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

In the Matter of:)	
)	
District of Columbia Metropolitan Police Department)	
)	PERB Case No. 22-A-03
Petitioner)	
)	Opinion No. 1814
v.)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On April 4, 2022, 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 March 13, 2022. The Award sustained a 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 that the Award is contrary to law and public policy.² FOP filed an Opposition, requesting the Board 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 that the Award is not contrary to law or public policy. Therefore, the Board denies MPD’s request.

¹ D.C. Official Code § 1-605.02(6).

² Request at 2.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. The Grievant began his position as an MPD officer in 2017.³ On February 1, 2019, the Grievant submitted a Paid Family Leave (PFL) application for the birth of his child.⁴ The Grievant specified on his application that he planned to take continuous leave from February 18 through March 8, 2019.⁵ On February 6, 2019, MPD's Human Resources Management Division (HRMD) approved the Grievant for "up to 320 hours [of PFL] effective on the later of February 22 or the day the child was born," with an expiration date of April 19, 2019.⁶ The Grievant used forty-six (46) hours of PFL before his child was born, caring for his pregnant girlfriend.⁷ The Grievant's child was born on March 2, 2019.⁸ The Grievant subsequently learned he could not use his PFL until after his child was born, and HRMD revised the Grievant's PFL to allow up to 320 hours of intermittent leave between March 2, 2019, and March 2, 2020.⁹

On June 10, 2019, the Grievant requested to use PFL from December 9, 2019, to January 2, 2020.¹⁰ The Grievant obtained approval and, on August 17, 2019, booked a flight to Sierra Leone.¹¹ The Grievant booked flights departing on December 9, 2019, and returning on January 3, 2020.¹² On December 9, 2019, the Grievant traveled to Sierra Leone without his child.¹³ "The purpose of the trip was to visit family and friends, and to commemorate the 10-year anniversary of the death of [the] Grievant's mother."¹⁴

"On January 2, 2020, [the] Grievant called the Fifth District Sergeants office from Sierra Leone...and requested to use a 3-day 'optional'" for the dates of January 3 through January 5, 2020.¹⁵ The Arbitrator found that the term "optional" referenced "optional sick leave, whereby an employee can take up to three days of sick leave without having to appear for examination."¹⁶ The Arbitrator found that the Grievant was not sick when he requested the optional, however, the Arbitrator determined that the Grievant did not claim to be sick when he made the request.¹⁷

³ Award at 2.

⁴ Award at 2.

⁵ Award at 2.

⁶ Award at 3.

⁷ Award at 3.

⁸ Award at 3.

⁹ Award at 3.

¹⁰ Award at 3.

¹¹ Award at 3.

¹² Award at 4.

¹³ Award at 4.

¹⁴ Award at 4.

¹⁵ Award at 4.

¹⁶ Award at 4.

¹⁷ Award at 4.

Sometime between December 13 and December 16, 2019, the Grievant visited a hookah lounge in Sierra Leone and ordered a hookah that was not supposed to contain tetrahydrocannabinol (THC).¹⁸ However, the waiter mistakenly gave the Grievant a hookah containing THC, which the Grievant smoked for a few minutes before the waiter informed the Grievant of the mistake.¹⁹ On January 6, 2020, after returning to the United States, the Grievant emailed a Lieutenant at the Fifth District and informed the Lieutenant of the Grievant's accidental ingestion of THC.²⁰ Also on January 6, 2020, the Lieutenant "obtained an Incident Summary (IS) number, and prepared and submitted a 901a (Preliminary Report Form-Misconduct, Duty Status, or Unusual Incidents) regarding the situation."²¹

The Grievant was scheduled for regular days off from January 6 through January 8, 2020,²² and took leave on January 9 and January 10, 2020.²³ The Grievant was scheduled to return to work on the evening of January 10, 2020, and tested negative for illegal drugs that day.²⁴ The Sergeant in charge of the Grievant's Internal Affairs Division (IAD) investigation "concluded that there was insufficient evidence supporting the allegation that [the] Grievant violated the rule against taking a controlled substance without a prescription."²⁵

