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

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In the Matter of:	)	
	)	
Fraternal Order of Police/Metropolitan Police	)	
Department Labor Committee	)	
(on behalf of Johnny Norris)	)	
Petitioner	)	PERB Case No. 23-A-01
	)	Opinion No. 1843
v.	)	
	)	
District of Columbia Metropolitan	)	
Police Department	)	
	)	
Respondent	)	

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**DECISION AND ORDER**

**I. Statement of the Case**

On March 3, 2023, Johnny Norris (Grievant) timely filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA)<sup>1</sup> seeking review of a February 13, 2023, arbitration award (Award).<sup>2</sup> In the Award, the Arbitrator denied a grievance that the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) filed on the Grievant’s behalf and upheld the decision of the District of Columbia Metropolitan Police Department (MPD) to terminate the Grievant, an MPD officer.<sup>3</sup> FOP now argues that the Award is contrary to law and public policy.<sup>4</sup>

Upon consideration of the Arbitrator’s conclusions, applicable law, and the record presented by the parties, the Board concludes that the Award is not contrary to law and public policy. Therefore, the arbitration review request is denied.

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

<sup>2</sup> On March 17, 2023, the Request was dismissed on the grounds that the Grievant was not one of the parties in the underlying arbitration and thus, lacked standing to appeal the Award. On April 12, 2023, the Grievant and FOP jointly filed a Motion to Amend the Arbitration Review Request (Motion to Amend) and an Amended Arbitration Review Request (Amended Request). On April 25, 2023, the case was reinstated, and the Amended Request was accepted into the record following FOP’s substitution for the Grievant.

<sup>3</sup> Award at 82-83.

<sup>4</sup> Amended Request at 3.

## II. Arbitration Award

### A. Background

The Arbitrator made the following factual findings. The Grievant began his career as an MPD officer approximately four and a half years before the May 23, 2021, incident that led to his termination.<sup>5</sup> At approximately 7:30 p.m. on the evening of the incident, the Grievant and his female friend arrived at a bar located in Falls Church, Virginia.<sup>6</sup> They spent several hours drinking.<sup>7</sup> One of the Grievant's male friends eventually joined them.<sup>8</sup> The Grievant later testified to MPD's Internal Affairs Division (IAD) that he consumed three or four alcoholic beverages while at the bar.<sup>9</sup> However, the group's receipt from the bar showed they purchased a total of thirty-four drinks.<sup>10</sup>

At approximately 11:55 p.m., the Grievant's female friend left the bar and drove away in her vehicle.<sup>11</sup> The Grievant and his male friend left the bar a few minutes later in separate vehicles.<sup>12</sup> Shortly thereafter, the Grievant's female friend crashed her car into a telephone pole in Alexandria Virginia, causing an explosion and a power outage in the area.<sup>13</sup> She was uninjured, but the airbag deployed, and her vehicle was damaged.<sup>14</sup> She immediately called the Grievant.<sup>15</sup>

Officers from the Fairfax Country Police Department (FCPD), Arlington County Police Department (ACPD), and Alexandria City Police Department (APD) (collectively, "Virginia officers") arrived at the scene and approached the Grievant's female friend to investigate her for driving while intoxicated (DWI).<sup>16</sup> They heard her on the phone with the Grievant, asking him to come to the site of the accident so the police officers would let her go.<sup>17</sup> Officers from FCPD and APD spoke to the Grievant on his female friend's phone, and the Grievant advised them that he was on his way to the scene.<sup>18</sup>

The Grievant arrived at the scene of the accident.<sup>19</sup> He loudly announced his presence and identified himself as an MPD officer.<sup>20</sup> The surrounding Virginia officers later testified that they observed the Grievant "swaying, slurring his speech, and smelling of alcohol, all signs of

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<sup>5</sup> Award at 3.

<sup>6</sup> Award at 3.

<sup>7</sup> Award at 3.

<sup>8</sup> Award at 3.

<sup>9</sup> Award at 10.

<sup>10</sup> Award at 10, fn. 16.

<sup>11</sup> Award at 3.

<sup>12</sup> Award at 3.

<sup>13</sup> Award at 3.

<sup>14</sup> Award at 3.

<sup>15</sup> See Award at 4.

<sup>16</sup> Award at 4.

<sup>17</sup> Award at 4.

