

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
District of Columbia)	
Metropolitan Police Department,)	
)	PERB Case No. 14-A-03
Petitioner,)	
)	Opinion No. 1458
v.)	
)	
Fraternal Order of Police/Metropolitan)	
Police Department Labor Committee,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Petitioner District of Columbia Metropolitan Police Department (“Petitioner” or “MPD”) filed the above-captioned Arbitration Review Request (“Request”), seeking review of Arbitrator Michael Murphy’s Arbitration Award (“Award”). Petitioner asserts that the Arbitrator was without authority or exceeded his jurisdiction in granting an Award which reversed Grievant Andre Powell’s termination and reinstated him with full back pay. (Request at 6).

Respondent Fraternal Order of Police/Metropolitan Police Department Labor Committee filed an Opposition to the Arbitration Review Request (“Opposition”), denying the Petitioner’s allegations and contending that MPD failed to state a ground upon which the Board may modify the Award. (Opposition at 3). The Request and Opposition are now before the Board for disposition.

II. Discussion

A. Award

a. Findings of fact

The Arbitrator found that the material facts in this matter were not in dispute. (Award at 1). The Arbitrator found that in September 2004, the Grievant challenged a speeding ticket received in the DC area by claiming that he had been on official police business at the time he received the ticket and producing an MPD daily activity form to corroborate his claim. *Id.* When it was discovered that the Grievant had lied about being on official police business at the time of the speeding ticket, he was issued a Notice of Intent to Remove. *Id.* The Grievant agreed to a settlement providing for a 45-day suspension without pay in lieu of termination, but this agreement was set aside by the Assistant Chief of Police, and the Grievant was notified that he would be terminated effective February 4, 2005. *Id.*

The termination advanced to arbitration, and on January 9, 2006, an arbitrator ordered the Grievant reinstated with back pay for the reason that MPD had violated the so-called "55-day Rule." (Award at 2). MPD appealed the arbitrator's ruling to PERB, which ruled against MPD on April 20, 2007. (Award at 3; Slip Op. No. 1348).

Prior to the Board's decision, the Grievant was stopped for speeding in Georgia on February 5, 2007. (Award at 3). During the stop, the Grievant mentioned his police background to the Georgia officer in the hopes that he would not be issued a speeding ticket. *Id.* The Grievant was "obviously a bit put out that no break was forthcoming. In so many words he suggested that if the situation were reversed, the least he, as a DC officer, would do is call Georgia to clarify the situation." *Id.* This interaction and the Grievant's Georgia driver's license caused the Georgia officer to check with the MPD, who informed him that the Grievant was not currently an active MPD officer. *Id.* The Grievant was subsequently arrested in Georgia for the crime of impersonating a police officer. *Id.*

Despite the Board's April 20, 2007, ruling upholding the Grievant's reinstatement to MPD, the Grievant was not reinstated until after he filed an enforcement petition in October 2007. (Award at 4). MPD then notified the Grievant that he would be reinstated effective March 3, 2008. *Id.* As a part of the reinstatement process, the Grievant disclosed his Georgia arrest for impersonating a police officer. *Id.* The Grievant was placed on administrative leave with pay while the Georgia arrest was under review. *Id.* On April 1, 2008, the Georgia authorities dismissed their case against the Grievant. *Id.* On June 2, 2008, the Grievant receive a Notice of Proposed Adverse Action from MPD. (Award at 5). The charges in the Notice of Proposed Adverse Action were sustained following an MPD Trial Board hearing, and the Trial Board recommended his removal. *Id.* On October 22, 2008, the Grievant's appeal of the Trial Board's recommendation was denied by the Chief of Police, and the matter proceeded to arbitration. *Id.* Instead of holding a hearing, the Arbitrator reviewed arbitration briefs, the record of the Trial Board hearing, and other exhibits provided by the parties. *Id.*

b. Analysis

The Arbitrator was asked to determine whether the Grievant was terminated for cause, and if not, what the appropriate remedy should be. (Award at 5). The Arbitrator noted that “[c]omponent parts of this question” included: (1) Whether sufficient evidence existed to support the alleged charges; (2) Whether MPD’s conduct violated due process; and (3) Whether termination was an appropriate remedy. *Id.* The charges against the Grievant were:

Charge No. 1: Violation of General Order Series 120, Number 21, part A-7 which provides:

“Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere, or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction.” This misconduct is further defined as cause in the District Personnel Manual, Chapter 16, § 1603.4.