On June 3, 2020, the Grievant received a Notice of Proposed Adverse Action (NPAA).²⁶ The NPAA charged the Grievant with "engag[ing] in the commission of an act that would constitute the crime of fraud" (Charge 1, Specification 1).²⁷ The NPAA also charged the Grievant with willfully making untruthful statements to a superior by (1) reporting sick at a time he was not sick; (2) untruthfully stating that he returned from Sierra Leone on January 2, 2020, when he returned a day later; (3) untruthfully reporting that he booked his trip in October, when he booked it in August; and (4) telling IAD that December 8, 2019, was the his day off, and later telling IAD that he was approved for PFL on December 8, 2019, despite the Grievant's superior denying the Grievant's PFL request for that day (Charge 2, Specifications 1, 2, 3, and 4).²⁸ Additionally, the NPAA charged the Grievant with "conduct unbecoming an officer" (Charge 3 Specification 1).²⁹ The NPAA also charged the Grievant with "failing to obey orders and directives" by (1) failing to provide contact information while on sick leave; (2) "being outside the metropolitan area without obtaining permission during sick leave"; and (3) failing to immediately report the ingestion of a controlled substance (Charge 4, Specifications 1, 2, and 3).³⁰ Last, the NPAA charged the Grievant with "malingering or feigning illness" (Charge 5 Specification 1).³¹

¹⁸ Award at 4.

¹⁹ Award at 4.

²⁰ Award at 5.

²¹ Award at 5.

²² Award at 4.

²³ See Award at 5.

²⁴ See Award at 5.

²⁵ Award at 6.

²⁶ Award at 6.

²⁷ Award at 6.

²⁸ Award at 6-7.

²⁹ Award at 6.

³⁰ Award at 7-8.

³¹ Award at 6.

An Adverse Action Panel (Panel) convened on March 1, 2021, to hear the evidence concerning the Grievant's alleged misconduct.³² The "Grievant pled guilty to Charge 4, Specifications 1 and 2."³³ "[T]he Panel sustained all of the charges except Charge 2 Specifications 2, 3, and 4," which the Panel dismissed.³⁴ The Panel reviewed the *Douglas* factors and determined "that termination was the appropriate penalty relating to Charges 1 and 3, and to Charge 4 Specification 4."³⁵ The chief of police denied the Grievant's appeal and MPD terminated the Grievant effective May 17, 2021.³⁶ On May 27, 2021, FOP invoked arbitration.³⁷

B. Arbitrator's Findings

The parties submitted the following issues to the Arbitrator:

- (1) Whether the Department imposed adverse action against [the Grievant] in violation of D.C. Code §5-1031 ("the 90-day rule")?
- (2) Whether there was sufficient evidence to sustain the charges against [the Grievant]?
- (3) Whether termination is an appropriate penalty?³⁸

The Arbitrator established that "MPD's administrative decision must be upheld if substantial evidence supports the findings of fact, and the conclusions of law rationally follow from the findings."³⁹

1. The 90-Day Rule

As an initial matter, the Arbitrator discussed the 90-day rule, which states that MPD is required to commence an adverse action within ninety (90) business days of the date MPD has "notice of the act or occurrence allegedly constituting cause."⁴⁰ The Arbitrator specified that MPD "has notice of the act or occurrence allegedly constituting cause on the date...[MPD] generates an internal investigation system tracking number for the act o[r] occurrence."⁴¹ The Arbitrator further stated that where "the act or occurrence allegedly constituting cause is the subject of a criminal investigation...the 90-day period for commencing a corrective or adverse action...shall be tolled until the conclusion of the investigation."⁴² The Arbitrator found that MPD did not violate the 90-

³² Award at 8.

³³ Award at 7.

³⁴ Award at 8.

³⁵ Award at 8.

³⁶ Award at 8.

³⁷ Award at 8.

³⁸ Award at 2.

³⁹ Award at 8.

⁴⁰ Award at 11 (quoting D.C. Official Code § 5-1031).

