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

In the matter of:

**Fraternal Order of Police/District of
Columbia Metropolitan Police
Department Labor Committee
Grievant: William Harper

Petitioner,

v.

District of Columbia
Metropolitan Police Department

Respondent.**

PERB Case No. 15-A-10

Opinion No. 1531

DECISION AND ORDER

On April 10, 2015, Petitioner Fraternal Order of Police/ District of Columbia Metropolitan Police Department Labor Committee (“FOP” or “Petitioner”) filed a timely Arbitration Review Request (“Review Request”) of an Arbitration Award (“Award”) upholding the termination of Grievant William Harper (“Harper” or “Grievant”) from employment with the D.C. Metropolitan Police Department (“MPD” or Respondent”). For reasons stated herein, Petitioner’s Review Request is denied.

I. Statement of the Case

On September 5, 2008, MPD Officer William Harper was working an approved off-duty job in uniform at the Wingate Apartments in Southwest, Washington, D.C. along with two other MPD officers, Rosa Roldan-Torres and Bridgette King. That evening, a fight erupted between two groups of 50-60 females where rocks, sticks, bricks and bleach were thrown. While citizen Deja Jennings admitted to picking up and throwing rocks, she also accused Harper of grabbing her, pushing her to the ground, and punching her in the face during the melee. She also alleged that after he punched her, he removed his badge and name plate and refused to identify himself. Jennings was taken to the hospital by ambulance and required stitches for a lip injury.

Even though a criminal investigation into the matter was initiated on March 18, 2009, the United States Attorney’s Office notified MPD that it would not file criminal charges against

Officer Harper, after which, Sgt. Nick Kunysz of MPD's Force Investigations Branch, initiated an administrative investigation into the incident. On April 10, 2009, Sgt. Kunysz interviewed Harper. In that interview, Harper stated that he "did not push anyone during this incident." As a result of the investigation, a Notice of Proposed Adverse Action against Harper was filed on July 16, 2009, alleging four charges of misconduct; (1) untruthful statements; (2) using unnecessary force; (3) conduct unbecoming an officer; and, (4) neglect of duty. The Notice of Adverse Action also included an analysis of the *Douglas*¹ factors to assess the appropriateness of the penalty, and mentioned that during Officer Harper's tenure with MPD he had only "one sustained adverse action within the past three years."² After reviews by the Use of Force Review Board and the Adverse Action Panel³, Officer Harper was found guilty on Charges 1 and 4.⁴ Harper was terminated from MPD and unsuccessfully appealed the termination to Chief of Police Cathy L. Lanier. The case was then submitted to arbitration.

Based on a review of the evidence before him, Arbitrator Richard Anthony sustained the decisions of MPD in its termination of Officer Harper. The Arbitrator held that while there was no proof that Harper engaged in any wrongdoing on September 5, 2008, the date of the original incident, Harper did indeed give misleading statements to IAD during his interview on April 10, 2009. As a result of those misleading statements, the Arbitrator held that the adverse action was warranted and timely filed on July 16, 2009 because the charges came within the 90 day window after the April 10, 2009 interview. The Arbitrator also found that the Notice of Proposed Adverse Action was not unduly prejudicial based on the fact that the Adverse Action Panel was free to make its own analysis of the *Douglas* factors.

FOP has filed this Arbitration Review Request seeking to have the Arbitrator's Award reviewed on the grounds that it is contrary to law and public policy.

¹ *Douglas vs. Veterans Administration*, 5 M.S.P.R. 280 (1981), sets forth the criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct. These factors include (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) the potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

² Record at 3.

³ In its own analysis of the *Douglas* factors the Adverse Action Panel found, "In the three year [sic] that Officer Harper has been a member of the Metropolitan Police Department, he has been cited for Adverse Action for Untruthful Statements twice and Conduct Unbecoming twice."

⁴ Grievant was found Not Guilty on Charges 2 and 3 by the Adverse Action Panel.

