

Notice: This decision may be formally revised within thirty days of issuance 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,	)	
Petitioner	)	PERB Case No. 24-A-05
v.	)	Opinion No. 1873
	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	
Respondent	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On January 29, 2024, the District of Columbia Metropolitan Police Department (MPD) filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), seeking review of an arbitration award (Award) dated January 8, 2024. The Award sustained MPD’s charges against a police officer (Grievant), but reversed the Grievant’s termination and mitigated the penalty to a 60-calendar day suspension. MPD seeks review on the grounds that the Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) filed an Opposition, asking the Board to deny MPD’s request.

Upon consideration of the Arbitrator’s conclusions, applicable law, and the record presented by the parties, the Award is remanded back to the Arbitrator for the reasons stated herein.

**II. Arbitration Award**

**A. Background**

The Arbitrator made the following factual findings. The Grievant was employed as an MPD officer for approximately twelve years. On or about August 19, 2019, MPD completed an incident summary sheet in a misconduct investigation against the Grievant prior to the incident that resulted in MPD's charges in this case.<sup>1</sup> The incident summary stated that the Grievant "is potentially a target of a confidential criminal investigation" and the allegation listed was "prejudicial conduct."<sup>2</sup> On or about August 19, 2019, the Grievant was placed in a non-contact duty assignment<sup>3</sup> and his police powers revoked.<sup>4</sup>

On or about May 22, 2021, the Grievant was present in a parking lot located at the 3600 block of Jay Street NE when gun shots were fired at another individual by unknown assailants.<sup>5</sup> The Grievant took cover.<sup>6</sup> CCTV cameras showed the Grievant holding a silver weapon.<sup>7</sup> The Grievant did not have a license to carry a pistol in the District of Columbia.<sup>8</sup> After MPD officers responded to the scene, the Grievant left without identifying himself as an officer.<sup>9</sup> The incident resulted in a homicide.<sup>10</sup> On or about May 24, 2021, an MPD officer reviewed CCTV footage and recognized the Grievant.<sup>11</sup> On or about June 4, 2021, the Grievant was interviewed concerning the incident.<sup>12</sup>

On or about June 24, 2021, the Grievant was federally indicted for the offense of bribery and false statement in a matter unrelated to the investigation of the shooting.<sup>13</sup>

On August 3, 2021, MPD generated Incident Summary ("IS") numbers concerning the May 22, 2021 incident.<sup>14</sup> The U.S. Attorney's Office declined to prosecute the Grievant for possession of a firearm and informed MPD that it could not establish such a charge beyond a reasonable doubt.<sup>15</sup> The Grievant received a notice of proposed adverse action on or about December 10, 2021.<sup>16</sup> The notice contained three charges and four specifications.<sup>17</sup>

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<sup>1</sup> Award at 7.

<sup>2</sup> Award at 7.

<sup>3</sup> Non-contact duty is an assignment to an MPD element with powers revoked and restricted contact with the public and no loss of salary.

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

<sup>5</sup> Award at 7.

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

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

<sup>8</sup> Award at 7.

<sup>9</sup> Award at 7.

<sup>10</sup> Award at 7.

<sup>11</sup> Award at 7-8.

<sup>12</sup> Award at 8.

<sup>13</sup> Award at 8. The Award was issued on January 8, 2024. In the Request, MPD notes that the Grievant was found guilty of conspiracy, bribery, and false statement on January 11, 2024. *See* Request at 15.

<sup>14</sup> Award at 8.

<sup>15</sup> Award at 8.

<sup>16</sup> Award at 8.

