

II. Discussion:

A. Background

The Arbitrator found that the parties did not dispute that they were "parties to a collective bargaining agreement (herein CBA) which runs from FY 2004-FY2008. . . . [and that] [m]ost of the facts surrounding the suspension of the Grievant, are now undisputed." (Award at p. 2). "The following is a chronology of the events leading to Grievant's disciplinary suspension:

July 21, 2007: Sergeant Scott's vehicle is stopped by the 6-D Warrant Squad. He is found in the company of a female fugitive who is also a known prostitute.

November 29, 2007: Lieutenant Cusick serves Sergeant Scott with the entire Notice of Proposed Adverse Action package, including the Final Investigative package. . . . Sergeant Scott signs [the Notice] acknowledging acceptance of the entire package, then departs abruptly, leaving behind the investigation [package].

90 BUSINESS DAYS LAPSED BETWEEN JULY 21, 2007 AND NOVEMBER 29, 2007.

In addition, the Arbitrator found that on December 11, 2007, the Union sent an email to MPD "claiming that Sergeant Scott did not receive the investigative report." (Award at p. 2). The Arbitrator also found that on January 9, 2008, Union Representative Officer Newman retrieved the investigative package from MPD. (See Award at p. 3). Upon review of the Notice of Proposed Adverse Action, the Arbitrator found that MPD charged the Grievant with misconduct based on an alleged violation of MPD General Order 120.21.¹ (See Award at pgs. 3-5). In summary, the charges of misconduct against

¹ MPD's Notice of Proposed Adverse Action to the Grievant contained four charges of misconduct which identify the general orders alleged to have been violated (e.g. "Charge No. ___") and the alleged actions that MPD believed were in violation of those general orders (e.g. "Specification Number ___"). The Arbitrator indicated that the four charges imposed against the Grievant to be as follows:

Charge Number One: Violation of General Order 120.21, Attachment A, Part A-12 which reads: "Conduct unbecoming of an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violation of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual. This misconduct is further defined in the General Order

201.26 Part I-B-22, which states "Members shall conduct their private and professional lives in such a manner as to avoid bringing discredit upon themselves or the department."

Specification Number One: On July 21, 2007, you were off-duty in your privately owned vehicle when you were stopped by a member of the Sixth District's Warrant Squad in the company of a female fugitive. During the stop you failed to immediately identify yourself as a police official of the Metropolitan Police Department.

Charge Number Two: Violation of the General Order 120.21, Attachment A, Part A-16, which reads: "Failure to obey orders and directives issued by the Chief of Police." This misconduct is further defined in the Special Order 04-07, Part I.V.C., which reads: "in the event of an incident requiring police action, members in an off-duty status shall cooperate fully with on-duty officers who respond shall advise the on-duty officer of his or her presence and duty status as soon as practicable."

Specification Number One: On July 21, 2007, while off-duty, you were stopped by members of the Sixth District Warrant Squad and was advised that the reason that you were being stopped was due to you being in the company of a female subject that was wanted and you failed to make your identity and duty status as a sworn member of the Metropolitan Police Department known at that time to on-duty members involved in police action.

Charge Number Three: Violation of the General Order 120.21, Attachment A, Part A-16, which reads: "Failure to obey orders and directives issued by the Chief of Police." This misconduct is further defined in Special Order 04-07, Part I-V-F, which reads: "Members who chose to carry a firearm while off-duty shall carry the weapon on their person at all times, or leave the weapon properly secured at their homes."

Specification Number One: On July 21, 2007, you were stopped by members of the Sixth District's Warrant Squad and your departmental issued service weapon was found under the front passenger seat of your vehicle.

Charge Number Four: Violation of the General Order 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 Metropolitan Police Officer to, or in the presence of, any superior officer, or making an untruthful statement before any court or any hearing." This misconduct is further defined in General Order 201.26, Part I, Section B, which reads in part, "During the course of an investigation, all members shall respond truthfully to questions by an agent or official of the Internal Affairs Division, even if the IAD agent is not of superior rank."

Specification Number One: On September 20, 2007, you were interviewed by Internal Affairs Division Agents with regards to your involvement and actions on July 21, 2007. During the course of the

Sergeant Scott assert violations of General Order 120.21: (1) conduct unbecoming an officer due to being stopped while off-duty in the company of a female fugitive and not immediately identifying himself as a police official; (2) failing to obey orders by not identifying himself as a police official to an on-duty officer; (3) failing to obey orders by not carrying his weapon on his person while off-duty; and (4) willfully and knowingly making an untruthful statement to internal affairs divisions agents concerning the location of his service weapon. (See Award at pgs. 3-5).