⁴¹ Award at 11 (quoting D.C. Official Code § 5-1031).

⁴² Award at 12 (quoting D.C. Official Code § 5-1031).

day rule when it imposed an adverse action against the Grievant, because the criminal investigation into the Grievant's conduct tolled the 90-day period from January 27 through February 21, 2020.⁴³

2. The Sufficiency of the Evidence

The Arbitrator evaluated the sufficiency of the evidence supporting each of the charges against the Grievant. The Arbitrator reviewed Charge 1, Specification 1, which asserted that the "Grievant engaged in conduct that would constitute the crime of fraud" under D.C. Official Code § 22-322 "by using PFL to travel to Sierra Leone without his child."⁴⁴ The Arbitrator noted that Charge 1, Specification 1 "reference[d] District Personnel Manual (DPM) § 1288.1, which provides that when an agency determines that an employee uses [PFL] for purposes other than th[ose] specified in supporting documentation..., or as provided in the DPM chapter on [PFL], the employee's action will be 'considered fraud against the District government, and the employee may be subject to disciplinary action.'"⁴⁵ However, the Arbitrator stated that this DPM provision did not preclude him from finding that the Grievant's actions did not constitute the crime of fraud, even though the Grievant used PFL for purposes other than those specified in his supporting documentation.⁴⁶ In reaching his conclusion, the Arbitrator found that the Grievant did not "have the requisite intent sufficient to support the conclusion that his use of PFL" would constitute the "crime of fraud" under D.C. Official Code § 22-322.⁴⁷ The Arbitrator cited the Grievant's supervisor's testimony that "a lot of officers are confused about how Paid Family Leave is used and what it can be used for."⁴⁸ The Arbitrator also noted that the Grievant freely disclosed to the Lieutenant that he had been in Sierra Leone at the time he ingested THC.⁴⁹ Therefore, the Arbitrator concluded that "the Panel's finding of guilt on Charge 1, Specification 1, was not supported by substantial evidence," and the Arbitrator dismissed Charge 1, Specification 1.⁵⁰

The Arbitrator evaluated Charge 2, Specification 1, which alleged that the Grievant "willfully and knowingly" made an untruthful statement to a superior officer pertaining to the Grievant's official duties.⁵¹ Charge 2, Specification 1 alleged that the Grievant called the Fifth District Sergeants office while in Sierra Leone and knowingly, untruthfully stated that he was sick.⁵² The Arbitrator found that the Panel's determination of guilt regarding this specification was not supported by substantial evidence, as there was no evidence on the record that the Grievant

⁴³ Award at 13. The Arbitrator based this finding on a January 30, 2020, email from an MPD investigator to an OAG attorney, which revealed that investigation into the Grievant was ongoing. Award at 13. The Arbitrator also based this finding on a February 21, 2020, written communication in which the Assistant Chief of OAG's Criminal Section informed the MPD investigator that OAG had decided not to file criminal charges in this case. Award at 13-14.

⁴⁴ Award at 15.

⁴⁵ Award at 15-16.

⁴⁶ Award at 16.

⁴⁷ Award at 17.

⁴⁸ Award at 2.

⁴⁹ Award at 16-17.

⁵⁰ Award at 17.

⁵¹ Award at 18.

⁵² Award at 18.

stated he was sick, and a request for an “optional” merely implies that the requester is sick.⁵³ Thus, the Arbitrator dismissed Charge 2, Specification 1.⁵⁴

The Arbitrator reviewed Charge 3, Specification 1, which alleged that “by misusing PFL to travel to Sierra Leone without his child..., [the] Grievant engaged in conduct unbecoming an officer...”⁵⁵ The Arbitrator determined that, “[w]hile MPD did not prove that [the] Grievant had the level of intent required for his actions to constitute the crime of fraud, [MPD] did prove that [the] Grievant’s use of PFL for the trip to Sierra Leone in fact violated the PFL rules.”⁵⁶ The Arbitrator concluded that, while the Grievant did not know that his use of PFL was improper, he should have known.⁵⁷ Therefore, the Arbitrator found the Grievant guilty of Charge 3, Specification 1.⁵⁸