II. Analysis

D.C. Official Code § 1-605.02(6) authorizes the Board to modify or set aside an arbitration award in only three limited 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.⁵

Citing PERB Rule 538.3, FOP contends that this Arbitrator's Award should be reversed because the award on its face is contrary to law and public policy. FOP does not make any contentions that the Arbitrator was without or exceeded his authority, or that the Award was procured by fraud, collusion, or other similar and unlawful means.⁶

A. The Award is Not Contrary to Law and Public Policy

In order for the Board to find that an arbitrator's award is on its face contrary to law, the asserting party bears the burden to specify the "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result."⁷ Furthermore, the Board has held that a mere "disagreement with the Arbitrator's interpretation ... does not make the award contrary to law and public policy."⁸

1. The Arbitrator's 90 day Rule finding is not a violation of law and public policy.

D.C. Official Code §5-1031 requires MPD to bring any corrective or adverse action against a sworn member or civilian employee within 90 days of when MPD knew or should have known of the action. In this case, the Arbitrator had to address the date of the original incident on September 5, 2008 and the subsequent date of April 10, 2009 when Officer Harper allegedly gave untruthful statements to IAD.

The original incident occurred on September 5, 2008. The charges against Officer Harper were brought on July 16, 2009. The Arbitrator found that MPD did in fact exceed 90 days before bringing charges against Grievant. Therefore, the Arbitrator concluded that the charges and discipline imposed on Grievant for his conduct on September 5, 2008 must be rescinded.

On April 10, 2009, Officer Harper was interviewed by IAD at which time, he allegedly gave untruthful statements. The Arbitrator reviewed the transcripts of the interviews of Officer

⁵ *University of the District of Columbia v. PERB*, 2012 CA 8393 P (MPA)(2014)

⁶ Request at 2-3.

⁷ *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 11329, Slip Op. No. 1295, PERB Case No. 09-A-11 (2012). *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000).

⁸ *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008); see also *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Thomas Pair)*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at pp. 7-8, PERB Case No. 09-A-05 (2014).

Harper and listened to the recordings. After his review, he made a factual determination that Officer Harper was indeed "... evasive, imprecise, circuitous, equivocating, and dishonest in that interview."⁹ This factual finding was not challenged by FOP in its Arbitration Review Request.

On July 16, 2009, MPD gave the Notice of Proposed Adverse Action against Officer Harper charging him with making untruthful statements on April 10, 2009. The Arbitrator held that these allegations were within the 90 day Rule window. In its Arbitration Review Request, FOP argues that the statements that Harper made to IAD should be construed as part of the September 5, 2008 events at Wingate Apartments. MPD asserts in its opposition that FOP's arguments are nothing more than a disagreement with the Arbitrator's factual findings. We agree.

In this case there were two separate events that necessitated the starting of the 90 day Rule clock. The first incident was the original disturbance that occurred on September 5, 2008. This incident began the 90 day clock for the alleged neglect of duty. The second incident was the untruthful statements given by Officer Harper on April 10, 2009. Even though the conversation with IAD would not have occurred but for the incident at Wingate Apartments, these are two separate events. Contrary to the arguments made by FOP, the earlier event cannot be allowed as a shield for a police officer to lie to IAD. As the Arbitrator points out, lying by a police officer is taken so seriously that "nearly all police departments call for the discharge of an officer on the very first offense when the officer deals with the public and who [sic] intentionally lies to Internal Affairs...."¹⁰ But for Grievant deciding to lie to IAD, he would have been completely exonerated from his behavior on September 5, 2008 and from his questioning by IAD on April 10, 2009.¹¹

FOP's Arbitration Review Request does not articulate a law or a well-defined public policy that the Award violates. We find that the Arbitrator's conclusion that Grievant's April 10, 2009 statement to IAD was within the 90 day window of MPD filing charges against the Grievant on July 16, 2009 is supported by the record.¹²

2. *The Arbitrator's ruling on MPD's use the Douglas factors in its Notice of Proposed Adverse Action is not a violation of law and public policy.*

After the initial investigation, MPD filed a Notice of Adverse Action outlining the charges against Officer Harper. Contained in the notice was an analysis of the *Douglas* factors

⁹ Award at 35.

¹⁰ Award at 41.

¹¹ Responsibility for Grievant's behavior on September 5, 2008 was barred by the untimeliness of MPD's complaint, filed outside of the 90 day Rule window. If Grievant had been truthful on April 10, 2009, there would have been no remaining charges against him.