B. The Arbitration Award and Parties' Positions.

At arbitration, the parties agreed to submit the following issues to the Arbitrator:

Was the Grievant, Sergeant Scott, issued a twenty ["20"] day suspension on November 13, 2008[,] for "cause"? If not what remedy, if any, is appropriate?

There is also a threshold procedural issue; did the Agency violate their rules and the law when they failed to supply the Grievant with a copy of the investigative report when they served him with the "Notice of Adverse Action"?

(Award at pgs. 5-6).

The Arbitrator accepted into evidence the affidavit of MPD Lieutenant Cusick, which the Arbitrator incorporated into the Award, representing MPD's position at arbitration. (See Award at pgs. 8-9). The affidavit, in summary, stated that Lieutenant Cusick had Sergeant Scott sign the Notice of Proposed Adverse Action, verifying his receipt of the Notice. (See Award at pgs. 8-9). The Affidavit also indicated that Sergeant Scott left Lieutenant Cusick's office without the "Member's Copy" and that Sergeant Scott did not return to retrieve the documents. (See Award at p. 9).

Based on the Union's position at the hearing, the Arbitrator found that the Union argued that: (1) the penalty should be mitigated because "the Grievant is a long term employee with a clean disciplinary record at the time of the incident with superior performance evaluations and several commendations from the Commanding Officer[; and] (2) the Agency failed to give the Grievant the final investigative report in a timely manner and therefore the grievance should be granted." (Award at p. 9).

interview you provided untruthful statements concerning the location of your departmental issued service weapon inside your vehicle. For the aforementioned violation, the Department proposes to suspend you for twenty ["20"] work days.

(Award at pgs. 3-5).

The Arbitrator denied the grievance with respect to the procedural matter, as well as the twenty-day suspension (i.e. back-pay). (See Award at p. 10). However, the Arbitrator also directed MPD to remove the incident from the Grievant's employment record. (See Award at p. 10). The Arbitrator's reasoning for his Award balances several factors and considerations, such as the length of time (90-days) it took for MPD to serve the Notice of Proposed Adverse Action to the Grievant. (See Award at p. 10). The Arbitrator also found the conduct of the Grievant and Lt. Cusick "mysterious" as to the Grievant's receipt of the Notice. (See Award at p. 10). In addition, the Arbitrator credited the Grievant's admirable employment history as a mitigating factor in determining a remedy. (See Award at p. 10). Specifically, the Arbitrator found:

The Union's procedural argument, though technically correct lacks merit because I believe that the Grievant went to Lieutenant Cusick's office with a plan and that plan was to leave the office without all of the required paper work. Why Cusick didn't stop the Grievant from leaving without the investigative report is beyond me. Why it took so long to get the report of investigation to the Grievant and the Union is another mystery. But the fact is that two wrongs don't make a right and the Grievant is guilty of gross misconduct; but I feel that the loss of twenty days of income is sufficient corrective punishment. The Grievant is planning to retire in two years, he parted the hearing room by telling me "I won't be back"; I believe him.

The following circumstances serve as mitigation to the Grievant's misconduct:

- He is a long term employee with an otherwise clean record and several commendations.
- I feel strongly that when the stop was made the Sergeant panicked, he got in over his head and just kept going with his story. However, he did finally admit to his misconduct at the hearing.
- I observed the Grievant closely at the hearing; he was not comfortable and really didn't want to be there. I am sure he is truly remorseful.

- When asked by his Union representative if he would now do anything different he said, "Yes, I would have stayed home".

(Award at p. 10)(citations to record omitted).

As stated above, the Arbitrator sustained the grievance, finding that the Grievant did receive the investigative report in a timely manner, and that MPD had established cause for imposing discipline. (See Award at p. 11). However, the Arbitrator determined that based on the mitigating factors cited above, in particular the Grievant's "clean record", that the disciplinary record of the incident was to be expunged. (See Award at p. 11). The Arbitrator specifically describes the remedy in three ways: (1) "all records relating to the unfortunate incident [should] be immediately removed from the Grievant's employment file"; (2) [t]he record of [discipline] should be removed from the Grievant's employment record immediately. I believe that the Grievant's clean record of service is more important to him than the [back-pay]"; and (3) the discipline record must be expunged." (Award at pgs. 1, 10-11).

