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

In the Matter of:)	
)	
Metropolitan Police Department,)	
)	
Petitioner,)	PERB Case No. 15-A-16
)	
v.)	Opinion No. 1591
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee (on behalf of)	
Tania Bell),)	
Respondent.)	

DECISION AND ORDER

The D.C. Metropolitan Police Department (“Department”) has filed an arbitration review request and a supporting memorandum appealing an award issued in a grievance arbitration brought by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) on behalf of Sergeant Tania Bell (“Grievant”). The Department contends that in the opinion and award (“Award”) issued by Arbitrator Martha R. Cooper the Arbitrator exceeded her jurisdiction. The Comprehensive Merit Personnel Act (“CMPA”) authorizes the Board to modify, set aside, or remand an arbitration award “if the arbitrator was without or exceeded, his or her jurisdiction.”¹

I. Statement of the Case

An investigation of the conduct of the Grievant while on duty in the early of hours of November 10, 2007, led the Department to prefer charges against her and to issue to her a notice of proposed adverse action. The charges were:

Charge No. 1:	Violation of General Order 120.21, Attachment A, Part A-14, which reads: “Neglect of duty to which assigned or required by rules and regulations adopted by the Department.”
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¹ D.C. Official Code § 1-605.02(6). The other narrow grounds for review, which are not alleged in this case, are that “the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means.”

- Specification No. 1: In that on November 10, 2007, you responded to the “Avenue” Nightclub after receiving a distress phone call from your subordinate, Officer Talika Moore, who was off-duty. Upon your arrival on the scene, you failed to query officers on the scene, along with Officer Moore to ascertain what occurred. Moreover, you did not determine whether or not there was a complainant involved in this matter, and you placed Officer Moore into a vehicle and allowed her to leave the scene. Despite the objections of the complainant, you allowed Officer Moore to leave the scene, without conducting any type of investigation to determine whether or not a crime had been committed. (R. 27-28.)
- Charge No. 2: Violation of General Order 120.21, Attachment A, Part A12, which reads, “Failure to obey orders or directives issued by the Chief of Police.” This misconduct is further prohibited by General Order 120.23, Part B, Section A, which reads in part, “Members of the Department shall immediately notify an official when any member is accused or an allegation of misconduct is made.”
- Specification No. 1: In that, on November 10, 2007, you responded to the “Avenue” Nightclub after receiving a distress phone call from an off-duty officer (Officer Talika Moore), that you supervise. When you arrived on the scene, you knew or should have known from the behavior that Officer Moore was exhibiting, that she was intoxicated. Being aware of this misconduct, you allowed Officer Moore to leave the scene.
- Specification No. 2: In that, on November 10, 2007, you responded to the “Avenue” Nightclub after receiving a distress phone call from an off-duty officer (Officer Talika Moore), that you supervise. Upon your arrival on the scene, you knew or should have known that Officer Moore was alleged to have engaged in misconduct. However, you failed to contact the Watch Commander from the appropriate District to make the necessary notification.²

On April 8 and 9, 2009, an adverse action panel of the Department (“Panel”) held a hearing on the charges against the Grievant. The Panel found the Grievant guilty of all the charges and recommended that her employment with the Department be terminated.³

² Award 15-16.

³ Award 2, 31.

On May 13, 2009, Commander Jennifer Greene of the Human Resources Management Division issued the Grievant a final notice of adverse action that accepted the Panel's findings and recommendation.

The Union appealed the final notice to the Chief of Police. The Chief denied the appeal in a letter dated June 12, 2009, but not served on the Grievant until June 17, 2009. The Union notified the Chief that it demanded arbitration of the adverse action in a letter dated July 7, 2009, and received July 8, 2009.⁴

The Panel's record and the briefs of the parties were submitted to the Arbitrator. The Department moved that the Arbitrator dismiss the arbitration on the ground that the demand for arbitration was untimely.

The Arbitrator found that the demand was timely and denied the motion to dismiss. On the merits, the Arbitrator found that substantial evidence supported the allegation of Charge No. 1, Specification No. 1 that the Grievant was guilty of failing to question Officer Moore and the police on the scene to ascertain what had occurred. The Arbitrator found that the last two sentences of Charge No. 1, Specification No. 1 were not supported by substantial evidence because the Grievant had no reason to believe that a complainant was involved or that a crime had been committed. The Arbitrator acknowledged that the complainant yelled to the Grievant that Officer Moore had spat at him but states that the Panel did not find that the Grievant heard him.