<sup>18</sup> Award at 4.

<sup>19</sup> Award at 5.

<sup>20</sup> Award at 5.

intoxication.”<sup>21</sup> The APD officer who had spoken to the Grievant over the phone greeted him and explained that a DWI investigation was underway.<sup>22</sup> The Grievant was in plain clothes and the APD officer inquired whether the Grievant was really a police officer.<sup>23</sup> The Grievant cursed at the APD officer and produced his MPD badge.<sup>24</sup> The APD officer attempted to take the badge from the Grievant’s hand for further inspection, but the Grievant would not permit him to hold it.<sup>25</sup> The APD officer later testified that the Grievant’s demeanor shifted in that moment, becoming aggressive.<sup>26</sup>

The Grievant referenced his experience investigating car accidents in D.C. and challenged the APD officer’s assessment of the situation, suggesting that perhaps a different vehicle was at fault for the accident.<sup>27</sup> The Grievant “tapped [the APD officer’s] chest repeatedly with his right hand, making contact at least five times in a matter of seconds.”<sup>28</sup> The APD officer advised the Grievant not to touch him.<sup>29</sup> The Grievant commented to one of the FCPD officers that he did not want to speak to the APD officer for fear of becoming angry and “get[ting] locked up for knocking him out.”<sup>30</sup> The APD officer told the Grievant that he was observably intoxicated and advised him to leave or risk being arrested.<sup>31</sup> The APD officer turned away from the Grievant and gave him the opportunity to depart, but the Grievant explicitly refused to leave.<sup>32</sup> The FCPD officer told the Grievant that he was not helping his female friend, but was interfering with the DWI investigation and unnecessarily risking his MPD job.<sup>33</sup> The Grievant ignored this advice and asked the Virginia officers whether they understood how to properly evaluate a field sobriety test and whether they had video footage of the crash.<sup>34</sup>

The Grievant’s male friend arrived at the scene, briefly spoke with the FCPD officer, and “eventually escorted the [Grievant] away from the immediate area of the investigation.”<sup>35</sup> The FCPD officer advised his colleague that they must keep the Grievant from driving off in his vehicle because “they would be liable if something happened.”<sup>36</sup>

The Virginia officers administered sobriety and breathalyzer tests to the Grievant’s female friend before arresting her for a DWI.<sup>37</sup> As they prepared to leave the crash site, the Virginia

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<sup>21</sup> Award at 5.

<sup>22</sup> Award at 5.

<sup>23</sup> Award at 5.

<sup>24</sup> Award at 5.

<sup>25</sup> Award at 5.

<sup>26</sup> Award at 5.

<sup>27</sup> Award at 5.

<sup>28</sup> Award at 5.

<sup>29</sup> Award at 6.

<sup>30</sup> Award at 6.

<sup>31</sup> See Award at 6.

<sup>32</sup> Award at 6.

<sup>33</sup> Award at 6.

<sup>34</sup> Award at 6-7.

<sup>35</sup> Award at 7. The Report does not indicate how the Grievant’s male friend became aware of the crash.

<sup>36</sup> Award at 7.

<sup>37</sup> Award at 7.

officers received a call about a possible fight in the vicinity and heard yelling from a hotel parking lot across the street.<sup>38</sup> Upon inspection, they observed that the Grievant and his male friend were “involved in what appeared to be a physical and verbal altercation with one another.”<sup>39</sup>

An APD officer approached the men and inquired as to their wellbeing.<sup>40</sup> The Grievant responded by yelling obscenities and disparaging the APD.<sup>41</sup> An FCPD officer observed the Grievant’s male friend attempting to guide the Grievant into the passenger seat of his car.<sup>42</sup> The FCPD officer asked the Grievant’s friend whether everything was resolved, and the Grievant cursed at him and shouted a racial slur.<sup>43</sup> The Grievant’s friend apologized on his behalf.<sup>44</sup> The FCPD officer suggested that the two men use a ride-share service, as the Grievant’s friend also showed signs of intoxication.<sup>45</sup>