C. MPD's Arbitration Review Request.

MPD filed the instant Request, asserting that the Award is contrary to law and public policy because: (1) the Award is contrary to provisions of the DPM and MPD's General Orders concerning disciplinary documentation; (2) that the Arbitrator's "finding of 'gross misconduct' is at odds with his recommendation that the personnel records be purged;" and (3) the Arbitrator's "reliance on only two of the *Douglas*² factors was erroneous as a matter of law." (Request at pgs. 4, 6 and 7) (footnote added).³

The Board has held that when a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:⁴

² *Douglas v. Veterans Administration*, 5 MSPR 280 (1981).

³ In support of its appeal, MPD maintains that pursuant to D.C. Official Code § 1-605.02(6) and Board Rule 538.3, the grounds for its appeal are that the award is contrary to law and public policy. (Request at p. 2).

⁴ D.C. Code § 1-605.02(6) (2001 ed.). In addition, Board Rule 538.3 provides:

In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:

- (a) The arbitrator was without authority or exceeded the jurisdiction granted;

1. If "the 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 support of its appeal, MPD argues that the Award is contrary to law and public policy because provisions of the D.C. Personnel Regulations ("DPM"), Chapter 16, General Discipline and Grievances, do not allow the removal of a disciplinary record from an employee's permanent personnel file. (See Request at pgs. 4-6). In addition, MPD states that its own regulations, (MPD General Orders), take precedence over these DPM provisions and require the retention of disciplinary records for a period of three years. (See Request at pgs. 4-6).

MPD cites DPM § 1601.6, which provides:

Except as provided in § 1601.7, the final decision notice on a corrective or adverse action shall remain in the employee's Official Personnel Folder (OPF) for not more than three years from the effective date of the action. The official personnel action document effecting the corrective or adverse action is a permanent record and shall remain in employee's OPF.

In addition, MPD identifies DPM § 1601.7 in support of its position, stating:

Section 1601.7 permits documentation of a corrective or adverse action to be withdrawn earlier than stipulated therein if so ordered by an arbitrator of competent jurisdiction.

(Request at p. 4).

MPD argues that based upon this language in the DPM, an arbitrator can remove the Grievant's "final decision notice on adverse action", but the "official personnel action documentation" effecting the Grievant's adverse action must remain in his OPF as a

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- (b) The award on its face is contrary to law and public policy; or
 - (c) The award was procured by fraud, collusion or other similar and unlawful means.

permanent record. Consequently, MPD claims the Award is contrary to law because it "violates the plain language of this DPM provision." (Request at p. 4).

As an alternative argument, MPD proposes that DPM § 1601.6 and § 1601.7 do not extend to MPD, but that pursuant to § 1601.5, MPD regulations take precedence. (See Request at p. 5). In support of this claim, MPD states that Section 1601.5(a) of the DPM provides:

"Any procedures for handling corrective or adverse actions, involving uniformed members of the Metropolitan Police Department . . . provided for by law, or by regulations of the respective departments in effect on the date of these regulations, including but not limited to procedures involving trial boards, **shall take precedence over the provisions of this chapter to the extent that there is a difference.**" (Emphasis added).

(Request at p. 5).

MPD argues that:

While DPM § 1601.6 provides an exception permitting the removal of the final decision notice on an adverse action, the Department's internal regulations governing personnel records provide no such exemption. Specifically, General Order 201.19 (Employee Personnel Records), governs the various personnel records retained by the Department. Part IV.A.5 (page 3) provides that records relating to adverse actions are to be purged three (3) years from the effective date of the action. The directive provides no exceptions that would authorize removal of such records before that time. Since the DPM expressly provides that any conflict between the provisions governing adverse action procedures must be decided in favor of the Department, the applicable standard is that contained in the Department's General Order which provides for a three (3) year retention period with no exceptions. Accordingly, by ordering the removal of all applicable documentation pertaining to Grievant's adverse action, Arbitrator Tobin's award violated the law and should be overturned.

(Request at pgs. 5-6).

The Board has held that in reviewing whether an arbitration award is contrary to law and public policy:

the possibility of overturning an arbitration decision on the basis of public policy is an 'extremely narrow' exception to the rule that reviewing bodies must defer to an arbitrator's ruling. . . . [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. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See, *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). The petitioning party has the burden to specify applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.

MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987).

MPD's first argument contends that the Arbitrator's order directing MPD to expunge the grieved disciplinary incident from Grievant's record violates the DPM and MPD's General Orders. The Board notes that MPD does not assert that the Arbitrator was presented with, or considered these provisions in making his determination. In addition, MPD does not indicate that it was unable to anticipate a remedy that would require the Grievant's record to be expunged.

Instead, MPD offers interpretations of the DPM and MPD's General Orders, and argues that these provisions provide that a record of disciplinary action cannot be fully removed from an employee's OPF. As stated above, MPD believes that under the DPM, the Award can only be removed to the extent that a "final notice of adverse action" can be removed consistent with § 1601.6 and § 1601.7. MPD also believes that part of the disciplinary record must remain in the OPF because it is presumably the "official personnel action document" described in the second part of § 1601.6. MPD's assertions do not identify or explain how the DPM provisions specifically relate to the Grievant's disciplinary record. Moreover, MPD's argument requires that the Board accept this ambiguous, if not conflicting, interpretation of the DPM that suggests *a disciplinary record can be expunged but must also remain in the permanent record*. Whereas MPD has provided no such explanation, the Board finds that MPD has not identified a clear and specific policy mandating that the Arbitrator reach a different result.

MPD also provided an alternative position, claiming that MPD General Order 201.19 takes precedence over the DPM §§ 1601.6 and 1601.7.⁵ Conversely, MPD argues that this provision conflicts with the DPM, and only allows a disciplinary record to be expunged after three years, without the exception in DPM § 1601.7, authorizing an arbitrator to expunge a record prior to three years.

However, a reading of MPD General Order 201.19, does not, as MPD suggests, indicate that an arbitrator is prohibited from removing a disciplinary record from an employee's OPF prior to the three year retention period. Instead, the provision cited by MPD, General Order 201.19, Part IV.A.5, provides:

Certain **temporary** records are required to be removed from the OPF at the end of a designated period of time. Temporary records that must be purged from the OPF include:

- a. Adverse Actions-Three years from the effective date of the action.

(emphasis added).

Moreover, it is significant that a complete examination of MPD General Order 201.19 indicates that disciplinary records are not included in records designated as permanent and, as stated above, an adverse action record is specifically designated as temporary.⁶ Specifically, General Order 201.19, Part A, subpart 4, provides:

⁵ The Board has held that, where provided, MPD's General Orders may take precedence over the disciplinary procedures of the DPM. See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip Op. 282 at p. 4, n. 5, PERB Case No. 87-A-04 (1991).

⁶ MPD General Order 201.19 - Regulations, provides in pertinent part:

- A. Official Personnel Files and Records
 1. The Human Services File Room shall maintain the Official Personnel Files (containing originals) of all civilian and sworn employees throughout their service with the MPD.
 2.
 3. Permanent records pertain to the employee's status throughout their tenure with the District Government. Permanent records include:
 - a. Appointment;
 - b. Separation;

4. Temporary records pertain to an employee's status for a designated period of time and may be periodically removed from the OPF at the end of the designated period. Temporary records include:

- d. Final Decision of Adverse Actions (up to three years);

A plain reading of this regulation is inconsistent with MPD's assertion in its Request that DPM General Order 201.19 prohibits an arbitrator from expunging a disciplinary record. Instead, General Order 201.19 clearly indicates that an adverse action record is only **temporary**, and may only remain in the OPF "**up to three years.**" Therefore, General Order 201.19 plainly would permit an arbitrator to remove an adverse action record, and that the record could be removed at any time up to three years.

In addition, MPD has provided alternative arguments, citing multiple regulations which it suggests are conflict with each other. Thus, MPD has not established a law or public policy that "on its face" mandates that Arbitrator was prohibited from removing the Grievant's disciplinary record. The Board finds that neither DPM §§ 1601.6, 1601.7 or MPD General Order 201.19 support MPD's argument in its Request. Moreover, MPD has failed to specify any other applicable law or definite public policy that would have mandated that the Arbitrator reach a different result, i.e. restrict the Arbitrator in his authority regarding the expunging of the Grievant's disciplinary record.

