GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,	PER Case No. 03-A-06
Petitioner,	Opinion No. 757
and	
FRATERNAL ORDER OF POLICE/ METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE (on behalf of Officer Anthony Brown),	
Respondent.	

DECISION AND ORDER

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request (Request) in the above captioned matter. MPD seeks review of an Arbitrator's Decision on Remand[1] (Award), which rescinded a termination action that had been imposed on a bargaining unit employee. MPD contends that the: (1)Award is contrary to law and public policy; and (2)Arbitrator exceeded his authority. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public

[1] Pursuant to the Board's Decision and Order (Slip Op. No. 719) issued on June 16, 2003, this matter was remanded to the original Arbitrator for a decision on the merits.

policy" or whether "the arbitrator was without or exceeded his or her jurisdiction. . . ." D.C. Code Sec. 1-605.02(6).[2] Upon consideration of the Request, we find that MPD has established a statutory basis for our review. Therefore, pursuant to Board Rule 538.4, MPD's request for review is granted and this matter is remanded to the Arbitrator for a decision consistent with this Decision and Order.

MPD terminated the Grievant, a Police Officer for: (1) conduct unbecoming of a police officer [3] and (2) the commission of any act which would constitute a crime, whether or not a court record reflects a conviction.[4] (Request a pgs. 3-4). The conduct allegedly arose out of domestic turmoil that Officer Brown and his wife were experiencing after they separated. (Request at pg. 2). Specifically, Officer Brown's wife alleged that Officer Brown engaged in misconduct. As a result, Prince Georges' County charged Officer Brown with "Telephone Misuse[5] "and "Harassment" pursuant to the relevant Maryland statutes. (Award a pgs. 5-6). These charges were filed as a result of repeated calls that Officer Brown made to his wife, at home and at work, despite her requests for him to stop.

The Arbitrator determined that MPD had sufficient cause to take the adverse action against Officer Brown, as it related to the "conduct unbecoming of a police officer"[6] charge, but did not have sufficient grounds to take adverse action pursuant to the "commission of acts that would constitute a crime"[7] charge. (Award at pgs. 8 and 13) [8]. Nonetheless, the Arbitrator found

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[2]Throughout this Opinion, all references to the D.C. Code will refer to the 2001 edition, unless otherwise noted.

[3]This misconduct is defined as cause in Title 1, Section 617.1 (d)(10), (11) and (16) of the D.C. Code. The exact language of the charges are set forth on pages 3 and 4 of MPD's Request.

[4]This misconduct is defined as "cause" in Title 1 , Section-617.1(d) (10). The exact language of the charges are set forth on pages 3 and 4 of MPD's Request.

[5]The exact language contained in the Maryland Criminal Statute for "unlawful use of a telephone" and "harassment" is found on page 4 of MPD's Request.

[6] In MPD's Request, the charge involving the unbecoming conduct is referred to as Charge 1.

[7] In MPD's Request, the charge which involves the alleged criminal acts is referred to as Charge 2.

[8]The Arbitrator also found that the January 6, 1999 second degree assault charge and arrest could not be considered because Charge 2 specifies that the charges relate to conduct which occurred between July 31, 1998 through November 18, 1998. Therefore, the Arbitrator

that termination was an excessive penalty for Officer Brown's actions.[9] Specifically, the Arbitrator concluded that despite the fact that Officer Brown engaged in this wrongful conduct, the *Douglas* factors require a conclusion that the most severe penalty of termination for a first offense would not be reasonable or justified.[10] As a result, he determined that Officer Brown should: (1) serve a disciplinary suspension of 120 calendar days with loss of pay and benefits, and (2) be reinstated to his former position with full back pay and benefits.

MPD takes issue with the Arbitrator's Award. MPD asserts that the Arbitrator's decision to reduce Officer Brown's termination to a suspension is contrary to law. Specifically, MPD asserts that although the Arbitrator determined that there was cause for taking disciplinary action, he unlawfully substituted his judgement regarding discipline for that of the Agency. Relying on Stokes v. District of Columbia[11], MPD contends that the Arbitrator is precluded from substituting

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determined that actions which occurred after November 18, 1998 were not properly before the Trial Board for decision.

