly provided for in the agreement. Also, relying on Metropolitan Police Department v. District of Columbia Public Employee Relations Board, D.C. Sup. Ct. No. 01 MPA 19 (September 11, 2002), MPD argues that the Arbitrator violated her authority. (Request at p. 8). We disagree. Specifically, we find that Arbitrator Hochhauser was within her authority to rescind the Grievant's termination to remedy MPD's violation of the CBA. We have held that

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We have previously held that, "disagreement with the Arbitrator's calculation of the 55-day time limit is not a sufficient basis for concluding that an Award is contrary to law and public policy or that the arbitrator exceeded his jurisdiction." *District of Columbia Metropolitan Police Department v. Fraternal Order of Police, Metropolitan Police Department Labor Committee*, 47 DCR 5313, Slip Op No. 625, PERB Case No. 00-A-01 (2000); *District of Columbia Metropolitan Police Department v. Fraternal order of Police, Metropolitan Police Department Labor Committee*, 31 DCR 4159, Slip Op. No. 85, PERB Case No. 84-A-05 (1984). (emphasis in original).

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an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." D.C. Department of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). 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). 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 for violations of collective bargaining agreements. (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 violated Article 12, Section 6 of the parties' CBA, she also had the authority to determine what she deemed to be the appropriate remedy. Contrary to MPD's contention, Arbitrator Hochhauser did not add to or subtract from the parties' CBA but merely used her equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator Hochhauser acted within her authority.

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 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 12, Section 6 of the parties' CBA 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

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

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Department v. Public Employee Relations Board, D.C. Sup. Ct. No. 01 MPA 18 (September 17, 2002).

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). Also, 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).

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), case law interpreting the Civil Service Reform Act, and the Civil Service Reform Act itself. (Request at p. 6-7) However, the Award does not violate the law and public policy referenced in MPD's authorities.

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 Board's jurisdiction and review of arbitration awards is limited by the CMPA. 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., FAA⁴ and Shaw v. Postal Service⁵ which apply a "procedural error" requirement regarding the Civil Service Reform Act ("CSRA")⁶. 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

⁴ 735 F.2d 477 (Fed. Cir. 1984).

⁵ 697 F.2d 1078 (Fed. Cir. 1983).

⁶ U.S.C. §7701(c)(2)(A).

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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.⁷ 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.

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. Thus, MPD has failed to point to any clear public policy or law that the Award contravenes. Instead, MPD is requesting that we adopt their findings and conclusions. Therefore, it is clear that MPD's argument involves a disagreement with the Arbitrator's ruling. As previously noted, we have 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, PERB Case No. 95-A-02 (1995). In conclusion, MPD has 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 that there is no merit to either of 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, contrary to law or public policy, or in excess of her authority under the parties' collective bargaining agreement. Therefore, no statutory basis exists for setting aside the Award.

⁷ 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).

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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.

January 9, 2006

Government of the District of Columbia
Public Employee Relations Board

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In the Matter of:)	
)	
District of Columbia Metropolitan Police)	
Department,)	
)	
	Petitioner,)	
		)	PERB Case No. 05-A-07
and)	
		)	Opinion No. 819
)	
Fraternal Order of Police/Metropolitan Police)	FOR PUBLICATION
Department Labor Committee,)	
)	
	Respondent.)	
)	
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DECISION AND ORDER

I. Statement of the Case

The District of Columbia Metropolitan Police Department Labor Committee ("Agency", "Department" or "MPD") filed an Arbitration Review Request ("Request"). MPD seeks review of an Arbitration Award ("Award") that sustained a grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union"). FOP opposes the Request.¹ In addition, FOP filed Motions for Expedited Review and a Motion to Dismiss.

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

¹See Respondent's Opposition to Petitioner's Arbitration Review Request ("Opposition").

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Page 2

II. Discussion

As a preliminary matter the Board will address FOP's Motion for Expedited Review and Motion to Dismiss.

On April 21, 2005, FOP filed a Motion for Expedited Review, requesting that the present matter be resolved no later than 90 days from the date of filing. In support of this Motion, FOP indicates that the Stress Protocol, the policy which is the subject of the grievance, has had a continuing impact on bargaining unit members. FOP cites no authority which authorizes this Board to expedite review of the case for the reasons provided by FOP. Moreover, incidents occurring beyond the record in this case are not within this Board's authority to resolve. Therefore, FOP's Motion for Expedited Review is denied.

