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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. 14-A-06
	)	
Petitioner,	)	Opinion No. 1493
	)	
v.	)	
	)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee, (on behalf of Tracy Kennie),	)	Decision and Order
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

On May 5, 2014, the District of Columbia Metropolitan Police Department (“MPD”) filed an Arbitration Review Request (“Request”) seeking review of an arbitration award (“Award”)<sup>1</sup> that overturned the termination of Grievant Tracy Kennie (“Grievant”). The sole issue before the Board is whether the Arbitrator acted without authority or exceeded his jurisdiction. Pursuant to D.C. Official Code § 1-605.02(6), the Board finds that the Arbitrator did not act without authority or exceed his jurisdiction. Thus, MPD’s Arbitration Review Request is denied.

**I. Statement of the Case**

**A. Background**

The matter before the Board arises from a grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Union”) challenging MPD’s termination of Grievant’s employment.<sup>2</sup> The precise issues submitted for arbitration, as

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<sup>1</sup> Included with MPD’s Arbitration Review Request as Exhibit 1.

<sup>2</sup> (Award at 10-11).

stated by the arbitrator, were, “[w]hether the Grievant’s termination was for cause?” and “[i]f not, what shall be the remedy?”<sup>3</sup>

The Arbitrator reviewed the findings of the MPD adverse action panel (“Panel”) that found Grievant guilty of the following allegations: Charge 1- a false statement charge with four specified allegations; and Charge 2- a neglect of duty charge with one specified allegation.<sup>4</sup> MPD only challenged the Arbitrator’s findings concerning Charge 1.<sup>5</sup>

Under Charge 1, the Arbitrator concluded that MPD “met its burden of proof to show that the Grievant violated MPD General Orders and work rules” and that there were “no grounds to overturn the Panel’s determination that the Grievant was guilty of the misconduct described in Charge 1, Specifications 1 through 4.”<sup>6</sup> Having determined that there was substantial evidence to support MPD’s guilty findings under Charge 1, the Arbitrator then looked to whether termination was an appropriate penalty.<sup>7</sup>

The Arbitrator’s analysis of MPD’s penalty determination focused on the Panel’s evaluation of the twelve factors articulated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (MSPB 1981) (“*Douglas Factors*”). The Arbitrator found that the record supported the Panel’s findings regarding eight of the *Douglas Factors*,<sup>8</sup> but that the record did not support the Panel’s analyses of the other four Factors.<sup>9</sup> Accordingly, the arbitrator reduced Grievant’s termination to a 30-day suspension.<sup>10</sup>

#### B. MPD’s Position

MPD asserts that the arbitrator exceeded his authority under Article 19, E, Section 5(4)<sup>11</sup> of the parties’ collective bargaining agreement<sup>12</sup>, which requires arbitrators to confine their

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<sup>3</sup> *Id.* at 2.

<sup>4</sup> (Award at 4-5).

<sup>5</sup> *See* (Petitioner’s Brief at 4-6).

<sup>6</sup> (Award at 21, 26).

<sup>7</sup> *Id.* at 27-31.

<sup>8</sup> Namely, the Panel’s determinations that the nature and seriousness of the offense, the job level and type of employment, the effect on Grievant’s ability to perform his duties and supervisor confidence, and the clarity of notice Factors were “aggravating”; that Grievant’s past disciplinary record, his past work record, and his potential for rehabilitation Factors were “mitigating”; and that the consistency of the penalty with MPD’s table of penalties Factor was “neutral”. (Award at 27, 29).

<sup>9</sup> The Arbitrator determined that the Panel should have evaluated the possibility of alternative sanctions Factor as “mitigating” rather than “neutral”; and that the mitigating circumstances, the consistency of the penalty with other employees, and the notoriety of the offense Factors should have been evaluated as “neutral” instead of “aggravating.” *Id.* at 28-30.

<sup>10</sup> *Id.* at 31.

<sup>11</sup> Article 19, E, Section 5(4) states: “The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision of the issue presented and shall confine his [or her] decision solely to the precise issue submitted for arbitration.” (Award at 25).

