

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

In the Matter of:)	
)	
District of Columbia Metropolitan Police Department)	
)	PERB Case No. 21-A-01
Petitioner)	
)	Opinion No. 1765
v.)	
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On November 2, 2020, the District of Columbia Metropolitan Police Department (MPD) filed an Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA)¹ seeking review of an arbitration award (Award) dated October 5, 2020. The Award sustained, in part, the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) on behalf of an employee (Grievant). MPD seeks review of the Award on the grounds that the Arbitrator exceeded his authority, and the Award is contrary to law and public policy.² FOP filed an Opposition, asking the Board to deny MPD's Request.

Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Board concludes that the Arbitrator did not exceed his authority and the Award is not contrary to law and public policy. Therefore, the Board denies MPD's Request.

II. Arbitration Award

A. Background

¹ D.C. Official Code § 1-605.02(6).

² Request at 2.

At the time of the Grievant's removal, he had been employed by MPD as a Detective for approximately twenty-one (21) years.³ There were three distinct categories of events which led MPD to take disciplinary action against him, all of which will be discussed herein. First, on July 5, 2018, the Grievant interviewed the victim of a Robbery Force and Violence - Domestic Violence incident.⁴ MPD concluded that the Grievant's demeanor and attitude during the interview demonstrated irritability and a lack of compassion and appreciation of the seriousness of the allegation.⁵ MPD concluded this behavior may have been intended to dissuade the victim from cooperating with the police in filing a report.⁶ During the investigation, the Grievant failed to provide a *Miranda* warning before questioning a suspect who was in custody about the whereabouts of the victim's stolen property.⁷ Upon learning from the suspect that the stolen property was in the suspect's home, the Grievant allowed MPD members to search the residence, where they recovered the victim's property.⁸

Second, on July 30, 2018, the Grievant reported to the Sixth District substation to assist with the investigation of an Assault with a Deadly Weapon (ADW).⁹ Although the Grievant was aware of the facts of the case and the identity of a potential suspect, MPD determined that he did not recognize a sense of urgency and failed to conduct and/or ensure proper follow up of the avenues of investigation presented.¹⁰

Last, according to MPD, the Grievant failed, on four occasions, to present affidavits in a timely manner.¹¹ MPD found that he (1) failed for approximately 39 days to present an affidavit to the United States Attorney's Office (USAO) for a Simple Assault which had a named suspect, (2) failed for approximately eight days to present an affidavit to the USAO for a Threats to do Bodily Harm case which had a named suspect, (3) failed for nine business days after it was signed to present to a Judge an affidavit from the USAO for a Threats to do Bodily Harm case, and (4) failed for nine business days after it was signed to present to a Judge an affidavit from the USAO for a Simple Assault case.¹²

MPD issued a Notice of Proposed Adverse Action (Notice) on November 9, 2018.¹³ The Notice contained four Charges: (1) "Failure to obey orders or directives issued by the Chief of Police," (2) "Neglect of duty to which assigned, or required by rules and regulations adopted by the Department," (3) "Violation of General Order Series 12-.21, Attachment A, Part A-25," which prohibits "conduct prejudicial to the reputation and good order of the police for, or involving

³ Award at 2.

⁴ Award at 2-3.

⁵ Award at 2-3.

⁶ Award at 2-3.

⁷ Award at 3.

⁸ Award at 12.

⁹ Award at 3.

¹⁰ Award at 3-4.

¹¹ Award at 4-5.

¹² Award at 4-5.

¹³ Award at 2.

failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force,” and (4) “Neglect of duty to which assigned, or required by rules and regulations adopted by the Department.”¹⁴ The Notice proposed termination.¹⁵

On November 14, 2018, the Grievant requested an Adverse Action Hearing.¹⁶ The Panel heard the charges on July 16 and 17, 2019.¹⁷ The Panel determined that the Grievant was guilty of all charges, with the exception of Charge No. 4, Specification No. 2 (failing for approximately eight days to present an affidavit to the USAO for a Threats to do Bodily Harm case which had a named suspect).¹⁸ The Panel recommended a total of 75 days of suspension as well as termination.¹⁹ On September 3, 2019, MPD issued a notice of termination to the Grievant.²⁰ He appealed the Panel’s decision to the Chief of Police, who denied the appeal on September 20, 2019.²¹ FOP requested that the matter be arbitrated and the parties proceeded to arbitration.²²

B. Arbitrator’s Findings

At arbitration, the Arbitrator considered the following issues:

- (1) Whether the Panel’s guilty findings are supported by substantial evidence?
- (2) Whether termination is an appropriate penalty?²³

Before the Arbitrator, FOP argued that the Supreme Court has held that physical evidence obtained pursuant to statements made in violation of *Miranda* are not fruits of the poisonous tree.²⁴ In *Patane*, the Court found that failure to give a suspect the warnings prescribed by *Miranda* does not require suppression of the physical fruits of the suspect’s unwarned voluntary statements.²⁵ Therefore, the Arbitrator concluded that the Panel’s decision to suspend the Grievant for 10 days because he directed MPD members to go to the suspect’s private residence to recover the victim’s property was not supported by facts or law.²⁶

¹⁴ Award at 2-4.