On July 22, 2005, FOP filed a Motion to Dismiss, based on the assertion that MPD no longer utilizes the aforementioned Stress Protocol. Again, the Board cannot consider events which have occurred outside the record. Consequently, FOP's Motion to Dismiss is denied.

On January 9, 1998, MPD promulgated General Order 1001.1, which established "policy and procedures for sworn members utilizing the services of the Police and Fire Clinic . . . and other medical facilities." Included among these procedures, were the procedures to be followed by bargaining unit members who claimed that they had suffered "performance-of-duty" (POD) illness or injury. Employees making such a claim are required to complete a "PD Form 42" and to advise an official whenever an injury or illness was incurred while on duty. If an employee has suffered a POD injury or illness, the Department pays the employee's salary and medical expenses and the employee is not required to use sick leave for the absence from work. If the Department administratively determines that an illness or injury was not incurred in the performance of duty, the employee may appeal to the Human Resources Officer and to the D.C. Office of Employee Appeals. (Award at pgs. 2-3).

In August of 2003, MPD promulgated a new "Stress Protocol", which provided in pertinent part as follows:

The purpose of this protocol is to identify and define the conditions upon which a member may claim "stress" as a performance of duty injury or illness.

I. Definitions

The term "critical incident" means:

- I. A psychiatric injury or illness incurred while the member is

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directly involved in taking police action in the performance of duty and such police action results in death, or injury requiring urgent or emergency medical intervention.

2. A psychiatric injury or illness incurred by a member when he or she has been the victim of an on-duty assault or other violent crime that results in death or serious bodily injury.

A PD-42 stress claim may only be filed when the injuries and illnesses are the direct result of a critical incident as defined in Section I of this protocol.

Members filing a PD-42 must identify the critical incident that forms the basis for the performance of duty claim. Failure of the member to identify the critical incident that forms the basis of the PD-42 claim shall result in the claim being ruled as a non-performance of duty injury or illness.

(Award at pgs. 3-4).

The Stress Protocol went on to state that the Department's Medical Director would "review all PD-42 claims filed between 2000 to date to determine which claims meet the critical incident criterion." This provision would allow for the reopening and reconsideration of old POD leave decisions. The Protocol further provided that new and re-opened decisions by the Medical Director could be appealed to the Director of Human Services, who would issue the Department's final agency action. From there, employees are advised that they may appeal to the District of Columbia Superior Court. (Award at p. 4).

The Union was not consulted prior to the adoption of the new Stress Protocol, and was not aware of its existence until members affected by the new criteria complained to the Union. On October 28, 2003, the Union, in writing, requested from MPD a copy of the Stress Protocol. In November of 2003, MPD replied to the request, indicating that the new protocol was a result of the Department of Human Services' examination of workers' compensation laws. Also, the new protocol was intended to reflect the "current thinking" on stress in the law enforcement environment. Included in the reply was a copy of the new Stress Protocol.

On December 4, 2003, the Union representatives met MPD's Chief Ramsey to discuss the new Stress Protocol. At the meeting, the Union complained that the definition of a critical incident was too narrow in requiring death or physical injury. The Union also complained about the retroactive nature of the Protocol. After the meeting, on January 6, 2004, the Union wrote to Chief Ramsey, reiterating its complaints with the new Stress Protocol. Chief Ramsey did not reply to the January 6th letter.

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In February 2004, the Union received notice of the first claim in which POD leave was denied under the new Stress Protocol. An appeal of that decision was filed in mid-February. The Union also filed a class grievance on March 29, 2004, alleging that the new POD policy was not consistent with prevailing law and objected to the retroactive nature of the new Stress Protocol. It requested that the New Stress Protocol be rescinded and that any new changes to the POD policy comply with "applicable laws, rules and regulations." (Award at 7).

"Chief Ramsey denied the grievance on April 19, 2004, asserting several grounds: (1) the [new] Stress Protocol is not part of the contract and therefore is not grievable; (2) the grievance is untimely, since the Union learned of the [new] Stress Protocol in either October or November and failed to file a grievance within 30 days (in accordance with Article 19.B Section 2, of the CBA); and (3) on the merits, the cases cited by the Union are inapposite because they apply to stress-related disability for civilians, rather than public safety personnel." (Award at p. 7).