Specification No. 1:

In that on March 1, 2007, you were arrested for Impersonating an Officer by Newton County, Georgia Sheriff’s Office, in violation of Georgia Code 16-10-23.

Charge No. 2: Violation of General Order Series 120.21, Attachment A Part A-25, which reads:

“Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.”

Specification No. 1:

In that on February 5, 2007, you were stopped by a sworn law enforcement officer of the Newton County, Georgia Sheriff’s Office for traffic offenses. At that time you identified yourself as a sworn law enforcement officer.

(Award at 6). The Arbitrator determined that the case resolved around whether substantial evidence existed to sustain either of the two charges against the Grievant, and concluded that MPD had not met its burden of proof on either charge. (Award at 12).

After reviewing the videotape of the Grievant’s traffic stop, the Arbitrator noted that the Grievant initially mentioned an affiliation with MPD, then went to state (with some indistinguishable pauses):

[Grievant]: It's not admin leave...I am not actually...I am waiting to get called back to work.

Georgia officer: Waiting to get called back to work?

[Grievant]: I had some problems on that department.

(Award at 13). The Arbitrator noted that the Grievant's "initial response, when asked to identify himself, had been to associate himself with being a DC officer, and this is not surprising. Professional courtesy to fellow police officers is a well-known fact of life. While an officer can always write a ticket, they also have the discretion to give warnings. So before they make up their mind, you are probably inclined to offer any mitigating comments you can muster." *Id.*

Based upon his review of the videotape, the Arbitrator concluded that the Grievant's statements, taken as a whole, were not meant to mislead the Georgia officer into believing that the Grievant had a DC police affiliation that did not exist. (Award at 13). The Arbitrator notes that "[t]o be fair," the Grievant was not called back to work until a year after the Georgia traffic stop, but that the Grievant had "clearly indicated that he was waiting to be called back to work." (Award at 14). Additionally, the status quo at the time of the Georgia traffic stop was a ruling from the January 2006 arbitration that the Grievant should be returned to work. *Id.*

Further, the Arbitrator concluded that the Grievant's Georgia arrest did not meet the circumstances that the "catch-all" language of Charge 1 ("deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction") because his actions were not "conduct one could deem to be a crime by anything remotely approaching a preponderance of the evidence." (Award at 17). Specifically, the Arbitrator stated that "[h]oping to catch a break, by mentioning an affiliation with the DC police, does not come close to constituting criminal behavior in the context of what occurred," because the Grievant "quickly indicated he was not currently working on the DC police force but was waiting to be called back to work following some problems he had encountered," and also because the Grievant handed the Georgia officer a Georgia driver's license, "which would suggest to any reasonable person that he was spending a lot of time in Georgia." *Id.*

Regarding the second charge, that of conduct unbecoming an MPD officer, the Arbitrator relied on his finding in Charge No. 1 that the Grievant had not engaged in criminal conduct, and that the burden then fell to MPD to establish by a preponderance of the evidence that the Grievant's non-criminal conduct "is sufficiently reprehensible so as to tarnish the image of the police force." (Award at 19). The Arbitrator went on to say that he "simply cannot find that mentioning a police affiliation in hopes of perhaps avoiding a speeding ticket is an activity which is so inappropriate, that it rises to the level of conduct unbecoming an officer." *Id.*

The Arbitrator dismissed MPD's reliance on the Trial Board's findings and its argument that the Trial Board's conclusions were based on credibility determinations, which provided substantial evidence to support the charge of conduct unbecoming an officer. *Id.* Stating that "[w]hile reliance on credibility determinations are certainly to be given due deference," the Arbitrator stated that his position in the instant case was unique because the videotape allowed the Arbitrator the ability to make his own credibility determinations regarding the Grievant's

actions and comments during the Georgia traffic stop. (Award at 20). Thus, the Arbitrator stated that his “independent analysis of the traffic stop itself is also an important component of the determinations set forth” in his Award. *Id.* The Arbitrator further contends that arbitrators are not a “rubber stamp” for Trial Board credibility conclusions, and that the Trial Board’s credibility findings lack substantial evidence. *Id.* The Arbitrator concluded that “[t]he Georgia authorities did not find any criminal conduct, the [A]rbitrator did not find any evidence of criminal conduct, and the non-criminal conduct of the [G]rievant does not by a preponderance of the evidence establish conduct unbecoming an officer or likely to besmirch the reputation of the force.” *Id.*

After overturning the Trial Board’s findings, the Arbitrator ordered the Grievant to be reinstated with full back pay and benefits, without any loss of seniority. (Award at 21).