The Grievant’s friend called a ride-share service.<sup>46</sup> As they waited for their ride, the Grievant continued to yell at the Virginia officers while his friend restrained him.<sup>47</sup> The Virginia officers later testified that he shouted more racial expletives at them and threatened to physically harm them.<sup>48</sup> The APD officer testified that the Grievant was “angry and aggressive,” threatening that if the APD officer came to D.C., the MPD officers would not treat him well.<sup>49</sup> The APD officer testified that he had probable cause at that time to arrest the Grievant for “disorderly conduct” and being “drunk in public.”<sup>50</sup>

At approximately 2 a.m. on the night of the incident, an APD officer informed MPD’s Internal Affairs Division (IAD) of the Grievant’s conduct.<sup>51</sup> On May 24, 2021, IAD generated an Incident Summary number for the matter.<sup>52</sup> IAD conducted further investigation and sustained the allegations against the Grievant.<sup>53</sup> On September 29, 2021, MPD’s Disciplinary Review Division served the Grievant with a Notice of Proposed Adverse Action (Notice).<sup>54</sup> The Notice set forth five administrative charges, each with one or more specifications.<sup>55</sup> The charges were as follows—Charge No. 1: being under the influence of alcohol while off duty; Charge No. 2: failing to obey orders or directives issued by the Chief of Police concerning the proper conduct for MPD officers;

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<sup>38</sup> Award at 7.

<sup>39</sup> Award at 7. A hotel employee later provided IAD with testimony corroborating that observation. *See* Award at 9-10.

<sup>40</sup> Award at 7.

<sup>41</sup> Award at 7.

<sup>42</sup> Award at 8.

<sup>43</sup> Award at 8.

<sup>44</sup> Award at 8.

<sup>45</sup> Award at 8.

<sup>46</sup> *See* Award at 8.

<sup>47</sup> Award at 8.

<sup>48</sup> Award at 8-9.

<sup>49</sup> *See* Award at 8.

<sup>50</sup> Award at 8.

<sup>51</sup> Award at 9.

<sup>52</sup> Award at 9, fn. 14.

<sup>53</sup> Award at 9-11.

<sup>54</sup> Award at 11.

<sup>55</sup> Award at 11-14.

Charge No. 3: engaging in conduct prejudicial to the police force; Charge No. 4: engaging in conduct unbecoming an officer; and Charge No. 5: being involved in the commission of an act which would constitute a crime, with or without a conviction.<sup>56</sup> The Notice included an analysis of the *Douglas*<sup>57</sup> factors to support MPD's conclusion that termination was the only appropriate penalty for the Grievant's actions.<sup>58</sup>

The Grievant requested an administrative action hearing (Hearing) which convened on September 29, 2021, March 4, 2022, and March 7, 2022.<sup>59</sup> The Grievant pled "Not Guilty" to all the charges and specifications except Charge No. 2, Specification No. 1, to which he pled "Guilty with Explanation."<sup>60</sup> The Adverse Action Panel (Panel) found the Grievant guilty of all charges and specifications except Charge No. 3, Specification No. 1.<sup>61</sup> The Panel recommended termination for Charge No. 5, Specification No. 1.<sup>62</sup> Accordingly, on March 25, 2023, MPD issued a Final Notice of Adverse Action (Final Notice), informing the Grievant that he would be terminated on April 11, 2022.<sup>63</sup> FOP appealed the determination on the Grievant's behalf, but the Chief of Police denied the appeal.<sup>64</sup> The Grievant's termination was effectuated on May 9, 2022.<sup>65</sup> FOP invoked arbitration.<sup>66</sup>

## B. Arbitrator's Findings

The parties submitted the following issues to the Arbitrator for consideration:

- (1) Whether there was sufficient evidence to sustain the charges against [the Grievant]?
- (2) Whether termination is an appropriate penalty?<sup>67</sup>

The Arbitrator established that his authority stemmed solely from the parties' collective bargaining agreement (CBA) and thus, the underlying issue was whether the adverse action MPD

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<sup>56</sup> See Award at 11-14.

<sup>57</sup> In *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), the Merit Systems Protection Board established a list of twelve factors an agency must consider when determining an appropriate penalty to impose for employee misconduct.

<sup>58</sup> Award at 14. Under *Douglas*, the agency is obligated to determine *an* appropriate penalty to impose for employee misconduct. See *Douglas*, 5 M.S.P.B. at 330. Here however, MPD went a step further and concluded that termination was the *only* appropriate penalty to impose on the Grievant.

<sup>59</sup> Award at 14.