[9]The Arbitrator concluded that MPD lacked just cause for terminating Officer Brown. Specifically, the Arbitrator determined that Officer Brown's repeated telephone calls to his estranged wife and his obtaining of her telephone records did not rise to the level of harassment because the evidence suggests that Officer Brown was attempting to effect a reconciliation with his wife. (Request at pg. 8;Award at pg. 18). Furthermore, the Arbitrator concluded that: (1) the charges involving criminal conduct against Officer Brown required a finding of "intent"; (2) the standard of proof; therefore, is "beyond a reasonable doubt" and; (3) it has not been shown beyond a reasonable doubt that the conduct encompassed in Charge No. 2, Specifications 1 and 2, would have constituted a crime in the State of Maryland. (Award at pg. 18).

[10]The Arbitrator relied on the mitigating factors enumerated in Douglas v. V.A., 5 MPR 280 (1981).

[11]In Stokes v. District of Columbia, the D.C. Department of Corrections terminated an employee for violating four (4) of the Department's regulations. 501 A.2d 1006 (D.C. 1985) Upon hearing the case on Appeal, the Office of Employee Appeals (OEA) determined that the penalty of termination was excessive, and ordered that the employee be suspended for 60 days and then reinstated. The Administrative Judge at OEA based his decision on the fact that the Department's penalty went beyond the sanctions specified in the table of penalties, without providing the Administrative Judge with evidence of its reasons for going beyond the penalty table. In addition, the Administrative Judge concluded that the Department failed to show that the penalty it imposed reflected the severity of the infractions, as mandated by D.C. Code §1-617.1(b)(1981 ed.).

MPD appealed the decision to the D.C. Superior Court, which reversed the OEA's

his judgment for that of the Department where the Department has engaged in responsible balancing of the relevant factors in this case and its judgment does not exceed the limits of reasonableness. See, 501 A.2d 1006 (D.C. 1985).

As a second basis for review, MPD contends that the Arbitrator exceeded his authority. Specifically, MPD claims that the Arbitrator erred by determining procedures for the Disciplinary Trial Board's decision making process, contrary to limitations placed on the Arbitrator pursuant to management rights contained in the parties' collective bargaining agreement (CBA).[12] In asserting that the Arbitrator's decision should be reversed, MPD argues that the Arbitrator disregarded the express language of the CBA which precludes the Arbitrator from changing MPD's procedures.[13] In the present case, MPD contends that the Arbitrator erred by concluding

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decision. The Employee appealed to the D.C. Court of Appeals. The D.C. Court of Appeals held that OEA "may not substitute its judgment for that of the Agency in deciding whether a particular penalty is appropriate." The "primary discretion" in selecting a penalty has been entrusted to Agency management, not to the OEA. Because the OEA exceeded its authority, the Court of Appeals upheld the ruling of the D.C. Superior Court and set aside the OEA decision. Id.

MPD contends that the Stokes case is applicable to the facts presently before the Board. However, we find that this analysis ignores Board precedent, which has consistently held that an Arbitrator may reduce a disciplinary penalty, in the absence of any language restricting his equitable power. MPD v. FOP/ MPD Labor Committee, 36 DCR 3339, Slip Op. No. 218, PERB Case No. 89-A-01 (1989) .The Board has also held that an Arbitrator does not exceed his authority by reducing a penalty, particularly where the CBA does not restrict the Arbitrator's exercise of equitable powers in fashioning a remedy. See, Id.

[12]MPD relies on §8 of Article 4, which provides, *inter alia*, that Management has the right to formulate, change, or modify Department rules, regulations and procedures, except that no rule, regulation or procedure shall be formulated, changed or modified in a manner contrary to the provisions of this agreement. MPD also relies on Article 4 of the parties' cba for management's authority take actions, consistent with management's rights, including the right to discipline employees. (Request at pg. 9) Additionally, MPD relies on the portion of Article 4 which specifies that management rights shall not be subject to the negotiated grievance procedure, unless specifically abridged or abrogated in a separate distinctive article of the agreement.