<sup>12</sup> Included with FOP’s Opposition to Petitioner’s Brief as Attachment 2.

decisions solely to the precise issue(s) submitted.<sup>13</sup> MPD contends that because the arbitrator determined that there was substantial evidence to support the Panel's finding that Grievant was guilty of each untruthful statement specification, and because the Arbitrator noted that MPD General Order 120.21 states that the recommended penalty for a first time false statement violation is "suspension for 15 days to removal", he was therefore not authorized under the collective bargaining agreement to then proceed to the "if not" portion of the issues before him and reduce the termination, or to substitute his penalty preference for that of the Chief of Police.<sup>14</sup> MPD asserts that alternatively, the Arbitrator should have remanded the case to the Panel.<sup>15</sup>

## II. Analysis

D.C. Official Code § 1-605.02(6) authorizes the Board to modify, remand in whole or in part, 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.

In this case, MPD stated in its initial Request that it was challenging the Award on the bases that the Arbitrator acted without or exceeded the authority granted him in violation of Article 19, E, Section 5(4) of the parties' collective bargaining agreement, and that the Award is contrary to law and public policy.<sup>16</sup> In its brief, however, MPD only presented arguments supporting its contention that the Arbitrator acted without or exceeded his authority.<sup>17</sup> Therefore, the Board will not conduct any analysis as to whether or not the Award is contrary to law and public policy.

In order to determine if an arbitrator has exceeded his jurisdiction or was without authority to render an award, the Board evaluates "whether the award draws its essence from the collective bargaining agreement."<sup>18</sup> The U.S. Court of Appeals for the Sixth Circuit in *Michigan Family Resources, Inc. v. Service Employees International Union Local 517M*, provided a standard whereby it can be determined if an award "draws its essence" from a collective

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<sup>13</sup> (Petitioner's Brief at 5).

<sup>14</sup> *Id.* at 5-6 (citing *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (1985) (holding that a hearing examiner's role is not to insist that the *Douglas* Factors "be struck precisely where [he] would choose to strike it if [he was] in the agency's shoes in the first instance [because] such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce").

<sup>15</sup> *Id.* at 6 (citing *Stokes, supra*).

<sup>16</sup> (Petition at 2).

<sup>17</sup> (Petitioner's Brief at 4-6).

<sup>18</sup> *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (on Behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (quoting *D.C. Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156, PERB Case No. 86-A-05 (1987)); see also *Dobbs, Inc. v. Local No. 1614, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987).

bargaining agreement, stating:

[1] Did the arbitrator act “outside his authority” by resolving a dispute not committed to arbitration?; [2] Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award?; [a]nd [3] [I]n resolving any legal or factual disputes in the case, was the arbitrator arguably construing or applying the contract? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made “serious,” “improvident” or “silly” errors in resolving the merits of the dispute.<sup>19</sup>

The Arbitrator in this case addressed only the precise issues presented to him by the parties, and therefore did not act without or exceed his authority in violation of Article 19, E, Section 5(4) of the collective bargaining agreement.

**A. The Arbitrator Did Not Exceed or Act Without Authority When He Reviewed and Reduced Grievant’s Penalty.**

MPD’s main contention does not challenge the merits of the Arbitrator’s findings regarding the Panel’s analysis of each *Douglas* Factor, but instead focuses on whether the Arbitrator was authorized to make any findings about MPD’s choice of remedy in light of his exact phrasing of the issues in the Award.<sup>20</sup> There is no indication from the record, however, that the parties stipulated to or agreed upon any particular phrasing of the precise issues they submitted to the Arbitrator as envisioned in Article 19, E, Section 2 of the collective bargaining agreement.<sup>21</sup> MPD does not state how it phrased the issues it presented to the Arbitrator. The relevant parts of FOP’s phrasing, however, are as follows:

- Whether sufficient evidence exists to support the alleged charges?
- Whether termination is an appropriate remedy?<sup>22</sup>

The Board notes that FOP’s phrasing does not include the “if not” clause that the Arbitrator used and on which MPD’s whole argument is based. Rather, FOP’s phrasing presents two

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<sup>19</sup> 475 F.3d 746, 753 (6th Cir. 2007).