<sup>60</sup> Award at 14-15.

<sup>61</sup> Award at 15.

<sup>62</sup> Award at 15.

<sup>63</sup> Award at 15.

<sup>64</sup> Award at 15.

<sup>65</sup> Award at 15.

<sup>66</sup> Award at 15.

<sup>67</sup> Award at 15-16.

imposed on the Grievant was consistent with the CBA requirement that “discipline may be imposed only for cause, as authorized in D.C. Official Code § 616.51.”<sup>68</sup>

At Arbitration, MPD cited *Stokes v. D.C.*<sup>69</sup> for the proposition that an “agency[’s] decision should not be set aside if it is supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law.”<sup>70</sup> The Arbitrator dismissed this argument, finding that *Stokes* does not provide a mandatory standard of review in situations where the parties select an arbitrator in accordance with a CBA for the purposes of determining whether a disciplinary decision is for cause.<sup>71</sup> The Arbitrator found that an arbitrator has wide discretion to overturn an adverse action and/or the resulting penalties, subject only to the limitations contained in the parties’ CBA.<sup>72</sup> The Arbitrator determined that MPD was subject to a preponderance of the evidence standard.<sup>73</sup> Faced with contradictory narratives concerning the events of this case, the Arbitrator principally relied on body worn camera (BWC) footage, the Grievant’s testimony, and sworn testimony from the Virginia officers to establish an evidentiary record.<sup>74</sup>

The Arbitrator’s analysis focused on the merits of Charge No. 5 because that was the charge for which MPD terminated the Grievant.<sup>75</sup> Charge No. 5 asserted that the Grievant violated MPD General Order Series 120.21, Attachment A, Part A-7 through his involvement in the commission of an act which would constitute a crime, regardless of the fact that he was not convicted.<sup>76</sup> The sole Specification under that Charge stated that multiple Virginia officers indicated they had probable cause to arrest the Grievant for violations of Virginia Criminal Code (VCC) § 18.2-388 (intoxication in public); § 18.2-415 (disorderly conduct in public places); § 18.2-57 (assault and battery against a law enforcement officer); and § 18.2-460 (obstructing justice).<sup>77</sup>

Regarding the first of these crimes, “intoxication in public,” the Arbitrator found that the Grievant’s actions indisputably occurred in a public place.<sup>78</sup> Thus, the Arbitrator examined the evidence demonstrating the Grievant’s intoxication.<sup>79</sup> At the Hearing, the Grievant testified that “he was inebriated and impaired by alcohol” and BWC footage captured his [male] friend’s statement that he was drunk.<sup>80</sup> Additionally, several Virginia officers testified that he displayed “various signs of intoxication at the accident scene and in the [hotel] parking lot.”<sup>81</sup> The Arbitrator

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<sup>68</sup> Award at 16 (citing Article 12, Section 1.1(b) of the CBA).

<sup>69</sup> 502 A.2d 1006, 1010 (D.C. 1985); *Pitt v. DOC*, 819 A.2d 955, 958 (D.C. 2003).

<sup>70</sup> Award at 17.

<sup>71</sup> Award at 62.

<sup>72</sup> Award at 62.

<sup>73</sup> Award at 62-63. The Arbitrator found that pursuant to MPD’s internal rules, the preponderance of the evidence “means that the evidence in support of the proposition outweighs the evidence against, no matter how slightly” and “the belief or the truth of the matter must be actual not speculative.” Award at 63, fn. 95.

<sup>74</sup> Award at 63.

<sup>75</sup> Award at 64.

<sup>76</sup> Award at 14.

<sup>77</sup> Award at 14.

<sup>78</sup> Award at 64-65.

<sup>79</sup> Award at 65.

<sup>80</sup> Award at 65.

<sup>81</sup> Award at 65.

dismissed FOP's argument that there was no chemical evidence of the Grievant's intoxication, finding that VCC § 18.2-388 only requires the observable indicators of intoxication, which the Virginia officers testified the Grievant displayed.<sup>82</sup> The Arbitrator concluded that MPD proved the Grievant's intoxication by a preponderance of the evidence and had probable cause to arrest the Grievant for violating VCC § 18.2-388.

