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

In the Matter of:)	
)	
Metropolitan Police Department)	
)	PERB Case No. 19-A-03
Petitioner)	
)	Opinion No. 1707
v.)	
)	
Fraternal Order of Police/ Metropolitan)	
Police Department Labor Committee)	
)	
Respondent)	

DECISION AND ORDER

I. Introduction

On January 22, 2019, the District of Columbia Metropolitan Police Department (“MPD”) filed this Arbitration Review Request pursuant to the Comprehensive Merit Personnel Act (“CMPA”), section 1-605.02(6) of the D.C. Official Code. MPD seeks review of an arbitration award (“Award”) issued on January 2, 2019, granting the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”) on behalf of the Grievant. The Award rescinded the Grievant’s termination. MPD seeks review of the Award claiming it is contrary to law and public policy.

Pursuant to the CMPA, the Board is permitted to modify, set aside, or remand a grievance arbitration award only if: (1) the arbitrator was without or exceeded his or her jurisdiction; (2) the award on its face is contrary to law and public policy; or (3) the award was procured by fraud, collusion, or other similar unlawful means.¹ Upon consideration of the Arbitrator’s conclusions, applicable law, and record presented by the parties, the request is denied for the reasons stated herein.

¹ D.C. Official Code § 1-605.02(6).

II. Statement of the Case

On August 7, 2012, the Grievant was scheduled to appear at a trial to testify on behalf of the government.² According to the Grievant, he exchanged text messages with a fellow MPD officer and determined that the case was continued and that he was not required to appear.³ The Grievant emailed an MPD supervisor claiming to have been excused from the trial by the Assistant Attorney General (“AAG”).⁴ The MPD supervisor issued a log number to mark the excusal from the court appearance.⁵ The Grievant’s claim of excusal was untruthful. Since the Grievant failed to appear at trial, the case was dismissed.⁶

On August 21, 2012, MPD began an investigation into the Grievant’s court absence.⁷ Initially, the Grievant provided the log number and a statement that he was dismissed from the appearance by the AAG. After further investigation, MPD learned that the Grievant was not dismissed from the appearance by the AAG.⁸ The Grievant made a second statement reflecting his belief that he was dismissed but confirming that he did not speak with the AAG.⁹

On September 6, 2012, the Grievant was issued a reprimand for failing to appear at court and a second investigation was initiated related to the untruthful statement regarding the dismissal by the AAG.¹⁰ On September 12, 2012, an investigative memorandum recommended charging the Grievant with an untruthful statement.¹¹

On December 12, 2012, the Grievant was issued a Notice of Proposed Adverse Action that specified the following charges:

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-6, which reads, “Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of, any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing.”

Charge No. 2: Violation of General Order 120.21, Attachment A, Part A-16, which states, “Failure to obey orders or directives issued by the Chief of Police.” This misconduct is further specified in General Order 901.07, Part V-B, which

² Request at 3.

³ Request at 3.

⁴ Request at 4.

⁵ Request at 4.

⁶ Request at 4.

⁷ Request at 5.

⁸ Request at 5.

⁹ Request at 5.

¹⁰ Request at 6.

¹¹ Request at 6.

reads, "Members shall report to the prosecuting attorney's office, witness room, or proper court room on the appropriate date and scheduled time."¹²

On March 27, 2013, an adverse action panel held a hearing in the matter. Charge No. 2 was dismissed since the Grievant was previously reprimanded for failing to appear in court. During the hearing, the Grievant testified that he attended a doctor's appointment the day of or day before the court date to address a thyroid condition.¹³ The record of the hearing was held open to allow the Grievant to provide documentation of the doctor's appointment.

On April 10, 2013, the Grievant submitted an affidavit that there was no doctor's appointment for a thyroid condition or any other condition on August 7, 2012.¹⁴ The Grievant asserted that on August 7, 2012, he was at his grandson's pediatrician's office and learned that the appointment was scheduled for the next day while at the office.¹⁵

After receiving the affidavit, the adverse action panel wrote a memorandum recommending a new charge of false statements.¹⁶

On June 4, 2013, the Grievant was issued an Amended Notice of Proposed Adverse Action that specified the following charge:

Charge No. 3: Violation of General Order Series 120.21, Attachment A, Part A-6, which states, "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of, any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing."¹⁷

On June 6, 2013, the adverse action panel reconvened to hear evidence related to Charge No.3.¹⁸ Thereafter, the adverse action panel found the Grievant guilty of Charge No. 1 and recommended a 30-day suspension and guilty of Charge No. 3 and recommended termination. In the Final Notice of Adverse Action, the recommendations were accepted, and the termination was given an effective date of August 15, 2013.¹⁹

On July 5, 2013, the Grievant appealed to the Chief of Police. On July 26, 2013, the Chief of Police denied the appeal. On August 15, 2013, the FOP moved for arbitration.²⁰

III. Arbitration Award

¹² Request at 6.

¹³ Request at 7.

¹⁴ Request at 7.

¹⁵ Request at 7.

¹⁶ Request at 8.

¹⁷ Request at 8.

¹⁸ Request at 9.

¹⁹ Request at 9.

