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

In the Matter of:	)	
	)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,	)	
	)	PERB Case No. 11-A-05
Petitioner,	)	
	)	Opinion No. 1373
v.	)	
	)	
District of Columbia	)	
Metropolitan Police Department,	)	
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

Petitioner Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Petitioner” or “FOP”) filed the above captioned arbitration review request (“Request”), asking the Public Employee Relations Board (“Board”) to modify or overturn an arbitration award (“Award”) denying the grievance of Master Patrol Officer Donald Williams (“Grievant”). Specifically, FOP asserts that the Award is on its face contrary to law and public policy, and that the arbitrator was without authority or exceeded his jurisdiction. (Request at 3). Respondent Metropolitan Police Department (“Respondent” or “MPD”) filed an opposition to the Request (“Opposition”).

The Request and Opposition are now before the Board for disposition.

**II. Discussion**

A. Award

In the Award, the Arbitrator found that the Grievant’s wife, Michelle Williams, applied for a temporary protection order (“TPO”) against the Grievant, and was scheduled to appear in court on August 27, 2007, to obtain a final protective order. (Award at 6). In the early morning

hours of August 27, 2007, Mrs. Williams was assaulted outside of her home in Prince George's County, Maryland. *Id.* Mrs. Williams then drove away in her car, but was found slumped over the wheel of her car several miles away in Washington, D.C. *Id.* When first responder MPD Officer Hiller asked Ms. Williams who had assaulted her, she responded "my husband." *Id.* When asked by a co-worker who had come to the scene of the accident whether her husband had injured her, Mrs. Williams nodded affirmatively. *Id.* Later, Mrs. Williams recanted and stated that her husband did not attack her. *Id.*

Later that morning, the Grievant, who was separated from Mrs. Williams and not living in her home, attended the TPO hearing. (Award at 2, 6). Mrs. Williams' injuries required hospitalization, and she was unable to attend the hearing. (Award at 2). The case was dismissed. *Id.* While still in the courtroom, the Grievant was arrested and charged with second degree assault on his wife. *Id.* The assault case was later dismissed when Mrs. Williams invoked her marital privilege and refused to testify against her husband. *Id.* Eight months later, the Grievant successfully petitioned to have the records of the TPO and assault arrest expunged. (Award at 6).

On December 13, 2007, MPD served the Grievant with a Notice of Adverse Action. (Award at 9). The Notice of Adverse Action contained two charges. (Opposition Attachment 1 at p. 1) The first charge was conduct unbecoming an officer, and cited to MPD General Order Series 201, Number 26, Part I-B-22, which stated that "[m]embers shall conduct their private and professional lives in such a manner as to avoid bringing discredit upon himself or herself and the Department." *Id.* Charge No. 1, Specification No. 1 stated:

In that on August 20, 2007, your wife, Mrs. Michelle Williams, obtained a "Temporary Protective Order" against you, alleging that you physically, verbally and mentally abused her. A "Final Protective Order" was scheduled for August 27, 2007. *Id.*

Charge No. 1, Specification No. 2 stated:

In that on August 27, 2007, you assaulted your wife by punching and kicking her in the face and body, causing swelling to the face and body. She was transported to the Howard University Hospital where she was treated for lacerations to the face and injuries to her pelvic area. *Id.*

The second charge against the Grievant was for:

Violation of General Order Series 120, Number 21, Part A-7, which provides in part: "Is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report, or have reported their involvement to their commanding officers."

This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual. (Opposition Attachment 1 at p. 2).

Charge No. 2, Specification No. 1 stated:

In that on August 27, 2007, the Prince George's County Sherriff's Department arrested you on an outstanding warrant for "Second Degree Assault" on your wife, Mrs. Michelle Williams. *Id.*

On October 8, 2008, the charges against the Grievant were considered by an MPD Adverse Action Panel ("Panel"). (Award at 9). The Panel found the Grievant guilty of all charges and specifications, and recommended that the grievant be terminated. *Id.* On November 28, 2008, a Final Notice of Adverse Action was issued, informing the Grievant that he would be terminated effective January 2, 2009. (Opposition Attachment 3 at p. 2). The Grievant's appeal was rejected by the Chief of Police. (Opposition Attachment 4). The parties advanced the matter to arbitration.

The Arbitrator was presented with the following questions:

1. Whether the Adverse Action Hearing Panel erred in failing to dismiss Charge No. 2 against MPD Williams?
2. Whether the Adverse Action Hearing Panel erred in hearing expert testimony?
3. Whether the Panel improperly allowed into evidence testimony and records concerning previous allegations of similar conduct by MPO Williams?
4. Whether the evidence presented by [MPD] was sufficient to support the alleged charges?
5. Whether termination is an appropriate penalty?

