Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Metropolitan Police Department	
Petitioner	PERB Case No. 20-A-01
	Opinion No. 1731
v.	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	
Respondent	

DECISION AND ORDER

I. Statement of the Case

On October 7, 2019, 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).[1] MPD seeks review of an arbitration award (Award) issued on September 16, 2019, which granted, in part, the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP). MPD seeks review of the Award, asserting that the Arbitrator exceeded his jurisdiction.[2]

Pursuant to the CMPA, the Board is permitted to modify, set aside, or remand a grievance arbitration award 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,

[1] The Board notes that MPD's Request was deficient, because it failed to provide "[a] statement of the reasons for appealing the award" as required by Board Rule 538.1. The Request merely asserted, without reasons, that the statutory criteria for review of an arbitration award had been met. MPD filed a motion for leave to cure the deficiency and show cause for an extension of time to cure the deficiency. In accordance with Board Rule 501.13, MPD timely cured its deficiency.

[2] In its deficient filing, MPD requested review on the basis that the award was contrary to law and public policy. In its Memorandum, MPD only addressed the Arbitrator's authority, thus waiving the argument that the award is contrary to law and public policy.

collusion, or other similar unlawful means.[3] Upon consideration of the Arbitrator's conclusions, applicable law, and the record submitted by the parties, the Request is denied, for the reasons stated herein.

II. Award

A. Background

On the morning of October 28, 2014, the Grievant lectured at a conference.[4] The Grievant was paid $600 as an honorarium for the lecture.[5] Although the Grievant was scheduled to begin his MPD tour of duty at 2:30 p.m., the Grievant departed the conference between 2:30 and 3:00 p.m.[6] The Grievant arrived at his duty station at approximately 3:30 p.m.[7] Notwithstanding the Grievant's late arrival, the time-keeping report indicated that the Grievant worked his assigned schedule of 2:30 p.m. to 11:00 p.m.[8]

The Department of Justice investigated the Grievant for allegations of time and attendance fraud and issued a letter declining prosecution on March 25, 2015. On April 22, 2015, the Grievant was interviewed by the MPD Internal Affairs Department (IAD). During the interview, the Grievant claimed that he had called the duty station to report his late arrival and worked an hour later than scheduled. On July 24, 2015, the Grievant was served with a Notice of Proposed Adverse Action (NPAA).[9]

The NPAA contained two charges. Charge No. 1 alleged that the Grievant violated General Orders 120.21 and 201.26 by knowingly making an untruthful statement during the April 22, 2015 interview.[10] Charge No. 2 alleged that the Grievant violated General Orders 120.21 and 201.17 by engaging in outside employment without proper authorization, and while on duty.[11]

The Grievant appealed the NPAA to an Adverse Action Panel (Panel). The Panel found the Grievant guilty of Charge No. 1 and Charge No. 2 The Panel recommended termination for Charge 1 and for Specification 2 of Charge 2. The Panel recommended a 20-day suspension for the violation in Specification 1 of Charge 2, holding that the Grievant engaged in outside employment without obtaining prior approval.[12] The Grievant appealed the Panel's recommendation to the Chief of Police who denied the appeal. FOP subsequently moved for arbitration under the parties' collective bargaining agreement.[13]

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[3] D.C. Official Code § 1-605.02(6).
[4] Award at 3.
[5] Award at 3. The Grievant split the $600 honorarium with an MPD Lieutenant who also lectured before the delegation at the recommendation of the Grievant.
[6] Award at 3.
[7] Award at 4.
[8] Award at 4.
[9] Award at 4.
[10] Award at 5.
[11] Award at 5.
[12] Award at 11.
[13] Award at 12.

B. Arbitration

The issues stipulated by the parties before the Arbitrator were:

1. Whether the evidence presented by MPD was sufficient to support Charge No. 1 against the Grievant for allegedly making an untruthful statement during his IAD interview that he worked late on October 28, 2014?

2. Whether the evidence presented by MPD was sufficient to support Charge No.2 against the Grievant for allegedly working outside employment on October 28, 2014, when he spoke at an academic seminar.

