Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Metropolitan Police Department	)	
Petitioner	)	PERB Case No. 19-A-04
v.	)	Opinion No. 1711
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	
Respondent	)	

DECISION AND ORDER

I. Introduction

On February 5, 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 14, 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 The Award rescinded the Grievant's termination.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 the 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 Case

On January 1, 2011, the Grievant responded to an accident which involved a pedestrian being struck by a vehicle on George Washington University's (GWU) campus.[2] Upon arriving, the Grievant spoke with a GWU police officer and the driver of the vehicle. The Grievant learned that the pedestrian was transported to GWU Hospital to be treated for injuries.[3] The Grievant allowed the driver to leave the scene without issuing a citation.[4]

A second GWU police officer arrived at the scene after returning from escorting the pedestrian to GWU Hospital.[5] The second GWU police officer relayed the pedestrian's version of the accident to the Grievant.[6] Shortly thereafter, the Grievant went to GWU Hospital to interview the pedestrian. The Grievant told the pedestrian that he issued the driver a ticket.[7] The Grievant also provided the pedestrian with an accident report number to use to obtain a copy of the report.[8]

On January 10, 2011, the pedestrian attempted to obtain a copy of the accident report from the public records division of the MPD. The accident report was unavailable, and the pedestrian was directed to request the accident report from the Second District police station.[9] Between January 10, 2011, and March 14, 2011, the pedestrian called the Second District police station once or twice per week to no avail. On March 16, 2011, the pedestrian contacted the Grievant's Sergeant.[10] The Sergeant noticed that the accident report was not submitted in the system and questioned the Grievant. The Grievant stated that he believed that he submitted the accident report and that the system had a glitch that did not allow it to appear.[11] The Sergeant directed the Grievant to contact the pedestrian and produce an accident report.[12]

The Grievant called the pedestrian. The pedestrian gave the Grievant information about the accident and referred the Grievant to the second GWU police officer for more details.[13] The Grievant submitted an accident report on March 17, 2011.[14] The pedestrian received a copy of the report on March 21, 2011. The accident report contained many errors.[15] The errors included a misspelling of the pedestrian's name, an incorrect location of the accident, and a misclassification of the accident as a hit-and-run.[16]

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[2] Request at 3.
[3] Request at 3.
[4] Request at 3.
[5] Request at 4.
[6] Request at 4.
[7] Request at 4.
[8] Request at 4.
[9] Request at 5.
[10] Request at 5.
[11] Request at 6.
[12] Request at 5.
[13] Request at 6.
[14] Request at 6.
[15] Request at 6.
[16] Request at 6.

On March 26, 2011, the Sergeant interviewed the Grievant concerning the accident report and the errors. The Grievant stated that he could not find his notes on the accident and admitted to falsifying the accident report.[17]

On March 27, 2011, MPD began an investigation into the failure to produce an accident report on January 2, 2011.[18] On July 19, 2011, the Grievant was served with the Notice of Proposed Adverse Action.[19]

The Notice of Proposed Adverse Action included four charges.[20] Charge No.1 alleged that the Grievant falsified an official record when completing the March 17, 2011, report. Charge No.2 alleged that the Grievant made an untruthful statement that he completed an accident report on January 2, 2011. Charge No.3 alleged that the Grievant was in neglect of duty by failing to complete the January 2, 2011, report. Finally, Charge No.4 alleged that the Grievant's failure to complete the January 2, 2011, report was prejudicial to the reputation and good order of the police department.[21]

On August 23, 2011, an Adverse Action Panel was convened. The Panel found the Grievant guilty of all charges and recommended termination. On October 12, 2011, the Grievant appealed to the Chief of Police. The Chief of Police denied the appeal on November 1, 2011. On November 22, 2011, the FOP demanded arbitration.

III. Arbitration Award

The Arbitrator found that there were two issues presented by the parties: (1) whether MPD violated the 90-day time limit for taking corrective action under D.C. Code § 5-1031 ("90-day rule"), and (2) if MPD did not violate the 90-day rule, did the MPD have just cause to terminate the grievant, and if not, what is the appropriate remedy.[22]

Before the Arbitrator, MPD argued that it did not violate the 90-day rule. MPD claimed that it did not have notice of the Grievant's failure to complete the report until the Sergeant spoke with the pedestrian on March 16, 2011.[23] MPD argued that the termination was appropriate and that the Arbitrator cannot substitute his judgment on whether a penalty is appropriate unless the agency's decision is clearly erroneous.[24] Also, MPD argued that it adequately analyzed the *Douglas* Factors.[25]

Before the Arbitrator, FOP argued that the adverse action was untimely because the MPD should have known of the missing accident report on January 2, 2011.[26] Additionally, FOP argued that MPD had actual notice of the missing report when it was unable to locate the accident report

[17] Request at 7.
[18] Request at 7.
[19] Request at 8.
[20] Request at 8.
[21] Request at 8.
[22] Award at 2.
[23] Award at 16.
[24] Award at 17.
[25] *Douglas v. Veterans Admin.*, 5 MSPR 280, 5 MSPB 313 (1981). *Douglas* provides twelve factors as guidance to determine the appropriateness of discipline for public sector employees.
[26] Award at 19.