B. MPD’s Position on Appeal

MPD asserts that the Award exceeded the Arbitrator’s authority because the Arbitrator disregarded the proper appellate standard of review. (Request at 6-7). Specifically, MPD contends that the Arbitrator examined the evidence on a *de novo* basis, improperly weighed the Trial Board’s determination of the evidence against his own factual determinations, and erroneously rejected the Trial Board’s credibility findings. (Request at 7).

In its Request, MPD includes a more detailed description of the Georgia traffic stop than is provided by the Arbitrator in the Award. MPD states:

On February 5, 2007, Grievant was stopped by Sergeant Randy Downs in Newton County, Georgia, for speeding. Sergeant Downs approached Grievant, explained the reason for the stop and asked for identification. When questioned whether he lived in Georgia, Grievant replied that he had just bought a house in Georgia, but he was still living in DC. He then explicitly stated “I am a...DC officer...DC officer up there.” Sergeant Downs asked for additional information, but Grievant replied that he did not have any. Sergeant Downs inquired where Grievant was employed because he did not believe that Grievant was a DC officer since he had a Georgia driver’s license. Grievant stated that he was currently with the DC Police Department, but he was waiting to be called back to work because he had some problems in the department. As Grievant was signing the citation, he retorted “no courtesy down here in Georgia, huh? You come up to police week in DC anytime?” Sergeant Downs responded in the negative and Grievant replied “well, that’s probably why.” Sergeant Downs then remarked that Grievant did not have any identification that would prove he was a police officer. In response, Grievant argued that he would have attempted to verify Downs’ place of employment had he pulled Downs over instead. Sergeant Downs

reiterated that the citation did not mean Grievant was guilty of speeding and sent him on his way.

(Request at 3-4; internal citations to Trial Board R. omitted).

First, MPD contends that as an appellate tribunal, the Arbitrator was limited to determining whether there was substantial evidence in the record such that a reasonable person would have come to the same conclusion as the Trial Board. (Request at 7). Instead, the Arbitrator reviewed the Trial Board record *de novo* and rejected the Trial Board's decision because, based upon the Arbitrator's own review of the videotape, he believed that the Grievant's explanation regarding his status with MPD was ambiguous. (Request at 7-8).

MPD states that the Trial Board found that the Grievant identified himself as a DC police officer and asked for courtesy, and notes that it was uncontested that the Board did not issue its Decision and Order regarding the Grievant's first termination until more than two months after the traffic stop. (Request at 8; citing Trial Board R. at 35; 373-4). MPD contends that the Grievant's employment status with MPD was still in legal dispute at the time of the traffic stop, and that the Grievant admitted at the Trial Board hearing that he knew he was not employed with MPD at the time of the stop. (Request at 8; citing Trial Board R. at 201, 374). MPD asserts that "[b]ased upon the evidence and Grievant's own admission, the [Trial Board] found that Grievant falsely represented himself as a police officer when he stated 'I am a DC officer,'" and that the Trial Board's decision is thus based on substantial evidence in the record. (Request at 8).

Second, MPD alleges that even if there are alternative interpretations of the Grievant's traffic stop, the "mere fact that there may be substantial evidence to support a contrary conclusion reached by the tribunal does not establish that the tribunal's findings of fact were inadequate or erroneous." (Request at 9). MPD states that the Arbitrator reversed the Trial Board's decision because he disagreed with its conclusion regarding the Grievant's statements to the Georgia officer, "[d]espite conceding that the audio-video tape was less than clear" and that he had to review the tape multiple times to distinguish the conversation. *Id.* MPD asserts that a reviewing court is not entitled to reverse a decision simply because it is convinced it would have weighed the evidence differently had it been sitting as the trier of fact. *Id.*; citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-4 (1985).