(Award at 2).

The Arbitrator found that the Panel did not err in failing to dismiss Charge No. 2 due to the expungement of the TPO record and assault arrest. (Award at 10-11). The Arbitrator cited to the Panel's reliance on General Order Series 120, Number 21, Part A-7, and noted that the court records in Prince George's County were not expunged until eight months after the Panel's investigation was concluded. (Award at 11).

The Arbitrator concluded that the Panel erred in hearing expert testimony from an MPD expert witness. (Award at 12). The Arbitrator found that the MPD Trial Board handbook requires 72 hours prior notice before calling an expert witness, and that expert witnesses must "have first been qualified as such unless both parties stipulate to the witness as an expert." *Id.* MPD did not follow these guidelines before calling an expert witness before the Panel, and therefore, the Arbitrator stated that he would "not admit any testimony from the MPD expert witness." *Id.*

The Arbitrator determined that the Panel properly admitted testimony and records of previous allegations of similar domestic abuse by the Grievant. (Award at 11). The Arbitrator held that as a quasi-legal, fact finding body, the Panel has great latitude in determining what evidence to admit. *Id.* Notwithstanding that no prior allegations of abuse were sustained, the Arbitrator concluded that the Panel did not err in hearing testimony from witnesses who had heard Mrs. Williams say that her husband abused her, and evidence of past calls to the police for domestic violence at the Williams home. *Id.*

The Arbitrator found that MPD presented evidence sufficient to support the charges against the Grievant. (Award at 11). In support of this conclusion, the Arbitrator noted that the first two witnesses to speak with Mrs. Williams at the scene of the accident testified that Mrs. Williams gave “unpremeditated responses implicating MPO Williams” in the attack, and the Arbitrator credited this testimony in determining that Mrs. Williams told the truth to these first responders. *Id.* Additionally, the Arbitrator stated that the testimony established a pattern of Mrs. Williams reporting domestic abuse and then recanting her allegations. *Id.* The Arbitrator cited to testimony from a co-worker of Mrs. Williams that the Grievant had told Mrs. Williams, “If I lose my job, I will kill you.” (Award at 12).

Finally, the Arbitrator concluded that termination was the appropriate penalty. (Award at 12). The Arbitrator was persuaded by the Panel’s consideration of the *Douglas* factors, particularly factor 10, which pertains to the potential for the employee’s rehabilitation. *Id.* The Panel found that “[b]ased upon the seriousness of this incident and the testimony of previous incidents, as well as the propensity for this cycle to repeat itself in the future, I find that there is little chance for MPO Williams to be rehabilitated.” *Id.*

#### B. Position of FOP before the Board

In its Request, FOP contends that the Award is contrary to law and public policy on two fronts: first, that the Award “ignores the legal effect of an expungement,” and second, that the Award violates the Grievant’s due process rights. (Request at 6, 8).

FOP states that during the arbitration, FOP informed the Arbitrator that an “Order for Expungement of Police and Court Records” concerning the Grievant’s arrest was entered by the District Court for Prince George’s County. (Request at 6). The Order specified that the Grievant was “entitled to an expungement of the police records pertaining to his/her arrest, detention, or confinement on or about 08/27/2007...and the court records in this action.” (Request at 6-7; Request Attachment 7). The Clerk of Court and several other custodians of court and police records were instructed to “expunge all court and police records pertaining to the action or proceeding in their custody...and remove all records from public inspection.” (Request at 7; Request Attachment 7). At the Arbitration, counsel for the Grievant requested that the Arbitrator exclude all records relating to the assault charge. (Request at 8).

FOP alleges that by ruling that the record of the Grievant’s arrest could be introduced into evidence in support of Charge No. 2 before the Panel, the Arbitrator “ignores the well-defined public policy that is in place to protect individuals from further scrutiny over an arrest

that is deemed improper, and the individual has received a court order directing that the arrest record be expunged.” (Request at 7). Further, FOP states that “[g]iven that the order of expungement precluded the continued dissemination of any and all arrest records pertaining to MPO Williams concerning this issue, it is irrelevant that the expungement occurred ‘8 months after the investigation into this case had concluded.’” *Id.*