²⁰ Request at 9.

The Arbitrator made findings on three issues: (1) whether the department violated the Grievant's due process rights, (2) whether the evidence presented by the MPD was sufficient to support the alleged charges, and (3) whether termination was the appropriate penalty.²¹

A. Due Process

FOP argued that, by issuing a memorandum and then adjudicating the additional charge the adverse action panel improperly tipped the scales of justice, predetermining the outcome of Charge No. 3 prior to reconvening the hearing.²² MPD argued that FOP waived its right to challenge the objectivity of the adverse action panel by waiting to appeal to the Chief of Police.²³ MPD argues that the Grievant was provided with the memorandum and the opportunity to be represented by counsel but failed to make an objection at the June 6, 2013 hearing.²⁴ MPD argued that the memorandum did not prejudge the Grievant, instead, it provided information that cause existed for the additional charge.²⁵

The Arbitrator held that MPD violated the Grievant's due process rights. The Arbitrator noted that the strong language in the memorandum read like a decision on the merits. Although a hearing was held on June 6, 2013, the Arbitrator found that the adverse action panel had already made up its mind before receiving testimony.²⁶ The Arbitrator noted that the incomplete findings provided by the adverse action panel in relation to Charge No. 3 bolstered her decision.²⁷ The Arbitrator acknowledged that the adverse action panel made partial findings that the Grievant willfully and knowingly lied but saw its failure to make complete findings as evidence of a rush to judgment. Finally, the Arbitrator found that, by presenting the due process argument to the Chief of Police, FOP preserved the argument for arbitration.²⁸

B. Evidence Sufficient to Support Charges

FOP argued that MPD failed to demonstrate that the Grievant willfully and knowingly lied. FOP argued that there was no evidence that the Grievant knew that his statements were false at the time he made them.²⁹ FOP argued that the Grievant admitted that he made mistakes in reading the text messages, but misinterpretation of information is insufficient to support the Charges of willfully or intentionally presenting false information.³⁰ MPD argued that the Grievant made misrepresentations both to be excused from the court appearance and during the

²¹ Award at 4.

²² Award at 11.

²³ Award at 14.

²⁴ Award at 14.

²⁵ Award at 14.

²⁶ Award at 24.

²⁷ Award at 25.

²⁸ Award at 25.

²⁹ Award at 12.

³⁰ Award at 13.

investigation of the excusal.³¹ MPD argues that the misrepresentations provide sufficient evidence of the Grievant's state of mind and credibility.³²

The Arbitrator held that there was sufficient evidence to support Charge No. 1. The Arbitrator found that a reasonable person could not have read the text messages and determined that the court case was continued.³³ The Arbitrator held that MPD proved by a preponderance of evidence that the Grievant lied and that it was not reasonable for the Grievant to conclude that the case was continued.³⁴

C. Appropriateness of Termination

The Arbitrator evaluated MPD's and FOP's arguments related to the twelve *Douglas*³⁵ factors and determined that termination was not the appropriate penalty.³⁶ The Arbitrator found that the adverse action panel failed to independently review and evaluate the *Douglas* factors. The Arbitrator determined that the *Douglas* factors were mitigating for the Grievant.³⁷ The Arbitrator held that the recommended 30-day suspension for Charge No. 1 was appropriate and that termination for Charge No. 3 was not appropriate, since MPD violated the Grievant's due process rights.³⁸

IV. Position of the Parties

A. MPD's Position

MPD argues that the Award is contrary to law and public policy. MPD seeks the Board's review of the holding that the Grievant's due process rights were violated. MPD argues that the Grievant was provided with timely notice of all charges, presented with the investigative report before the hearings, represented by counsel, and afforded the opportunity to appeal to the Chief of Police before termination became effective.³⁹ MPD argues that the Arbitrator erred in determining that the adverse action panel violated the Grievant's due process rights by writing the strongly worded memorandum. MPD asserts that the memorandum did not disqualify the adverse action panel and that due process is not violated when an adverse action panel "adjudicates a charge of misconduct brought on its own recommendation."⁴⁰ Moreover, MPD argues that FOP waived their argument by not addressing it to the panel. MPD asserts that bias cannot be the basis for a reversal when a party has knowledge of the bias and fails to timely

³¹ Award at 16.

³² Award at 17.

³³ Award at 22.

³⁴ Award at 22.

³⁵ *Douglas v. Veterans Admin.*, 5 MSPR 280, 5 MSPB 313 (1981).

³⁶ Award at 25.

³⁷ Award at 26.

³⁸ Award at 26.

³⁹ Request at 10.