MPD notes that unlike the Arbitrator, the Trial Board gave more weight to the Grievant's initial statement of "I'm a D.C. officer" than his later explanation. (Request at 10). The Trial Board found that:

The February 5, 2007, traffic stop...captures [Grievant] state to Sergeant Downs that he was a DC police officer. [Grievant] later stated he was on "admin" leave. After asking for some credentials that would identify [Grievant] as a police officer, [Grievant] stated that it was in his other car.

[Grievant] did not take full responsibility for his actions as was evidenced by his testimony before the [Trial Board]. [Grievant] stated during testimony that he told Sergeant Downs that he was not on the Department. However, the video clearly shows [Grievant] identifying himself as a DC police officer. [Grievant] testified before the [Trial Board] that he told Sergeant Downs he was not on the Department. That statement was not captured on the police video.

(Request at 10; citing Trial Board R. at 374). MPD states that while the Arbitrator may have disagreed with the Trial Board regarding the weight of the Grievant's explanations, the Trial Board's decision "cannot be clearly erroneous when it is undisputed that Grievant explicitly stated that he was a police officer." (Request at 10). Further, MPD argues that the Grievant's subsequent comments that his police credentials were in his other car, as well as his statement that he would have attempted to verify the Georgia officer's place of employment had he pulled over the Georgia officer, clearly indicate the Grievant's intent to convey that he was currently an MPD officer at the time of the traffic stop. *Id.*

Finally, MPD contends that the Arbitrator improperly rejected the Trial Board's credibility determinations regarding the Grievant's testimony that he was trying to represent himself as "merely affiliated" with MPD. (Request at 10-11). MPD states that the Trial Board found that the videotape did not capture such a statement, and thus determined that the Grievant was not credible when he testified at the Trial Board hearing regarding his intentions during the traffic stop. (Request at 11). MPD notes that the D.C. Court of Appeals has "long emphasized the importance of credibility evaluations by the individual who sees the witness 'first-hand.'" *Id.*; citing *Stevens Chevrolet, Inc. v. Comm'n on Human Rights*, 498 A.2d 546, 549-50 (D.C. 1985). MPD asserts that the Trial Board had the opportunity to hear the Grievant's testimony and cross-examine him during the hearing, and that an appellate tribunal must therefore defer to the Trial Board's determination based upon first-hand observations instead of disregarding those determinations because the Arbitrator was "in the unique position" of being able to review a videotape of the traffic stop. (Request at 11).

C. FOP's Position on Appeal

In its Opposition, FOP first argues that the Arbitrator's review of the Trial Board record was proper, and that the Award complies with the authority granted to him by the language of the parties' collective bargaining agreement ("CBA"). (Opposition at 3-4). FOP states that an arbitrator's contractual authority may be found in Article 19 E, Section 5 Number 4 of the parties' CBA:

The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision of the issue presented and shall confine his decision solely to the precise issue submitted for arbitration.

(Opposition at 3). FOP also cites Article 12, Section 1, Subpart (b), which states: "Discipline may be imposed only for cause as authorized in D.C. Official Code § 1-616.51." *Id.* Based upon these CBA provisions, FOP argues that the Arbitrator was required to determine whether the Grievant had been disciplined for cause, and that "MPD's real complaint is that it is displeased with the result that was reached by Arbitrator Murphy after he engaged in the just 'cause' analysis." (Opposition at 4). FOP contends that mere disagreement with an arbitrator's ruling is not a basis upon which the Board may set aside an arbitration award. *Id.*

FOP concedes that MPD correctly identified the substantial evidence standard as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Opposition at 4-5). However, FOP states that MPD failed to include that the D.C. Court of Appeals "has held that evidence is not substantial if it is so 'highly questionable in the light of common experience and knowledge' that it [is] unworthy of belief." (Opposition at 5; citing *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1160 (1989)). FOP asserts that the Arbitrator properly identified the "highly questionable" nature of the Trial Board's guilty findings, and thus his decision to overturn the Trial Board's conclusion was proper¹. (Opposition at 5). FOP notes that the Arbitrator identified "several highly questionable actions" by the Trial Board, which established that the Trial Board's decision was not supported by substantial evidence, specifically failing to take the Grievant's entire conversation in context, illogically concluding that the Grievant attempted to state he was an active DC police officer when he gave the Georgia officer a Georgia driver's license, and failing to take into account MPD's animus against the Grievant stemming from the previous arbitration decision. (Opposition at 6).