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- c. Reassignment;
 - d. Promotion;
 - e. Retirement;
 - f. Employee Benefit Information;
 - g. Employee Annual Evaluations of Outstanding or Unsatisfactory;
 - h. Salary/Step increases;
 - i. Court Orders Changing a Person's Status (Reinstatement, back pay, *etc.*);
 - j. Letters of Resignation; and
 - k. Copies of Degrees & Certificates.

Even if MPD had established that the provisions of the DPM or MPD's General Orders were applicable in the present matter, the Arbitrator was not asked to apply them to the facts of this case. Moreover, MPD "[agreed] to be bound by the Arbitrator's decision which necessarily includes the Arbitrator's interpretation of the parties' agreement and **related rules and/or regulations** as well as his evidentiary findings and conclusions upon which the decision is based." *University of the District of Columbia and University of the District of Columbia Faculty Association*, 39 DCR 9628, Slip Op. No. 320 at p.2, PERB Case No. 92-A-04 (1992) (emphasis added).⁷ As a result, had the Arbitrator addressed the issue of the applicability of, for example, General Order 201.19, "the Board [would] not substitute its own interpretation or that of the Agency for that of the duly designated Arbitrator." *District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246*, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). Here, MPD's argument merely requests that the Board adopt its interpretation of General Order 201.19, absent the Arbitrator's opportunity to address the issue. Therefore, the Board, based on this argument, denies MPD's request for review.

MPD's second argument states: "Arbitrator Tobin's finding of Grievant's 'gross misconduct' is at odds with his recommendation that the personnel records be purged." (Request at p. 6). MPD speculates that because the Arbitrator found that the Grievant's actions constituted misconduct, removal of the disciplinary record from the Grievant's OPF could result in a failure to properly assess future misconduct or properly apply steps in progressive discipline. (See Request at pgs. 6-7). However, MPD's concern over possible future misconduct does not constitute a definite public policy. As previously stated, we must "not be led astray by our own (or anyone else's) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A2d 319, 325 (D.C. 1989). Whereas MPD's argument does not specify any applicable law or public policy that would mandate the Arbitrator not expunge the Grievant's disciplinary record, the Board denies MPD's Request.

Lastly, MPD claims that the Award is contrary to law and public policy because the "Arbitrator[s] . . . reliance on only two of the *Douglas* factors was erroneous as a matter of law." (Request at p. 7). In support of this argument, MPD identifies other mitigating factors listed in the *Douglas* case. (See Request at pgs. 7-8; and *Douglas v. Veterans Administration*, 5 MSPR 280 (1981). In addition, MPD argues that the Grievant's panicked state during his investigatory interview or the Grievant's remorsefulness, are not among the mitigating factors cited in *Douglas*. (See Request at p. 8). MPD also submits that the Arbitrator should have considered the Grievant's alleged violation of his off-duty responsibilities to the public as a law enforcement officer to be

⁷ See also *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993); *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000); *D.C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*; 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004); and *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

an aggravating factor, requiring permanent retention of the record of the Grievant's misconduct in his OPF.

However, the Board finds that MPD's disagreement with the interpretation of the *Douglas* case does not make an award contrary to law and public policy. See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee, _ DCR _, Slip Op. No. 757, PERB Case No. 03-A-06 (2004)*. Furthermore, with respect to the Arbitrator's findings and conclusions, we have stated that resolution of "disputes over credibility determinations" and "assessing what weight and significance such evidence should be afforded" is within the jurisdictional authority of the Arbitrator. See *American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO and District of Columbia General Hospital, 37 DCR 6172, Slip Op. No. 253 at p. 2, PERB Case No. 90-A-04 (1990)*; and *University of the District of Columbia and District of Columbia Faculty Association/NEA, 37 DCR 5666, Slip Op. No. 248 at n. 8, PERB Case No. 90-A-02 (1990)*. Since the parties bargained for the opinion of the Arbitrator, the Board may not substitute its, or MPD's, opinion for that of the duly designated Arbitrator. Therefore, the Board concludes that MPD's disagreement with the Arbitrator's interpretation of *Douglas* does not establish that the Award is contrary to law and public policy.

In view of the above, we find no merit to MPD's arguments. We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The District of Columbia Metropolitan Police Department'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
Washington, D.C.**

July 16, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.09-A-06 was transmitted via Fax and U.S. Mail to the following parties on this the 16th day of July 2010.

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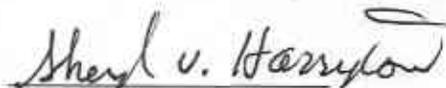
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