The Arbitrator discussed Charge 4, Specification 3, which alleged that the Grievant failed to immediately report that he had unintentionally ingested a controlled substance.⁵⁹ The Arbitrator found that substantial evidence did not support the Panel’s conclusion that the Grievant’s reporting delay was an intentional attempt to avoid repercussions.⁶⁰ However, the Arbitrator found that substantial evidence supported the Panel’s conclusion that the Grievant delayed in notifying MPD of his unintentional THC ingestion.⁶¹ The Arbitrator concluded that the Grievant was guilty of Charge 4, Specification 3.⁶² The Arbitrator noted that the appropriate penalty for this specification was affected by the Arbitrator’s finding that the Grievant showed “no intention to delay testing and to conceal potential misconduct.”⁶³

The Arbitrator addressed Charge 5, Specification 1, which “alleged that [the] Grievant reported sick on January 2, 2020 when he was not in fact sick,”⁶⁴ thereby “malinger[ing] or feign[ing] illness in order to evade the performance of duty.”⁶⁵ The Arbitrator concluded that the Panel’s finding of guilt on this charge was supported by substantial evidence, as the Grievant had testified during an investigative interview that he reported sick on January 2, 2020, but was not sick at that time.⁶⁶ Therefore, the Arbitrator found the Grievant guilty of Charge 5, Specification 1.⁶⁷

⁵³ Award at 19.

⁵⁴ See Award at 19.

⁵⁵ Award at 18.

⁵⁶ Award at 18.

⁵⁷ Award at 18.

⁵⁸ Award at 18.

⁵⁹ Award at 20.

⁶⁰ Award at 21.

⁶¹ Award at 21.

⁶² Award at 21.

⁶³ Award at 21.

⁶⁴ Award at 19.

⁶⁵ Award at 19.

⁶⁶ Award at 19.

⁶⁷ See Award at 19.

3. The Appropriateness of the Penalty – *Douglas* Factor Analysis

After reviewing the charges against the Grievant, the Arbitrator turned to the question of whether termination was an appropriate penalty for the charges of which the Arbitrator found the Grievant guilty – Charge 3, Specification 1, Charge 4, Specifications 1 and 2 (by Grievant’s guilty plea), Charge 4, Specification 3, and Charge 5, Specification 1.⁶⁸ To determine “the appropriate disciplinary penalty for these findings of guilt,” the Arbitrator examined the Panel’s application of the *Douglas* factors set forth in the Merit Systems Protection Board (MSPB) case, *Douglas v. Veterans Administration*.⁶⁹

The Arbitrator disagreed with the Panel’s analysis of several factors. The Arbitrator found factors neutral or mitigating that the Panel determined were aggravating. For instance, while the Panel found that *Douglas* factor 1 (the nature and seriousness of the offense) was aggravating, the Arbitrator deemed factor 1 mitigating, stating that the Grievant’s actions constituted a “minor transgression,” as opposed to the crime of fraud.⁷⁰ Similarly, the Arbitrator disagreed with the Panel’s conclusion that *Douglas* factor 5 (the effect of the offense on the Grievant’s ability to perform at a satisfactory level and on his supervisor’s confidence in that ability) was aggravating.⁷¹ The Arbitrator found factor 5 mitigating, noting that the Grievant’s supervisor “still expressed confidence in [the] Grievant’s ability to do an outstanding job upon his return,” based on her direct knowledge of the Grievant’s past performance.⁷²

In sum, the Arbitrator concluded that, in light of the evidence presented, the Panel’s evaluation of nine of the twelve *Douglas* factors was inappropriate.⁷³ The Arbitrator found that a fair analysis of the *Douglas* factors did not indicate that termination was an appropriate penalty.⁷⁴ Based on his conclusions, the Arbitrator directed MPD to reinstate the Grievant and reduce the Grievant’s termination to a 30-day suspension.⁷⁵ Additionally, the Arbitrator directed MPD to provide the Grievant with full back pay, less the pay for the 30-day suspension.⁷⁶ Last, the Arbitrator directed that, “[p]ursuant to Article 19E, Section 5(7) of the Collective Bargaining Agreement, the fees and expenses of the Arbitrator shall be borne by the losing party, the MPD.”⁷⁷

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 three narrow circumstances: (1) if an arbitrator was

⁶⁸ Award at 21.