Next, FOP contends that the Arbitrator's application of the record evidence is consistent with law. (Opposition at 6-7). Specifically, FOP states that the essence of MPD's Request is a challenge to the Arbitrator's evaluation of whether substantial evidence existed to sustain the Trial Board's decision, and reiterates that this is not a proper challenge to the Arbitrator's authority. (Opposition at 6). FOP notes that the parties bargained for the Arbitrator's analysis when they negotiated Article 19 of their CBA, and that the Arbitrator's analysis and decision on substantial evidence is exactly what the CBA requires. (Opposition at 7).

FOP discounts MPD's reliance on *Anderson*, arguing that while *Anderson* stands for the proposition that "where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous," in the instant case the existence of the videotape leaves only one permissible view of the evidence. (Opposition at 7-8; citing *Anderson*, 470 U.S. at 575). FOP asserts that due to bias against the Grievant, the Trial Board "ignored and manipulated the evidence in order to terminate him again from the Department," which was "highly improper and clearly erroneous as a matter of law." (Opposition at 8). FOP states that since the Arbitrator's decision "simply addresses these departmental errors," the Award is in accordance with law and should not be disturbed. *Id.*

¹ FOP contends that "[w]hile MPD only claims to file a challenge to the arbitrator's authority, its arguments read as though it is really challenging whether Arbitrator Murphy's decision violates law and public policy." (Opposition at 5, fn. 1). FOP calls this an "inappropriate and improper method in which to challenge an arbitrator's decision," and states that the Request should be dismissed. *Id.*

Finally, FOP argues that the Arbitrator's credibility assessments are proper due to the existence of the Georgia traffic stop videotape. (Opposition at 9-10). FOP asserts that MPD's Request ignores the fact that no credibility determinations are necessary because the videotape "captures exactly what was stated during the traffic stop," and substantial evidence does not support the Trial Board's credibility determinations. (Opposition at 9). FOP contends that the Award draws its essence from the parties' CBA, and that the Board may not substitute its own interpretation of the CBA for that of the Arbitrator. (Opposition at 10).

D. Analysis

a. Whether the Arbitrator was without or exceeded his jurisdiction

The CMPA authorizes the Board to modify or set aside an arbitration award in three limited circumstances: (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." D.C. Official Code § 1-605.02(6) (2001).

MPD asserts that the Arbitrator exceeded his jurisdiction by disregarding the proper appellate standard of review. (Request at 6-7). An arbitrator's authority is derived from the parties' CBA, and any applicable statutory and regulatory provisions. *D.C. Dep't of Public Works v. AFSCME, Local 2901*, 35 D.C. Reg. 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). To determine whether an arbitrator has exceeded his or her jurisdiction and was without authority to render an award, the Board considers "whether the Award draws its essence from the collective bargaining agreement." *Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 59 D.C. Reg. 3959, Slip Op. No. 925 at p. 7, PERB Case No. 08-A-01 (2010) (quoting *D.C. Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987)). The Board follows the U.S. Court of Appeals for the Sixth Circuit's guidance on what it means for an award to "draw its essence" from a collective bargaining agreement:

Did the arbitrator act 'outside his authority' by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator 'arguably construing or applying the contract?' So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made 'serious,' 'improvident' or 'silly' errors in resolving the merits of the dispute.

Michigan Family Resources, Inc. v. SEIU Local 517M, 475 F.3d 746, 753 (6th Cir. 2007). As the court noted in *Michigan Family Resources*, "[t]his view of the 'arguably construing' inquiry will no doubt permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes, a view that respects the finality clause in most arbitration agreements... and a view whose imperfections can be remedied

by selecting [different] arbitrators.” 475 F.3d at 753-4. The Board has concurred with this view, stating that by submitting a matter to arbitration, “the parties agreed to be bound by 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 v. University of the District of Columbia Faculty Ass’n*, 39 D.C. Reg. 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).

