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

In the Matter of:	)	
	)	
District of Columbia Metropolitan Police Department	)	
Petitioner	)	PERB Case No. 20-A-06
v.	)	Opinion No. 1754
	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	
Respondent	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On March 23, 2020, the District of Columbia Metropolitan Police Department (MPD) filed this Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-605.02(6), seeking review of an arbitration award (Award), dated March 2, 2020. The Award sustained the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (Union) on behalf of an employee (Grievant) who had been removed from service. The Arbitrator ordered MPD to rescind the Grievant’s official reprimand, to reinstate the Grievant, and to make the Grievant whole. The issue before the Board is whether the Arbitrator exceeded her jurisdiction.

Upon consideration of the Arbitrator’s conclusions, applicable law, and record presented by the parties, the Board concludes that the Arbitrator did not exceed her jurisdiction. Therefore, the Board denies MPD’s Request.

## II. Arbitration Award

### A. Background

At the time of Grievant's termination, she had worked for the MPD for approximately twenty-two years.<sup>1</sup> According to the Arbitrator, the Grievant was involved in an abusive relationship.<sup>2</sup> On April 7, 2009, the Grievant's significant other made two non-emergency calls to MPD.<sup>3</sup> In the first call, the significant other alleged that the Grievant stopped him from driving, punched him, and snatched his phone.<sup>4</sup> MPD dispatched two officers to the location of the significant other. The significant other told the officers that the Grievant punched him in the face and took his cell phone.<sup>5</sup> Later, two additional officers, a sergeant, and a lieutenant responded to the scene.<sup>6</sup> The officers completed a robbery report.<sup>7</sup> At the scene, the significant other changed his report of the incident twice. The significant other reported that he had not been punched by the Grievant, but the Grievant took his phone. Finally, the significant other reported that the Grievant neither punched him nor took his phone.<sup>8</sup>

Fifteen hours later, April 7, 2009, the significant other met with the Internal Affairs Division (IAD).<sup>9</sup> During the interview with IAD, the significant other again denied that the Grievant assaulted him or snatched his phone.<sup>10</sup> On June 30, 2009, the significant other was interviewed by IAD a second time.<sup>11</sup> The significant other provided details of his interactions with the Grievant on April 7, 2009, but ultimately denied that the Grievant assaulted him or took his phone.<sup>12</sup>

Subsequently, IAD interviewed the Grievant. The Grievant provided different details regarding the interactions with her significant other on April 7, 2009.<sup>13</sup> The Grievant denied assaulting or snatching the phone of her significant other.<sup>14</sup>

On September 9, 2009, MPD served the Grievant with a Notice of Proposed Adverse Action (NPAA).<sup>15</sup> The NPAA contained four charges. Charge No. 1 alleged conduct unbecoming an officer. Charge No. 1, Specification-1 alleged that on April 7, 2009, the significant other placed

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<sup>1</sup> Award at 1.

<sup>2</sup> Award at 3.

<sup>3</sup> Award at 3.

<sup>4</sup> Award at 3.

<sup>5</sup> Award at 3.

<sup>6</sup> Award at 4.

<sup>7</sup> Award at 4.

<sup>8</sup> Award at 4.

<sup>9</sup> Award at 5.

<sup>10</sup> Award at 5.

<sup>11</sup> Award at 5.

<sup>12</sup> Award at 5-6.

<sup>13</sup> Award at 6-7.

<sup>14</sup> Award at 7.

<sup>15</sup> Award at 1.

an emergency call to the police and reported that the Grievant punched him, took his cell phone, and left the scene.<sup>16</sup> Charge No. 2, alleged involvement in the commission of an act that constitutes a crime. Charge No. 2, Specification-1 alleged that the Grievant was named as the suspect in the April 7, 2009, robbery report made by MPD officers reporting to the scene. Charge No. 3 alleged untruthful statements.<sup>17</sup> Charge No. 3, Specification-1 alleged that the Grievant was untruthful on June 9, 2009, during her interview with IAD in that she stated that she neither struck her significant other nor took his cell phone.<sup>18</sup> Charge No. 4 alleged a failure to obey directives. Charge No. 4, Specification-1 alleged that the Grievant admitted to failing to report several domestic incidents with her significant other.<sup>19</sup> MPD proposed termination for Charges Nos. 1-3 and an official reprimand for Charge No. 4.<sup>20</sup>

