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**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. 04-A-16 |
| and |) | |
| |) | Opinion No. 781 |
| |) | |
| Fraternal Order of Police/Metropolitan Police |) | |
| Department Labor Committee |) | |
| (On behalf of Grievant Carolyn Tate), |) | |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

DECISION AND ORDER

I. Statement of the case

The Metropolitan Police Department ("MPD") filed an Arbitration Review Request ("Request"). MPD seeks review of an arbitration award ("Award") that rescinded the termination of Carolyn Tate ("Grievant"), a bargaining unit member. The Arbitrator found that MPD proved the acts of misconduct and demonstrated a nexus with the Grievant's status as a police officer. However, he found that MPD failed to properly apply the *Douglas* factors.¹ Specifically, the Arbitrator found that MPD failed to give proper consideration to factors of mitigation and consistency with penalties for like offenses in deciding on the penalty of removal. As a result, he ordered MPD to reinstate the Grievant without back pay and to adjust her records to show a disciplinary suspension from the date of her termination through the date of her reinstatement.

MPD contends that the Award is on its face, contrary to law and public policy. In addition,

¹Douglas v. Veterans Administration, 5 MPSR 280 (1981).

MPD asserts that "the Arbitrator exceeded his authority under the collective bargaining agreement because it does not give him the authority to reduce a penalty because he disagrees with the penalty selected." (Request at p. 9). The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP"), 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 jurisdiction..." D. C. Code §1-605.02(6) (2001 ed.).

II. Discussion:

From September 1985 until she was terminated on June 1, 2001, the Grievant served as a police officer with MPD. In November 1998, the Grievant's son was shot in the head and hand. Following her son's wounding, the Grievant became depressed and suffered emotional distress. (Award at p. 3) As a result of this situation, she voluntarily relinquished her weapon and badge. In addition, at her request, she was placed on light duty.

On May 15, 1999, the Grievant was arrested in Maryland for failure to have the proper license tags on her car and for driving without insurance. (Award at p. 4) However, she failed to notify MPD of her arrest. As a result, MPD suspended her for 30 days.

Subsequently, on August 7, 1999, the Grievant was arrested in Maryland for driving under the influence of alcohol/driving while intoxicated (DUI). (Award at p. 4) In July 2000, she pleaded guilty to the DUI charge and was sentenced to 60 days (suspended) and two years of probation. (Award at p. 4). In addition, she was ordered to pay a \$150 fine and to perform 40 hours of community service.

In light of the above, in November 2000, MPD proposed the Grievant's termination. The proposed termination was based on the following charges: (1) conduct unbecoming an officer;² (2) conviction of a criminal or semi-criminal offense;³ and (3) failure to obey orders;⁴ (See, Award at pgs. 4-5). "On March 6, 2001, MPD convened an Adverse Action Hearing before the Trial Board." (Request at p. 4) The Grievant appeared before the Trial Board and pleaded guilty with an explanation to each of the three charges. (Award at p. 4) The Trial Board recommended that the Grievant be terminated. "In reaching that recommendation, [the Trial Board] considered the *Douglas*

² This charge was the result of the Grievant being arrested for DUI on August 7, 1999.

³ This allegation involved the Grievant's guilty plea to the DUI charge.

⁴ This concerned the Grievant's failure to notify MPD about her DUI arrest.

factors. [Specifically, the Trial Board] stated that the Grievant's misconduct was 'quite serious', that her misconduct was significant in relation to her role as a police officer and the [Trial Board] noted the Grievant's May 15, 1999 arrest and suspension as part of her disciplinary record." (Award at p. 5) The Trial Board "found that the Grievant's misconduct damaged [MPD's] reputation and that there was no doubt that the Grievant had received adequate notice of the rules she violated." (Award at p. 6). In addition, the Trial Board "determined that the Grievant had shown a pattern of indifference to the requirements of her position and had done so more than once; it concluded, in effect, that there was little potential for her rehabilitation." Id. Furthermore, the Trial Board asserted that the termination was consistent with penalties for similar misconduct and with MPD's table of penalties. (Award at p. 6) As a result, the Grievant's employment was terminated on June 1, 2001. She appealed the termination and FOP invoked arbitration on her behalf.