In the instant case, the Arbitrator’s authority derives from Article 19E, Section 5, Number 4 of the parties’ CBA, which states: “The arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision of the issue presented and shall confine his decision solely to the precise issue submitted for arbitration.” (Opposition Attachment 1). Article 12, Section 1, Subsection (b) states: “Discipline may be imposed only for cause as authorized in D.C. Official Code § 1-616.51.” *Id.* The Arbitrator arguably construed the CBA when he examined the record of this case to determine that there was no substantial evidence to sustain the Grievant’s termination, and thus the Grievant was not disciplined for cause. (Award at 12, 21). The Board finds nothing in the record to suggest that fraud, a conflict of interest, or dishonesty impacted the Award or the arbitral process. The parties do not dispute that the CBA committed this grievance to arbitration, and that the Arbitrator was mutually selected to resolve the dispute. *See Michigan Family Resources*, 475 F.3d at 754.

Additionally, the Award bears the hallmarks of interpretation: the Arbitrator refers to and analyzes the parties’ positions, and at no point appears to do anything other than attempt to reach a good-faith interpretation of the CBA. (Award at 15-20); *See D.C. Child and Family Services Agency v. AFSCME, District Council 20, Local 2401*, 60 D.C. Reg. 15060, Slip Op. No. 1025 at p. 6, PERB Case No. 08-A-07 (2010). The Award is not “so untethered from the [CBA] that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his ‘own brand of industrial justice.’” *Michigan Family Resources*, 475 F.3d at 754. Instead, MPD’s allegations amount to a disagreement with the Arbitrator’s conclusion that substantial evidence did not exist to uphold the Grievant’s termination, and this does not present a statutory basis for reversing the Award. *See Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee v. Metropolitan Police Dep’t*, 59 D.C. Reg. 9798, Slip Op. No. 1271, PERB Case No. 10-A-20 (2012).

b. Whether the Award is contrary to law and public policy

As FOP points out in its Opposition, “[w]hile MPD only claims to file a challenge to the arbitrator’s authority, its arguments read as though it is really challenging whether Arbitrator Murphy’s decision violates law and public policy.” (Opposition at 5, fn. 1). Indeed, MPD’s contentions that the Arbitrator used the wrong standard of review, improperly weighed the Trial Board’s determination of the evidence against his own factual determinations, and erroneously rejected the Trial Board’s credibility determinations may lend themselves to an argument that the Award “on its face is contrary to law and public policy.” (Request at 7); D.C. Official Code § 1-605.02(6) (2001). In order to “effectuate the purposes and provisions of the CMPA,” the Board will consider MPD’s arguments under this framework as well. Board Rule 501.1.

The Board's review of an arbitration award on the basis of law and public policy is an extremely narrow exception to the rule that reviewing bodies must defer to an arbitrator's ruling. *Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 60 D.C. Reg. 9201, Slip Op. No. 1390 at p. 8, PERB Case No. 12-A-07 (2013). "[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." *MPD*, Slip Op. No. 925 (quoting *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986)). A petitioner must demonstrate that an arbitration award compels the violation of an explicit, well-defined public policy grounded in law or legal precedent. See *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987). Moreover, the violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result." *Metropolitan Police Dep't v. Fraternal Order of Police/Metropolitan Police Dep't Labor Committee*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Further, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *Id.*

First, MPD asserts that the Arbitrator examined the evidence on a *de novo* basis, instead of limiting himself to "determining whether there was substantial evidence in the record such that a reasonable person would have come to the same conclusion as the [Trial Board]." (Request at 7). In support of this contention, MPD cites to *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). The Board finds *Stokes* inapplicable to the instant case. In *Stokes*, the D.C. Office of Employee Appeals ("OEA") reinstated an employee who had been terminated by the D.C. Dep't of Corrections. The OEA's decision was appealed to the D.C. Superior Court, who reversed the OEA's decision, and the reversal was upheld by the D.C. Court of Appeals. *Stokes*, 502 A.2d at 1007. In *Stokes*, the D.C. Court of Appeals held that while the CMPA does not define the standards by which the OEA is to review final agency decisions, "it is self-evident from both the statute and its legislative history that the OEA is not to substitute its judgment for that of the agency." 502 A.2d at 1010. As an initial matter, the OEA is a separate and independent agency from the Public Employee Relations Board, with different statutory authority². See *D.C. Office of the Chief Financial Officer v. AFSCME District Council 20, Local 2776*, 60 D.C. Reg. 7218, Slip Op. No. 1386 at p. 4, PERB Case No. 12-A-06 (2013). Further, in *Stokes*, the termination decision was made by the employer and appealed to the OEA; in the instant case, the termination decision was made by the employer and appealed to an arbitrator through the parties' negotiated grievance procedure. *Stokes*, 502 A.2d at 1007; Award at 5. Thus, *Stokes* does not mandate that the Arbitrator arrive at a different result, nor has MPD articulated an explicit, well-defined policy grounded in law and legal precedent requiring the Board to modify or reverse the Award. See *MPD*, Slip Op. no. 633 at p. 2.

