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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	)	
	)	PERB Case No. 20-A-03
Petitioner	)	
	)	Opinion No. 1738
v.	)	
	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	
	)	
Respondent	)	

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**DECISION AND ORDER**

**I. Statement of the Case**

On November 25, 2019, the District of Columbia Metropolitan Police Department (MPD) filed this Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-605.02(6), seeking review of an arbitration award (Award) ,dated October 31, 2019.<sup>1</sup> The Award sustained, in part, the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (Union) on behalf of an employee (Grievant) who had been removed from service. The Arbitrator ordered that the Grievant’s termination be reduced to a ninety-day suspension without pay and that the Grievant be reinstated and made whole. The issue before the Board is whether the Award is contrary to law and public policy.<sup>2</sup>

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<sup>1</sup> On November 25, 2019, MPD filed Petitioner’s Arbitration Review Request contemporaneously with a Motion for an Extension of Time to Submit a Statement of the Reasons for Appealing the Award. On December 4, 2019, FOP filed an opposition to MPD’s request for additional time. After reviewing MPD’s arbitration review request, in a letter dated December 10, 2019, the Executive Director determined that the filing was deficient, pursuant to PERB Rule 501.13, and requested that MPD submit an amended arbitration review request. MPD timely filed an amended arbitration review request on December 18, 2019. FOP timely filed an amended opposition to MPD’s arbitration review request on January 2, 2020.

<sup>2</sup> In its deficient arbitration review request, MPD requested review on the basis that the arbitrator exceeded their jurisdiction and that award was contrary to law and public policy. In the Amended Arbitration Review Request, MPD

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

## **II. Arbitration Award**

### **A. Background**

At the time of the Grievant's removal, the Grievant had been employed by MPD as a police officer for approximately twenty-one (21) years.<sup>3</sup> On November 28, 2011, the Grievant informed MPD of several boxes of evidence that were stored by the Grievant's spouse in the Grievant's garage.<sup>4</sup> At the time of the Grievant's removal, Grievant's spouse was employed by MPD as a police officer. In an initial interview on November 29, 2011, the Grievant admitted to being aware of the evidence prior to November 28, 2011. In a second interview on January 24, 2012, the Grievant initially denied being aware of the evidence prior to November 28, 2011, then clarified the answer.<sup>5</sup>

MPD issued a Notice of Proposed Adverse Action (Notice) on March 8, 2012.<sup>6</sup> The Notice contained two charges: (1) "Failure to obey orders or directives issued by the Chief of Police" and (2) "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her duties . . . ." <sup>7</sup> The Notice proposed termination.<sup>8</sup>

On March 8, 2012, the Grievant requested an Adverse Action Hearing.<sup>9</sup> On March 21, 2012, the Grievant filed a motion requesting that an Adverse Action Panel (Panel) member be removed from the Panel because of the Panel member's previously-held position involving MPD discipline.<sup>10</sup> The Motion was denied.<sup>11</sup> The charges were heard before a Panel on March 23, 2012.<sup>12</sup> The Panel determined that the Grievant was guilty of both charges.<sup>13</sup> The Panel recommended termination.<sup>14</sup> On July 10, 2012, Grievant received the Final Notice of Adverse Action.<sup>15</sup>

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only addresses the argument that the award is contrary to law and public policy, thus waiving the argument that the arbitrator exceeded their jurisdiction.

<sup>3</sup> Award at 9.

<sup>4</sup> Award at 10.

<sup>5</sup> Award at 10; Pet'r Am. Req. at 3.

<sup>6</sup> Award at 10.

<sup>7</sup> Award at 11.

<sup>8</sup> Award at 11.

<sup>9</sup> Award at 11.

<sup>10</sup> Award at 11.

<sup>11</sup> Award at 11.

<sup>12</sup> Award at 11.

<sup>13</sup> Award at 11.

<sup>14</sup> Award at 11.

<sup>15</sup> Award at 11.

The Grievant appealed the Panel's decision to the Chief of Police, who denied the appeal.<sup>16</sup> The Grievant's employment was terminated.<sup>17</sup> Thereafter, the parties proceeded to arbitration.<sup>18</sup>

### **B. Arbitrator's Findings**

At arbitration, the Arbitrator considered the following issues:

- (1) Whether [MPD's] actions violated due process?
- (2) Whether the evidence presented by [MPD] was sufficient to support the alleged charges?
- (3) Whether termination is the appropriate penalty?<sup>19</sup>

Before the Arbitrator, the Union contended that MPD violated Grievant's due process rights when (1) evidence was forwarded to the Panel and Grievant's counsel the day before the hearing and (2) the MPD retained a member of the Panel over Grievant's objection.<sup>20</sup> The Arbitrator found that the evidence presented the day before the hearing was improper, but did not prejudice Grievant's case.<sup>21</sup> The Arbitrator found nothing in the record to support the Union's contention that the Panel member was not neutral or acted in an inappropriate manner at trial.<sup>22</sup> Therefore, the Arbitrator found that MPD's actions at trial did not result in harmful error.<sup>23</sup>

The Arbitrator found that the evidence submitted by MPD was sufficient to support both charges.<sup>24</sup> First, the Arbitrator found that Grievant's initial interview "may reasonably be understood to include an admission from Grievant that [Grievant] had noticed some evidence being improperly stored in [Grievant's] garage prior to [Grievant's] November 2011 report."<sup>25</sup> Further, the Arbitrator determined that Grievant's second interview response as to whether Grievant was aware of the improper storage of evidence in Grievant's garage "may reasonably lead to the conclusion that Grievant made false statements."<sup>26</sup>

In addressing the Grievant's termination, the Arbitrator concluded that the Panel's recommendation of termination for both charges was not a reasonable penalty based on the Panel's

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<sup>16</sup> Award at 11-12.