The Arbitrator addressed the Panel's conclusion that the Grievant violated VCC § 18.2-415(a)(1) by engaging in disorderly conduct in a public space. Under that provision, guilt is established where a person "while in a public place engages in conduct having a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct is directed."<sup>83</sup> The Arbitrator determined that "a violation occurs if an officer reasonably feels that he or she [i]s going to have to fight to subdue the person."<sup>84</sup> The Arbitrator observed that "there is no requirement that an officer must have the immediate *impression* of a pending fight, or that a person's behavior must be *assaultive*, to be charged with a violation of § 18.2-415."<sup>85</sup> The Arbitrator found that the Panel properly concluded that the Grievant violated § 18.2-415(a)(1) based on testimony from the Virginia officers, as well as the Grievant's admission at the Hearing that his verbal threats "could have placed someone in fear."<sup>86</sup> The Arbitrator addressed FOP's argument that "the [Panel] failed to identify the specific disorderly conduct the [Grievant] engaged in," thus failing to demonstrate that he violated VCC § 18.2-415(a)(1).<sup>87</sup> The Arbitrator determined that FOP's contention was unpersuasive because substantial evidence demonstrated that the Grievant "was involved in the commission of acts that would constitute a violation of § 18.2-415."<sup>88</sup>

The Arbitrator discussed the Panel's conclusion that the Grievant violated VCC § 18.2-57 by committing assault and battery against a law enforcement officer.<sup>89</sup> The Arbitrator found that "a violation of VCC § 18.2-57 for common law tortious *assault* occurs if it can be proven that: (1) a person engaged in an overt act intended to place the victim in fear or apprehension of bodily harm; and (2) the act creates reasonable fear or apprehension in the victim."<sup>90</sup> The Arbitrator found that BWC footage clearly shows the Grievant "making repeated, albeit relatively light and rapid" contact with an APD officer's chest, followed by that officer objecting to the contact.<sup>91</sup> FOP argued that the Grievant did not possess the necessary intent to inflict bodily harm or place the APD officer in fear of bodily harm.<sup>92</sup> However, the Arbitrator found that unlawful intent may be imputed from willful touching which is "rude, insolent, or angry" and can be "gathered from

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<sup>82</sup> Award at 65.

<sup>83</sup> Award at 66 (quoting VCC § 18.2-415(a)(1)).

<sup>84</sup> Award at 66 (emphasis in original).

<sup>85</sup> Award at 67.

<sup>86</sup> Award at 66.

<sup>87</sup> Award at 67.

<sup>88</sup> Award at 67-68.

<sup>89</sup> Award at 68-69.

<sup>90</sup> Award at 68 (emphasis in original) (citing *Blankenship v. Commonwealth*, 71 Va. App. 608 (2020); *Parish v. Commonwealth*, 56 Va. App. 324 (2010)).

<sup>91</sup> Award at 68.

<sup>92</sup> Award at 68.

the conduct of the aggressor, viewed in light of the attending circumstances.”<sup>93</sup> The Arbitrator considered the circumstances of this case, and concluded that substantial evidence showed the Grievant violated § 18.2-57.<sup>94</sup>

Lastly, the Arbitrator discussed the Panel’s determination that the Grievant violated VCC § 18.2-460 by obstructing justice.<sup>95</sup> The Arbitrator determined that this charge required proof that the Grievant “knowingly, and without just cause, obstructed a law-enforcement officer in the performance of his duties, or failed or refused to cease such obstruction when required to do so by a law-enforcement officer.”<sup>96</sup> The Arbitrator considered BWC footage from the accident scene, which documented Virginia officers repeatedly ordering the Grievant to leave and the Grievant’s refusal to comply.<sup>97</sup> The Arbitrator also considered an APD officer’s testimony that the Grievant’s behavior impeded the investigation.<sup>98</sup> The Arbitrator addressed FOP’s argument that the Panel’s guilty finding for this charge was unreasonable, given that the Panel found the Grievant’s act of gathering information at the scene did not violate MPD policy.<sup>99</sup> The Arbitrator dismissed FOP’s contention, concluding there was a marked difference between merely gathering information and disrupting an investigation.<sup>100</sup> The Arbitrator concluded that substantial evidence showed the Grievant violated § 18.2-460.