<sup>17</sup> Award at 8-9. Charge 1 alleged violation of General Order 120.21, Attachment A, Part A-14, which states, "Neglect of Duty to which assigned, or required by rules and regulations adopted by the Department." Charge 1 contained one

The Grievant requested a hearing.<sup>18</sup> On or about July 6, 2022, an Adverse Action Hearing was convened.<sup>19</sup> The Panel made findings and concluded the Grievant was guilty of all charges and specifications.<sup>20</sup> The panel unanimously found the Grievant guilty of Charge One, Specification One, and Charge Three, Specification Three.<sup>21</sup> By a split of 2-1, the Panel found the Grievant guilty of Charge Two, Specification One, and Charge Three, Specification Two.<sup>22</sup> The panel unanimously recommended termination.<sup>23</sup> On or about August 15, 2022, the Grievant was provided the Final Notice of Adverse Action.<sup>24</sup>

The Grievant appealed the decision to the Chief of Police, who denied the appeal.<sup>25</sup> The Grievant's employment was terminated.<sup>26</sup> On October 20, 2022, FOP invoked arbitration on behalf of the Grievant.<sup>27</sup>

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

The Arbitrator determined that the issues presented for decision in this case were the following:<sup>28</sup>

1. Whether the Department imposed adverse action against the Grievant in violation of D.C. Code § 5-1031 ("the 90-day rule")?
2. Whether there was sufficient evidence to sustain the charges against [the Grievant]?
3. Whether termination is an appropriate penalty?

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Specification. Award at 8. Charge 2 alleged violation of General Order 120.21, Attachment A, Part A-7, which "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." Award at 8. Charge 2 contained one Specification. Award at 8. Charge 3 alleged violation of General Order 120.21, Attachment A, Part A-12, which states, "Conduct unbecoming 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 any law, municipal ordinance, or regulation of the District of Columbia." Award at 8. Charge 3 contained two Specifications. Award at 8-9.

<sup>18</sup> Award at 9.

<sup>19</sup> Award at 9.

<sup>20</sup> Award at 9.

<sup>21</sup> Award at 9.

<sup>22</sup> Award at 9.

<sup>23</sup> Award at 9.

<sup>24</sup> Award at 9.

<sup>25</sup> Award at 9.

<sup>26</sup> Award at 9.

<sup>27</sup> Award at 9.

<sup>28</sup> Award at 2.

The Arbitrator sustained FOP's grievance, in part, and denied it, in part, for the reasons below.

### **1. The 90-Day Rule**

On the first issue, the Arbitrator found that MPD was not barred from bringing charges by D.C. Official Code § 5-1031 ("the 90-day rule"), which required MPD to commence an adverse action against its police officers within ninety (90) business days of the date MPD has "notice of the act or occurrence allegedly constituting cause."<sup>29</sup> The Arbitrator noted that when "the act or occurrence allegedly constituting cause is the subject of a criminal investigation," the 90-day period must be tolled "until the conclusion of the investigation."<sup>30</sup>

The Arbitrator found that the criminal investigation into the act or occurrence allegedly constituting cause for MPD's charges against the Grievant in the present case concluded on August 3, 2021.<sup>31</sup> Therefore, the Arbitrator found that MPD's Notice of Proposed Adverse Action, which was served on December 10, 2021, was within the time allowed by the 90-day rule.<sup>32</sup>

### **2. Sufficiency of MPD's Charges against the Grievant**

The Arbitrator found that there is sufficient evidence to sustain MPD's charges against the Grievant.<sup>33</sup> The Arbitrator noted that it is undisputed that the Grievant was in the vicinity of a shooting which resulted in a homicide and that, rather than identify himself to fellow officers, the Grievant chose to leave the scene.<sup>34</sup> The Arbitrator further noted that the Grievant did not contact the detectives or anyone in the Department between the time he left the scene and the time he was contacted by detectives for an interview.<sup>35</sup> The Arbitrator found the Grievant's argument, that he was relieved of his responsibility to identify himself to fellow officers because he was in a noncontact status, to be without merit.<sup>36</sup> Though the Grievant's police powers had been revoked because he was the subject of an investigation, the Arbitrator noted that the Grievant remained employed by the MPD.<sup>37</sup> The Arbitrator therefore found substantial evidence that the Grievant

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<sup>29</sup> Award at 21. In January 2023, the D.C. Council enacted the Comprehensive Policing and Justice Reform Amendment Act of 2022 ("Reform Act"). See D.C. Law 24-345, 70 D.C. Reg. 953 (Jan. 27, 2023). The Reform Act repealed D.C. Code § 5-1031(a-1) ("the 90-day rule"), as it applied to MPD officers, and applied the repeal "to any matter pending before any court of adjudicatory body." See *id.*

<sup>30</sup> Award at 21.