¹⁵ Award at 5.

¹⁶ Br. of MPD at 2.

¹⁷ Award at 5.

¹⁸ Award at 5.

¹⁹ Award at 5. The Panel recommended termination for both 1) the Grievant’s failure to recognize a sense of urgency and failure to conduct proper follow up of the avenues of investigation presented in an ADW case and 2) the Grievant’s failure for nine business days to present to a Judge an affidavit which was signed by the USAO for a Simple Assault case.

²⁰ Award at 5-6.

²¹ Award at 6.

²² Award at 6.

²³ Award at 6.

²⁴ Award at 12-13. *United States v. Patane*, 542 U.S. 630 (2004).

²⁵ *Id.* at 633-34.

²⁶ Award at 13.

The Arbitrator also concluded that there was no record evidence to support the allegation that the Grievant neglected his duty by failing to recognize a sense of urgency when dealing with an ADW matter and failing to conduct and/or insure proper follow up of the avenues of investigation that were presented.²⁷ Therefore, the Arbitrator declined to sustain the Panel's decision to terminate the Grievant in connection with this matter.²⁸

With respect to the Grievant's processing of affidavits, the Arbitrator found that a person handling a case has an obligation to obtain review some time before the passage of 39 days. Therefore, the Arbitrator sustained the penalty imposed for the Grievant's failure to do so. The Arbitrator also found that the Grievant was guilty of neglect of duty for his failure to present two signed affidavits to a judge until nine days after they were signed, but he reduced the 20-day suspension and termination imposed by the panel to two 10-day suspensions.²⁹

The Arbitrator denied as unsupported by fact or law the Grievant's 10-day suspension for Charge No. 1, Specification No. 3 – failing to obtain a proper consent to search or search warrant before allowing MPD members to respond to a private residence to recover property belonging to the victim of a robbery.³⁰ He also denied as unsupported by record evidence the termination and 15-day suspension of the Grievant for Charge No. 2, Specification No. 1 and Charge No. 3, Specification No. 1 – allegedly failing to recognize the urgency of an Assault with a Deadly Weapon (ADW) matter and failing to follow up on avenues of investigation.³¹ The Arbitrator lessened from 20 days to 10 days the suspension which the Panel recommended as a penalty for Charge No. 4, Specification No. 3 – the Grievant's alleged failure to present for nine business days after it was signed an affidavit which from the USAO for a Threats to do Bodily Harm case to a Judge.³² Lastly, the Arbitrator denied as unsupported the termination which the Panel recommended as a penalty for Charge No. 4, Specification No. 4 – the Grievant's alleged failure for nine business days after it was signed to present to a Judge an affidavit from the USAO for a Simple Assault case, lowering it to a 10-day suspension.³³

The Award also reviewed the Panel's application of the 12-factor test set forth in *Douglas* (*Douglas* Factors).³⁴ Factor 4 considers the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.³⁵ The Arbitrator found that the panel improperly assessed this factor when it concluded the *current* allegations of misconduct called the Grievant's dependability and abilities as a Detective Grade I into question, as Factor 4 is supposed to examine *prior* conduct.³⁶ Unlike the Panel, the Arbitrator

²⁷ Award at 13-16.

²⁸ Award at 17.

²⁹ Award at and 21, 24.

³⁰ Award at 12-13.

³¹ Award at 13-17.

³² Award at 19-21.

³³ Award at 19-21.

³⁴ Award at 22-24. *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981).

³⁵ *Id.* at 332.

³⁶ Award at 22.

found Factor 4 to be a mitigating factor for the Grievant.³⁷ Factor 6 assesses the consistency of the penalty with those imposed on other employees for the same or similar offenses.³⁸ The Arbitrator found that, when it determined that the penalty proposed in this matter was in line with similar offenses, the Panel failed to set forth what prior similar conduct resulted in the same discipline.³⁹ Therefore, the Arbitrator concluded, it is impossible to judge whether the Panel struck "...a reasonable balance within tolerable limits of reasonableness" when recommending termination, as required under *Douglas*.⁴⁰ Lastly, when considering the notoriety of the Grievant's offense or its impact on the reputation of MPD, as required by Factor 8, the Panel found that the case at hand caused embarrassment to MPD.⁴¹ However, the Arbitrator found nothing in the record which clearly delineated "embarrassment."⁴² While the Panel mentioned newspaper articles, it did not specifically state what those articles contained – information necessary to evaluate them.⁴³

Based on his conclusions regarding the Panel's recommendations, the Arbitrator determined that the appropriate penalty was a suspension totaling 50 days.⁴⁴ The Award directed that the Grievant be reinstated with backpay, interest, and benefits from the day of his termination to the date of his full reinstatement, less interim earnings.⁴⁵ MPD seeks review of the Award.