on January 10, 2011.[27] FOP argued that the standard of review for the Arbitrator is to determine whether discipline was issued for cause by weighing and determining the probative value of the evidence presented.[28] FOP asserted that the Panel erred in consideration of the *Douglas* Factors and that the *Douglas* Factors supported a lesser penalty.[29]

The Arbitrator found that Charge No.3 and Charge No.4 involved the Grievant's failure to file an accident report on January 2, 2011. The Arbitrator determined that the 90-day rule began to run on January 10, 2011, because MPD had actual knowledge that the report was missing on that date. Therefore, disciplinary action was untimely. Additionally, the Arbitrator found that the record contained insufficient evidence to conclude that the Grievant failed to file an accident report on January 2, 2011. The Arbitrator found that the Grievant obtained a report number and provided it to the pedestrian on January 2, 2011.[30] The Arbitrator found that the Grievant's standard practice was to complete accident reports on the same day and that the Sergeant was not aware of any past deviation from that practice.[31] Finally, the Arbitrator found that reports were known to go missing in the MPD system and that there was no evidence presented that the January 2, 2011, report did not go missing due to a system error.[32] The Arbitrator dismissed Charge No.3 and Charge No.4.[33]

The Arbitrator found that Charge No.2/Specification No.1 alleged that the Grievant lied about completing the accident report on January 2, 2011.[34] The Arbitrator dismissed Charge No.2 Specification No.1 since there was insufficient evidence to establish that the Grievant did not submit a report on January 2, 2011.[35] Charge No.2/Specification No.2 alleged that the Grievant lied about issuing the Driver a ticket.[36] The Arbitrator dismissed Charge No.2 Specification No.2 since the record contained insufficient evidence that the Grievant was intentionally attempting to deceive rather than attempting to remember and piece together what happened using his normal practices.[37]

Finally, the Arbitrator found the Grievant guilty of Charge No.1 because the Grievant did not dispute that he knowingly mischaracterized the nature of the accident as a hit and run on the March 17, 2011, report.

The Arbitrator found that the Panel did not prejudice the Grievant in its weighing of the *Douglas* Factors but, because the Panel failed to identify the extent to which each factor related to each allegation, the Arbitrator could not give deference to the Panel's conclusions.[38] The Arbitrator conducted an analysis of the *Douglas* Factors and determined that Charge No.1 did not provide

[27] Award at 19.
[28] Award at 19.
[29] Award at 21.
[30] Award at 23.
[31] Award at 23.
[32] Award at 24.
[33] Award at 24.
[34] Award at 24.
[35] Award at 24.
[36] Award at 25.
[37] Award at 25.
[38] Award at 28.

just cause for termination, and implemented a forty-five (45) day suspension for falsifying the March 17, 2011, report.[39]

IV. Position of the Parties

A. MPD Position

MPD argues that the Award is contrary to law because the Arbitrator misconstrues the date when the 90-day rule begins to run. MPD asserts that Charge No.3 and Charge No.4 concern the Grievant's failure to complete a report on January 2, 2011.[40] MPD argues that the fact MPD knew the report was missing on January 10, 2011, does not lead to the conclusion that the Grievant failed to complete the report. MPD argues that it did not know of the Grievant's failure to complete the report until March 16, 2011, and timely served the Grievant with the Notice of Proposed Adverse Action on the 88th day.[41]

MPD asserts that the Award is contrary to the public policy that police officers preserve peace, protect life, and uphold the law.[42] MPD argues that to permit the Grievant to continue to work as a police officer knowing that he falsified an official police report would be directly at odds with public policy.[43]

MPD cites to the Connecticut Superior Court for the position that there is a clear public policy requiring good conduct by police officers and that, when a police officer violates the public policies enumerated in state statutes and employment regulations, a reviewing court cannot enforce an arbitral award that reinstates the officer. MPD also cites to the Court of Appeals of Ohio for the position that falsification of a police report violates the public policy to preserve peace, protect persons, and obey and enforce the law.[44] MPD asserts that the Grievant's continued employment with MPD will erode the public's trust and confidence in the police department and runs contrary to a well-defined public policy.[45]

B. FOP Position

FOP argues that MPD has failed to show that the Award is contrary to law and public policy. FOP argues that the Arbitrator was authorized to determine when the statutory time limit began to run and that the MPD's argument is a mere disagreement with the Arbitrator.[46] Further, FOP asserts that MPD misconstrued the 90-day rule's actual or constructive knowledge standard. FOP argues that MPD failed to address the finding that there was insufficient evidence in the record to support a finding that the Grievant failed to file an accident report on January 2, 2011.[47]

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[39] Award at 32.
[40] Request at 9.
[41] Request at 10.
[42] Request at 11.
[43] Request at 12.
[44] Request at 13.
[45] Request at 15.
[46] Opposition at 3.
[47] Opposition at 10.