[13]In arguing that the Arbitrator's Award is flawed, MPD relies on Article 19 E, §5(4) of the parties' collective bargaining agreement to support is contention that the Arbitrator in this instance did not have the power to add its own standard of proof, when determining whether MPD had cause to terminate Officer Brown, pursuant to Charge No. 2. (Request at pg. 9)

that the standard of proof to be applied in an Administrative Hearing concerning a disciplinary action involving a crime should be a "beyond a reasonable doubt" standard, instead of the "preponderance of evidence"[14] standard, which the Administrative body's rules specify. (Request at pgs. 10-11). MPD also points to MPD's hearing procedures . These hearing procedures indicate that a Disciplinary panel is not prevented from examining the behavior and conduct of an officer to see if his actions violate Departmental rules, even where a judge or jury may have acquitted the Respondent of a criminal charge, or the court record fails to reflect a finding of guilt or innocence. Furthermore, MPD asserts that no other provision in the collective bargaining agreement authorizes the Arbitrator to change MPD's disciplinary and hearing procedures.

In response to MPD's first basis for review, FOP asserts that the Board's precedent clearly supports the proposition that an Arbitrator may reduce a disciplinary penalty. To support its position, FOP relies on two Board cases involving MPD and FOP, in which the Board decided that an arbitrator has the authority to reduce the penalty proscribed by MPD in a disciplinary action. (See, Opposition at pgs. 8 and 9); See also, D.C. MPD v. FOP/MPD Labor Committee (Meritt), 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000) and D.C. MPD v. FOP/MPD Labor Committee (Short), 46 DCR 10382, Slip Op. No. 602; PERB Case No. 99-A-09 (1999). In addition, FOP contends that the Stokes v. District of Columbia decision is not persuasive on this issue. 501 A.2d 1006 (D.C. 1985) Furthermore, FOP claims that the D.C. Court of Appeals has refused to follow Stokes because the regulation on which that decision was based has been superceded. 501 A.2d 1006 (D.C. 1985). Therefore, FOP asserts that the case in not controlling.

In response to MPD's second basis for review, FOP asserts that the Arbitrator acted well within the scope of his authority when he found that Officer Brown was not guilty of Charge 2. FOP contends that MPD's argument is erroneous because MPD failed to properly characterize the Arbitrator's determination relevant to Charge 2. FOP asserts that a careful reading of the Arbitrator's decision reveals that his rejection of the Panel's findings was not based on the standard of proof applied by the Panel, but rather his determination that the Panel completely failed to address an essential element of the alleged crime, namely whether Officer Brown had the requisite intent to meet the requirements of the Maryland criminal statutes. Second, FOP asserts that even if the Arbitrator's decision is found to rely on the "beyond a reasonable doubt" standard, the application of the standard was absolutely correct. (Opposition at pg. 4). FOP argues that the burden of proof for whether an officer committed acts that would constitute a crime depends on the actual criminal statute involved. Accordingly, FOP contends that the Arbitrator properly applied the criminal law and criminal burden of proof to determine whether

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[14]MPD has a Handbook for conducting Administrative Trials and Hearings at the Metropolitan Police Department, which outlines the Police Disciplinary Trial Board's procedures and the standard of proof. See, Request Exhibit 6 at pgs. 5-8.

Mr. Brown actually committed a crime. Furthermore, FOP contends that the Board has held that no basis exists for concluding that an arbitrator has exceeded his authority by interpreting an MPD General Order. See, DCMPD v. FOP/MPD Labor Committee (Hassell)[15], 47 DCR 5315, Slip Op. No. 626, PERB Case No. 00-A-02(2000).