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an 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.⁴⁶ MPD requests review on the grounds that the Arbitrator exceeded his authority and the award is contrary to law and public policy.

The issues before the Board are 1) whether, in determining the Award, the Arbitrator exceeded his authority, and 2) whether the Award is contrary to law and public policy. MPD argues that the Board should reverse the Award and affirm MPD's final decision.⁴⁷ It claims the Arbitrator exceeded his authority and violated law and public policy by 1) lowering the penalty for Charge No. 4, Specification No. 3 (failing to present a signed affidavit for a Threats to do Bodily Harm case for nine business days) from a 20-day suspension to a 10-day suspension, and 2) lowering the penalty for Charge No. 4, Specification No. 2 (failing to present a signed affidavit for a Simple Assault case for nine business days) from termination to a 10-day suspension.⁴⁸ In its Opposition

³⁷ Award at 22.

³⁸ *Douglas*, 5 M.S.P.B. at 332.

³⁹ Award at 22-23.

⁴⁰ Award at 23. 5 M.S.P.B. at 333.

⁴¹ Award at 23. *Id.*

⁴² Award at 23.

⁴³ Award at 23.

⁴⁴ Award at 25.

⁴⁵ Award at 25.

⁴⁶ D.C. Official Code § 1-605.02(6).

⁴⁷ Request at 19.

⁴⁸ Request at 2,19.

to the Request (Opposition), FOP argues that there is no valid basis for the Board to overturn the Award.⁴⁹

A. The Arbitrator did not exceed his authority.

When determining whether an arbitrator exceeded his authority in rendering an award, the Board analyzes whether the award “draws its essence from the parties['] collective bargaining agreement.”⁵⁰ The relevant questions in this analysis are whether the arbitrator acted outside his authority by resolving a dispute not committed to arbitration and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.⁵¹

Here, the parties expressly charged the Arbitrator with the task of reviewing whether termination was an appropriate remedy. The Arbitrator determined that a case assigned pursuant to Article 19 of the collective bargaining agreement requires an arbitrator to consider evidence in the record and determine whether there is enough to support a cause for discipline, including review of the charges and analysis of the *Douglas* factors. The Arbitrator based his decision on the record and briefs provided by the parties and determined that several of the penalties the Panel imposed were inappropriately severe. He therefore lessened the total penalties imposed on the grievant from 75 days of suspension and termination to 50 days of suspension.

In its Arbitration Review Request, MPD states that it “seeks reversal of the Award in this case because...the arbitrator exceeded his authority...”⁵² MPD argues that the Arbitrator “effectively threw out” the Panel’s findings due to a perceived lack of evidence showing his guilt.⁵³ This is a mischaracterization. The Arbitrator carefully considered the Panel’s findings and determined that, while it had reached some logical, supported conclusions, it had also made some errors. For example, the Panel found the Grievant guilty of Charge No. 2, Specification No. 1 (allegedly failing to recognize the urgency of an Assault with a Deadly Weapon (ADW) matter and failing to follow up on avenues of investigation).⁵⁴ But, as the Arbitrator noted, “nowhere in its decision (Decision) does the Panel rely on or even allude to any facts to support its conclusion.”⁵⁵ MPD accuses the Grievant of failing to recognize a sense of urgency and failing to conduct/ensure proper follow-up of the avenues of investigation that were presented in an ADW matter.⁵⁶ However, as the Arbitrator stated⁵⁷, the record shows that the Grievant did, in fact, check the name of the suspect and was appraised that a canvas of his residence and vehicle had already

⁴⁹ Opposition at 19.

⁵⁰ *AFGE Local 2725 v. D.C. Housing Auth.*, 61 D.C. Reg. 9062, Slip Op. 1480 at 5, PERB Case No. 14-A-01 (2014).

⁵¹ *Mich. Family Resources, Inc. v. Serv. Emp’ Int’l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. 1258 at 4, PERB Case No. 10-A-09 (2012).

⁵² Request at 2.

⁵³ Request at 12.

⁵⁴ Decision at 57.

⁵⁵ Award at 13.

⁵⁶ Request. at 12.