FOP argues that the parties bargained for the Arbitrator's interpretation and PERB should dismiss the request since it cites no legal grounds that show a violation of law and public policy.[48]

V. Discussion

The Board may not modify or set aside the Award as contrary to law and public policy in the absence of a clear violation on the face of the Award.[49] The law and public policy exception is "extremely narrow."[50] The narrow scope limits potentially intrusive judicial review under the guise of public policy.[51] 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."[52] The violation must be so significant that law and public policy mandate a different result.[53]

MPD argues that the Award is contrary to the dominant public policy of requiring police officers to preserve peace, protect life, and uphold the law. MPD looks to cases from the Connecticut Superior Court and the Court of Appeals of Ohio that vacated arbitration awards based on public policy grounds. The Board has previously found that these cases are unpersuasive and rejected this broad public policy argument as a basis for overturning an arbitration award.[54] MPD failed to meet its burden and did not specify any "established law" and "well defined public policy" that mandates that the Arbitrator arrive at a different result.

The Arbitrator has the authority to resolve issues of fact including determinations regarding the credibility, significance, and weight of the evidence.[55] 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."[56] In this case, the Arbitrator found that there was insufficient evidence in the record to support a finding that the Grievant failed to complete an accident report on January 2, 2011. The Arbitrator found that the Notice of Proposed Adverse Action was untimely served since the MPD had notice of the missing report on January 10, 2011. These findings result in the dismissal of Charge No.2, Charge No.3, and Charge No.4. Only Charge No.1 was upheld by the Arbitrator.

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[48] Opposition at 21.
[49] MPD v. FOP/MPD Labor Comm., 65 D.C. Reg.7468, Slip Op. 1667 at 3, PERB Case No. 18-A-04 (2018).
[50] *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).
[51] *American Postal Workers,*789 F.2d at 8.
[52] *Id.*
[53] *Id*.
[54] *MPD v. FOP/MPD Labor Comm*., 65 D.C. Reg. 12884, Slip Op. 1684 at 4, PERB Case 18-A-09 (2018); MPD v. *FOP/MPD Labor Comm.*, 65 DC Reg. 7468, Slip Op.1667 at 4, PERB Case No. 18-A-04 (2018).
[55] *DCDHCD v. AFGE Local 2725 AFL-CIO*, 45 D.C. Reg. 326, Slip Op. 527 at 2, PERB Case No. 97-A-03(1998). *AFSCME District Council 20 AFL-CIO v. D.C. General Hospital*, 37 D.C. Reg. 6172, Slip Op. 253, PERB Case No. 90-A-04 (1990).
[56] *FOP v. Dept. of Corrections* 59 D.C. Reg. 9798, Slip Op. 1271 at 2, 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).

It was reasonable for the Arbitrator to reexamine the *Douglas* Factors because the appropriateness of the penalty was an issue explicitly presented for the Arbitrator's consideration.[57] An arbitrator may overturn a termination decision based on his/her assessment of the agency's evaluation of the *Douglas* factors.[58] The Arbitrator determined that the Panel's *Douglas* analysis did not adequately differentiate the weight each factor had on a given charge. Because three out of four charges were dismissed, the Arbitrator could not defer to the Panel's findings. The Arbitrator conducted an independent analysis to reach an appropriate disciplinary decision for the falsification of the March 17, 2011, report. Upon this analysis the Arbitrator determined that a forty-five (45) day suspension was appropriate.

The Board will not substitute its own interpretation for that of the duly designated arbitrator.[59] Disagreement with the Arbitrator is not sufficient reason to modify, set aside, or remand an Award.[60]

VI. Conclusion

Based on the foregoing, the Board finds that the Arbitrator's Award is not contrary to law and public policy. Accordingly, MPD's Arbitration Review Request is denied, and the matter is dismissed in its entirety with prejudice.

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.

May 16, 2019

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[57] *MPD v. FOP/MPD Labor Comm. ex rel. Garcia*, 63 D.C. Reg. 4573, Slip Op. 1561 at 3, PERB Case No. 14-A-09 (2016).
[58] *MPD v. FOP/MPD Labor Comm. ex rel. Kennie,* 61 D.C. Reg. 12364, Slip Op. 1493 at 5, PERB Case No. 14-A-06 (2014).
[59] *FEMS v. AFGE, LOCAL 3721,* 51 D.C. Reg. 4158, Slip Op. 728, PERB Case No. 2-A-08 (2004).
[60] *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).

Certificate of Service

This is to certify that the attached Decision and Order in PERB Case No. 19-A-04, Opinion No. 1711 was sent by File and ServeXpress to the following parties on this the 20th day of May 2019.

Jhumur Razzaque, Esq.
Office of the Attorney General
Personnel and Labor Relations Section
441 Fourth Street, NW
Suite 1180 North
Washington, D.C. 20001

Marc L. Wilhite, Esq.
Pressler, Senftle & Wilhite, P.C.
1432 K Street, NW
12th Floor
Washington, D.C. 20005

_____/s/_____

Andrea Lozada