On April 22, 2004, the Union invoked arbitration and an arbitration hearing was held on November 19, 2004. The issues presented to the Arbitrator were:

Is the grievance arbitrable for the reasons stated in Chief Ramsey's letter of April 19, 2004, to Gregory Green, FOP/MPD Labor Committee?

If arbitrable, did [t]he Department's [new] Stress Protocol violate the [CBA]?

If so, what shall the remedy be?

(Award at p. 2).

At arbitration, the Union asserted that the contract permits arbitration of the Union's grievance that Management misapplied applicable District of Columbia law. It also argued that the grievance is not untimely, since it was filed prior to the time that the MPD issued a final agency action under the new Stress Protocol in August 2004.² The Union also alleged an ongoing violation of the collective bargaining agreement and that the new Stress Protocol continues to be applied erroneously to employees.

In support of its argument protesting the new Stress Protocol, the Union cited *Spartin v. DOES*, 584 A. 2d 564 (D.C. App. 1990), asserting that the case permits disability claims for emotional distress arising out of employment and does not limit recovery to "critical incidents," as defined in the new Stress Protocol. *Spartin*, the Union claimed, does not make death or physical

²The Union asserts that the new Stress Protocol had not been finalized prior to the submission of its grievance. Thus, there was no occurrence, as required by Article 19.B, Section 2. In addition, the Union argues that if the grievance was premature, MPD waived its right to object. The Arbitrator agreed. (See Award at p. 16).

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injury a requirement for recovery of workers' compensation. Since, the new Stress Protocol does not comply with *Spartin*, its promulgation exceeded Management's rights. (See Award at pgs. 9-10).

MPD countered that Article 19 and Article 4, Section 8 of the CBA limits grievances and disputes over the contract and that neither of the Articles authorizes grievances involving Management's statutory rights. MPD also argued that the grievance is untimely, since the Union had notice of the new Stress Protocol by November 2003, when MPD sent a copy to the Union. MPD also asserted that the first individual appeal filed by the Union over the new Stress Protocol was on February 15, 2004 and that the grievance was not filed within 30 days of either of these events.

MPD also argued that the only law governing workers' compensation for D.C. police officers is the Police and Firefighters Retirement and Disability Act, D.C. Code § 5-701, *et seq.* and that the Union's reliance on *Spartin* was in error. MPD asserted that judicial precedent supports the "critical incident" standard of the new Stress Protocol, citing *Neer v. D.C. Police and Firemen's Retirement and Relief Board*, 415 A.2d 523 (D.C. App. 1980).³

In an Award issued February 28, 2005, Arbitrator Wolf determined that the grievance was timely under Article 19.⁴ (See Award at p. 16). Specifically, he found that the new Stress Protocol, although promulgated in August 2003, existed in a state of uncertainty. In addition, the Arbitrator held that "[t]he Union need not grieve a new policy if its finality is uncertain and if senior Management (in this case the Chief) has indicated a willingness to reconsider the policy." (Award at p. 16). The Arbitrator also stated that "[i]n light of this state of uncertainty, I cannot conclude that the grievance was untimely." (Award at p. 16).

Arbitrator Wolf also determined that the grievance was arbitrable. Article 19.A states:

Only an allegation that there has been a violation, misapplication or misinterpretation of the terms of this Agreement shall constitute a grievance under the provisions of this Grievance Procedure.

(Award at p. 17)

As stated above, MPD asserts that Article 19.A, does not permit grievances which protest the implementation of management rights under Article 4. The Arbitrator concluded that "[o]n the one

³It should be noted, however, that MPD has allowed compensation for injuries from assaults even in the absence of physical injury. See *Melva Spencer*, CCN 110-240 (Award at pgs. 10-13.)