In support of its contention that the Award violates well-defined public policy, FOP alleges that the Award violates Maryland law. (Request at 7). Citing to *U.S. v. Bagheri*, FOP states that under Maryland law, the “formal procedure for expunging police records, court records, and other records maintained by [the] state and its subdivisions must be followed.” 999 F.2d 80, 85 (4th Cir. 1993); (Request at 7). Further, FOP asserts that once an expungement is completed, “the legal effect is that the subject arrest did not occur.” (Request at 7). FOP stated that any administrative charge requiring the review or analysis of documentation that was expunged, like the Panel’s consideration of the Grievant’s arrest when determining the outcome of Charge No. 2, must be dismissed. (Request at 8). According to FOP, the Panel was obligated by Maryland law to remove all records of the assault arrest from public inspection, and the Arbitrator erred in upholding the Panel’s decision not to dismiss Charge No. 2 based upon the expungement. *Id.*

Next, FOP alleges that the Award violates law and public policy by infringing on the Grievant’s due process rights. (Award at 8). Specifically, FOP argues that the Panel deprived the Grievant of a fair and impartial hearing by allowing witness testimony regarding previous allegations of misconduct by the Grievant<sup>1</sup>. (Request at 9). FOP states that caselaw prohibits the Panel from considering allegations of past misconduct until after a finding of guilt is reached. *Id.*; citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981) (the determination of an appropriate penalty is appropriate “once the alleged conduct and its requisite general relationship to the efficiency of the service have been established.”). FOP alleges that in permitting *Douglas* information during the hearing, the Panel “purposefully poison[ed] the well” and that the Arbitrator acted contrary to “longstanding public policy” by failing to overturn the Panel on this issue. (Request at 11).

Finally, FOP asserts that the Arbitrator exceeded his authority by failing to issue a remedy for his finding that the Panel improperly allowed the testimony of an expert witness. (Request at 11). FOP states that Article 4 of the parties’ CBA requires MPD’s disciplinary actions to be in conformance with the laws, rules, and regulations of the District of Columbia, which “most certainly incorporates the Trial Board Handbook procedure, which was created by MPD.” *Id.* FOP notes the precedent in *United Paperworkers Int’l Union v. Misco, Inc.*, which holds that arbitrators have a wide degree of latitude and flexibility in fashioning remedies for violations of a collective bargaining agreement (“CBA”), as long as that discretion is not expressly limited by the CBA. 484 U.S. 29, 41 (1987); (Request at 12). FOP states that “[i]mplicitly underlying the principle that arbitrators are afforded discretion in fashioning

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<sup>1</sup> In particular, FOP objects to the testimony of MPD Agent McGuire, who testified that “I was the only one in my Internal Affairs Division that did not know that MPO Williams and Michelle Williams have a history,” and that he’d “heard in the office that Michelle Williams has been shot in the past and there were allegations that MPO Williams had shot her.” (Request at 9-10, Attachment 3 at pp. 15-16).

remedies for violations of a labor agreement is the understanding that an employee who is harmed by a violation of the agreement *is entitled to a remedy.*" *Id.* (emphasis in original). FOP views the Arbitrator's failure to issue a remedy for his expert witness finding as the arbitrator imposing "his own brand of industrial justice," and therefore unenforceable. *Id.*; citing *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). FOP asserts that the Arbitrator should have rescinded the Panel's findings due to the "inextricable taint that such testimony casts on the proceedings." (Request at 13).

C. Position of MPD before the Board

In its Opposition, MPD asserts that the Award does not run contrary to law and public policy. (Opposition at 5). First, MPD relies on the plain language of Charge No. 2 against the Grievant, which states that the Grievant "is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction." *Id.* MPD contends that the plain language of Charge No. 2, Specification No. 1 – "that on August 27, 2007, the Prince George's County Sheriff's Department arrested you on an outstanding warrant for 'Second Degree Assault' on your wife, Mrs. Michelle Williams" – supports its position that a court record is not required to prove Charge No. 2. *Id.*

Further, MPD alleges that the Order of Expungement did not order the MPD Panel to take any action, and that the Order of Expungement was not in effect when the Notice of Proposed Adverse Action was served. (Opposition at 5). MPD disputes FOP's contention that the expungement order means the Grievant's conduct never occurred, and does not negate the fact that the Grievant was arrested. (Opposition at 6). MPD cites to eyewitness testimony that the Grievant was arrested, and "highly credible" testimony that the Grievant assaulted his wife, as "sufficient to support the charge that the Grievant is deemed to have been involved in the commission of an act which would constitute a crime." *Id.*

