

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
)	
Fraternal Order of Police/ Protective Services)	
Division Labor Committee)	
)	PERB Case No. 21-A-10
Petitioner)	
)	Opinion No. 1802
v.)	
)	
Department of General Services)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On August 27, 2021, the Fraternal Order of Police/Protective Services Division Labor Committee (Union) filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA),¹ seeking review of an arbitration award (Award) dated August 6, 2021. In that Award, the Arbitrator denied the Union’s grievance and upheld the decision of the Department of General Services (Agency) to terminate the Grievant. The Union requests review on the grounds that the Arbitrator exceeded his jurisdiction and that the Award is contrary to law and public policy.

Upon consideration of the Arbitrator’s conclusions, applicable law, and record presented by the parties, the Board finds that the Arbitrator did not exceed his jurisdiction and that the Award is not contrary to law and public policy. Therefore, the Board denies the Union’s Request.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. The Grievant was a special police

¹ D.C. Official Code § 1-605.02(6).

officer (SPO) for the Department of General Services. In general, an SPO's jurisdiction is limited.² SPOs who work for the Agency have jurisdiction on properties that are adjacent to, owned, or leased by the District.³ On March 19, 2019, the Grievant worked mobile patrol during an evening shift.⁴ During the shift, the Grievant arrested two individuals in two separate incidents on property that was outside of the Agency's jurisdiction.⁵

In the first incident, the Grievant observed a "vehicle sitting against a lamppost and fence off to the right of the roadway" on Interstate 295.⁶ The Grievant saw an individual leaving the scene.⁷ Using emergency lights, the Grievant pursued the individual at a high rate of speed. The Grievant then exited the vehicle to pursue the individual on foot.⁸ After apprehending the individual, the Grievant detained him until the Metropolitan Police Department (MPD) and the Grievant's Watch Commander arrived on the scene.

Shortly thereafter, in the second incident, the Grievant pursued an individual after an alleged hit-and-run accident involving the Grievant.⁹ The Grievant was allegedly hit on the right leg by a vehicle while crossing Interstate 295.¹⁰ The Grievant engaged in a high-speed pursuit, initiated a traffic stop, and detained the driver of the vehicle.¹¹ MPD and the Grievant's Watch Commander reported to the scene. MPD refused to process the arrests.¹² The Watch Commander and Grievant processed the arrests for the two individuals.¹³

On March 9, 2019, the Agency placed the Grievant on administrative leave to investigate the Grievant's conduct pertaining to the arrests.¹⁴ On May 10, 2019, the Agency issued a Notice of Proposed Termination (Notice) to the Grievant.¹⁵ The Notice charged the Grievant with two instances of misconduct:

[Charge No.] 1. On-duty conduct that an employee should reasonably know is a violation of law and regulations, 6B DCMR §1607.2 (a) (4), and

[Charge No.] 2. Unethical or improper use of official authority or credentials. 6B DCMR §1607.2 (a) (9).¹⁶

The Grievant denied the misconduct, and the Agency held an administrative hearing to resolve the

² Award at 5.

³ Award at 5.

⁴ Award at 6.

⁵ Award at 6.

⁶ Award at 6.

⁷ Award at 6.

⁸ Award at 6.

⁹ Award at 6.

¹⁰ Award at 6-7.

¹¹ Award at 7.

¹² Award at 7.

¹³ Award at 8.

¹⁴ Award at 13.

¹⁵ Award at 13.

¹⁶ Award at 13.

disciplinary charges. In the administrative hearing, the hearing officer found the Grievant guilty on Charge No. 1. The hearing officer determined that the Grievant violated the Agency's safe operation of vehicles policy by driving at unsafe speeds.¹⁷ The hearing officer found the Grievant guilty of Charge No. 2, because the Grievant "conducted two unauthorized traffic stops outside of his scope of work/jurisdiction, and exceeded the speed limit in his government vehicle at rates of 87 miles per hour and 106 miles per hour, all under the aegis of being a [Protective Service Division] officer."¹⁸ On August 23, 2019, the Agency issued a decision to terminate the Grievant. On September 12, 2019, the Union invoked arbitration.¹⁹

B. Arbitrator's Findings

The parties submitted three issues to the Arbitrator:

1. Whether there was just cause to remove [Grievant] from his position at the DC Department of General Services, Protective Services Division Agency? If not, what is the remedy?
2. If so, whether the Agency followed all applicable District of Columbia laws, rules, and regulations and whether the removal was proper? If not, what is the remedy?
3. Whether the Agency complied with its August 2nd, 2019 grievance decision in accordance with the Collective Bargaining Agreement and applicable laws. If not, what is the remedy?²⁰

On the first issue, the Arbitrator defined "just cause" using a four-prong test. The first prong required that the Agency show that the Grievant had knowledge of the policies, as well as knowledge of the consequences for violating the relevant policies.²¹ The Arbitrator concluded that the Grievant received notice of the Agency's policies and expectations regarding jurisdiction, safe operation of a vehicle, and travel outside of the District because the Grievant signed a document acknowledging his responsibility to be aware of and abide by the Agency's policies.²² The Arbitrator also concluded that the Grievant was fully conversant in the Agency's policies because of his tenure and experience.²³

In the second prong of the "just cause" test, the Arbitrator examined whether the Grievant received due process.²⁴ The Arbitrator determined that due process requires that an agency act fairly when administering discipline to safeguard and ensure a fair process.²⁵ The Arbitrator found

¹⁷ Award at 14.

¹⁸ Award at 14-15.

¹⁹ Award at 15.

²⁰ Award at 17.

²¹ Award at 19.

²² Award at 20.

²³ Award at 20.

²⁴ Award at 21.

²⁵ Award at 21.

that the elements of due process are timeliness, a full and fair investigation, notice, and an opportunity for the employee to provide an explanation.²⁶ The Arbitrator addressed the Union's argument that the Notice was untimely. The Union asserted that the CBA required the Grievant to receive the Notice fifteen days before the proposed termination date.²⁷ The Agency's Notice to the Grievant proposed a termination date of May 26, 2019.²⁸ In the briefs before the Arbitrator, the Union presented the Notice with a certificate of service dated May 13, 2019,²⁹ and the Agency presented the Notice with a certificate of service dated May 10, 2019.³⁰ Before the Arbitrator, the Union argued that, because there were two certificates of service, one dated for May 10, 2019 (timely)³¹, and one dated for May 13, 2019 (untimely)³², the Agency was attempting to conceal its timeliness error by providing false documentation of service.³³ The Union asserted that the Grievant did not receive the Notice until May 14, 2019. The Arbitrator found that the Union's timeliness argument was without merit because (1) the argument was presented for the first time in the Union's brief and procedurally untimely, (2) the Agency was denied an opportunity to respond to the Union's claim of untimely service in the hearing record, and (3) it was just as likely that the May 10, 2019 certificate of service was accurate rather than the May 13, 2019 certificate of service.³⁴

The Arbitrator concluded that the Agency's action was timely.³⁵ The Arbitrator found that a "fair investigation was conducted, the grievant was provided clear notice of charges and the specifics of each charge in the Proposal together with all evidence supporting each charge, and the grievant was given an opportunity to respond and did in fact provide a lengthy response prepared by his attorney."³⁶

The Arbitrator determined that the third prong of "just cause" was proof of misconduct.³⁷ The Arbitrator found that the Agency had the burden to show by a preponderance of evidence that the Grievant engaged in the charged misconduct.³⁸ The Grievant was charged with improperly conducting police activities outside of the Agency's jurisdiction, conducting unauthorized pursuits at excessive speeds of 87 mph and 106 mph, and making an unauthorized stop outside of the District in the state of Maryland.³⁹ The Arbitrator found that the Agency met its burden to show that the Grievant engaged in the wrongdoing as charged.⁴⁰

²⁶ Award at 21.

²⁷ Award at 22.

²⁸ Award at 22.

²⁹ See Ex. 4 at 19.

³⁰ See Ex. 3 at 4.

³¹ See Ex. 3 at 4.

³² See Ex. 4 at 19.

³³ Award at 22.

³⁴ Award at 23.

³⁵ Award at 22.

³⁶ Award at 22.

³⁷ Award at 23.

³⁸ Award at 23.

³⁹ Award at 23.

⁴⁰ Award at 27-28.