⁴⁰ Request at 11.

object.⁴¹ Finally, MPD asserts that since the termination did not violate the Grievant's due process rights, the Arbitrator's discussion of the *Douglas* factors was contrary to law.⁴²

B. FOP's Position

FOP argues that MPD has failed to meet its burden to show that the Award is contrary to law and public policy. FOP asserts that the demand for arbitration was more than sufficient to preserve the Grievant's due process claim because it clearly states that the Grievant "relies on applicable provisions of the Collective Bargaining Agreement in conjunction with all law, rules, and/or regulations applicable in the District of Columbia, including, but not limited to, Article 12, Section 1, of the Agreement in that termination, was not for cause, Article 4 of the Agreement, and those grounds asserted in [the Grievant's] appeal to the Chief of Police."⁴³ FOP argues that the adverse action panel denied the Grievant the opportunity for a fair hearing, violating his right to due process.⁴⁴

V. Discussion

The law and public policy exception is "extremely narrow."⁴⁵ The narrow scope limits potentially intrusive judicial reviews under the guise of public policy.⁴⁶ MPD 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."⁴⁷ The violation must be so significant that law and public policy mandates a different result.⁴⁸

Herein, the Arbitrator found that the Grievant's due process rights were violated by MPD and that the argument was preserved in the appeal to the Chief of Police.⁴⁹ The Arbitrator applied the just cause provision of the CBA under Article 12, Section 1(b) as the standard of review. The Arbitrator interpreted this provision of the CBA to require consideration and weighing of all the evidence in the record to determine whether the Employer has met its burden of proof.⁵⁰ The Arbitrator did not disqualify the adverse action panel for recommending and then adjudicating Charge No. 3. The Arbitrator found a violation of due process since the adverse action panel indicated that it decided there was enough evidence to sustain the charge prior to a hearing and then failed to make complete findings regarding the Grievant's explanation and credibility.

⁴¹ Request at 11.

⁴² MPD also presents an unpersuasive public policy argument unsupported by law and legal precedents. *See American Postal Workers v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986).

⁴³ Opposition at 12.

⁴⁴ Opposition at 16.

⁴⁵ *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). *See MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. 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. 925 at 11-12, PERB Case No. 08-A-01 (2012).

⁴⁶ *MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. 1487 at 8, PERB Case No. 09-A-05 (2014).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Award at 25.

⁵⁰ Award at 10.

In the present case, MPD asserted that the Award is on its face contrary to law and public policy. However, MPD does not specify any “established law” and “well defined public policy” that mandates that the Arbitrator arrive at a different result. By agreeing to submit a grievance to arbitration “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ agreement, related rules, and regulations, as well as the evidentiary findings on which the decision is based.”⁵¹ MPD’s arguments are a repetition of the arguments considered and rejected by the Arbitrator. Therefore, we believe that MPD’s ground for review only involves disagreement with the Arbitrator’s findings and conclusions. MPD merely requests that we adopt its interpretation of the evidence presented.

Additionally, an arbitrator may overturn a termination decision based on his/her assessment of the agency’s evaluation of the *Douglas* factors.⁵² The Arbitrator found that MPD’s discussion of the *Douglas* factors was inadequate because it contained conclusory language not specific to the Grievant.⁵³ We have previously upheld an arbitrator’s finding that MPD did not properly analyze *Douglas* in its decision to terminate, reasoning that the arbitrator effectively determined that there was insufficient “cause” to support termination as the appropriate remedy.⁵⁴ In this case, the Arbitrator found that the adverse action panel did not properly analyze the *Douglas* factors when it failed to conduct an independent and thorough review and evaluation as required by law.⁵⁵ “The Board will not substitute its own interpretation for that of the duly designated arbitrator.”⁵⁶ Disagreement with the Arbitrator is not a sufficient reason to modify, set aside, or remand an Award.⁵⁷

VI. Conclusion

The Board rejects MPD’s arguments and finds no cause to modify, set aside, or remand the Arbitrator’s Award. Accordingly, MPD’s request is denied and the matter is dismissed in its entirety.

⁵¹ *FOP v. Dept. of Corrections* 59 D.C. Reg. 9798, Slip Op. 1271 at 3, PERB Case No. 10-A-20 (2012). See *MPD v. FOP/MPD Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633 at p. 3, PERB Case No. 00-A-04 (2000); *MPD v. FOP/MPD Labor Comm. ex rel. Fisher*, 51 D.C. Reg. 4173, Slip Op. 738, PERB Case No. 02-A-07 (2004).

⁵² See *MPD v. FOP/MPD Labor Committee ex rel. Kennie*, 61 D.C. Reg. 12364, Slip Op. 1493 at 5, PERB Case No. 14-A-06 (2014).

⁵³ Award at 27.

⁵⁴ *MPD v. FOP/MPD Labor Committee ex rel. Kennie*, 61 D.C. Reg. 12364, Slip Op. 1493 at 5, PERB Case No. 14-A-06 (2014).

⁵⁵ Award at 26.

⁵⁶ *FEMS v. AFGE, LOCAL 3721*, 51 D.C. Reg. 4158, Slip Op. 728, PERB Case No. 2-A-08 (2004).

⁵⁷ *AFSCME District Council 20 AFL-CIO v. D.C. General Hospital*, 37 D.C. Reg. 6172, Slip Op. 253 at 3, PERB Case No. 90-A-04 (1990).

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
2. Pursuant to Board Rule 559, 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 Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

Washington, D.C.

April 18, 2019

Certificate of Service

This is to certify that the attached Decision and Order in PERB Case No. 19-A-03, Opinion No. 1707 was sent by File and ServeXpress to the following parties on this the 19th day of April 2019.

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