The Arbitrator found that substantial evidence supported Charge No. 2, Specification No. 1 because the Grievant should have known from the circumstances that Officer Moore was intoxicated and evidently did know that she was impaired because the Grievant immediately pulled her away from the group and led her to a vehicle. The Arbitrator found that because the Grievant came to the scene in response to a personal call and not a dispatch, substantial evidence did not support Charge No. 2, Specification No. 2's allegation that upon the Grievant's arrival at the scene she "knew or should have known that Officer Moore was alleged to have engaged in misconduct."⁵

Turning to the issue of the appropriate penalty, the Arbitrator focused on the Panel's evaluation of the dozen factors articulated in *Douglas v. Veterans Administration*.⁶ The

⁴ Award 2-3, 4.

⁵ Award 20-30, 46-47.

⁶ 5 M.S.P.B. 313 (1981). In *Douglas* the Merit Systems Protection Board articulated its standard for assessing the appropriateness of a disciplinary penalty imposed by federal agencies. It delineated twelve factors that an agency should consider when determining the appropriate penalty for an act of employee misconduct. These factors include (1) The 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; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties; (6)

Arbitrator found flaws in the Panel's analysis of the *Douglas* factors. With regard to the first and second *Douglas* factors, the Panel performed "such analysis only as to the most serious charge, for which there is not substantial evidence in the Record."⁷ The Grievant's good work record and clean disciplinary record should have made *Douglas* factors 3 and 4 mitigating factors in the Arbitrator's view, but the Panel treated them as neutral factors. The Panel did not consider *Douglas* factors 6 and 7, which involve consistency with past offenses and with the Department's table of penalties. *Douglas* factor 11 calls for consideration of "the mitigating circumstances surrounding the offense." The Panel deemed *Douglas* factor 11 an aggravating factor in this case. It is at worst a neutral factor. The Arbitrator disagreed with the Panel's findings that *Douglas* factors 10 and 12 were aggravating because the Panel relied on unsupported charges in its consideration of those factors and determined that lesser punishment would be ineffective without considering that the Grievant had never before received lesser punishment or any formal discipline from the Department.⁸

The Award reduced the penalty from a termination to a fifteen-day suspension and ordered the payment of back pay from the date the suspension would have been served less any interim earnings or government benefits.⁹

The Department filed an arbitration review request and a supporting memorandum. In its memorandum, the Department contended that the Arbitrator exceeded her authority by modifying the time limit for demanding arbitration that the parties' collective bargaining agreement ("CBA") prescribes, re-weighting the evidence in concluding that the last two sentences of Charge No.1, Specification No. 1 were unsupported,¹⁰ and substituting her judgment for that of the Chief in selecting a penalty.

II. Discussion

A. Arbitrability

An arbitrator derives his jurisdiction from the collective bargaining agreement and any applicable statutory or regulatory provisions.¹¹ The principles the Board has followed in

consistency of the penalty with those imposed upon other employees 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, or had been warned about the conduct in question; (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, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

⁷ Award 47.

⁸ Award 31-46.

⁹ Award 49.

¹⁰ The Department does not challenge the Arbitrator's finding that Charge No. 2, Specification No. 2 was not supported by substantial evidence.

¹¹ *AFGE, Local 872 v. D.C. Water & Sewer Auth.*, 63 D.C. Reg. 6477, Slip Op. No. 1566 at 4, PERB Case No. 15-A-09 (2016).

determining whether arbitrators exceeded their jurisdiction are summarized in *United Paperworkers International v. Misco, Inc.*,¹² where the Supreme Court stated,

[T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.¹³

The same principles apply to a claim that an arbitrator's determination of arbitrability exceeded the arbitrator's jurisdiction.¹⁴

The Department contends that this case was not arbitrable because the Union's demand for arbitration was untimely. Article 19, section E(2) of the CBA provides, "Within fifteen (15) business days of the decision of the Chief of Police on an adverse action or grievance, the Union, on behalf of an employee or employees, may advise the Chief of Police in writing, signed by the aggrieved employee, of its demand for arbitration."¹⁵ The Department argues that the arbitrator modified the CBA by finding timely a demand submitted more than fifteen days after the Chief's decision.