⁶⁹ 5 M.S.P.B. 313 (1981). It is the Arbitrator’s role to review and evaluate the Panel’s *Douglas* factor analysis. *E.g.*, *MPD v. FOP*, Slip Op. No. 1731, PERB Case No. 20-A-01 (2019); *MPD v. FOP*, 63 D.C. Reg. 12581, Slip Op. No. 1591, PERB Case No. 15-A-16 (2016).

⁷⁰ Award at 22.

⁷¹ Award at 23.

⁷² Award at 24.

⁷³ Award at 30.

⁷⁴ Award at 30.

⁷⁵ Award at 31.

⁷⁶ Award at 32.

⁷⁷ Award at 32.

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.⁷⁸ MPD requests review of the Award on the grounds that the Arbitrator exceeded his authority and the Award is contrary to law and public policy.

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.”⁷⁹ 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.⁸⁰ “[S]o long as the arbitrator does not offend any of these requirements, the request for [Board] intervention should be resisted even though the arbitrator made serious, improvident, or silly errors in resolving the merits of the dispute.”⁸¹

In the context of Charge 2, Specification 1, MPD contends that the Arbitrator exceeded his authority when “he assigned a different meaning to requesting an ‘option’... as used by MPD officers.”⁸² MPD argues that “being sick is a prerequisite to being allowed to take an optional” and that the Arbitrator changed the meaning of the term by finding that an optional implies illness but is not a statement of illness. As a result, MPD argues that the Arbitrator’s determination of the meaning of “optional” and its application to the Grievant was outside the Arbitrator’s jurisdiction.⁸³ Additionally, MPD states that the Arbitrator’s finding that the Grievant feigned an illness (Charge 5, Specification 1) contradicted the Arbitrator’s finding that the Grievant did not make an untrue statement that he was sick (Charge 2, Specification 1).⁸⁴ In its Opposition, FOP argues that MPD “failed to identify any mandatory authority that specifies that a request for an optional constitutes an affirmative statement of sickness.”⁸⁵ Further, FOP draws a distinction between Charge 5, Specification 1, and Charge 2, Specification 1, noting that the latter requires a statement, while the former does not.⁸⁶

The Board has held that parties who submit a matter to arbitration agree to be bound by the Arbitrator’s decision which necessarily includes the Arbitrator’s evidentiary findings and

⁷⁸ D.C. Official Code § 1-605.02(6).

⁷⁹ *AFGE, Local 2725 v. DCHA*, 61 D.C. Reg. 9062, Slip Op. 1480 at 5, PERB Case No. 14-A-01 (2014).

⁸⁰ *Mich. Family Resources, Inc. v. SEIU, 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 *DCFMS v. AFGE, Local 3721*, 59 D.C. Reg. 9757, Slip Op. 1258 at 4, PERB Case No. 10-A-09 (2012).

⁸¹ *FOP/DOC Labor Comm.*, Slip Op. No. 1271 at 7 (citing *Mich. Family Resources, Inc.*, 475 F.3d at 753).

⁸² Request at 16.

⁸³ Request at 16.

⁸⁴ Request at 16-17.

⁸⁵ Opposition at 16.