On February 5, 2010, MPD held an Adverse Action Panel Hearing (Panel). The Panel found the Grievant guilty on all four charges. On March 19, 2020, MPD served the Grievant with a notice of termination. On April 2, 2010, the Grievant appealed to the Chief of Police, who denied the appeal. Thereafter, the Union invoked arbitration.<sup>21</sup>

### **B. Arbitrator's Findings**

Although the parties did not submit a joint statement of the issues, both parties' briefs before the arbitrator included the statement of issues presented by the Union.<sup>22</sup> The issues were:

1. Whether [MPD] violated [the Grievant's] right to due process by relying on unreliable hearsay evidence and making an improper allegation of witness tampering when that allegation was clearly absent from the [NPAA]...?
2. Whether the evidence presented by [MPD] was sufficient to support the alleged charges of conduct unbecoming [an officer], commission of a crime, and untruthful statements concerning the original accusations made by [the Grievant's significant other] which were later retracted. . . .?
3. Whether the evidence presented by [MPD] was sufficient to support the alleged charge that [the Grievant] failed to report to her officials that she had been assaulted by her significant other in the past?
4. Whether termination was an appropriate penalty?<sup>23</sup>

The Arbitrator found that the standard of review required a finding that MPD's actions were supported by substantial evidence and relied on PERB's case law for the position that, by

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<sup>16</sup> Award at 1.

<sup>17</sup> Award at 2.

<sup>18</sup> Award at 2.

<sup>19</sup> Award at 2.

<sup>20</sup> Award at 2.

<sup>21</sup> Award at 3.

<sup>22</sup> Award at 13.

<sup>23</sup> Award at 13-14.

submitting the matter to arbitration, the parties agreed to be bound by the evidentiary findings and conclusions of the arbitrator.<sup>24</sup>

The Arbitrator also determined that MPD violated the Grievant's due process rights.<sup>25</sup> The Arbitrator found that a guilty finding based entirely on hearsay evidence would constitute capricious action and an abuse of discretion.<sup>26</sup> The Arbitrator held that it was incumbent on MPD to produce the significant other as a witness.<sup>27</sup> Because the statements of the significant other were unreliable, those statements could not form the basis of a decision against the Grievant.<sup>28</sup> The Arbitrator found that MPD violated the Grievant's due process rights by asking the Panel to admonish the Grievant for witness tampering.<sup>29</sup> The Arbitrator found that, although MPD requested the Panel to drop the issue, MPD continued to repeat the facts related to tampering and the Panel included the issue in its finding of facts.<sup>30</sup> The Arbitrator held that MPD violated the Grievant's rights by not including the allegation of tampering in the NPAA to permit the Union to defend the allegations. The Arbitrator found that the Panel further violated the Grievant's due process right by including the tampering allegation in its finding of facts, which prejudiced the Grievant on appeal.<sup>31</sup> Finally, the Arbitrator found that MPD violated the Grievant's due process rights by including a discussion of the *Douglas* factors in the NPAA because the *Douglas* factors are considered only after a finding of guilt is made.<sup>32</sup>

The Arbitrator found that the cumulative testimony of the parties involved in the April 7, 2009, incident supported a finding that the Grievant did not assault and take the phone of her significant other. Thus, the Arbitrator held that MPD failed to meet its burden of proof by substantial evidence for Charges 1-3.<sup>33</sup>

The Arbitrator held that the official reprimand was not appropriate. The Arbitrator found that the Department knew of the long history of domestic violence against the Grievant.<sup>34</sup> The Grievant reported being the victim of past assaults by her significant other and her supervisor sent her to the Employee Assistance Program. The Arbitrator found that, although the failure to report all incidents may give rise to a reprimand, it was not appropriate in this case.<sup>35</sup>

The Arbitrator concluded that MPD violated the Grievant's due process rights and failed to prove its case by substantial evidence. Although the Arbitrator found that MPD did not carry its burden of proof, she also provided an analysis that found the Panel inappropriately applied the

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<sup>24</sup> Award at 34 (citing *MPD v. NAGE, Local R3-5 ex rel. Burrell*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2012)).

