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

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| In the Matter of: |) | |
| |) | |
| District of Columbia, Metropolitan Police Department |) | |
| |) | PERB Case No. 16-A-03 |
| Petitioner, |) | |
| |) | Opinion No. 1604 |
| and |) | |
| |) | |
| Fraternal Order of Police/ Metropolitan Police Department Labor Committee (obo G. Singletary) |) | |
| |) | |
| Respondent. |) | |
| <hr/> |) | |

DECISION AND ORDER

I. Introduction

The District of Columbia Metropolitan Police Department (“MPD,” or “Petitioner”) filed this Arbitration Review Request (“Request”) seeking review of an Arbitration Award (“Award”) that determined that the grievance filed by the Fraternal Order of Police/ Metropolitan Police Department (“Union” or “FOP”) on behalf of Officer G. Singletary (“Grievant”) was arbitrable. The issues before the Board are whether the award on its face is contrary to law and public policy and whether the Arbitrator exceeded his jurisdiction.¹

For the reasons stated herein, Petitioner’s Request is denied.

II. Statement of the Case

On August 30, 2006, a private citizen filed a complaint with MPD’s Office of Police Complaints (“OPC”) against the Grievant and another MPD officer (not a grievant in this matter), alleging on-duty misconduct occurring on August 12, 2006.² MPD conducted an investigation.³ On August 20, 2007, OPC issued a Report of Investigation, which concluded there was reasonable cause to believe the Grievant and the other officer had violated certain

¹ See D.C. Official Code § 1-605.02(6).

² Award at 1.

³ *Id.*

MPD policies and procedures.⁴ OPC referred the matter to an MPD Complaint Examiner for an evidentiary hearing.⁵ On February 27, 2008, an evidentiary hearing was held.⁶

On May 28, 2008, the Complaint Examiner issued a “Findings of Fact and Merits Determination,” sustaining the allegation of “Harassment” against the Grievant.⁷ On October 28, 2008, MPD issued a “Final Notice of Adverse Action,” advising Grievant that he would be suspended for 20 workdays for the conduct set forth therein.⁸ On November 20, 2008, the Grievant appealed the “Final Notice” to the Chief of Police.⁹ That appeal was subsequently denied and on December 30, 2008, the Union invoked arbitration.¹⁰

On September 30, 2015, MPD raised the issue of the scope of arbitrability. MPD contended that under D.C. Official Code § 5-1114(e),¹¹ the Arbitrator, Lawrence M. Evans, could not hear this matter *de novo* on its merits because all “essential facts” had already been determined by the Complaint Examiner.¹² MPD argued that Section 5-1114(e) established that the Arbitrator was bound by the Complaint Examiner’s “merits determination.”¹³ MPD also contended that public policy compelled this outcome because of the costs incurred in having a complaint examiner conduct an evidentiary hearing.¹⁴ MPD asserted that “[i]t would be inefficient and wasteful to repeat the process again in arbitration, particularly, where, as here, the evidentiary hearing was held 7.5 years ago—now, witnesses might not be available and memories have faded.”¹⁵ MPD requested that the Arbitrator rule on the threshold arbitrability issue prior to the hearing on the merits.¹⁶

The Union opposed MPD’s position, citing to the April 25, 2016 Decision and Award of Arbitrator Donald Wasserman (“referenced herein as the *Wasserman Award*”) in a separate and unrelated case.¹⁷ In the *Wasserman Award*, heard under the same CBA, Wasserman rejected

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ “A merits determination by a complaint examiner, on the basis of an evidentiary hearing, or a later decision of a final review panel, shall be binding on the subject police officer and on the Police Chief in all subsequent proceedings as to the essential facts determined and all violations found.” D.C. Official Code § 5-1114(e).

¹² Award at 5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 3.

¹⁷ *Id.* In his Award, the Arbitrator determined that the *Wasserman Award* was not directly relevant to the matter before him and was therefore not “dispositive of the outcome in the instant case as argued by the Union. *Id.* at 10. The Arbitrator found that the *Wasserman Award* did not analyze D.C. Official Code § 5-1114(e). *Id.* The parties do not dispute this finding and did not submit the *Wasserman Award* as part of the record.