⁴Article 19.B Section 2. of the CBA provides that a class grievance must be initiated by the Union "not later than thirty (30) days from the date of the occurrence giving rise to the grievance or within thirty (30) days of the Union's knowledge of its occurrence . . ." (Award at p. 13)

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hand, Article 4.8 permits MPD to modify its rules, regulations and procedures, while the preamble to Article 4 requires such action to be consistent with applicable laws, rules and regulations.” (Award at p. 18). He concluded that “the plain language of Article 4 should be read to mean, at a minimum, that Departmental changes to rules, regulations and procedures be permitted without Union interference, so long as the changes are consistent with applicable laws. By placing this restriction on Management rights into the contract, the parties must have intended that arbitrators selected pursuant to Article 19 would be empowered to interpret this restriction.” (Award at p. 19). Furthermore, the Arbitrator determined that “[n]othing in Article 19 precludes the Union from grieving Management actions that allegedly exceed the statutory limitation in Article 4 and nothing precludes an arbitrator from ruling on that grievance. In sum, I conclude that the Union’s grievance in this case, premised on alleged violations of both Article 4 and public law, is arbitrable.” (Award at p. 19).

The Arbitrator addressed the merits of the case. Specifically, he examined whether the new Stress Protocol violated the CBA. The question before the Arbitrator was whether the new Stress Protocol’s definition of “critical incident”, requiring death or serious bodily injury, violated the D.C. law. The Arbitrator found that D.C. law does not support a “critical incident” standard, stating that “[w]hile Management is free to change its policies, it may do so under Article 4 only if it is consistent with prevailing law. Since the new Stress Protocol’s definition of “critical incident” is not consistent with prevailing law⁵, it constitutes an action in violation of Article 4 of the collective bargaining agreement.” (Award at p. 26).

As a remedy, the Arbitrator directed MPD “to rescind the [new] Stress Protocol to the extent it requires employees to satisfy the critical incident definition.” The Arbitrator also “directed [MPD] to decide POD leave applications on a case-by-case basis, consistent with governing law, as interpreted by the D.C. Courts. [MPD] may not reject POD leave applications solely because they do not meet the current definition of a ‘critical incident.’ [MPD] should also rescind any decisions already rendered under the [new] Stress Protocol if a POD claim was rejected because of a failure to satisfy the definition of ‘critical incident.’” (Award at p. 26).

In their Arbitration Review Request (“Request”), MPD claims that: (1) “Arbitrator Wolf exceeded his authority when he ruled that the occurrence had to be “final” before the 30 days to file the grievance would be triggered” (Request at p. 4); (2) “Arbitrator Wolf exceeded the jurisdiction granted to him” (Request at p. 8); and (3) “the award is contrary to law and public policy.” (Request at p. 9).

The Union counters that the Arbitrator did not exceed his authority regarding the timeliness of the grievance, and that the Arbitrator interpreted the CBA to mean that a policy change such as the new Stress Protocol does not become an “occurrence” subject to the grievance/arbitration process

⁵ The law considered by the Arbitrator consisted of the *Spartin* and *Neer* cases.

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until such time as the Union reasonably perceives that the policy is in final form and will be implemented "(in other words, when there is no longer any reasonable possibility that the policy may be voluntarily modified or rescinded by the Agency)." (Opposition at p. 4).

The Union also argues that the Arbitrator interpreted the contractual definition of a grievance to mean that "Departmental changes to rules, regulations and procedures be permitted without Union interference, so long as the changes are consistent with applicable laws." (Opposition at pgs. 4-5, citing the Award at p. 19). The Union asserts that the Agency's disagreement with this contractual interpretation and finding does not give rise to the Board's arbitration review jurisdiction. (See Opposition at p. 5).

Lastly, the Union argues that "the Agency fails to present any clearly applicable legal precedent or point to any well-defined public policy to refute the Arbitrator's well-reasoned conclusion (i.e., that application of the [new] Stress Protocol 'redefine[s] POD leave in a way that erects a barrier to employees asserting rights created by D.C. law.')." (Opposition at p. 5). Rather, the Agency merely argues its disagreement with the Arbitrator's legal analysis and asserts that because the Award is "contrary to the governing exclusive law" it is also "contrary to [public] policy." (Opposition at p. 5, citing Request at p. 11). In light of the above, the Union asserts that the Board should deny MPD's Request.

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 ed.).