3. Whether termination was the appropriate penalty.[14]

Before the Arbitrator, MPD argued that the appropriate standard of review is whether the Panel's findings and conclusions were supported by substantial evidence in the record and not clearly erroneous as a matter of law.[15] MPD argued that the Panel's findings related to Charge No. 1 should not be disturbed because there was ample evidence in the record to demonstrate that the Grievant's statement about working late was untrue.[16] Further, MPD argued that the Panel's findings related to Charge No. 2 should not be disturbed because there was undisputed evidence in the record that the presentation at the seminar qualified as outside employment, that the Grievant received a payment, and that the outside employment overlapped with the Grievant's tour of duty for which he was paid by MPD.[17]

FOP argued that the standard of review is not whether the Panel's decision was clearly erroneous but whether the discipline was imposed for just cause.[18] FOP argued that the deferential standard of review applies only to an agency's review of decisions and that there is nothing to prevent an arbitrator from re-weighing the evidence.[19] FOP argued that Charge No. 1 was not proven by MPD because the evidence failed to demonstrate that the Grievant was not at work after 11:00 p.m. Further, for Charge No. 2, FOP argued that the evidence failed to support that the Grievant's presentation at the conference qualified as outside employment or that the Grievant's presentation overlapped with his tour of duty.[20] Finally, FOP argued that termination was not an appropriate penalty and that the Panel's analysis of the *Douglas*[21] factors was unsupported by the record.[22]

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[14] Award at 2.
[15] Award at 15 (citing *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985)).
[16] Award at 15.
[17] Award at 16.
[18] Award at 17-18.
[19] Award at 17.
[20] Award at 18.
[21] *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.
[22] Award at 20.

The Arbitrator determined that the standard of review advanced by FOP was appropriate for evaluation of the Panel's decision, which included re-weighing the evidence and the *Douglas* factors.

The Arbitrator found that the Panel's analysis of Charge No. 1 erroneously evaluated the factual evidence in the record for the charge. The Arbitrator explained the following:

> Based on what was explained in the record, it seems that, confronted with inconclusive evidence as to whether [Grievant's] account of working late was true or not, the Panel decided to invert the burden of proof. Its decision cited a lack of evidence to support the Grievant's position, ignoring the principle that it is the MPD's burden to prove that [the Grievant] was guilty of the charges.
>
> More importantly, the Panel's conclusion that the Grievant's claim to [IAD] that he worked past 11:00 p.m., "was knowingly made to the IAD agent, and was false," was a misstatement of the applicable standard. General Order 120.21, Attachment A, Part A-6, prohibits "Willfully and knowingly making an untruthful statement . . ." The Notice of Proposed Adverse Action correctly articulated the standard for a violation of this provision as, "You provided the investigating official with this information knowing it to be untrue." There is a significant distinction between these two specifications – "providing information knowing it to be untrue" was the correct standard to support this charge; regardless of whether it is true or not, a statement made voluntarily, or knowingly, is not necessarily a violation. A violation occurs when the maker knows the statement is untrue but says it anyway. The Panel's conclusion – which is what was eventually adopted by MPD for purposes of the final disciplinary decision – was based upon an erroneous articulation of the factual basis for Charge No. 1.
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> The Panel erred in both its factual assessment and articulation of the standard for Charge No. 1. Consequently, its finding must be set aside. The charge of [the Grievant] "willfully and knowingly making an untruthful statement" to IAD . . . on April 22, 2015, was unsupported, both factually and legally, and is hereby dismissed.[23]

Therefore, the Arbitrator dismissed Charge No. 1 as unsupported in the record.

On Charge No. 2, the Arbitrator held that General Order 201.17 required the Grievant to request prior authorization before engaging in outside employment and that sporadic instructive employment qualifies as outside employment for the purpose of General Order 201.17.[24] The Arbitrator found that the Grievant violated General Order 201.17 because he did not receive proper authorization before engaging in outside employment.[25] The Arbitrator found that the Panel had no evidence from which to conclude that the outside employment extended past 2:30 p.m. to overlap with the Grievant's tour of duty.[26]

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[23] Award at 24-25.
[24] Award at 26.
[25] Award at 26.
[26] Award at 27.

The Arbitrator dismissed Charge No. 1 and Specifications 2 and 3 of Charge No. 2. The Arbitrator dismissed the Panel's recommendations of termination. The Arbitrator found that MPD offered no *Douglas* analysis for the single violation of failing to obtain prior approval for outside employment. The Arbitrator found support in the record for the penalty of a 20-day suspension, which the Panel had imposed for engaging in outside employment without authorization.[27] The Arbitrator ordered the Grievant reinstated with a 20-day suspension and made whole.