⁸⁶ Opposition at 16.

conclusions.⁸⁷ Here, the Arbitrator considered the record evidence and the parties' briefs and found that requesting an "optional" implies sickness, and the Grievant admitted to reporting sick and taking sick leave. Nonetheless, the Arbitrator concluded that there was no evidence that the Grievant explicitly stated he was sick when he called to request a 3-day optional.⁸⁸ The Arbitrator noted testimony from the Sergeant whom the Grievant called to request the optional, in which the Sergeant said that he could not recall whether the Grievant directly stated that he was sick.⁸⁹ Hence, the Arbitrator concluded that, given the context and history of the term "optional," the Grievant effectively made an untrue implication about his health, but not an untrue statement.⁹⁰ Based on this distinction between an untrue statement and an untrue implication, the Arbitrator concluded that the Grievant was guilty of Charge 5, Specification 1 (feigning an illness), but not guilty of Charge 2, Specification 1 (untruthfully stating that he was sick).⁹¹ MPD did not introduce any evidence to contradict the Arbitrator's conclusion. For these reasons, the Board finds that the Arbitrator did not exceed his authority when he found that MPD did not prove Charge 2, Specification No. 1.

MPD also asserts that the Arbitrator exceeded his authority by reversing MPD's penalty determination, because the holding in *Douglas* required the Arbitrator to defer to MPD's decision.⁹² MPD argues that "the Arbitrator was required...to review MPD's penalty imposed in this case, and to assure that MPD did 'conscientiously consider the relevant facts and did strike a responsible balance within tolerable limits of reasonableness.'" ⁹³ FOP states that the Arbitrator was within his authority when he reversed MPD's penalty determination, as the appropriateness of the penalty was one of the issues the parties explicitly committed to the Arbitrator.⁹⁴

MPD asserts that the Arbitrator must apply the holding in *Douglas* in the same manner as the Merit Systems Protection Board. However, MPD does not cite any contractual provision in the CBA that would place such a limit on the Arbitrator's authority. The Board has established that where the parties commit a penalty determination to an arbitrator, and the arbitrator relies on the record, the parties' briefs, and the *Douglas* factors in reaching his determination, the arbitrator does not exceed his authority.⁹⁵ Furthermore, in similar matters, the Board has held that it will not substitute its judgment for the duly appointed arbitrator.⁹⁶

MPD does not deny that the parties jointly committed the instant dispute to arbitration and granted the Arbitrator authority to determine whether termination was an appropriate penalty.⁹⁷

⁸⁷ *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 2, PERB Case No. 92-A-04 (1992)).

⁸⁸ See Award at 19.

⁸⁹ Award at 19.

⁹⁰ See Award at 19.

⁹¹ Award at 18-19.

⁹² Request at 17-18.

⁹³ Request at 18 (quoting *Douglas*, 5 M.S.P.B at 332-333).

⁹⁴ Opposition at 18-19.

⁹⁵ *MPD v. FOP/MPD Labor Comm.*, 68 D.C. Reg. 5078, Slip Op. No. 1784 at 7, PERB Case No. 21-A-08 (2021).

⁹⁶ See, e.g., *MPD v. FOP/MPD Labor Comm.*, 68 D.C. Reg. 4485, Slip Op. No. 1780 at 8, PERB Case No. 21-A-04 (2021).

⁹⁷ See Award at 2.

MPD's arguments amount to disagreement with the Arbitrator's evidentiary findings and conclusions, and do not constitute grounds for reversal.

For the reasons stated, the Board finds that the Arbitrator did not exceed his contractual authority in his *Douglas* factor analysis when he resolved the jointly-submitted issue of an appropriate penalty determination and the parties' CBA did not limit his authority.

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

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."⁹⁸ The D.C. Court of Appeals has reasoned that, "[a]bsent 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."⁹⁹ Overturning an arbitration award due to law and public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to the arbitrator's interpretation of the contract.¹⁰⁰ "[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.'"¹⁰¹

MPD argues that the Award is contrary to law and public policy with respect to the Arbitrator's conclusion that the Grievant was not guilty of Charge 1, Specification 1.¹⁰² MPD asserts that the plain language of DPM § 1288.1 "mandates that [the] Grievant's action be considered fraud against the District government."¹⁰³ Charge 1, Specification 1 alleged that the Grievant violated D.C. Official Code § 22-3221 (Fraud) – specifically, DPM § 1288.1. D.C. Official Code § 22-3221 states that "[a] person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise." DPM § 1288.1 states:

When an agency head (or his or her designee) has determined that an employee has used paid family leave for a purpose other than that specified in supporting documentation submitted by the employee, or as provided in this chapter, the application shall be void and the action considered fraud against the District government, and the employee may be subject to disciplinary action in accordance with Chapter 16.