Next, MPD contends that the Arbitrator's refusal to dismiss the Final Notice of Adverse Action due to alleged improper testimony did not violate the Grievant's due process rights. (Opposition at 6). MPD asserts that the testimony that the Grievant objects to, which consists of responses elicited on cross examination, "did not address the facts which support the underlying specifications in the case," and that "[i]t would have been impossible for the panel to reach a finding of guilt based upon the objected to testimony." *Id.* Further, MPD states that FOP has provided no authority to support its allegation that a witness' response to cross examination, if deemed improper, results in a due process violation. *Id.*

MPD advances a public policy argument against FOP's request that the Board overturn the Grievant's termination. (Opposition at 10-11). Specifically, MPD asserts that the suitability of a person employed as a police officer is an important public policy, and that the Grievant's request for reinstatement would return an unsuitable individual to his position as a police officer. MPD supports the Panel's conclusion that:

[t]he matters in question reflect poor judgment and a propensity for MPD Williams to operate outside the laws, policies, and

procedures regarding domestic violence. The fact [is] that this behavior reflects a repeated pattern of behavior that will adversely affect his relationship with his supervisors and his ability to perform his duties as a field training officer and Master Patrol Officer. (Opposition at 11).

Finally, MPD rejects FOP's contention that the Arbitrator exceeded his authority in issuing the Award. (Opposition at 8). MPD disagrees with FOP's allegation that Article 4 of the parties' CBA incorporates the MPD Trial Board Handbook. (Opposition at 9). MPD believes that based upon this logic, all applicable law would be part of the CBA. *Id.* Additionally, MPD points out that the Arbitrator did provide a remedy for the expert witness violation when he held that "[t]herefore, I will not admit any testimony from the MPD expert witness." *Id.* MPD states that the "fact that the Grievant dislikes the remedy is not a basis to seek relief." *Id.*

Further, MPD states that FOP provided no explanation or analysis to support its allegation that the expert witness testimony tainted the Panel's hearing. (Opposition at 9). To the contrary, MPD alleges that even without the expert witness testimony, the evidence supports the Panel's finding that the Grievant was guilty of all charges and specifications. *Id.* In particular, MPD points to undisputed, non-expert witness testimony that Mrs. Williams was found slumped over the steering wheel of her vehicle on the morning of the TPO hearing, she had been severely beaten and required hospitalization, and that in response to questions by first responders, Mrs. Williams identified that her husband had beaten her. (Opposition at 9-10). Further:

Mrs. Williams also testified before the Panel and recanted her first statement. However, the Panel had an opportunity to observe her demeanor and assess the explanation she provided. Without the assistance of the expert witness, the Panel discerned that Mrs. Williams' explanation that she was beaten at home but did not follow up to check on her disabled child inside the home before leaving for the gym made her explanation incredible. In addition, the Panel heard eyewitness testimony regarding the Grievant's arrest on August 27, 2007. (Opposition at 10)

MPD concludes that the Panel and Arbitrator made their decisions without the expert witness' testimony, that the expert testimony was "used more to bolster" MPD's case, and that the expert testimony was "not intrinsic to proving the facts of this case." (Opposition at 10).

#### D. Analysis

The CMPA authorizes the Board to modify or set aside an arbitration award in 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.).

The Board's scope of review, particularly concerning the public policy exception, is extremely narrow. 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 Misco*, 484 U.S. 29. Absent a clear violation of law evident on the face of the arbitrator's award, the Board lacks authority to substitute its judgment for the arbitrator's. *Fraternal Order of Police/Department of Corrections Labor Committee v. PERB*, 973 A.2d 174, 177 (D.C. 2009). Disagreement with the arbitrator's findings is not a sufficient basis for concluding that an award is contrary to law or public policy. *Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Comm.*, 31 DC Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984).

FOP's first allegation is that the Award violates Maryland law and public policy regarding expungement. (Request at 6). In the Award, the Arbitrator approves the Panel's reliance on General Order Series 120, Number 21, Part A-7, which reads in part, "or is deemed to have been involved in the commission of any conduct which would constitute a crime, whether or not a court record reflects a conviction." (Award at 11). MPD contends that the Grievant's arrest itself is enough to support the guilty finding on Charge No. 2. (Opposition at 5). The Board finds that the Award does not compel the violation of Maryland law. Although the expungement order required the clerk of the District Court of Maryland for Prince George's County, the Central Repository, and five other Maryland state entities to expunge the court and police records pertaining to the Grievant's arrest, the Maryland court's authority does not extend across state lines to the MPD Panel. (*See* Request Attachment 7). The Full Faith and Credit clause, and the modern statute encompassing it, requires that "Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every **court** within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken." 28 U.S.C. § 1738 (2006) (emphasis added); *accord Nader v. Serody*, 43 A.3d 327, 332 (D.C. 2012). MPD is not a court, and MPD's investigators were not obligated to dispose of any records or documentation in their investigation of the Grievant's arrest, nor was the Panel obligated to act as if "the subject arrest did not occur." (Request at 7). The plain language of General Order Series 120, Number 21, Part A-7, as quoted by Charge No. 2<sup>2</sup>, is clear that a court record is not required to sustain a violation of the General Order. Therefore, in upholding the Panel's guilty determination on Charge No. 2, the Arbitrator did not compel the violation of an explicit, well defined public policy ground in law or legal precedent.