<sup>31</sup> Award at 21.

<sup>32</sup> Award at 21.

<sup>33</sup> Award at 21.

<sup>34</sup> Award at 22.

<sup>35</sup> Award at 22.

<sup>36</sup> Award at 22.

<sup>37</sup> Award at 22.

neglected his duties and engaged in conduct unbecoming when he failed to identify himself on or about May 22, 2021.<sup>38</sup>

The Arbitrator further found that the evidence supports MPD's charges against the Grievant regarding the Grievant's possession of a firearm.<sup>39</sup> Based on the record, the Arbitrator determined that the Grievant possessed a firearm and did not have a license to carry that firearm in the District, in violation of the law.<sup>40</sup> For these reasons, the Arbitrator concluded that the weight of the evidence supports the charges sustained by the Panel.<sup>41</sup>

### 3. Appropriate Penalty

The Arbitrator determined that MPD's termination of the Grievant was not an appropriate penalty.<sup>42</sup> The Arbitrator noted that, after finding sufficient evidence to sustain the charges against the Grievant, the Arbitrator must next determine whether the penalty imposed by MPD is supported by the criteria established in *Douglas v. Veterans Administration*, 5 MPR 280 (1981), referred to as the Douglas Factors.<sup>43</sup> The Arbitrator noted that it is the employer's burden to establish there is substantial evidence to sustain the charges and that the penalty of termination is supported by the Douglas Factors.<sup>44</sup>

The Arbitrator discussed the Douglas Factors, which are:<sup>45</sup> (1) The nature and seriousness of the offense; (2) The employee's job level and type of employment; (3) The employee's past disciplinary record; (4) The employee's past work record, including length of service, performance on the job; (5) The effect of the offense upon the employee's ability to perform at a satisfactory level; (6) Consistency of the penalty with those imposed upon other employee for the same or similar offenses; (7) Consistency of the penalty with any applicable agency table of penalties; (8) The notoriety of the offense or its impact upon the reputation of the agency; (9) The clarity with which the employee was on notice of any rules that were violated in committing the offense; (10) The potential for the employee's rehabilitation (11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith; (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The Arbitrator found Douglas factors one and two to be aggravating.<sup>46</sup> The Arbitrator noted that even if the Grievant was unaware that the shooting resulted in a homicide, he was still

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<sup>38</sup> Award at 22.

<sup>39</sup> Award at 22.

<sup>40</sup> Award at 22-23.

<sup>41</sup> Award at 23.

<sup>42</sup> Award at 23.

<sup>43</sup> Award at 19-20.

<sup>44</sup> Award at 20.

<sup>45</sup> Award at 20 (citing to *Douglas v. Veterans Administration*, 5 MPR 280 (1981)).

<sup>46</sup> Award at 23.

obligated to contact his fellow officers investigating the shooting.<sup>47</sup> The Arbitrator also found it highly relevant that, as a police officer, the Grievant engaged in misconduct that was in violation of the law.<sup>48</sup>

The Arbitrator found Douglas factor three to be mitigating.<sup>49</sup> Even though MPD found this factor to be aggravating, the Arbitrator noted that the Grievant had no past discipline.<sup>50</sup> The Arbitrator found that, while the Grievant was under investigation and, later, indicted for unrelated conduct, it is inappropriate to use as of yet unproven allegations in considering the Grievant's past disciplinary record.<sup>51</sup> The Arbitrator noted, however, that any intervening conviction may impact remedy.<sup>52</sup>

The Arbitrator found Douglas factor four to be mitigating.<sup>53</sup> The Arbitrator noted that MPD also categorized this factor as mitigating, and the Union agreed.<sup>54</sup>

The Arbitrator found Douglas factor five to be neutral.<sup>55</sup> The Arbitrator noted that MPD concluded this factor was aggravating, given the Grievant's rampant disrespect for the law and duties as a member of the Metropolitan Police Department.<sup>56</sup> However, given the Grievant's previous commendations, lack of prior discipline, the testimony of an MPD Lieutenant on the Grievant's behalf, and the lack of testimony indicating the Grievant's supervisors had no confidence in the employee's ability to perform assigned duties in the future, the Arbitrator determined that this factor is reasonably categorized as neutral.<sup>57</sup>