In the present case, MPD contends that Arbitrator Wolf exceeded his authority when he ruled that the occurrence had to be "final" before the 30 days to file the grievance would be triggered. (See Request at p. 4). In support of its argument, MPD cites Article 19 of the CBA, regarding the grievance procedure. Article 19 provides as follows:

B. Presentation of Grievances

Section 2

A grievance shall not be accepted by the Department or recognized as

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a grievance under the terms of this Agreement unless it is presented by the employee to management at the Oral Step of this procedure not later than ten (10) days from the date of the occurrence giving rise to the grievance or within ten (10) days of the employee's knowledge of its occurrence, or in the case of class grievances, by the Union not later than thirty (30) days from the date of the occurrence giving rise to the grievance or within thirty (30) days of the Union's knowledge of its occurrence at Step 2 of the grievance.

Section 4

The time limits prescribed herein may be waived by mutual agreement, in writing, by the parties thereto, but if not so waived must be strictly adhered to.

E. Arbitration

Section 5

2. The parties to the grievance or appeal shall not be permitted to assert in such arbitration proceedings any ground or to rely on any evidence not previously disclosed to the other party.
4. The arbitrator shall not have the power to add to, subtract from or modify the provisions of this agreement in arriving at a decision of the issue presented and shall confine his decision solely to the precise issue submitted for arbitration."

MPD asserts that Arbitrator Wolf exceeded his authority by adding to or modifying the CBA when he held that an occurrence, in this case a policy change, had to be final before the thirty-day time period began to run. In addition, MPD argues that the Arbitrator's ruling on timeliness fails to draw its essence from the CBA, and conflicts with the "unambiguous language [of the CBA] concerning when a grievance is untimely." (Request at pgs. 5-6).

Based on the above and the Board's statutory basis for reviewing arbitration awards, MPD contends that the Arbitrator exceeded his authority by modifying the time frame for filing a grievance under the CBA. For the reasons discussed below, we disagree.

We have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the [CBA]." *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Sup. Ct. May 24, 1993). See also, *United Paperworkers Int'l Union AFL-CIO v.*

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Misco, Inc., 484 U.S. 29 (1987). Furthermore, an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract." *Misco, Inc.*, 484 U.S. at 38. Also, we have explained that:

[by] submitting a matter to arbitration the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based.

District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metropolitan Police Department and Fraternal of Police/Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

In addition, we have found that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." *D.C. Department of Public Works and AFSCME, Local 2091*, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). Also we have held that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' [CBA]. See, *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 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, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960), that "part of what the parties bargain for when they include an arbitration provision in a labor agreement is the 'informed judgment' that the arbitrator can bring to bear on a grievance, especially as to the formulation of remedies." See also, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6 (May 13, 2005).

MPD has cited authority limiting the Arbitrator's equitable powers. As stated above, that limitation is expressed in the Agreement as limiting the arbitrator's power to add to, modify or subtract from the agreement. Furthermore, "[o]ne of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is 'whether the Award draws its essence' from the collective bargaining agreement." *D.C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee*, 49 DCR 810, Slip Op. No. 669 PERB Case No. 01-A-02 (2002) (citing *D.C. Public Schools v. AFSCME, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at 5, PERB Case No. 86-A-05 (1987)). See also, *Dobbs, Inc. V. Local No. 1614, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987). The Board has adopted what is meant by "deriving its essence from the terms and conditions of the collective bargaining agreement" from the U.S. Court of Appeals for the Sixth Circuit in *Cement Division*,

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National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135, where the Court explained the standard by stating the following:

An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765 (6th Cir. 1986).⁶

In the present case, Arbitrator Wolf made a factual determination that the Union was unaware as to whether the new policy had become final and was in effect. As a result, we believe that MPD's assertion that the Arbitrator exceeded his authority by finding that the Union did not have notice that the new policy change had become final, only involves a disagreement with the Arbitrator's interpretation of Article 19 of the CBA, and his findings of fact. Moreover, MPD merely requests that we adopt its interpretation of the above referenced provision of the CBA. In addition, we believe that the portion of the Award requiring an occurrence to be final does not: (1) conflict with the express terms of the CBA; (2) impose an additional requirement not expressly contained by Article 19; and (3) can be rationally derived from the terms of the CBA. We also believe that the portion of the Award which requires that an occurrence be final derives its essence from the parties CBA and therefore, meets the *Cement Division* standard. Therefore, the Board cannot reverse the Award on the ground that the Arbitrator exceeded his authority.