The Union in its Opposition argues that the Department's position essentially is a disagreement with the Arbitrator's interpretation of article 19, section E(2). The Union refers to the Department's statement that this section "mandates the submission of a demand for arbitration within fifteen (15) days."¹⁶ Stressing that article 19, section E(2) says that within that time period the Union "may advise the Chief of Police . . . of its demand," the Union asserts that the CBA's use of the word "may" suggests that the provision is not mandatory.¹⁷

The Union is correct that the Arbitrator interpreted rather than modified the contract, but her interpretation of it did not involve any suggestion that the provision was not mandatory. She made clear that the *deadline* is mandatory: "Section E(2) of Article 19 of the Agreement does specify that a demand for arbitration in an adverse action matter is to be filed within fifteen business days of the decision of the Chief of Police."¹⁸ What may be permissive in article 19, section E(2) is whether the Union may choose to demand an arbitration. If the Union so chooses, it *may* demand arbitration, but, as the Board has often said, a union is not required to demand arbitration of every grievance.¹⁹

¹² 484 U.S. 29 (1987).

¹³ *Id.* at 38.

¹⁴ *D.C. Pub. Sch. v. Council of Sch. Officers, Local 4 (on behalf of Wells)*, 62 D.C. Reg. 14658, Slip Op. No. 1540 at 3-4, PERB Case No. 15-A-05 (2015).

¹⁵ Award 13.

¹⁶ Department's Mem. in Support of Arbitration Review Req. 6.

¹⁷ Union's Opp'n to Arbitration Review Req. 9.

¹⁸ Award 4.

¹⁹ *Bonaparte v. Dist. Council #20*, 63 D.C. Reg. 7579, Slip Op. No. 1573 at 5, PERB Case No. 15-U-06 (2016).

The Arbitrator's decisive interpretation of the section is found in her conclusion "that the demand for arbitration was filed thirteen business days after the Chief's decision was issued to the grievant. It was, therefore, timely filed."²⁰ In so concluding, the Arbitrator interpreted "fifteen days of the decision of the Chief of Police" to mean fifteen days from issuance to the grievant of the decision of the Chief of Police. If the Chief could reduce the period by five days by withholding the decision from the Grievant for five days, could she not hold a decision for fifteen days and foreclose the opportunity to demand arbitration? The Arbitrator interpreted the CBA in a manner that would avoid such a result. Therefore, her finding of arbitrability drew its essence from the contract and did not exceed her authority.

C. The Merits

As described by the Arbitrator, the "contractual and legal framework" of her analysis of the merits of the case begins with article 12, section 8 of the CBA.²¹ Article 12, section 8 provides:

Upon receipt of the decision of the Chief of Police on adverse actions, the employee may appeal to arbitration as provided in Article 19. Employees must use the negotiated grievance procedure (NGP) for a suspension of less than ten (10) days. In cases where a Departmental hearing has been held, any further appeal shall be based solely on the record established in the Departmental hearing. In such a case, the appellate tribunal has the authority to review the evidentiary ruling of the Departmental Hearing Panel, and may take into consideration any documentary evidence which was improperly excluded from consideration by the Departmental Hearing Panel.²²

The Arbitrator stated that under this provision of the CBA she serves as an appellate tribunal and her review is to be based solely on the record.²³ The Arbitrator went on to state:

Under applicable law, the Arbitrator is to review the Panel's decision to determine whether there is substantial evidence in the record to support the Panel's findings, whether there has been procedural error, and whether its decision was in some manner arbitrary, capricious, or an abuse of discretion. *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985). The District of Columbia courts have made clear that when reviewing administrative action under this standard, it is not the job of the reviewing tribunal to weigh the evidence and determine the facts; rather, its job is to determine whether the agency's findings are supported by substantial evidence and whether its conclusions of

²⁰ Award 5.

²¹ Award 14-15.

²² Award 12-13.

²³ Award 14.

law follow rationally from its findings. *Spackman v. District of Columbia Department of Employment Services*, 590 A.2d 515, 516 (DC 1991).²⁴

The Department relies upon the above statement and the cases the Arbitrator cites therein for its arguments against the Arbitrator's decisions on the charges and the penalty. After quoting the statement, the Department objects that the Arbitrator appears to have re-weighed the evidence in determining that the record did not contain substantial evidence in support of the last two sentences of Charge No. 1, Specification No. 1. The Department maintains that the record did contain substantial evidence for the entirety of that specification. "Since the Arbitrator was prohibited from re-weighing the evidence," the Department asserts, "she exceeded her authority in doing so."²⁵