The Arbitrator found Douglas factors six and seven to be mitigating.<sup>58</sup> The Arbitrator determined that the consistency of penalty with those imposed upon other employees for the same or similar offense to be a mitigating factor.<sup>59</sup> While the Arbitrator agreed with MPD that two of the comparator cases presented by the Union involving neglect of duty concerned dissimilar circumstances, the Arbitrator found one of the Union's cases to be an appropriate comparator.<sup>60</sup> In that comparator case, the Arbitrator noted that the officer involved not only possessed the firearm while his police powers were revoked in violation of law, but he also discharged the

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<sup>47</sup> Award at 24.

<sup>48</sup> Award at 24.

<sup>49</sup> Award at 24.

<sup>50</sup> Award at 24.

<sup>51</sup> Award at 24.

<sup>52</sup> Award at 28.

<sup>53</sup> Award at 24.

<sup>54</sup> Award at 24.

<sup>55</sup> Award at 25.

<sup>56</sup> Award at 25.

<sup>57</sup> Award at 25.

<sup>58</sup> Award at 25.

<sup>59</sup> Award at 25.

<sup>60</sup> Award at 25.

weapon, unlike the Grievant.<sup>61</sup> The Arbitrator determined that, as one of the offenses involved, possession of a firearm in violation of the law, is the same in both cases, the penalty imposed in the comparator case is highly relevant.<sup>62</sup> Therefore, the Arbitrator found these factors to be reasonably categorized as mitigating.<sup>63</sup>

The Arbitrator found Douglas factor eight to be neutral.<sup>64</sup> The Arbitrator noted that MPD found this factor to be aggravating.<sup>65</sup> However, the Arbitrator found MPD's aggravating categorization to be based on conjecture.<sup>66</sup> The Arbitrator noted that there was no media or other publicity related to the Grievant's misconduct and there is no proof in the record that any member of the community knew that the Grievant had committed any offense.<sup>67</sup> Therefore, the Arbitrator found Douglas factor eight to be reasonably categorized as neutral.<sup>68</sup>

The Arbitrator found Douglas factor nine to be aggravating.<sup>69</sup> The Arbitrator noted that the Grievant was an officer with over a decade of experience on the force.<sup>70</sup> The Arbitrator found that there is no credible argument that the Grievant was unaware of his responsibility to identify himself to his fellow officers at the scene of a crime nor is there any doubt that the Grievant knew he should refrain from unlawfully carrying a firearm in the District.<sup>71</sup>

The Arbitrator found Douglas factors ten, eleven and twelve to be mitigating or neutral.<sup>72</sup> The Arbitrator noted that MPD categorized factor ten aggravating, did not find any mitigating circumstances to exist in regard to factor eleven, and stated as to factor twelve: "The panel finds that the recommended discipline [of termination] is an effective deterrent for such wanton conduct and that no combination of alternative sanctions could be reasonably relied upon to deter other members of the agency from engaging in similar conduct."<sup>73</sup> In light of the record, the Arbitrator disagreed with MPD's assessment of Douglas factors ten and twelve.<sup>74</sup>

Concerning Douglas factor ten, the Arbitrator determined that the Grievant's potential for rehabilitation is a mitigating factor.<sup>75</sup> The Arbitrator noted that the Grievant had no prior discipline, had been recognized as an officer of the year just two years prior to the incident in

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<sup>61</sup> Award at 26.

<sup>62</sup> Award at 26.

<sup>63</sup> Award at 25-26.

<sup>64</sup> Award at 26.

<sup>65</sup> Award at 26.

<sup>66</sup> Award at 26.

<sup>67</sup> Award at 26.

<sup>68</sup> Award at 26.

<sup>69</sup> Award at 26.

<sup>70</sup> Award at 26.

<sup>71</sup> Award at 26.

<sup>72</sup> Award at 27.

<sup>73</sup> Award at 27 (citing to Agency Record at 937).

<sup>74</sup> Award at 27.