<sup>17</sup> Award at 12.

<sup>18</sup> Award at 12. By agreement of the parties, the arbitration was based solely on the administrative record and briefs submitted by the parties.

<sup>19</sup> Award at 5.

<sup>20</sup> Award at 21.

<sup>21</sup> Award at 21.

<sup>22</sup> Award at 22.

<sup>23</sup> Award at 22.

<sup>24</sup> Award at 23.

<sup>25</sup> Award at 23.

<sup>26</sup> Award at 23.

application of the 12-factor test in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981) (*Douglas Factors*).<sup>27</sup> The Arbitrator found the record reasonably supported only four of the eight aggravating factors advanced by MPD.<sup>28</sup> With respect to mitigating *Douglas* factors, the Arbitrator determined they were: the Grievant's past work record, including the Grievant's twenty-one years of service and prior performance; the mitigating circumstances surrounding the events, particularly the fact that the Grievant discovered the improperly stored evidence and reported the Grievant's spouse for misconduct; and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future, given the unusual circumstances present in the current matter.<sup>29</sup> The Arbitrator's review of the *Douglas* factors found that the factors were equally divided among aggravating, neutral, and mitigating factors.<sup>30</sup>

Based on his conclusions regarding the Panel's application of the *Douglas* factors, the Arbitrator determined that termination was not the appropriate penalty.<sup>31</sup> The Arbitrator found that the Grievant engaged in "serious misconduct" by not initially reporting the evidence and making an untruthful statement as to when the Grievant first saw the evidence in the Grievant's garage.<sup>32</sup> Therefore, the Arbitrator determined that the appropriate remedy was a ninety (90)-day suspension without pay.<sup>33</sup> The Arbitrator directed MPD to reinstate the Grievant to her former position and to make her whole, less the period of suspension.<sup>34</sup>

### 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.<sup>35</sup> MPD requests review on the grounds that the award is contrary to law and public policy.

#### A. 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 determined that termination was not the appropriate remedy notwithstanding the Arbitrator's finding that Grievant was guilty of knowingly making a false statement.<sup>36</sup> MPD asserts that the

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<sup>27</sup> Award at 23-28.

<sup>28</sup> Award at 28.

<sup>29</sup> Award at 28.

<sup>30</sup> Award at 29.

<sup>31</sup> Award at 29.

<sup>32</sup> Award at 29.

<sup>33</sup> Award at 29.

<sup>34</sup> Award at 30. The Arbitrator ordered MPD to make Grievant whole, "less the period of suspension, with an amount equal to all or any part of the pay, allowances, or differentials, including reimbursement of payments made by Grievant to retain health insurance benefits, as applicable, which Grievant normally would have earned or received during the period of removal less the amount forfeited as a result of the suspension and any amount earned by Grievant through other employment during that period."

<sup>35</sup> D.C. Official Code § 1-605.02(6).

<sup>36</sup> Pet'r Am. Req. at 6.

instant matter is analogous to a case from the Massachusetts Supreme Judicial Court, in which the court vacated an arbitration award that reinstated an officer who made a false police report, on the grounds that the arbitration award was contrary to law and public policy.<sup>37</sup> MPD asserts, similarly, that the District of Columbia Municipal Regulations make “any person who knowingly makes any false statement or falsified any document concerning any matter” ineligible to serve as a police officer.<sup>38</sup> Accordingly, MPD contends that the Award is contrary to law and public policy because the Arbitrator reduced Grievant’s termination to a suspension despite the Arbitrator’s finding that Grievant “committed serious misconduct” for not initially reporting Grievant’s spouse’s misconduct and for making untruthful statements.<sup>39</sup> MPD requests that the Award be overturned and that the Grievant’s termination be affirmed.<sup>40</sup>

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.<sup>41</sup> “[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.’”<sup>42</sup> A petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well-defined, public policy grounded in law or legal precedent.<sup>43</sup> Furthermore, MPD has the burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at a different result.”<sup>44</sup> 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.”<sup>45</sup>

Here, MPD fails to identify any specific law and public policy that has been violated. MPD relies on 6-B DCMR § 873.11(m), which states that an entry-level candidate for a police officer position is ineligible to become a police officer if the candidate has “knowingly made a false statement or falsified any document concerning any matter.”<sup>46</sup> The Award does not compel the violation of the cited regulation as that regulation is only applicable to entry-level candidates. Further, the cited Massachusetts court decision is not binding on the Board. Therefore, MPD has failed to point to any clear law or public policy that the Award contravenes.

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<sup>37</sup> Pet’r Am. Req. at 7 (citing *City of Bos. C. Bos. Police Patrolmen’s Ass’n*, 824 N.W.2d 855, 862 (2005)).

<sup>38</sup> Pet’r Am. Req. at 8; 6-B DCMR § 873.11(m).

<sup>39</sup> Pet’r Am. Req. at 8.

<sup>40</sup> Pet’r Am. Req. at 2.

<sup>41</sup> *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. 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)).

<sup>42</sup> *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

<sup>43</sup> *Id.*

<sup>44</sup> *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).

<sup>45</sup> *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)

<sup>46</sup> 6-B DCMR § 873.11(m).

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.<sup>47</sup> 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 the unanimous vote of Board Chairperson Douglas Warshof, Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler

February 20, 2020

Washington, D.C.

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<sup>47</sup> *DCHA v. Bessie Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999).

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 20-A-03, Op.No. 1738 was sent by File and ServeXpress to the following parties on this the 26<sup>th</sup> day of February 2020.

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