FOP argued that MPD "erred in its decision to terminate the Grievant because termination was unduly harsh and was inconsistent with lesser penalties imposed on other employees for the same or similar offenses." (Award at p. 11) MPD countered "that in order for cases to be appropriate for such analysis the Grievant must show: that she was in the same organizational unit, was subjected to discipline by the same supervisor within the same general time period, engaged in similar acts of misconduct; that there were no differentiating or mitigating circumstances that distinguished the misconduct and/or the appropriate discipline of the comparative employee from hers." Id. In an Award issued on May 28, 2004, the Arbitrator rejected MPD's argument by noting the following:

The appropriate disparate treatment analysis is not as rigid as the MPD] asserted. The MPD's analysis might be appropriate if looking to the cases of other employees for the value as binding precedent, but it is certainly not necessary to find such a precise match in such a large number of facts when considering the cases of other employees for their instructive and/or persuasive value. (Award at pgs. 11-12).

In his Award, the Arbitrator noted that the burden was on MPD "to prove, by a preponderance of the evidence that: [(1)] the Grievant committed the misconduct charged; [(2)] there was a nexus between the misconduct and the efficiency of the MPD, and [(3)] the penalty imposed was appropriate under the circumstances." (Award at p. 7) The Arbitrator concluded that the Grievant's guilty plea to the Trial Board established "that she committed the misconduct that was charged." (Award at p. 7). In addition, the Arbitrator determined that the "record established on its face the nexus between that misconduct and the efficiency of [MPD]." Id. With respect to the appropriateness of the penalty of termination, he noted that the record indicated that MPD considered the *Douglas* factors. However, he found that MPD erred significantly in its application of the *Douglas* factors. (Award at p. 8) Specifically, the Arbitrator determined that the evidence established that the Grievant suffered substantial adverse mental and physical effects from her son's shooting, and that her "ability to function and to comply with MPD rules was severely impaired." (Award at p.8). Also, he found that "MPD did not give sufficient weight to the depth of the

Grievant's difficulties and seemingly failed to comprehend her inability to function." (Award at p. 10) In light of the above, he concluded "that [MPD] committed a substantial error by failing to give proper consideration to factors of mitigation in deciding what penalty to impose on the Grievant." Id.

Also, the Arbitrator indicated that the misconduct in the comparative cases cited by the FOP was not as serious as the Grievant's, and that the penalties the comparative employees received ranged from 25 to 40 days. However, the Arbitrator noted that "while the misconduct was not as severe, the penalty in each case was far less than termination." (Award at p. 12) As a result, the Arbitrator noted the following:

In consideration of the Grievant's prior 30 day suspension, I find that a considerable period of suspension would have been appropriate for her misconduct herein, but that termination was not supported in this record. (Award at p. 12).

In light of the above, the Arbitrator concluded that MPD "failed to sustain its burden to prove that termination was the appropriate penalty." (Award at p. 13) Therefore, the Arbitrator ordered that the Grievant be reinstated without back pay. In addition, he ordered that the termination be expunged from her record and substituted with a disciplinary suspension from the date of her termination to the date of her reinstatement. (Award at p. 13)

MPD takes issue with the Award. Specifically, MPD argues that the: (1) Award is contrary to law and public policy and (2) Arbitrator exceeded his authority under the collective bargaining agreement because it does not give him the authority to reduce a penalty because he disagrees with the penalty selected. (See, Request at pgs. 2 and 9)

In support of its argument, MPD cites Stokes v. District of Columbia, 502 A.2d 1006 (D.C. 1985). In *Stokes*, an employee of the District of Columbia Department of Corrections was charged with violating four of the Department's regulations. The employee was terminated and he appealed his termination to the District of Columbia Office of Employee Appeals ("OEA"). OEA rescinded the termination. The District of Columbia Superior Court reversed OEA's decision and the employee filed an appeal with the District of Columbia Court of Appeals. The Court of Appeals upheld the decision of the Superior Court. In view of the above, MPD asserts the following:

the Court of Appeals . . . determined [that] OEA may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. The 'primary discretion' in selecting a penalty 'has been entrusted to agency management, not to the OEA.' (Request at p. 7)