The Arbitrator discussed the final prong of “just cause” as the weighing of the *Douglas* factors.⁴¹ The Arbitrator compared the hearing officer’s analysis of the *Douglas* factors to the factors presented by the Agency in the Notice to determine if the Agency was reasonable in its findings.⁴² The Arbitrator found that the findings of the hearing officer and the Agency were substantially consistent and concluded that the Agency complied with all elements of “just cause.”⁴³

Regarding the second issue of “whether the Agency followed all applicable District of Columbia laws, rules, and regulations and whether the removal was proper?”⁴⁴ The Arbitrator found that the Agency complied with District law in issuing the termination.⁴⁵

On the final issue submitted to arbitration, the Arbitrator found that the Agency properly paid the Grievant backpay for a suspension that was reversed in a separate grievance.⁴⁶ The Arbitrator denied the Union’s grievance in whole.⁴⁷

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.⁴⁸ The Union requests the Board’s review of the Award on the grounds that the Arbitrator exceeded his jurisdiction and that the Award is contrary to law and public policy.

A. The Arbitrator did not exceed his jurisdiction in issuing the Award.

The Union argues that the Arbitrator exceeded his jurisdiction by ignoring the CBA’s termination notice requirements. The Union argues that the CBA required the Agency to provide the Notice to the Grievant fifteen (15) workdays in advance of the proposed action.⁴⁹ The Union asserts that the Notice proposed termination for May 26, 2019. Therefore, the Agency was required to provide the Grievant notice by May 11, 2019. The Union’s position is that the 15-workday time-limit is mandatory, and service must be completed within the time-limit. The Union argues that the Agency’s service of the Notice was untimely because the Grievant did not receive the Notice until May 14, 2019.⁵⁰ Additionally, the Union argues that Arbitrator exceeded his jurisdiction by interpreting the CBA and regulations to determine “just cause” in a manner

⁴¹ Award at 30 (citing *Douglas v. Veterans Admin.*, 5 MSPR 280, 5 MSPB 313 (1981), which provides factors as guidance to determine the appropriateness of discipline for public sector employees).

⁴² Award at 30.

⁴³ Award at 32.

⁴⁴ Award at 17.

⁴⁵ Award at 32.

⁴⁶ Award at 33.

⁴⁷ Award at 33.

⁴⁸ D.C. Official Code § 1-605.02(6).

⁴⁹ CBA Article 9, Section C.

⁵⁰ Request Brief at 10.

that subjected the Grievant to a higher standard than other SPOs.⁵¹

The Agency argues that the CBA and regulations are subject to the Arbitrators interpretation.⁵² The Agency argues that the Arbitrator did not exceed his jurisdiction in determining that the service of the Notice was timely.⁵³ The Agency argues that the Arbitrator accepted its evidence of a timely certificate of service issued on May 10, 2019.⁵⁴ The Agency asserts that the Union failed to show any prejudice to the Grievant.⁵⁵ Further, the Agency contends that it was denied an opportunity to respond to the Union's timeliness argument in violation of the Agency's procedural rights. The Agency maintains that the Union merely disagrees with the Arbitrator's findings that the Agency provided timely notice of termination.⁵⁶

The Arbitrator did not exceed his jurisdiction by finding that the Agency timely served the Notice or by interpreting the CBA and regulations to determine "just cause." The Arbitrator determined that the Agency's May 10, 2019 certificate of service satisfied the standards of due process under the CBA.⁵⁷ By submitting a grievance to arbitration, the parties agree to be bound by the arbitrator's interpretation of the contract, rules, and regulations, and agree to accept the arbitrator's evidentiary findings and conclusions.⁵⁸ The Arbitrator has the power to determine of "just cause" and is not required to consider all of the Douglas factors.⁵⁹ An arbitrator is not required to explain the reason for a decision and the failure to do so does not render the decision unenforceable.⁶⁰ The Board has held that "disputes over credibility determinations" and "assessing what weight and significance such evidence should be afforded" is within the jurisdictional authority of the Arbitrator.⁶¹ The Arbitrator made an evidentiary finding and the Board will not substitute its judgment for that of the Arbitrator.⁶²

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

The Union argues that the Award is contrary to law and public policy because the Grievant had a statutory duty to respond to the incidents under D.C. Official Code § 5-115.03.⁶³

⁵¹ Request Brief at 11.

⁵² Opposition at 9-10.

⁵³ Opposition at 9.

⁵⁴ Opposition at 9.

⁵⁵ Opposition at 9.

⁵⁶ Opposition at 9.

⁵⁷ Award at 23.

⁵⁸ *MPD v. FOP/MPD Labor Comm. ex rel. Sims*, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000).