The Arbitrator proceeded to conduct an independent review of the *Douglas* factors to determine whether the Panel imposed an appropriate penalty for the Grievant’s misconduct.<sup>101</sup> The Arbitrator agreed with the Panel’s assessment with respect to all but two of the twelve factors.<sup>102</sup> In sum, the Arbitrator found that “seven of the factors [we]re aggravating, including the most important one, *Douglas* Factor No. 1,<sup>103</sup> four [we]re neutral, and only one, *Douglas* Factor No. 4, [wa]s mitigating.”<sup>104</sup>

Therefore, the Arbitrator found that there was no basis to disturb the penalty.<sup>105</sup>

### III. Discussion

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<sup>93</sup> Award at 68-69 (quoting *Parish*, 56 Va. App. at 330-31).

<sup>94</sup> Award at 69.

<sup>95</sup> Award at 69-70.

<sup>96</sup> Award at 69.

<sup>97</sup> Award at 69-70.

<sup>98</sup> Award at 70.

<sup>99</sup> Award at 69.

<sup>100</sup> Award at 69-70.

<sup>101</sup> Award at 70-83.

<sup>102</sup> Award at 82.

<sup>103</sup> *Douglas* factor No. 1 is “[t]he nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated...” *Douglas*, 5 M.S.P.B. at 332.

<sup>104</sup> Award at 82.

<sup>105</sup> Award at 21.



As a preliminary matter, FOP challenges the Arbitrator's assessment of the facts. FOP offers a factual narrative which characterizes the Grievant's actions in a more favorable light than the Award, asserting that the Arbitrator unjustly "order[ed] [the Grievant] to be terminated for merely engaging in an argument."<sup>106</sup> The Board does not act as a finder of fact, nor does it substitute its judgment for that of the arbitrator on credibility determinations and the weight attributed to evidence.<sup>107</sup> Thus, the Board will not disturb the factual record which the Arbitrator established, nor question the weight the Arbitrator assigned to the available evidence.

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 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. FOP requests review of the Award on the grounds that the Award is contrary to law and public policy.<sup>108</sup>

#### **A. The Award is not contrary to law.**

To set aside an award as contrary to law, the asserting party bears the burden to present applicable law that mandates that the arbitrator arrive at a different result.<sup>109</sup> Further, the asserting party 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."<sup>110</sup> The violation must be so significant that law and public policy mandate a different result.<sup>111</sup>

FOP argues that "the Arbitrator *ignored* the law when he issued [the Award]."<sup>112</sup> FOP's assertion is inaccurate, as the Arbitrator provided detailed analyses concerning each of the four statutory provisions governing the criminal offenses listed under Charge No. 5, Specification No. 1.<sup>113</sup> FOP argues that the Award violated those statutory provisions.<sup>114</sup> This argument is unavailing because it amounts to disagreement with the Arbitrator's statutory interpretation. The Board will not substitute its own legal interpretation for that of the Arbitrator. The Board has held that where, as here, the parties specifically bargained for the Arbitrator's interpretation of the

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<sup>106</sup> Amended Request at 3.

<sup>107</sup> *Teamsters Local Union No. 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO v. DOC*, 41 D.C. Reg. 1510, Slip Op. No. 296 at 4, fn. 6, PERB Case No. 87-A-11 (1994) (citing *AFSCME, District Council 20, Local 2743, AFL-CIO v. DCRA*, 38 D.C. 5076, Slip Op. No. 281 at 3-4, fn. 3, PERB Case No. 90-A-12 (1991)).

<sup>108</sup> Amended Request at 3.

<sup>109</sup> *MPD and FOP/MPD Labor Committee*, 47 D.C. Reg. 717, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000).

<sup>110</sup> *MPD v. FOP/MPD Committee*, 66 D.C. Reg. 6056, Slip Op. No. 1702 at 4, PERB Case No. 18-A-17 (2019).

<sup>111</sup> *Id.*

<sup>112</sup> Amended Request at 9 (emphasis in original).

<sup>113</sup> Award at 64-70.