III. Discussion

The Board has limited authority to review an arbitration award under D.C. Official Code § 1-605.02(6). When determining whether an arbitrator exceeded his authority in rendering an award, the Board analyzes whether the award "draws its essence from the parties' collective bargaining agreement."[28] The relevant questions in this analysis are whether the arbitrator acted outside his authority by resolving a dispute not committed to arbitration and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.[29]

MPD argues that the Board should set aside the Award because the Arbitrator exceeded his authority when he re-weighed the evidence and substituted his judgment for that of the Panel.[30] FOP counters that the Request does not present any legal authority in support of the position that the Arbitrator exceeded his authority.[31] FOP asserts that MPD's re-argument of the evidence is a mere disagreement with the Award and should be rejected.[32]

Here, the parties expressly charged the Arbitrator with the task of reviewing whether the evidence was sufficient to support a finding against the Grievant for Charge No. 1 and Charge No. 2, and whether termination was an appropriate remedy.[33] The Arbitrator determined that a case assigned pursuant to Article 19 of the collective bargaining agreement requires an arbitrator to consider evidence in the record and determine whether there is enough to support just cause for discipline, including review of the charges and analysis of the *Douglas* factors.[34] The Arbitrator based his decision on the record and briefs provided by the parties and determined that Charge No. 1 and Charge No. 2, in part, were unsupported by substantial evidence. The Arbitrator overturned the Grievant's termination and found that a 20-day suspension was an appropriate penalty.

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[27] Award at 28-29 (citing *Judy Waddy v. D.C. MPD*, OEA Matter No. 1601-0050-07 as reasonably on par with the instant case and finding that the Douglas analysis would have been substantially similar).
[28] *AFGE Local 2725 v. D.C. Housing Auth.*, 61 D.C. Reg. 9062, Slip Op. No. 1480 at 5, PERB Case No. 14-A-01 (2014).
[29] *Mich. Family Resources, Inc. v. Serv. Emp' Int'l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *FOP/DOC Labor Comm. v. DOC*, 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. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. No. 1258 at 4, PERB Case No. 10-A-09 (2012).
[30] Pet. Memo at 6.
[31] Opp. at 13.
[32] Opp. at 14.
[33] Award at 2.
[34] Award at 22-23 (crediting MPD's argument as prevailing which includes citations to *MPD v. FOP/MPD Labor Comm. ex. rel. Bell*, 62 D.C. Reg. 9189, Slip Op. No. 1517, PERB Case No. 15-A-06 (2015); *MPD v. FOP/Labor Comm. ex. rel. Fowler*, 64 D.C. Reg. 10115, Slip Op. No. 1635, PERB Case No. 17-A-06 (2017)).

MPD does not cite to any legal authority requiring deferential review in its Request. MPD makes the same argument before the Board as it made before the Arbitrator, citing *Stokes v. District of Columbia*.[35] The Board has repeatedly held that *Stokes v. District of Columbia* is not the correct standard to apply to an arbitrator's review of an agency's decision because an arbitrator's authority arises out of the parties' contractual agreement to submit the case to arbitration rather than the statutes creating the Office of Employee Appeals interpreted in *Stokes*.[36] The Board has found that by submitting a matter to arbitration, "the parties also agree 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."[37] The Board will not substitute its own interpretation for that of the duly designated arbitrator.[38] MPD presents an argument to the Board that was previously presented to and rejected by the Arbitrator. MPD disagrees with the finding that substantial evidence did not exist to support the termination. Disagreement with the Arbitrator is not a sufficient reason to modify, set aside, or remand an Award.[39] The Board finds that MPD has not me the standard to find that the Arbitrator exceeded his jurisdiction.

IV. Conclusion

The Board rejects MPD's arguments and finds no cause to modify, set aside, or remand the Arbitrator's Award. Accordingly, MPD's request is denied and the matter is dismissed in its entirety.

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 vote of Board Chairperson Charles Murphy and Board members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

Washington, D.C.
December 18, 2019

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[35] Award at 15.
[36] *E.g., MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6734, Slip Op. No. 1705 at 5, PERB Case No. 19-A-02 (2019).
[37] *MPD v. NAGE Local R3-5 ex. rel. Burrell*, Slip Op. No. 785 at 4, PERB Op. No. 03-A-08 (2006) (citing *UDC v. UDCFA*, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).
[38] *FEMS v. AFGE, LOCAL 3721*, 51 D.C. Reg. 4158, Slip Op. 728, PERB Case No. 2-A-08 (2004).
[39] *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. 20-A-01, Slip Op.1731, was sent by File and ServeXpress to the following parties on this the 30th day of December 2019.

Milena Mikailova
Assistant Attorney General
Personnel and Labor Relations Section
441 Fourth Street, NW, Suite 1180N
Washington, D.C. 20001

Daniel J. McCartin
Conti Fenn, LLC
36 South Charles Street, Suite 2501
Baltimore, Maryland 21201

_____/s/_____
Sheryl Harrington
Public Employee Relations Board