<sup>20</sup> *Id.* at 5-6.

<sup>21</sup> See (Opposition to Petitioner’s Brief, Attachment 2 at p. 24) (which states: “... the parties will attempt to agree on a statement of the issue for submission to arbitration. If the parties are unable to agree on a joint statement of the issue, the arbitrator/mediator shall be free to determine the issue”).

<sup>22</sup> (Opposition to Petitioner’s Brief at 4-5).

independent issues without any conditional clauses.<sup>23</sup> Furthermore, FOP's phrasing is consistent with the general outline of the Award in which the Arbitrator first reviewed the Panel's findings regarding the charges,<sup>24</sup> and then evaluated the appropriateness of the penalty the Panel recommended.<sup>25</sup> Based on the record, the Board finds that the Arbitrator resolved the disputes that were submitted to him by the parties, and likewise concludes that the Arbitrator acted within the jurisdiction granted to him by the collective bargaining agreement.<sup>26</sup>

Even if the Board only considered the Arbitrator's precise phrasing of the issues, it still would not be able to find that the Arbitrator acted outside of the scope of authority granted to him. Indeed, the Arbitrator's precise phrasing of the first issue reads, "[w]hether the Grievant's termination was for cause?"<sup>27</sup> By including the word "termination" in his phrasing of the issue, the Arbitrator sufficiently demonstrated that he would address the appropriateness of Grievant's termination, which necessarily included a discussion of whether or not the Panel's guilty findings were supported by sufficient evidence, and whether or not the penalty imposed by the Panel was sufficiently justified and supported by the record and relevant case law.<sup>28</sup> When the Arbitrator found that the Panel failed to properly analyze four of the *Douglas* Factors in its decision to terminate Grievant, he effectively determined that there was not sufficient "cause" to support "termination" as an appropriate remedy. As a result, the Arbitrator was then able to invoke the conditional "if not" portion in the second issue and address the question therein, namely "what shall be the remedy."<sup>29</sup>

**B. The Arbitrator Did Not Exceed or Act Without Authority When He Failed to Defer to the Chief of Police's Choice of Penalty.**

MPD argues that the Arbitrator should have deferred to the Chief of Police's decision to terminate Grievant because General Order 120.21 lists termination as a possible penalty for Grievant's conduct.<sup>30</sup> MPD's argument relies on a D.C. Court of Appeals case, *Stokes, supra*, in which the Court reversed a D.C. Office of Employee Appeals ("OEA") decision to reduce an employee's termination to a suspension.<sup>31</sup> In that case, The Court stated:

Although the OEA has a "marginally greater latitude of review" than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. *Douglas v. Veterans Administration, supra*, 5 M.S.P.B. at 327-328, 5 M.S.P.R. at 300. The "primary discretion" in selecting a penalty

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<sup>23</sup> *Id.*

<sup>24</sup> (Award at 26).

<sup>25</sup> *Id.* at 27-31.

<sup>26</sup> *Michigan Family Resources, Inc., supra*.

<sup>27</sup> (Award at 2).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> (Petitioner's Brief at 5-6).

<sup>31</sup> 502 A.2d at 1007.

“has been entrusted to agency management, not to the [OEA].” *Id.* at 328, 5 M.S.P.R. at 301.

Selection of an appropriate penalty must ... involve a responsible balancing of the relevant factors in the individual case. The [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.<sup>32</sup>

The Court ultimately held that because OEA's hearing examiner erred in finding that the agency did not comply with relevant penalty standards when in fact it had complied, OEA's decision to reverse the employee's termination was improper.<sup>33</sup>

In this case, the Arbitrator found that the Panel's analysis of four *Douglas* Factors exceeded the limits of reasonableness and that termination was therefore not an appropriate remedy.<sup>34</sup> In accordance with the Court's holding in *Stokes, supra*, the Arbitrator would only have been required to defer to the Chief of Police's decision to terminate Grievance if the Panel's *Douglas* Factors analysis contained no unreasonable omissions or errors.<sup>35</sup> But whereas the Arbitrator in this case found that the Panel failed to conduct an accurate *Douglas* Factors analysis, the Arbitrator was under no obligation to give any deference to the Chief of Police's determination.<sup>36</sup> Furthermore, as stated previously, the parties—in full accordance with the terms of their collective bargaining agreement<sup>37</sup>—expressly charged the Arbitrator with the task of reviewing whether termination was an appropriate remedy, so MPD cannot now argue that the Arbitrator exceeded his authority by addressing and resolving that precise issue in the Award.<sup>38</sup>

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<sup>32</sup> *Id.* at 1011.