The case of *Stokes v. District of Columbia*,²⁶ cited by the Arbitrator, establishes the deferential standard by which the Office of Employee Appeals is to review penalties that agencies impose upon employees. The other case cited by the Arbitrator, *Spackman v. District of Columbia Department of Employment Services*,²⁷ announces the D.C. Court of Appeals' standard for reviewing decisions of the Department of Employment Services. The Arbitrator may choose to regard *Stokes* and *Spackman* as guides in delineating her role as an "appellate tribunal" under article 12, but the Board will not police how well she adhered to her interpretation of article 12 by trying to assay whether she gave evidence the same weight as the Panel. The CMPA does not authorize the Board to overturn an award based on the weight attributed to the evidence.²⁸

The Arbitrator was not even obliged to interpret article 12 as applicable to the arbitration at all. An arbitrator could instead reasonably conclude that article 12 concerns only the Department's internal disciplinary proceedings and that by "further appeal" article 12 is referring to an appeal of the Panel's decision to the Chief.²⁹

There is then no basis in the Board's precedent for the premise of the Department's conclusion that "[s]ince the Arbitrator was prohibited from re-weighing the evidence, she exceeded her authority in doing so." Nothing prohibited the Arbitrator from re-weighing the evidence. Assessing the weight and significance of evidence is within the jurisdiction of an arbitrator.³⁰

²⁴ Award 14-15.

²⁵ Department's Mem. in Support of Arbitration Review Req. 9.

²⁶ 502 A.2d 1006, 1010 (D.C. 1985).

²⁷ 590 A.2d 515 (D.C. 1991).

²⁸ *AFSCME Dist. Council 20, Local 2743 v. D.C. Dep't of Consumer & Regulatory Affairs*, 38 D.C. Reg. 5076, Slip Op. 281 at 4 n.3, PERB Case No. 09-A-12 (1991).

²⁹ *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm. (on behalf of Garcia)*, 63 D.C. Reg. 4573, Slip Op. No. 1561 at 7, PERB Case No. 14-A-09 (2016). *See also D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't (on behalf of Jacobs)*, 60 D.C. Reg. 3060, Slip Op. No. 1366 at 6, PERB Case No. 12-A-04 (2013) (holding that an arbitrator's decision to look beyond the record established in an adverse action panel hearing arguably arose from an interpretation that article 12 does not apply to arbitrations).

³⁰ *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm.*, 59 D.C. Reg. 6124, Slip Op. No. 1015 at 13, PERB Case No. 09-A-06 (2010).

Again asserting that the charges of misconduct were supported by substantial evidence, the Department argues that the Chief's determination of the appropriate penalty must be upheld. The Department contends that the Arbitrator analyzed *de novo* whether the Panel recommended a fair and appropriate penalty under the circumstances. The Department claims that the Arbitrator's *de novo* consideration of the penalty exceeded her authority. In the alternative, the Department argues that if the Arbitrator found the penalty unreasonable, especially in light of her finding that some of the charged misconduct was not supported by the evidence, then the Arbitrator's proper recourse was to remand the matter back to the Department to select a different penalty.³¹

The Department supports its arguments with an extensively altered quotation from *Stokes v. District of Columbia*,³² one of the cases cited by the Arbitrator. The quotation from *Stokes* was, in turn, taken from *Douglas v. Veterans Administration*.³³ In *Douglas*, the Merit Systems Protection Board discussed the standard by which it reviews penalties imposed by federal agencies upon their employees.³⁴ In *Stokes*, the D.C. Court of Appeals quoted that discussion in connection with a petition for review of a decision of the Office of Employee Appeals, substituting OEA in brackets for "the Board," i.e., the Merit Systems Protection Board. The Department, in its version of the quotation, replaces OEA and the Board with "the hearing examiner" in brackets even though this case does not involve a hearing examiner.³⁵

Whatever words are substituted, the standard that *Stokes* directs OEA to use in reviewing a penalty does not apply to arbitrations because an arbitrator's authority arises out of the parties' contractual agreement to submit the case to arbitration rather than the statutes creating OEA interpreted in *Stokes*.³⁶

Another important distinction that the Board noted in a similar case³⁷ is that, unlike the parties in *Stokes*, the parties to this case authorized the Arbitrator to address the question of

³¹ Department's Mem. in Support of Arbitration Review Req. 9-11.

³² 502 A.2d 1006, 1010 (D.C. 1985).

³³ 5 M.S.P.B. 313 (1981).

³⁴ "The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the Board's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." *Id.* at 332-33.