<sup>114</sup> Amended Request at 9-17.

agreement, the parties have implicitly bargained for the Arbitrator's interpretation of the applicable law and related regulations.<sup>115</sup>

No further discussion is necessary regarding the first three criminal offenses listed under Charge No. 5, Specification No. 1 (VCC § 18.2-388 (intoxication in public); § 18.2-415 (disorderly conduct in public places); and § 18.2-57 (assault and battery against a law enforcement officer)).<sup>116</sup> However, FOP's argument concerning VCC § 18.2-460 (obstructing justice) warrants further attention. FOP asserts that the Arbitrator violated VCC § 18.2-460 by approving the Panel's recommended termination for Charge No. 5, Specification No 1., while also accepting the Panel's finding that the Grievant acted within his rights when he initially approached and questioned the Virginia officers and thus, he was not guilty of Charge No. 3, Specification No. 1 (prejudicial conduct).<sup>117</sup>

The Court of Appeals of Virginia has drawn a distinction between merely questioning a police officer and verbally engaging a police officer in a manner that obstructs justice under VCC § 18.2-460. The matter of *Molinet v. Commonwealth*<sup>118</sup> provides an example of an individual who crossed the line from lawfully questioning the police to obstructing justice. In *Molinet*, the appellant initiated a conversation with a police officer who was investigating a public fight, purportedly intervening out of concern for the individuals involved.<sup>119</sup> The officer was occupied with controlling the scene and ensuring the safety of those present, and repeatedly asked the appellant to leave.<sup>120</sup> However, the appellant refused, displaying threatening body language and directing profanities and insults at the officer.<sup>121</sup> The appellant was placed under arrest and was charged and convicted of obstruction of justice.<sup>122</sup> The Court of Appeals of Virginia upheld the conviction, finding that "a rational factfinder could have found that [the] appellant's conduct prevented [the officer] from performing his duties," in violation of VCC § 18.2-460.<sup>123</sup>

Consistent with the court's holding in *Molinet*, the Arbitrator upheld the Panel's determination that the Grievant's initial insertion of himself into the investigation did not amount to prejudicial conduct, but his subsequent behavior constituted an obstruction of justice. FOP has not met its burden to present applicable law that the Award violates on its face. Therefore, the Board finds that the Award is not contrary to law.

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<sup>115</sup> *MPD v. FOP/MPD Labor Comm.*, 68 D.C. Reg. 5078, Slip Op. No. 1784 at 6-7, PERB Case No. 21-A-08 (2021) (citing *MPD v. PERB*, 901 A.2d 784, 789 (D.C. 2006)).

<sup>116</sup> Award at 14.

<sup>117</sup> Amended Request at 15-17.

<sup>118</sup> 65 Va. App. 572, 779 S.E.2d 231 (2015).

<sup>119</sup> *Id.* at 574-76, 581.

<sup>120</sup> *Id.* at 574-76.

<sup>121</sup> *Id.* at 575-76, 580

<sup>122</sup> *Id.* at 578.

<sup>123</sup> *Id.* at 580.

**B. The Award is not contrary to public policy.**

The Board’s scope of review is particularly narrow concerning the public policy exception.<sup>124</sup> A grievant is required to first identify a public policy that “must be well defined and dominant,” and ascertained from “reference to the laws and legal precedents and not from general considerations of supposed public interests.”<sup>125</sup> Once a well-defined public policy is identified, the Grievant must demonstrate that the arbitration award “compels” the violation of this explicit, well defined public policy.<sup>126</sup> The D.C. Court of Appeals has noted that the issue is not whether the employee’s misconduct violated public policy but rather whether enforcing the arbitral award would do so.<sup>127</sup>

FOP argues that the Award “flies in the face of both the public policy underlying the laws of the Virginia legislature and the required *mens rea* element for deeming [the Grievant] guilty” of violating VCC § 18.2-57 (assault and battery involving a law enforcement officer).<sup>128</sup> FOP does not identify an “explicit, well defined” public policy, let alone demonstrate that such a policy compels reversal of the Award.

For these reasons, the Board finds that the Award is not contrary to public policy.

**IV. Conclusion**

For the reasons stated, the Board rejects FOP’s arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, FOP’s Request is denied, and the matter is dismissed in its entirety.

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<sup>124</sup> *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at p. 2, PERB Case No. 10-A-20 (2012).

<sup>125</sup> *Id.* (quoting *American Postal Workers Union v. USPS*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

<sup>126</sup> *Id.*

<sup>127</sup> *MPD v. PERB*, 282 A.3d 598, 606 (D.C. 2022) (citing *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 62-63 (2000)).

<sup>128</sup> Amended Request at 13-14.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The 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**

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

June 15, 2023

**Washington, D.C.**

## **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.