¹² D.C. Official Code § 5-1031(a-1)(1) states in pertinent part "... no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause." In this case, there were 67 days between the interview and the filing of charges against Grievant.

to assess the appropriateness of the penalty as well as a statement that during Officer Harper's tenure with MPD, Grievant had only "one sustained adverse action within the past three years."¹³

The Arbitrator stated that:

The Notice of Proposed Action was no doubt prepared and issued by the Department because they [sic] believed that Grievant was guilty of the offenses charged and that he should be terminated. That disclosure should not be surprising or at all prejudicial to the Panel. The whole appeal process is set up to pass judgement [sic] on the initial action taken by the Department. The Panel should have no problem, and this Arbitrator certainly has no problem with questioning and objectively analyzing the various conclusions reached by the Department as to charges made and the penalties recommended.

The Arbitrator continued:

The inclusion of a discussion of the appropriate discipline for the alleged wrongdoing does not irreparably damage any ability of the Adverse Action Panel to be, and remain, impartial and objective.¹⁴

FOP asserts in its Review Request that the early presentation of the *Douglas* factors analysis contaminated the deliberations of the Adverse Action Panel.¹⁵ In doing so, FOP claims that Officer Harper's due process rights were compromised because the Panel should have been allowed to reach its conclusion about the Grievant's guilt or innocence before being presented with the *Douglas* factors. Moreover, the Notice of Adverse Action should not have included information about any of Grievant's previous citations and "sustained prior misconduct."^{16/17} MPD argues that the imposition of the *Douglas* factors into the process had no bearing on the Panel's ultimate decision to terminate Harper.

We agree with the Arbitrator that the Panel was essentially conducting an appellate review of the Department's initial disciplinary findings and recommendation of sanctions. Likewise, the Panel should have had no problem with independently questioning and objectively analyzing the various conclusions reached by MPD as to the charges made and the penalties

¹³ Record at 3.

¹⁴ Award at 38.

¹⁵ Citing *Douglas v. Veterans Administration*, 5 M.S.P.B. 280 (1981) FOP asserts that the determination of an appropriate penalty is appropriate "once the alleged conduct and its requisite general relationship to the efficiency of the service has been established."

¹⁶ Award at 18.

¹⁷ The Notice of Proposed Adverse Action regarding Grievant's past disciplinary action in its *Douglas* factors analysis stated only "you have one (1) sustained adverse action within the past three (3) years." A document entitled "Biographical Documentation" that was apparently considered by the Use of Force Review Board included about Grievant that he had received 7 commendations and 2 prior disciplinary charges (Untruthful Statement and Conduct Unbecoming).

recommended. The analysis of the *Douglas* factors in the Panel's Findings of Fact and Conclusion of Law is clearly more in depth than that offered by MPD.¹⁸

In its Arbitration Review Request, FOP asserts that the Arbitrator violated the law by approving MPD's utilization of the *Douglas* factors in the Grievant's Notice of Proposed Adverse Action. In fact, FOP stated twelve times that the Arbitrator's decision was illegal but failed to identify, at any point, what law was being violated. FOP did not rely on any specific, well-defined law or public policy that would compel and mandate setting aside the Arbitrator's Award.¹⁹ Accordingly, we see no reason to alter the Arbitrator's decision on this point.²⁰

B. Conclusion

Based on the foregoing, the Board finds that (1) the April 10, 2009 conversation that Grievant had with IAD is within the 90 day Rule window of the charges being filed by MPD on July 16, 2009 and (2) Grievant was not prejudiced by MPD including its *Douglas* factors analysis in the Notice of Proposed Adverse Action. Accordingly, the Board rejects FOP's arguments and finds no cause to modify or set aside the Arbitrator's Award. Furthermore, FOP has likewise not demonstrated that the Award constitutes a violation of an explicit, well defined public policy grounded in law or legal precedent. Thus, the Board finds that the Award was not, on its face, contrary to law and public policy. Accordingly, FOP's Request is denied and the matter is dismissed in its entirety with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The FOP 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

By unanimous vote of Board Chairperson Charles Murphy, and Members Keith Washington and Yvonne Dixon. Member Ann Hoffman was not present.

July 24, 2015

Washington, D.C.

¹⁸ Record at 666-669.

¹⁹ See footnote 5.

²⁰ Without presenting any supporting arguments or citations, FOP stated at the very end of its Review Request that the "discipline issued in this case must be rescinded." The Board has no reason to address that issue.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-A-10, Opinion No. 1531, was served by File & ServXpress on the following parties on this the 24th day of July, 2015.

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