On a related note, MPD also contends that during his *de novo* review of the evidence, the Arbitrator improperly reversed the Trial Board's decision because he disagreed with the Trial Board's conclusion regarding the Grievant's statements to the Georgia officer. (Request at 9). FOP calls this argument "nothing more than a mere disagreement with the Arbitrator's decision." (Opposition at 7). While MPD cites to *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564,

² For example, the OEA is empowered to review final agency decisions affecting, *inter alia*, performance ratings, adverse actions, and employee grievance. See D.C. Official Code §§ 1-606.1, 1-606.3 (2011).

574 (1985) for its proposition that “[w]here there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.” FOP contends that “[g]iven that there is a complete videotape of the affected traffic stop...we are in the unique position to be able to see that there really is only one permissible view of the evidence.” (Request at 9; Opposition at 7-8).

Anderson is clearly distinguishable from the instant case, primarily because the Trial Board is not a trial court, and the Arbitrator is not an appellate court. In *Anderson*, the U.S. Supreme Court discussed the general principles governing the exercise of an appellate court’s power to overturn findings of a district court under the “clearly erroneous” standard set forth in Federal Rule of Civil Procedure 52(a). 470 U.S. at 573. As the Court noted:

If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that if it had been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.

Id. at 573-4 (internal citations omitted). Federal Rule of Civil Procedure 52(a) does not apply to Trial Board or arbitration proceedings under the parties’ CBA, which states that “[t]he hearing on the grievance or appeal shall be informal.” Article 19E, Section 5, Number 3; Opposition Attachment 1. Further, the parties’ CBA specifically states that in cases where a Trial Board hearing has been held and the matter advanced to arbitration through the negotiated grievance procedure, “the appellate tribunal has the authority to review the evidentiary ruling of the Departmental Hearing Panel.” Article 12, Section 8; Opposition Attachment 1. MPD has cited no law or public policy supporting its contention that an arbitration hearing is equivalent to a judicial court of appeal. MPD disagrees with the Arbitrator’s evidentiary conclusions, and the Board will not modify or amend the Award based upon this disagreement. *See MPD*, Slip Op. no. 633 at p. 2.

Finally, MPD asserts that the Arbitrator improperly rejected the Trial Board’s credibility determinations after reviewing the traffic stop videotape. (Request at 11). In support of this contention, MPD cites to *Stevens Chevrolet, Inc. v. Commission on Human Rights*, 498 A.2d 546, 549 (D.C. 1985), in which the D.C. Court of Appeals discussed the importance of credibility determinations made by a first-hand witness to the testimony. (Request at 9-10). However, the fact remains that the Trial Board and arbitration process are part of the negotiated grievance procedure in the parties’ CBA, and is not directly comparable to the judicial or administrative adjudication system. MPD’s analogy is too tenuous, and MPD has cited no “applicable law or definite public policy that mandates that the Arbitrator arrive at a different result.” *MPD*, Slip Op. No. 633 at p. 2.

MPD has failed to demonstrate that the Arbitrator exceeded his authority, or that the Award compels the violation of an explicit, well-defined public policy grounded in law or legal

precedent, which mandates that the Arbitrator arrive at a different result. *See Misco*, 484 U.S. 29; *MPD*, Slip Op. No. 633 at p. 2. Therefore, the Arbitration Review Request is dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The 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.

April 2, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-A-03 was transmitted via File & ServeXpress to the following parties on this the 2nd day of April, 2014.

Mr. Marc L. Wilhite, Esq.
Pressler & Senftle, PC
Three McPherson Square
927 15th St., N.W.
Twelfth Floor
Washington, DC 20005

FILE & SERVEXPRESS

Ms. Andrea Comentale, Esq.
Office of the Attorney General
441 4th St., NW
Ste. 1180 North
Washington, D.C. 20001

FILE & SERVEXPRESS

/s/ Erin E. Wilcox

Erin E. Wilcox, Esq.
Attorney-Advisor