As a second basis for review, MPD asserts that Arbitrator Wolf exceeded his jurisdiction by finding the present matter arbitrable. MPD argues that the Arbitrator overlooked Article 4 of the CBA, which provides that "management rights shall not be subject to the negotiated grievance procedure or arbitration." (Request at p. 8).

FOP counters that MPD's objection to the Arbitrator's ruling amounts to a disagreement with his contractual interpretation and findings and does not present a basis for statutory review. We agree.

In any agreement containing an arbitration clause, there is a presumption of arbitrability. *Beatrice/Hunt Wesson, Inc.* 16 LAIS 1060 (1989). A grievance, therefore, is considered arbitrable in the absence of any express provision excluding a particular grievance from arbitration *Id.*; See also

⁶*MPD and FOP/MPD Labor Committee*, 49 DCR 810, Slip Op. No. 669 at p. 5. PERB Case No. 01-A-02 (2001).

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United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960).

In addition, this Board has held that where the contract allows for arbitration of disputes concerning the misapplication of law resulting in alleged unfair personnel action, the matter is deemed arbitrable. *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 31 DCR 836, Slip Op. No. 69, PERB Case No. 84-A-01 (1984); *District of Columbia Fire Department and International Association of Firefighters, Local 36*, 29 DCR 739, Slip Op. No. 30, PERB Case No. 82-A-01 (1982). We have also held that issues of arbitrability present "an initial question for the arbitrator to decide" *American Federation of State, County, and Municipal Employees, D.C. Council 20, AFL-CIO v. District of Columbia General Hospital, et al.*, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989); See also, *Doctor's Council of the District of Columbia v. Government of the District of Columbia, Department of Human Services, Department of Corrections and Department of Public Works*, 43 DCR 5391, Slip Op. No. 353, PERB Case No. 92-U-07 (1996).

Furthermore, as stated above, by agreeing to submit a matter to arbitration the parties also agree to be bound by the Arbitrator's decision. "This applies equally to the Arbitrator's jurisdictional authority to decide issues of arbitrability." *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 41 DCR 6092, Slip Op. No. 325 at p. 4, PERB Case No. 92-A-07 and 92-A-09 (1994). The issue of arbitrability was submitted to the Arbitrator and his decision appears to be based on the plain language of the CBA. Consequently, the Arbitrator was authorized by the parties, pursuant to the CBA, to interpret that agreement. We believe that MPD's argument represents a mere disagreement with the Arbitrator's interpretation of the CBA. We find that the Arbitrator has not exceeded his jurisdiction and MPD has not presented a statutory basis for review. Therefore, the Board cannot reverse the Award on this ground.

Lastly, MPD argues that the Award is contrary to law and public policy because it relies partially on case law which MPD asserts is not controlling with regard to police and firefighter disabilities. Specifically, MPD contends that the case of *Spartin v. District of Columbia, Department of Employment Services*, 584 A. 2d 564 (D.C. App. 1990), is inapplicable because it does not concern police officers, but civilian employees.⁷

FOP countered that MPD failed to cite any specific law or public policy which would establish a statutory basis for review of the Award. We agree.

We have held that to set aside an award as contrary to law and public policy, the Petitioner has the burden to specify applicable law and definite public policy that mandates that the arbitrator arrive at a different result. See *AFGE, Local 631 and Dept. Of Public Works*, 45 DCR 6617, Slip

⁷The *Spartin* case was introduced by FOP in support of its contention that the "critical incident" criteria in the new Stress Protocol was too narrow.

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Op. No. 365, PERB Case No. 93-A-03 (1993); *District of Columbia Metropolitan Police Department and Fraternal Order Police/Metropolitan Police Department Labor Committee*, 47 DCR 717, Slip Op. No. 633, PERB CASE No. 00-A-04 (2000); See also *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). In addition, 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. "[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). 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 Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 43 (1987). Furthermore, as the D.C. Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." *Department of Corrections v. Local No. 246*, 554 A. 2d 319, 325 (D.C. 1989).

In the present case, MPD has cited no specific law or public policy which mandate that the Arbitrator arrive at a different result. We believe that MPD's argument merely represents a disagreement with the Arbitrator's interpretation of the Agreement and the case law presented at Arbitration.⁸ We have held that a "disagreement with the Arbitrator's interpretation of the parties' contract . . . does not render 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). Therefore, MPD's claim does not present a statutory basis for review. As a result, we cannot reverse the Award on this ground.