<sup>25</sup> Award at 36.

<sup>26</sup> Award at 35.

<sup>27</sup> Award at 36.

<sup>28</sup> Award at 35.

<sup>29</sup> Award at 37.

<sup>30</sup> Award at 37.

<sup>31</sup> Award at 37.

<sup>32</sup> Award at 37.

<sup>33</sup> Award at 41-42.

<sup>34</sup> Award at 42.

<sup>35</sup> Award at 42.

*Douglas* factors.<sup>36</sup> Additionally, the Arbitrator found that the history of severe domestic abuse against the Grievant made the official reprimand inappropriate. The Arbitrator rescinded the reprimand and the termination and ordered the Grievant put back to work with backpay.<sup>37</sup>

### 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 only three narrow 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.<sup>38</sup> MPD requests review on the grounds that the Arbitrator exceeded her jurisdiction.

The Board has limited authority to review an arbitration award. In determining whether the arbitrator has exceeded her authority, the Board looks to whether the Award draws its essence from the collective bargaining agreement. The relevant questions in this examination are:

1. Did the arbitrator act outside of her authority by resolving a dispute not committed to arbitration; and
2. In resolving legal and factual disputes was the arbitrator arguably construing or applying the contract?<sup>39</sup>

The Board has held that, by submitting a grievance to arbitration, parties agree to be bound by the arbitrator's interpretation of their contract, rules, and regulations; and agree to accept the arbitrator's evidentiary findings and conclusions.<sup>40</sup>

#### A. The Arbitrator did not exceed her jurisdiction based on her evidentiary findings.

MPD argues that the Arbitrator exceeded her jurisdiction by ignoring relevant evidence supporting the Grievant's termination. MPD argues that there is ample evidence to support the charges.<sup>41</sup> MPD argues that the Arbitrator was not a fact finder and could not properly assess the credibility of the police officers' testimony.<sup>42</sup> MPD asserts that the Arbitrator exceeded her jurisdiction by concluding that the Grievant's due process rights were violated.<sup>43</sup> Finally, MPD

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<sup>36</sup> Award at 43.

<sup>37</sup> Award at 44.

<sup>38</sup> D.C. Official Code § 1-605.02(6).

<sup>39</sup> *Mich. Family Resources, Inc. v. Serv. Emp' Int'l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *F.O.P./Dep't of Corrs. Labor Comm. v. D.C. Dep't of Corrs.*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFG Local 3721*, 59 D.C. Reg. 9757, Slip Op. No. 1258 at 4, PERB Case No. 10-A-09 (2012).

<sup>40</sup> *MPD v. FOP/MPD Labor Committee ex rel. Sims*, Slip Op. 633 at 3, PERB Case No. 00-A-04 (2000).

<sup>41</sup> Request at 11. MPD cites to the Record for the proposition that the Grievant made an outgoing call on the significant other's cellphone on the night of April 7, 2009. The Arbitrator found that the phone records indicate that the call was placed during a time when the Grievant and significant other were together earlier before the altercation. See Award at 27.

<sup>42</sup> Request at 12.

<sup>43</sup> Request at 13.

argues that the arbitrator exceeded her jurisdiction by finding that the inclusion of the Douglas factors in the NPAA violated the due process rights of the Grievant.<sup>44</sup>

MPD disagrees with the Arbitrator's weighing of the evidence. In support of its argument, MPD argues that the Arbitrator should have deferred to the Panel's factual and credibility determinations and applied a deferential standard used by courts to review decisions of administrative agencies.<sup>45</sup> This is the same standard that the Board has repeatedly eschewed in reviewing the decisions of arbitrators because the authority of an arbitrator arises from the parties' collective bargaining agreement and not statute.<sup>46</sup> The Board has held that "disputes over credibility determinations" and "assessing what weight and significance such evidence should be afforded" is within the jurisdictional authority of the Arbitrator.<sup>47</sup> The Board will not substitute its judgment for that of the Arbitrator.<sup>48</sup>

Furthermore, MPD admits that the Arbitrator was empowered to review the Panel's decision to determine whether there was substantial evidence to support the Panel's findings.<sup>49</sup> Here, the Arbitrator found that MPD failed to meet its burden of proof by substantial evidence for Charges 1-3.<sup>50</sup> Therefore, the Board finds that the Arbitrator did not exceed her jurisdiction when she determined that MPD did not meet its burden of proof by substantial evidence.