⁹⁸ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No. 1702 at 4, PERB Case No. 18-A-17 (2019).

⁹⁹ *FOP/DOC Labor Comm. v. PERB*, 973 A.2d 174, 177 (D.C.2009).

¹⁰⁰ *MPD*, Slip Op. No. 1702 at 4, (citing *Am. Postal Workers Union v. USPS*, 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)).

¹⁰¹ *MPD*, Slip Op. No. 1702 at 4.

¹⁰² Request at 13. MPD does not make any specific arguments regarding public policy but asserts that "[a]n award that is contrary to a specific law *ipso facto* may be said to be contrary to public policy that the law embodies." Request at 15 (citing *FOP/DOC Labor Comm.*, 973 A.2d at 179).

¹⁰³ Request at 13.

MPD asserts that “the Arbitrator completely disregarded the charge of fraud pursuant to Section 1288.1 of the DPM...[and]...only analyzed a guilty finding of criminal fraud as defined by D.C. [Official] Code § 22-3221.”¹⁰⁴ In its Opposition, FOP asserts that the Arbitrator considered DPM Section 1288.1, but “no matter what regulation or statute was cited, for a fraud to be criminal there must be some fraudulent intent,” which FOP argues the Grievant did not have.¹⁰⁵

The Arbitrator concluded that the overarching allegation in Charge 1, Specification 1 was criminal fraud (D.C. Official Code § 22-3221), and that the specific variety of criminal fraud alleged was fraudulent use of PFL (DPM § 1288.1). In reaching his determination concerning Charge 1, Specification 1, the Arbitrator considered the Grievant’s supervisor’s testimony concerning the general confusion regarding use of PFL,¹⁰⁶ as well as the Grievant’s openness about using his PFL to travel to Sierra Leone.¹⁰⁷ Relying on record evidence, the Arbitrator concluded that although the Grievant “used PFL for purposes other than that specified in his supporting documentation,” the “Grievant’s actions [di]d not constitute the crime of fraud.”¹⁰⁸ Hence, the Arbitrator stated that the language of DPM § 1288.1 did not preclude the Arbitrator from finding that the Grievant was not guilty of Charge 1, Specification 1.¹⁰⁹

Because the Arbitrator found that the record evidence did not support a finding of criminal fraud, he determined that the Grievant was not guilty of Charge 1, Specification 1.¹¹⁰ The Arbitrator’s conclusion does not constitute a “clear violation of law,” evident on the face of the Award. The Board has held that where, as here, the parties specifically bargained for the Arbitrator’s interpretation of the agreement, the parties have implicitly bargained for the Arbitrator’s interpretation of the applicable law and related regulations.¹¹¹

For the reasons stated, the Board finds that the Award is not contrary to law and public policy.

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.

¹⁰⁴ Request at 14.

¹⁰⁵ Opposition at 11-12 (citing *Matter of Bond*, 519 A.2d 165, 166 (D.C. 1986) (per curiam); *United States v. Lemire*, 720 F.2d 1327, 1334-35 (D.C. Cir. 1983); *United States v. Briggs*, 54 F.Supp. 731, 733 (D.D.C. 1944)).

¹⁰⁶ Award at 2, 22, 28.

¹⁰⁷ Award at 16-17.

¹⁰⁸ Award at 16.

¹⁰⁹ Award at 16.

¹¹⁰ The Board notes that the Grievant was not convicted of a crime. Further, the DPM does not contain any criminal penalty nor does the DPM require discipline.

¹¹¹ *MPD*, Slip Op. No. 1784 at 6-7 (citing *MPD v. PERB*, 901 A.2d 784, 789 (D.C. 2006)).

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 Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

June 22, 2022

Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board 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 30 days after a decision is issued to file an appeal.