<sup>75</sup> Award at 27.

question, and was involved in mentoring youth in the Parkside community in Northeast D.C.<sup>76</sup> These factors, balanced against the misconduct in which the Grievant engaged, persuaded the Arbitrator that MPD's finding that the factor was aggravating is not supported by the record.<sup>77</sup>

Concerning Douglas Factor Twelve, the Arbitrator found that the misconduct, in and of itself, does not warrant termination in the first instance given the mitigating factors present in the instant case.<sup>78</sup> The Arbitrator determined that a substantial suspension would be an adequate sanction to deter such conduct in the future, and found such alternative sanction to be appropriate.<sup>79</sup>

Upon consideration of the Douglas factors, the majority of which the Arbitrator found to be mitigating and neutral, the Arbitrator concluded that MPD's penalty of termination exceeds the tolerable limits of reasonableness and was not supported by the Douglas Factors.<sup>80</sup> The Arbitrator found that, while MPD categorized seven of the first eleven Douglas Factors as aggravating and thus concluded termination was the appropriate penalty, the record only reasonably supports finding three of the factors aggravating.<sup>81</sup> Therefore, the Arbitrator determined termination is not an appropriate penalty.<sup>82</sup>

The Arbitrator mitigated the Grievant's penalty to a 60-calendar day prior suspension without pay.<sup>83</sup> The Arbitrator found that the conversion of the Grievant's termination to a substantial unpaid suspension brings the penalty within the parameters of reasonableness.<sup>84</sup>

### **III. Discussion**

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an arbitrator was without, or exceeded, his or her jurisdiction; (2) if the award on its face is contrary to law and public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.<sup>85</sup> MPD requests review on the grounds that the Award is contrary to law and public policy.

In the Award, the Arbitrator noted that it is necessary to acknowledge the fact that the Grievant was in a non-contact status and his police powers had been revoked because he was under investigation and later federally indicted for unrelated crimes.<sup>86</sup> However, the Arbitrator noted that the indictment "is not a conviction, and it is not appropriate for this Arbitrator to make any

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<sup>76</sup> Award at 27.

<sup>77</sup> Award at 27.

<sup>78</sup> Award at 27.

<sup>79</sup> Award at 27.

<sup>80</sup> Award at 27.

<sup>81</sup> Award at 27.

<sup>82</sup> Award at 27.

<sup>83</sup> Award at 28.

<sup>84</sup> Award at 28.

<sup>85</sup> D.C. Official Code § 1-605.02(6).

<sup>86</sup> Award at 28.



negative inference as to the Grievant's ability to be rehabilitated or the appropriateness of alternative sanctions in light of the indictment."<sup>87</sup> Notwithstanding, the Arbitrator states in a footnote that, "[a]ny intervening conviction may, of course, impact remedy."<sup>88</sup>

MPD states that the Grievant's unrelated misconduct investigation stemming from a Federal indictment has since resulted in a jury's January 11, 2024 entry of guilty verdicts against the Grievant for conspiracy in violation of 18 U.S.C. § 371, bribery in violation of 18 U.S.C. § 201(b)(2)(C), and false statement in violation of 18 U.S.C § 1001.<sup>89</sup>

Arbitrators not infrequently retain jurisdiction regarding part or all of a remedy.<sup>90</sup> In deciding whether an award in which an arbitrator has retained jurisdiction is final, the Board considers whether the matter the arbitrator retained jurisdiction to address was resolved or unresolved by the award.<sup>91</sup> Because the Arbitrator has retained jurisdiction on remedy here, it is appropriate to remand the Award back to the Arbitrator for consideration of the reinstatement remedy in light of the Grievant's subsequent conviction. Therefore, the Award is remanded back to the Arbitrator for a finding on remedy.

### **ORDER**

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

1. The Arbitration Award is remanded back to the Arbitrator; and
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

#### **BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

May 16, 2024

**Washington, D.C.**

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<sup>87</sup> Award at 28.

<sup>88</sup> Award at 28.

<sup>89</sup> Request at 15.

<sup>90</sup> *DCPS v. Council of School Officers, Local 4, American Federation of School Administrators*, 60 D.C. Reg. 12075, Slip Op. No. 1402 at 2, PERB Case No. 13-A-09 (2013).

<sup>91</sup> *Id.*

**APPEAL RIGHTS**

A final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.