<sup>33</sup> *Id.* at 1010-1011.

<sup>34</sup> (Award at 28-31); *see also Stokes, supra*, at 1011.

<sup>35</sup> *Stokes, supra*, at 1010-1011.

<sup>36</sup> (Award at 28-31); *see also Stokes, supra*, at 1010-1011.

<sup>37</sup> *See* (Opposition to Petitioner's Brief at 6-7, Attachment 2).

<sup>38</sup> *Id.* at 4-5.

C. The Arbitrator Was Under No Obligation to Remand the Grievance Back to the Panel.

Finally, the Board rejects MPD's argument that the Arbitrator should have remanded the case to the Panel to correct its flawed *Douglas* Factors analysis.<sup>39</sup> MPD again relies on *Stokes, supra*, to support its position, but the Board finds that there is nothing in that case to justify MPD's contention.<sup>40</sup> Furthermore, there is nothing in existing case law or the collective bargaining agreement that required the Arbitrator to remand the case to the Panel to correct its *Douglas* Factors analysis.<sup>41</sup> Such a decision was therefore solely within the discretion of the Arbitrator. Moreover, the parties' collective bargaining agreement definitively empowered the Arbitrator to "hear and decide" FOP's grievance, and both parties stipulated in the agreement that the Arbitrator's decision in the matter would be "binding."<sup>42</sup> Accordingly, the Board cannot conclude based on the record before it that the Arbitrator exceeded his jurisdiction or acted without authority when he exercised his discretion not to remand the case to the Panel.<sup>43</sup>

D. Conclusion

The Board finds that the Arbitrator addressed only the precise issues presented to him by the parties, and that the Award therefore sufficiently drew its essence from the collective bargaining agreement.<sup>44</sup> As such, the Board finds that the Arbitrator did not act without or exceed the authority granted to him by the parties in violation of Article 19, E, Section 5(4).<sup>45</sup> Further, the Board finds that because the Arbitrator found that the Panel misanalysed four *Douglas* Factors when determining Grievant's penalty—the merits of which MPD did not challenge—the Arbitrator did not act without or exceed his authority when he did not defer to the Chief of Police's decision to terminate Grievant's employment.<sup>46</sup> Finally, the Board finds that the Arbitrator did not act without or exceed his authority when he elected, in his discretion, not to remand the case to the Panel to correct its *Douglas* Factors analysis.<sup>47</sup>

Therefore, based on the foregoing, and in accordance with D.C. Official Code § 1-605.02(6), MPD's Arbitration Review Request is denied.

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<sup>39</sup> (Petitioner's Brief at 6).

<sup>40</sup> See *Stokes, supra*; and (Opposition to Petitioner's Brief at 7).

<sup>41</sup> *Id.*

<sup>42</sup> See (Opposition to Petitioner's Brief at Attachment 2).

<sup>43</sup> *Id.* at 7.

<sup>44</sup> *MPD v. FOP (on Behalf of Kenneth Johnson), supra*, Slip Op. No. 925, PERB Case No. 08-A-01.

<sup>45</sup> *Michigan Family Resources, Inc., supra*.

<sup>46</sup> (Award at 28-31); see also *Stokes, supra*, at 1010-1011.

<sup>47</sup> (Opposition to Petitioner's Brief at 7).

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. MPD'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**

By unanimous vote of Board Chairperson Charles Murphy, and Members Donald Wasserman and Keith Washington

October 30, 2014

Washington, D.C.



**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 14-A-06, Opinion No. 1493, was transmitted *via* File & ServeXpress and e-mail to the following parties on this the 3<sup>rd</sup> day of November, 2014.

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