⁵⁷ Award at 16.

been made and that no one was home.⁵⁸ Moreover, the Arbitrator emphasized⁵⁹ that the Panel did not suggest what the Grievant should have done differently.⁶⁰

MPD cites to *Stokes v. District of Columbia*⁶¹ for deferential review⁶² but the Board has repeatedly held that *Stokes* is not the correct standard to apply to an arbitrator's review of an agency's decision because an arbitrator's authority arises out of the parties' contractual agreement to submit the case to arbitration rather than the statutes creating the Office of Employee Appeals interpreted in *Stokes*. The Board has found that by submitting a matter to arbitration, "the parties also agree to be bound by the Arbitrator's decision which necessarily includes the Arbitrator's interpretation of the parties' agreement and related rules and/or regulations as well as his evidentiary findings and conclusions upon which the decision is based."⁶³ "The Board will not substitute its own interpretation for that of the duly designated arbitrator."⁶⁴ MPD presents an argument to the Board which was previously presented to the Arbitrator and rejected. MPD disagrees with the finding that substantial evidence did not exist to support the termination. Disagreement with the Arbitrator is not a sufficient reason to modify, set aside, or remand an Award.

B. The Award is not contrary to law and public policy.

MPD argues that the Award is contrary to law and public policy because the Arbitrator's decision to reduce MPD's penalty assessment for Charge No. 4 (neglect of duty to which assigned, or required by rules and regulations adopted by the Department) is a violation of the law and public policy established in *Stokes*, which holds that agencies must determine the appropriate level of discipline for employees found guilty of serious misconduct.⁶⁵ As previously stated, however, *Stokes* is not the proper standard to apply, as it concerns an abuse of discretion by the Office of Employee Appeals⁶⁶ – not the Public Employee Relations Board. MPD does not cite to any additional precedent to support its claim that the Award is contrary to law and public policy.

Overturing an arbitration award on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to the arbitrator's interpretation of the contract.⁶⁷ "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial

⁵⁸ Final Investigative Rep. and Recommendations at Bates Nos. 85, 90 and MPD Complainant/Witness Statement at Bates No. 149.

⁵⁹ Award at 16.

⁶⁰ Decision at 2-3, 57-58.

⁶¹ 502 A.2d 1006 (D.C. 1985).

⁶² Request at 15-16 (citing *Stokes*, 502 A.2d 1006).

⁶³ *MPD v. NAGE Local R3-5 ex. rel. Burrell*, Slip Op. No. 785 at 4, PERB Op. No. 03-A-08 (2006) (citing *UDC v. UDCFA*, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992)).

⁶⁴ *FEMS v. AFGE, LOCAL 3721*, 51 D.C. Reg. 4158, Slip Op. 728, PERB Case No. 2-A-08 (2004).

⁶⁵ Request at 18 (citing *Stokes*, 502 A.2d 1006).

⁶⁶ *Stokes*, 502 A.2d at 1010.

⁶⁷ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019) (citing *Am. Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986), accord *MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 8, PERB Case No. 09-A-05 (2014); *MPD v.*

review of arbitration awards under the guise of ‘public policy.’”⁶⁸ MPD bears the burden of demonstrating that the award itself violates established law or compels an explicit violation of “well defined public policy grounded in law and or legal precedent.”⁶⁹ Furthermore, MPD has the burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at a different result.”⁷⁰ The D.C. Court of Appeals has reasoned, “Absent a clear violation of law[,] one evident on the face of the arbitrator’s award, the [Board] lacks authority to substitute its judgment for the arbitrator’s.”⁷¹

The Board has held that a disagreement with an arbitrator’s choice of remedy does not render the Award contrary to law and public policy.⁷² MPD disagrees with the Arbitrator’s conclusion concerning the appropriate penalty to be imposed. This is not a sufficient basis for concluding that the Award is contrary to law and public policy. For the aforementioned reasons, MPD’s Request is denied.

IV. Conclusion

The Board rejects MPD’s arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, MPD’s Request is denied and the matter is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
2. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

December 17, 2020
Washington, D.C.

FOP/MPD Labor Comm. ex rel. Johnson, 59 D.C. Reg. 3959, Slip Op. No. 925 at 11-12, PERB Case No. 08-A-01 (2012)).

⁶⁸ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

⁶⁹ *Id.*

⁷⁰ *MPD v. FOP/MPD Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

⁷¹ *Fraternal Order of Police/Dep't of Corr. Labor Comm. v. District of Columbia Pub. Emp. Relations Bd.*, 973 A.2d 174, 177 (D.C.2009)

⁷² *DCHA v. Bessie Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999).

CERTIFICATE OF SERVICE

I hereby certify that the attached Decision and Order, Slip Op. 1765, in PERB Case No. 21-A-01 was served electronically via File & ServeXpress to the following parties on this the 22nd day of December 2020:

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