MPD's argument that the hearing could not be *de novo* and conducted a traditional arbitration hearing.¹⁸

In this case, MPD argued that the *Wasserman* Award was not binding on this matter because (1) in the *Wasserman* Award, the grievant was not given a Departmental hearing; and (2) PERB has held that an arbitrator's decision does not bind another arbitrator, even when the decision is based on the same collective bargaining agreement.¹⁹ The Union countered that there is neither a contractual nor statutory impediment to a *de novo* hearing by the Arbitrator.²⁰ The Union also argued that its position is supported by the parties' CBA, District of Columbia law, and the *Wasserman* Award.²¹

The Arbitrator in the current matter issued an Order to Show Cause, and the parties submitted responses.²² The threshold issue before the Arbitrator in this case was whether the Arbitrator was precluded from conducting a *de novo* hearing in this matter under D.C. Official Code § 5-1114(e) and/or the parties' CBA.^{23,24}

III. The Arbitrator's Award

In an Award dated November 12, 2015, the Arbitrator determined that "there is no statutory or contractual impediment to this case being heard *de novo* by the Arbitrator."²⁵ In particular, the Arbitrator found that Article 19, Part E of the Union's CBA "contains no language, direct or indirect, which limits the Arbitrator to the record developed before MPD's complaint examiner and his/her 'merits determination' where, as here, an adversarial hearing has been held, where the witnesses were subject to cross-examination and where the proceedings were transcribed."²⁶ The Arbitrator went on to state that "[h]ad the parties wanted the arbitrator to function [...] as MPD proposes they would have clearly said so somewhere in Article 19, Part E."²⁷

He noted several specific requirements and limitations enumerated in Article 19, Part E. First, the Arbitrator referred to Section 5, Subsection 1, which provides, in pertinent part, that "the arbitrator shall hear and decide only one grievance on appeal in each case."²⁸ Second, he noted that Section 2, in relevant part, provides that the "parties agree to meet at least once in a

¹⁸ *Id.*; See FMCS Case No. 05-5480 (Opinion and Award, April 25, 2006) (Donald S. Wasserman, Arb.).

¹⁹ Award at 6.

²⁰ *Id.* at 7.

²¹ *Id.* at 8.

²² *Id.* at 3.

²³ *Id.* The parties did not stipulate to the issues. Under the parties' CBA, Article 19, Part E, Section 2, "If the parties are unable to agree on a joint statement of the issue the arbitrator shall be free to determine the issue." Request, Attachment 2.

²⁴ As MPD requested that Arbitrator Evans bifurcate the proceedings and rule on the threshold arbitrability issue prior to a hearing on the merits, the merits of the case are not discussed in this decision and order.

²⁵ Award at 9.

²⁶ *Id.* at 9.

²⁷ *Id.* at 11.

²⁸ *Id.* at 11 (emphasis added by Arbitrator).

last attempt at conciliation.” The Arbitrator contended that MPD’s theory “simply makes no sense” that “the parties would meet to conciliate after the complaint examiner had already determined ‘guilt and punishment[.]’”²⁹ Additionally, the Arbitrator noted that Section 5, Subsection 6, in relevant part, provides for the “decision of the arbitrator...”³⁰ Furthermore, the Arbitrator determined that “if [he] were to agree with the position taken by MPD, [he] would be violating Article 19, Part E, Section 5, Subsection 4 which provides that the ‘arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement.’”³¹ The Arbitrator noted that D.C. Official Code § 5-1114(e) was enacted in 1999—five years before the current CBA went into effect, which shows that the parties chose not to incorporate that particular provision of the D.C. Official Code into the parties’ CBA.³²