For the reasons discussed above, MPD's Request is denied.

⁸The *Neer* case, cited by MPD, does provide standards for workers compensation claims for police officers. However, as the Arbitrator concluded, this case does not demand that the Arbitrator find that a critical incident criteria is mandatory for police officers, nor does the case mandate any other result.

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ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Motion for Expedited Review is denied.
- (2) The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Motion to Dismiss is denied.
- (3) The District of Columbia 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.**

August 24, 2006

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
)	
District of Columbia Nurses Association,	)	PERB Case No. 05-RC-03
)	
Labor Organization,	)	Opinion No. 821
)	
and	)	FOR PUBLICATION
)	
District of Columbia Child and Family Services Agency,)	
)	
Agency.)	
)	

**DECISION ON UNIT DETERMINATION AND
DIRECTION OF ELECTION**

I. Statement of the case:

The District of Columbia Nurses Association ("DCNA" or "Petitioner"), filed a Recognition Petition ("Petition") in the above-captioned proceeding. DCNA seeks to represent, for purposes of collective bargaining, all registered nurses employed by the District of Columbia Child and Family Services Agency. The Petition was accompanied by a showing of interest and a copy of the Petitioner's Constitution. (See Board Rules 502.1(d) and 502.2).

After conducting an investigation, the Board' Executive Director determined that DCNA satisfied the showing of interest requirement of Board Rule 502.2. As a result, on September 14, 2005, Notices concerning the Petition were issued for conspicuous posting where Notices to employees are normally located at the District of Columbia Child and Family Services Agency. The Notices indicated that requests to intervene and/or comments should be filed in the Board's Office no later than October 13, 2005. On September 29, 2005, the District of Columbia Child and Family Services Agency ("CFSA" or "Agency") confirmed that the Notices were posted. No comments were received by the Board. DCNA's Petition is before the Board for disposition.

II. Discussion

DCNA seeks to represent the following proposed unit:

All registered nurses employed by the District of Columbia Child and Family Services Agency, excluding management officials, confidential

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employees, supervisors, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

D.C. Code § 1-617.09(a) (2001ed.), requires that a community of interest exist among employees in order for a unit to be found appropriate by the Board for collective bargaining over terms and conditions of employment. An appropriate unit must also promote effective labor relations and efficiency of agency operations.

Our review of the Petition and exhibits reveal the following concerning the proposed unit. The proposed unit consists of registered nurses employed by the District of Columbia Child and Family Services Agency. All of these nurses share a common organizational structure and mission within the Child and Family Services Agency. No other labor organization represents these registered nurses. Also, there is no collective bargaining agreement in effect covering any of these registered nurses.

In view of the above, we believe that sufficient factors exist for the Board to find that these employees share a community of interest. Such a unit of registered nurses employed by the District of Columbia Child and Family Services Agency, that share a common purpose and mission would promote effective labor relations and efficiency of agency operations and thereby constitute an appropriate unit under the Comprehensive Merit Personnel Act.

Regarding the question of representation, the Board orders that an election be held to determine the will of the eligible employees (in the unit described above), regarding their desire to be represented by DCNA for purposes of collective bargaining with the District of Columbia Child and Family Services Agency. In accordance with the provisions of D.C. Code § 1-617.10 (2001 ed.) and Board Rules 510-515, eligible employees shall indicate their desire concerning whether they desire to be represented for purposes of collective bargaining on compensation and terms and conditions of employment by either the District of Columbia Nurses Association or No Union. Finally, we believe that a mail ballot election is appropriate in this case.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following unit is an appropriate unit for collective bargaining over terms and conditions of employment:

All registered nurses employed by the District of Columbia Child and Family Services Agency, excluding management officials, confidential employees, supervisors, employees engaged in personnel work in

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other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

2. A mail ballot election shall be held in accordance with the provisions of D.C. Code § 1-617.10 (2001 ed.) and Board Rules 510-515, in order to determine whether or not all eligible employees desire to be represented for purpose of collective bargaining on compensation and terms and conditions of employment, by either the District of Columbia Nurses Association or No Union.
3. 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.

December 19, 2005