⁵⁹ *FOP/MPD Labor Comm. ex. rel Lee v. DOC*, 59 D.C. Reg.10952, Slip Op. No. 1324 at 7, PERB Case No. 10-A-16 (2012).

⁶⁰ *MPD v. FOP/MPD Labor Comm.*, 67 D.C. Reg. 9579, Slip Op. No. 1754 at 7, PERB Case No. 20-A-06 (2020).

⁶¹ *MPD v. NAGE, Local R3-5 ex rel. Burrell*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2012) (citing *AFSCME, District Council 20 v. District of Columbia Gen. Hosp.*, 37 D.C. Reg. 6172, Slip Op. No. 253 at 2, PERB Case No. 90-A-04 (1990)).

⁶² *MPD v. NAGE, Local R3-5 ex rel. Burrell*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2012).

⁶³ Request Brief at 15. "If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District Jail or Penitentiary not exceeding 2 years, or by a fine not exceeding \$500. A member of the police force who deals with an individual in accordance with § 24-604(b) shall not be considered as having violated this section."

The Union contends that the Grievant believed that he observed crimes and, therefore, the Grievant had a duty to act under the law.⁶⁴ The Union asserts that the Arbitrator erred by looking outside of the record to evaluate the Grievant's duties and responsibilities.⁶⁵ Additionally, the Union argues that the Award is contrary to law and public policy because the Arbitrator (1) failed to apply the "just cause" standard defined by the District Personnel Manual⁶⁶ and (2) failed to reverse the termination on due process grounds because the Agency did not provide the Notice fifteen (15) workdays⁶⁷ prior to the Grievant's proposed termination.⁶⁸

The Agency argues that the Award is not contrary to law and public policy. The Agency contends that the Union disagrees with the factual findings of the Arbitrator. The Agency asserts that the Arbitrator correctly found that the Union failed to demonstrate that the Grievant was required to respond under D.C. Official Code § 5-115.03.⁶⁹ The Agency contends that the Grievant acted outside of his jurisdiction when he engaged in high-speed pursuits, initiated a traffic stop, and made the arrests.⁷⁰ The Agency maintains that any error committed by the Arbitrator looking outside of the record is harmless because there was enough evidence in the record to sustain the Grievant's termination.⁷¹

The law and public policy exception is "extremely narrow."⁷² The narrow scope limits potentially intrusive judicial reviews under the guise of public policy.⁷³ The Union has the burden to demonstrate that the Award itself violates established law or compels an explicit violation of "well-defined public policy grounded in law and or legal precedent."⁷⁴ The violation must be so significant that law and public policy mandate a different result.⁷⁵ The Board may not modify or set aside the Award as contrary to law and public policy in the absence of a clear violation on the face of the Award.⁷⁶

The Board has held that the Arbitrator is empowered to make factual determinations.⁷⁷ D.C. Official Code § 5-115.03 requires members of the police force to make arrests for offenses against the laws of the United States committed in their presence. The Arbitrator upheld the

⁶⁴ Request Brief at 17.

⁶⁵ Request Brief at 13.

⁶⁶ Request Brief at 18-19.

⁶⁷ Request Brief at n. 12 (The Union argues that despite the Agency's certificate of service demonstrating timeliness actual service was untimely).

⁶⁸ Request Brief at 19-20.

⁶⁹ Opposition at 11.

⁷⁰ Opposition at 12.

⁷¹ Opposition at 12.

⁷² *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)).

⁷³ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *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).

⁷⁷ *MPD v. NAGE, Local R3-5 ex rel. Burrell*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2012).

disciplinary decision of the Agency and found that there was insufficient evidence of a crime⁷⁸ that necessitated a response from the Grievant and that the arrests were invalid because the Grievant had acted outside of his jurisdiction.⁷⁹

Further, the Union has failed to provide any reference of law that would mandate the Arbitrator reach a different conclusion in his interpretation of “just cause.” The District Personnel Manual favors the parties’ collective bargaining agreements in the event of conflict between regulations and the parties’ agreement.⁸⁰ The Union concedes that the parties bargained for the Arbitrator’s interpretation of the collective bargaining agreement.⁸¹ Furthermore, the parties’ CBA does not define “cause.”⁸² The Arbitrator defined “just cause” using a four-prong test to determine whether the Agency afforded the Grievant notice, due process, proof of misconduct, and proper weighing of the *Douglas* factors.⁸³ The Arbitrator’s definition of “just cause” complements the definition found in the District Personnel Manual, which states “cause” is “a reason that is neither arbitrary nor capricious, such as misconduct or performance deficits, which warrants administrative action, including corrective and adverse actions. . . .”⁸⁴ Therefore, the Arbitrator’s definition of “just cause” is not contrary to law and public policy.