MPD also points to recent OEA decisions concerning a reviewing body substituting its judgment for that of the employing agency regarding the appropriateness of a penalty. Specifically,

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MPD cites Miller v. Department of Public Works, OEA Matter No. 1601-0113-98, Opinion and Order on Petition Review (November 22, 2002), in which the OEA Board reversed the action of an administrative judge who had reduced an agency penalty and reaffirmed its prior decision in Taggart v. Metropolitan Police Department, OEA Matter No. 2401-0113-92R94 (January 9, 1998). In the *Miller* case OEA indicated that:

Any review by OEA of an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's workforce is a matter entrusted to the agency, not OEA. When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." Indeed, OEA's scope of review is limited to a determination of whether the penalty is within the range allowed by the table of penalties, whether the penalty is based on relevant Douglas factors, and whether there is clear error in judgment. (Miller v. Dept. of Public Works at p. 2)

In MPD's view, the principles, reasoning, and holding in *Stokes* and *Miller* are applicable here, and call for a finding that "the Arbitrator abused his discretion when he substituted his judgment for that of MPD in assessing the penalty for the Grievant's misconduct." (Request at p. 8) For the reasons noted below, we disagree.

First, we note that both *Stokes* and *Miller* involve the issue of whether it is appropriate for a reviewing administrative agency to substitute its judgment for that of the employing agency. By contrast, the present case involves an arbitrator's determination concerning whether MPD had just cause to terminate the Grievant, and if not what the appropriate remedy should be. (See Award at p. 2) Also, the present case involves review of a decision issued by an Arbitrator who was selected by the parties pursuant to their collective bargaining agreement. Furthermore, 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 addition, we have held that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). Furthermore, 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.⁵ 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' collective bargaining agreement that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that MPD "failed to sustain its burden to prove that termination was the appropriate penalty," he also had the authority to determine what he deemed to be the appropriate remedy. (See, Award at p. 13).

In light of the above, we find that MPD's assertion that the arbitrator exceeded his authority by reversing a termination and reducing the penalty to a suspension, involves a disagreement with the Arbitrator's findings and conclusions. This is not a sufficient basis for concluding that the Arbitrator exceeded his authority. Therefore, we cannot reverse the Award on this ground.

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 does not directly cite a provision of law violated by the Award, although it does appear to rely indirectly on D.C. Code §1-617.1(b) (1981 ed.), the law in effect when *Stokes* was decided. We note that this section of the D. C. Code was repealed in 1998. Furthermore, we do not find that the Arbitrator substituted his judgment for that of MPD management. Specifically, the issues presented to the Arbitrator were whether MPD had just cause to terminate the Grievant and, if not, what the appropriate remedy should be. (See Award at p. 2) The Arbitrator found, based on his interpretation of MPD's policies and regulations and his interpretation of the *Douglas* factors, that there was not just cause for the Grievant's termination and that the remedy

⁵We note that if the parties' collective bargaining agreement limits the Arbitrator's equitable power, that limitation would be enforced.

should be to reinstate the Grievant without back pay and convert her time off the rolls to a suspension. Specifically, the Arbitrator found that the penalty imposed by MPD was based on a flawed and inadequate application of the relevant *Douglas* factors.

After reviewing MPD's public policy argument, we find that MPD fails to cite any specific public policy or law that was violated by the Arbitrator's Award. MPD merely cites to the *Stokes* and *Miller* cases and asserts that the Arbitrator's Award is not consistent with *Stokes* and *Miller*. 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. 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 his authority under the parties' collective bargaining agreement. Therefore, no statutory basis exists for setting aside the Award.

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.

May 17, 2005

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 04-A-16 was transmitted via Fax and U.S. Mail to the following parties on this the 17th day of May, 2005.

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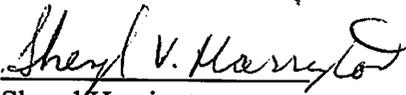
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