³⁵ However, the Department altered part of the quotation to include an arbitrator by saying "the [hearing examiner, or in this case Arbitrator's] role in this process is not to insist that the balance [of *Douglas* factors] be struck precisely where the [hearing examiner] would choose to strike it if the [hearing examiner] were in the agency's shoes in the first instance. . . ." Department's Mem. in Support of Arbitration Review Req. 10.

³⁶ *AFGE Local 872 v. D.C. Water & Sewer Auth.*, 63 D.C. Reg. 6477, Slip Op. No. 1566 at 7, PERB Case No. 15-A-09 (2016); *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't (on behalf of Suggs)*, Slip Op. No. 933 at 7-8, PERB Case No. 07-A-08 (Mar. 12, 2008); *Metro. Police Dep't v. Nat'l Ass'n of Gov't Employees, Local R3-5 (on behalf of Burrell)*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2006).

³⁷ *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm. (on behalf of Garcia)*, 63 D.C. Reg. 4573, Slip Op. No. 1561, PERB Case No. 14-A-09 (2016). Although the Department relies on *Stokes*, it fails to address this case or the cases cited in footnote 36.

whether termination is the appropriate penalty. In its brief to the Arbitrator, the Union wrote that the issues presented are “[w]hether the evidence presented by the Department was sufficient to support the alleged charges” and “[w]hether termination is an appropriate penalty.”³⁸ The Department did not include a list of issues in its brief to the Arbitrator.³⁹ The Arbitrator stated:

Although the parties did not submit a stipulated issue to the Arbitrator, it is clear from their briefs and submissions that they agree on the issues they are asking the Arbitrator to decide. These issues may be phrased as follows:

Was the demand for arbitration timely filed? If so:

Were the Panel’s findings that the grievant was guilty of all of the charges and specifications supported by substantial evidence in the record?

Is termination an appropriate penalty in this case?⁴⁰

The Department acceded to this conclusion by stating in its memorandum that the issues presented to the Arbitrator were:

1. Whether the demand for arbitration was timely filed?
2. Whether sufficient evidence exists to support the alleged charges and specifications?
3. Whether termination is an appropriate penalty?⁴¹

Where, as here, the parties present an arbitrator with the issue of whether termination is appropriate, the arbitrator may reasonably reexamine the *Douglas* factors.⁴² An objection that the reexamination was *de novo* is insufficient to show that the arbitrator exceeded her authority unless a provision of the CBA restricts the arbitrator’s exercise of remedial power.⁴³ If the arbitrator determines that termination is not appropriate, it then becomes reasonable for the arbitrator to determine what the appropriate penalty should be. The arbitrator does not have to remand the case to the agency to determine what the penalty should be unless the parties directed the arbitrator to do that.⁴⁴ In the present case, neither the CBA nor stipulations of the parties restricted the Arbitrator’s exercise of remedial power or directed the Arbitrator to remand to the Department in this situation. Determining the appropriate penalty was therefore within the arbitrator’s discretion.⁴⁵

³⁸ Union’s Opp’n to Arbitration Review Req. Ex. 2 at 1.

³⁹ Union’s Opp’n to Arbitration Review Req. Ex. 4.

⁴⁰ Award 3-4.

⁴¹ Department’s Mem. in Support of Arbitration Review Req. 4.

⁴² *F.O.P./Metro. Police Dep’t Labor Comm. (on behalf of Garcia)*, Slip Op. No. 1561 at 5.

⁴³ See *D.C. Metro. Police Dep’t v. F.O.P./Metro. Police Dep’t (on behalf of Jacobs)*, 60 D.C. Reg. 3060, Slip Op. No. 1366 at 5-7, PERB Case No. 12-A-04 (2013).

⁴⁴ *F.O.P./Metro. Police Dep’t Labor Comm. (on behalf of Garcia)*, Slip Op. No. 1561 at 4-5.

⁴⁵ *D.C. Metro. Police Dep’t v. F.O.P./Metro. Police Dep’t Labor Comm. (on behalf of Kennie)*, 61 D.C. Reg. 12364, Slip Op. No. 1493 at 7, PERB Case No. 14-A-06 (2014).

Accordingly, the Department's claims that the Arbitrator re-weighed the evidence, conducted a *de novo* reexamination of the *Douglas* factors, and failed to remand the penalty issue to the Department are not grounds for finding that the Arbitrator exceeded her authority.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is denied. The Award is sustained.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairman Charles Murphy and Members Ann Hoffman, Barbara Somson, and Douglas Warshof.

Washington, D.C.

August 12, 2016

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-A-16 is being transmitted via File & ServeXpress to the following parties on this the 23d day of August 2016.

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