Moreover, the Union has not demonstrated that law and public policy requires that the Arbitrator reach a different result because the Grievant did not receive the Notice until May 14, 2019. The District Personnel Manual requires that a notice of termination must be delivered to employees no less than fifteen workdays prior to implementing the adverse action.⁸⁵ According to 6B DCMR § 1618.6⁸⁶, service of the notice to the employee may be accomplished by delivering the notice to the employee’s address of record by a commercial courier that provides delivery tracking and confirmation information. The Arbitrator found that the Agency provided evidence in the record, which included certified mail tracking information, that showed the Agency served the Notice to the Grievant on May 10, 2019.⁸⁷ The Arbitrator held that the Agency provided timely notice.

⁷⁸ Award at 24.

⁷⁹ Award at 27.

⁸⁰ 6B DCMR § 1602.2 (“Employees who are subject to a recognized labor agreement shall enjoy the additional benefits of their collective bargaining agreement. Conflicts between such agreements and this chapter shall be resolved as follows:

a) The provisions of any labor agreement shall be construed as complementary to the provisions of this chapter;

b) The provisions of any labor agreement shall be construed as to give effect to the provisions of this chapter;

c) However, where a specific provision of a labor agreement cannot be reconciled with a specific provision of this chapter, the labor agreement shall control with respect to that provision.”)

⁸¹ Request Brief at 19.

⁸² Request Brief at 18.

⁸³ Award at 18-19.

⁸⁴ 6B DCMR § 1699.

⁸⁵ 6B DCMR § 1618.1.

⁸⁶ 6B DCMR § 1618.6 states, “The notice of proposed actions and supporting materials shall be served upon the employee. Service shall be accomplished by delivering the notice and materials to the employee in person, or to the employee’s address of record by a commercial courier that provides delivery tracking and confirmation information. However, service shall also be deemed proper upon a showing that the employee actually received delivery of the notice, irrespective of delivery method.”

⁸⁷ Award at 22-23. *See* Ex. 3 at 4.

Finally, the Union's argument that the Award is contrary to law and public policy because the Arbitrator considered evidence not contained in the record cannot be sustained. The Union has failed to provide any law to support its argument. Even if the Board finds that the Arbitrator erred by considering the evidence from outside the record, the Board ultimately evaluates the Award to determine if a fair hearing has been conducted in accordance with its limited statutory basis of review.⁸⁸ The Board has found that, where an Arbitrator has considered improper evidence, "such misbehavior does not deprive the objecting party of a fair hearing or taint the entire decision where the decision is also supported by the evidence presented at hearing."⁸⁹ The Arbitrator looked to material not submitted by the parties in the record related to the Grievant's duties and responsibilities. However, the record contains evidence to support the Arbitrator's conclusion that the Agency had "just cause" to terminate the Grievant for engaging in misconduct. Both parties were provided the same opportunity to submit exhibits and briefs for the Arbitrator's consideration. The parties bargained for the Arbitrator's interpretation of the contract, rules, and regulations, and agreed to accept the Arbitrator's evidentiary findings and conclusions.⁹⁰ In this case, the Arbitrator's consideration of evidence outside of the record does not make the Award contrary to law and public policy.

IV. Conclusion

The Board rejects the Union's arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, the Union'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 559.1, 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 Mary Anne Gibbons, Peter Winkler, and Renee Bowser.

Washington, D.C.
October 21, 2021

⁸⁸ *MPD v. FOP/MPD Labor Comm.*, 63 D.C. Reg. 2093, Slip Op. 1509 at 4, PERB Case No. 12-A-04(R) (2016) (citing *DCPS and WTU*, 43 D.C. Reg. 1283, Slip Op. No. 349, PERB Case No. 93-A-01 (1996)).

⁸⁹ *Id.*

⁹⁰ *MPD v. FOP/MPD Labor Comm. ex rel. Sims*, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order, Slip Opinion No. 1802, was served to the following parties on this 29th day of October 2021:

Via File & ServeXpress

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Public Employee Relations Board

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration within fourteen (14) days, requesting the Board to reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides thirty (30) days after a Board decision is issued to file an appeal.