The Arbitrator was not persuaded by MPD’s argument that D.C. Official Code §5-1114(e) renders a complaint examiner’s merit determinations binding on “all subsequent proceedings, including this arbitration.”³³ In the Arbitrator’s view, the language only applies to all proceedings within the “chain of command of MPD or the District of Columbia, to include the Office of Employee Appeals where it has jurisdiction.”³⁴ Accordingly, the Arbitrator found that the Grievant was entitled to a *de novo* hearing in arbitration.³⁵

IV. Standard of Review

In accordance with the Comprehensive Merit Personnel Act (“CMPA”), the Board is authorized 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.³⁶

V. Discussion

A. Law and Public Policy

MPD argues that the Arbitrator’s Award is contrary to law and public policy.³⁷ Specifically, MPD takes the position that the Arbitrator erred in finding that *de novo* review of merit determinations is permitted. In support of its argument, MPD claims that the Arbitrator’s findings were contradictory to the plain language of D.C. Official Code §§ 5-1114(e) and 5-1111(h), which provide that a merits determination by a complaint examiner may not be rejected

²⁹ *Id.* at 11-12.

³⁰ *Id.* at 12 (emphasis added by Arbitrator).

³¹ *Id.* at 12.

³² *Id.*

³³ *Id.* at 10; D.C. Official Code § 5-1114(e).

³⁴ *Id.* at 10-11.

³⁵ *Id.* at 12.

³⁶ *Fraternal Order of Police D.C. Metro. Police Dep’t Labor Comm. v. D.C. Metro. Police Dep’t*, 62 D.C. Reg. 12587 (2015), Slip Op. 1531, PERB Case No. 15-A-10 (2015).

³⁷ Request at 3.

unless they “clearly misapprehend the record” and “shall be binding on the subject police officer” “in all subsequent proceedings.”³⁸ Additionally, MPD points to §§ 5-1114(c) and (d), that instruct the Department to accept a complaint examiner’s merits determination for disciplinary purposes.³⁹ In its Opposition, FOP counters that MPD has failed to present any specific law or public policy that would mandate a different result from that reached by the Arbitrator.⁴⁰

The Board’s scope of review, particularly on the basis of law and public policy, is extremely narrow. “[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.”⁴¹ The law and public policy question must be “well defined and dominant,” and is to be ascertained “by reference to the law and legal precedents and not from general considerations of supposed public interest.”⁴² Absent a clear violation of law evident on the face of the arbitrator’s award, the Board lacks authority to substitute its judgment for that of the arbitrator.⁴³

D.C. Official Code § 5-1114(e) provides that a “[m]erits determination by a complaint examiner, on the basis of an evidentiary hearing, or a later determination of a final review panel, if any, shall be binding on the subject police officer or officers and on the Police Chief in all subsequent proceedings as to all essential facts determined and all violations found.” In the Arbitrator’s view, this language applies to all proceedings within the exclusive structure and chain of command of MPD and the District of Columbia, to include the Office of Employee Appeals where it has jurisdiction, but that “the section does not state or suggest that it is binding on the Union as exclusive bargaining agent for certain employees under the parties’ CBA.”⁴⁴ The Arbitrator noted, “[w]hat controls the nature and scope of the proceeding before the arbitrator is determined by Article 19, Part E of the parties’ CBA, and not by any provisions of the D.C. Official Code at issue here.”⁴⁵

We find that, under the facts of this case, the Arbitrator’s interpretation is reasonable. Section 5-1114(e) of the D.C. Official code does not state or suggest that it is binding on the Union as the exclusive bargaining agent for certain employees under the parties’ CBA. As noted

³⁸ *Id.* at 4. D.C. Official Code § 5-1111(h) states, in pertinent part: “written findings of fact and determinations by the complainant examiner (collectively, the ‘merits determination’) may not be rejected unless they clearly misapprehend the record before the complaint examiner and are not supported by substantial, reliable, and probative evidence in that record.”

³⁹ Request at 4-5.

⁴⁰ Opposition at 9.

⁴¹ *D.C. Metro. Police Dep’t and Fraternal Order of Police/D.C. Metro. Police Dep’t Labor Comm.*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (quoting *Am. Postal Workers Union, AFL-CIO v. US Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986).