**B. The Arbitrator did not exceed her authority in finding a due process violation and issuing the remedy.**

MPD disagrees with the Arbitrator's finding that the Grievant's due process rights were violated.<sup>51</sup> Here, both parties explicitly submitted the question of whether the Grievant's due process rights were violated.<sup>52</sup> By submitting a grievance to arbitration, the parties agree to be bound by the arbitrator's interpretation of their contract, rules, and regulations; and agree to accept the arbitrator's evidentiary findings and conclusions.<sup>53</sup> Thus, no statutory basis for reviewing the

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<sup>44</sup> Request at 16.

<sup>45</sup> Request at 11(citing *Cruz v. District of Columbia Dep't of Employment Serv.*, 633 A.2d 66, 70 (D.C.1993)).

<sup>46</sup> *E.g., MPD v. NAGE, Local R3-5 ex rel. Burrell*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2012).

<sup>47</sup> *Id.* (citing *AFSCME, District Council 20 v. District of Columbia Gen. Hosp.*, 37 D.C. Reg. 6172, Slip Op. No. 253 at 2, PERB Case No. 90-A-04 (1990)).

<sup>48</sup> *MPD v. NAGE, Local R3-5 ex rel. Burrell*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2012).

<sup>49</sup> Request at 10.

<sup>50</sup> Award at 41-42.

<sup>51</sup> In *FOP/MPD Labor Comm. ex rel. Harper v. MPD*, 62 D.C. Reg. 12586, Slip Op. No. 1531 at 4, PERB Case No. 15-A-10 (2015), the Board held that including the *Douglas* factors in the NPAA is not contrary to law and public policy. MPD has not presented this question for review under the law and public policy standard. In this case, the Arbitrator's decision amounts to harmless error because (1) the *Douglas* analysis was irrelevant to the outcome of the case because the Arbitrator properly found that MPD failed to meet its burden of proof by substantial evidence and (2) the Arbitrator provided a statement that the Panel improperly weighed the *Douglas* factors, which would cause the Arbitrator to implement a different disciplinary decision even if MPD met its burden of proof.

<sup>52</sup> Award at 13.

<sup>53</sup> *MPD v. FOP/MPD Labor Committee ex rel. Sims*, Slip Op. 633 at 3, PERB Case No. 00-A-04 (2000).

Award exists where, as here, there is only a disagreement with the Arbitrator's evaluation of the facts and the conclusions drawn.<sup>54</sup>

Likewise, the Arbitrator found that an official reprimand was not the appropriate penalty for Charge 4. The parties explicitly submitted the question of appropriate penalty to the Arbitrator. The Board has held that an arbitrator is not required to explain the reason for a decision, and that the failure to do so does not render the decision unenforceable.<sup>55</sup> The Arbitrator's decision in this case was based on the precise issues of the sufficiency of the evidence and the appropriateness of the termination. Therefore, the Board will not substitute its own interpretation for that of the duly designated Arbitrator.<sup>56</sup>

#### **IV. Conclusion**

The Board rejects the MPD's arguments and finds no cause to set aside, modify, or remand the Arbitrator's Award. Accordingly, MPD's request is denied and the award is enforceable as written.

#### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. MPD's Arbitration Review Request is hereby denied; and,
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 the Board Chairperson Douglas Warshof, Members Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

June 18, 2020

Washington, D.C.

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<sup>54</sup> *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).

<sup>55</sup> *FOP/MPD Labor Committee (on behalf Harris) v. MPD*, 59 D.C. Reg. 11329, Slip Op. 1295 at 9, PERB Case No. 9-A-11 (2012).

<sup>56</sup> *MPD v. NAGE, Local R3-5 ex rel. Burrell*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2012).

**CERTIFICATE OF SERVICE**

I hereby certify that the attached Decision and Order, Slip Op.1754, in PERB Case No. 20-A-06 served electronically via File & ServeXpress to the following parties on this the day of July 2, 2020:

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