FOP's next allegation is that the Arbitrator violated the Grievant's due process rights by failing to reverse the Panel for hearing witness testimony regarding previous allegations of abuse by the Grievant. (Request at 9). FOP asserts that this testimony, during a hearing where the Grievant was professing his innocence, was highly prejudicial and "improperly tipped the scales of justice" in favor of MPD. *Id.* Additionally, FOP states that prior discipline or allegations of discipline is a *Douglas* factor, and may only be considered to determine an appropriate remedy

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<sup>2</sup> The relevant portion of Charge No. 2 reads:

Violation of General Order Series 120, Number 21, Part A-7, which provides in part: "Is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction."

after a decision on guilt is reached. (Request at 10). FOP cites to *Lightfoot v. District of Columbia*, 448 F.3d 392, 401 (D.C. Cir. 2006 (per curiam) (Silberman, J., concurring), for a statement that “the issue in ‘the Supreme Court’s due process jurisprudence... is always...whether or not the claimant has had a fair opportunity – sometimes rather informal – to present his case.’” (Request at 9) (emphasis in Request). The Arbitrator was not persuaded by FOP’s argument, and determined that the Panel properly allowed the testimony of previous abuse allegations. (Award at 11). FOP merely disagrees with the Arbitrator’s decision. The Board will not modify or overturn the Arbitrator’s conclusion based only upon FOP’s disagreement. *See Metropolitan Police Dep’t*, Slip Op. No. 85.

Finally, FOP alleges that the Arbitrator exceeded his authority by failing to issue a remedy for his finding that the Panel violated the MPD Trial Board Handbook by improperly allowing testimony from an expert witness. (Request at 11, 13). FOP asserts that there is an implicit understanding that an employee who is harmed by a violation of a CBA is entitled to a remedy. (Request at 12). Further, FOP argues that if it is true that an arbitrator exceeds his authority by fashioning a remedy when he has not found a violation of a CBA, he must also exceed his authority when the converse is true – by failing to fashion a remedy when he has found a violation of the CBA. *Id.*

As FOP recognizes in its Request, arbitrators have wide latitude to construct equitable remedies, as long as those remedies are not expressly limited by the parties’ CBA. *See District of Columbia Metropolitan Police Dep’t v. Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992); (Request at 12). The Board will not make the leap FOP asks us to make by determining that arbitrators exceed their authority by not issuing a specific remedy when finding a violation of the parties’ CBA. FOP has cited no case law to support its argument that an arbitrator is required to issue a remedy for every violation. (Request at 12-13). Additionally, FOP has not cited any provision of the parties’ CBA that limits the Arbitrator’s equitable power, or requires that the Arbitrator adopt FOP’s requested remedy. The Arbitrator did not impose his own brand of industrial justice; rather, he determined that MPD’s violation did not mandate an exercise of his equitable power to formulate a remedy. *See Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee v. Metropolitan Police Dep’t*, 59 D.C. Reg. 11329, Slip Op. No. 1295 at p. 6, PERB Case No. 09-A-11 (2012). Therefore, the Arbitrator acted within his authority. *Id.*

Assuming *arguendo* that the Arbitrator was required to formulate a remedy, the Arbitrator complied with this requirement when he appropriately determined that he would not admit any testimony from MPD’s expert witness. (Award at 12).

In light of the above, we find that the Arbitrator’s ruling 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 Fraternal Order of Police/Metropolitan Police Department Labor Committee'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.

March 18, 2013

CERTIFICATE OF SERVICE

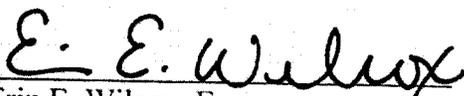
This is to certify that the attached Decision and Order in PERB Case No. 11-A-05 was transmitted via U.S. Mail and e-mail to the following parties on this the 18th day of February, 2013.

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