⁴² *D.C. Metro. Police. Dep’t v. Fraternal Order of Police/ D.C. Metro. Police Dep’t Labor Comm.*, 63 D.C. Reg. 4573, Slip Op. 1561, PERB Case No. 14-A-09 (2016); *See Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986).

⁴³ *D.C. Metro. Police. Dep’t*, Slip Op. 1561 at 6.

⁴⁴ Award at 10.

⁴⁵ *Id.* at 11.

above, that provision only states that a merits determination is binding on the “subject police officer or officers and on the Police Chief.”⁴⁶

We further find it reasonable that there is no language in Article 19 of the parties’ collective bargaining agreement that suggests that the arbitrator accept a complaint examiner’s factual determinations. In Article 19, the CBA states that the arbitrator “shall hear and decide” one grievance on appeal in each case.⁴⁷ The parties are instructed to “meet at least once in a last attempt at conciliation.”⁴⁸ There are no provisions which limit the Arbitrator’s factual determinations to those of the complaint examiner. Accordingly, the Arbitrator reasonably determined that Section 19, Part E of the parties’ collective bargaining agreement and not § 1114(e) of the D.C. Official Code, controls the nature and scope of the arbitration proceedings.

Moreover, the Board has adopted the D.C. Court of Appeals position in other cases involving MPD and FOP that “issues of procedural arbitrability are for the arbitrator to decide.”⁴⁹ This Arbitration Review Request is a disagreement with how that Arbitrator interpreted the CBA and the D.C. Official Code.

In sum, we find persuasive the Arbitrator’s conclusion that the Grievant is entitled to a *de novo* hearing under the facts of this case. Again, the Board stresses that our scope of review is extremely narrow. For MPD to prevail, it has the burden to specify the “applicable law and public policy that mandates that the Arbitrator arrive at a different result.”⁵⁰ In the present case, MPD has failed to meet its burden. Therefore, we cannot find, based on the Arbitrator’s finding and his interpretation of the pertinent statutes that the Award is contrary to law and public policy.

B. The Arbitrator’s Jurisdiction

As a second basis for review, MPD argues that the Arbitrator exceeded his authority in finding that Grievant is entitled to a *de novo* review.⁵¹ Specifically, MPD argues that the Arbitrator’s findings contravened the Arbitrator’s authority under § 5-1111(h), which allows the Arbitrator to reject a merits determination by a complaint examiner only if the determination “clearly misapprehend[s] the record before the complaint examiner and [is] not supported by substantial, reliable, and probative evidence in that record.”⁵² In its Opposition, FOP counters that issues of procedural arbitrability, such as whether the Arbitrator could hear this matter *de novo*, are reserved for the exclusive province of Arbitrators to decide.⁵³ FOP also argues that

⁴⁶ D.C. Official Code § 5-1114(e).

⁴⁷ Article 19, Part E, Section 5, Subsection 1.

⁴⁸ Article 19, Part E, Section 2.

⁴⁹ *E.g.*, *DCMPD v. FOP/MPLC*, 61 D.C. Reg. 11609, Slip Op. 1487 at 6, 09-A-05 (2009) (citing *Washington Teachers’ Union v. D.C. Pub. Sch.*, 77 A. 3d 441, 446, n.10 (D.C. 2013)).

⁵⁰ *MPD and FOP/MPD Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

⁵¹ Request at 5.

⁵² *See* n. 35; Request at 5.

⁵³ Opposition at 6-7.

Article 19, Part E, Section 3 of the parties' CBA "expressly empowers Arbitrator Evans to determine whether a *de novo* review of all factual findings is warranted...."⁵⁴

The test the Board uses to determine whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is: "whether the Award draws its essence from the collective bargaining agreement."⁵⁵ To determine whether the award "draw its essence" from a collective bargaining agreement, the Board looks to (1) whether the arbitrator acted "outside his authority" by resolving a dispute not committed to arbitration; (2) whether the arbitrator committed fraud, had a conflict of interest or otherwise acted dishonestly in issuing the award; and (3) in resolving any legal or factual disputes in the case, whether the arbitrator arguably construed or applied the contract⁵⁶

The Board has also held that by agreeing to submit a grievance to arbitration, it is the Arbitrator's interpretation, not the Board's, for which the parties have bargained.⁵⁷ The Board has found that by submitting a matter 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."⁵⁸ Moreover, "[t]he Board will not substitute its own interpretation or that of the Agency's for that of the duly designated arbitrator."⁵⁹ A party's disagreement with an arbitrator's interpretation of a provision in the parties' collective bargaining agreement does not mean that the arbitrator exceeded his jurisdiction.⁶⁰ The Board has further stated that this is the case even if the arbitrator misconstrued the contract, for it is the arbitrator's interpretation for which the parties bargained.⁶¹

⁵⁴ *Id.* at 7. See Exhibit 2 at 24. ("If the Department believes the issues is not arbitrable and the Union disagrees or if the agreement cannot be reached on a joint stipulations of the issue, each party shall submit its own statement of the issue to arbitration and the arbitrator will rule on arbitrability as a threshold issue before proceeding to a hearing on the merits.")

⁵⁵ *D.C. Metro. Police Dep't v. Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comm.*, (OBO Charles Jacobs), 60 DC Reg. 3060, Slip Op. 1366, PERB Case No. 12-A-04 (2013); See e.g., *D.C. Metro. Police Dep't v. Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comm.* (OBO Kenneth Johnson), 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (quoting *D.C. Pub. Schools v. AFSCME, Dst. 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, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987).

⁵⁶ *Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Comm. (on Behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012).

⁵⁷ See *Univ. of the District of Columbia and Univ. of the District of Columbia Faculty Ass'n*, 39 D.C. Reg. 9628, Slip Op. 320, PERB Case No. 92-A-04 (1992).

⁵⁸ E.g., *D.C. Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D.C. Metro. Police Dep't and Fraternal of Police, Metro. Police Dep't Labor Comm. (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. 738 PERB Case No. 02-A-07 (2004).

⁵⁹ *D.C. Dep't of Corr. and Int'l Bhd. of Teamsters, Local Union No. 246*, 34 D.C. Reg. 3616, Slip Op. 157 at p. 3, PERB Case No. 87-A-02 (1987).

⁶⁰ *D.C. Dept. Pub. Works v. AFSCME Local 2091*, 35 D.C. Reg. 8186, Slip Op. 194, PERB Case No. 87-A-08 (1988).

⁶¹ *UDC v. UDC Faculty Assn.*, 36 D.C. Reg. 3635, Slip Op. 220, PERB Case No. 88-A-03 (1989).

MPD's argument that *de novo* review is not permitted under D.C. Official Code § 5-1111(h) is merely a disagreement with the Arbitrator's interpretation of the CBA. Neither party disputes that the collective bargaining agreement committed this grievance to arbitration and the Arbitrator was mutually selected by the parties to resolve this dispute. In the current matter, MPD requested that the Arbitrator "rule on arbitrability before proceeding to a hearing on the merits" pursuant to Article 19, Part E of the parties' CBA.⁶² Further, MPD does not cite to any provisions in the CBA that limit the Arbitrator's authority. Contrary to MPD's contentions, § 5-1111(h) does not limit issues of arbitrability. Accordingly, the Board rejects the argument that the Arbitrator exceeded his authority.

VI. Conclusion

For the reasons discussed, the Board finds that the Arbitrator did not exceed his authority in this matter, and the Award is not contrary to law or public policy. Accordingly, no statutory basis exists for setting aside the award; MPD's Request is, therefore, denied.

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 unanimous vote of Board Chairperson Charles Murphy and Members Ann Hoffman and Douglas Warshof.

Washington, D.C.

November 22, 2016

⁶² Exhibit 9.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-A-03, Op. No. 1604 was sent by File and ServeXpress to the following parties on this the 30th day of November, 2016.

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