In its first ground for review, MPD claims that the Arbitrator's decision to reduce the Officer Brown's termination to a suspension is contrary to law pursuant to the Stokes v. District of Columbia case.501 A.2d 1006 (D.C. 1985) The Board finds no merit to this contention. The Board has held that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based." MPD v. FOP/MPD Labor Committee (Sims), 47 DCR 7217, Slip Op. No. 633 at pg.3, PERB Case No. 00-A-04 (2000). Moreover, the Board will not substitute its own interpretation or that of the Agency for that of the duly designated Arbitrator. Id. Here, the Arbitrator determined that there was cause for the adverse action; however, he determined that the penalty was excessive after applying the

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[15]In DCMPD v. FOP/MPD Labor Committee (Hassell), the Grievant was charged with violating an MPD General Order, which provided in part, that "it is the duty and responsibility of each member of the police force to preserve the peace, protect life and property, prevent crime, apprehend criminals, recover lost and stolen property, and enforce all laws...".47 DCR 5315, Slip Op. No. 626 at pg. 2 PERB Case No. 00-A-02 (2000). Based on this language, the Arbitrator found that the Grievant had the duty and responsibility to investigate and to inquire [into] suspicious or unusual situations and circumstances, and that it was the breach of this duty that was the basis for the charge. Id. As a result, the Arbitrator found that there was just cause to discipline the Officer. FOP asserted that the General Order placed no duty to investigate and inquire on police officers and therefore; the Grievant was penalized for violating a duty that does not exist in the General Order. In response to FOP's Request for Review, the Board found that FOP's contention involved "only a disagreement with the Arbitrator's interpretation of an MPD General Order." Id. In addition, the Board found that FOP failed to cite any law or public policy which mandates that the Arbitrator arrive at a different result. On FOP's claim that the Arbitrator exceeded her authority by finding misconduct based on charges other than those brought, the Board found that the Arbitrator interpreted a contract provision and an MPD regulation in reaching her conclusion. The Board noted that it has held that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision. Id. In addition, we have held that by agreeing to arbitration, it is the Arbitrator's decision for which the parties' have bargained. Furthermore, we have determined that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement and related rules and regulations, as well as [her] evidentiary findings and conclusions upon which the decision is based." Id. Therefore, no basis exists for finding that the arbitrator was without or exceeded her authority by making such an interpretation of this MPD General Order. Id.

Douglas factors. Douglas v. V.A., 5 MSPR 280 (1981). The Board has held that an Arbitrator does not exceed his authority by reducing a penalty, particularly where the CBA does not restrict the Arbitrator's exercise of equitable powers in fashioning a remedy. MPD v. FOP/MPD Labor Committee (Short), 46 DCR 10382, Slip Op. No. 602, PERB Case No. 99-A-09 (1989). The parties have failed to cite any language in the parties' CBA which limits the Arbitrator's equitable powers. In addition, MPD has not cited any applicable law which prevents the Arbitrator from reducing the penalty in this matter from termination to a suspension. We do not find that the Stokes v. District of Columbia case is applicable to the facts before us.501 A.2d 1006 (D.C. 1985). In the case before us, unlike Stokes, the matter was referred to an Arbitrator chosen by both of the parties.501 A.2d 1006 (D.C. 1985). In addition, as noted earlier, the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations. Here, the Arbitrator interpreted and decided that under Douglas v. V.A., the penalty was excessive. 5 MSPR 280 (1981). Since the parties bargained for the Arbitrator's opinion, the Board may not substitute its opinion or the opposing parties' opinion for that of the duly designated Arbitrator. Therefore, the Board concludes that the Arbitrator's decision was not contrary to law.

The final issue raised by MPD is one of first impression for the Board. Specifically, the Board is being asked to decide *whether an Arbitrator, in reviewing a Police Disciplinary Trial Board's decision, is authorized to use a different standard of proof than the Trial Board did when determining whether just cause for the discipline was met, where the Police Department procedures expressly set forth the standard of proof.* In the present case, the MPD regulations governing discipline and hearing procedures establish a "preponderance of the evidence" standard. The Arbitrator used a "beyond a reasonable doubt" standard in order to determine whether Officer Brown "committed acts that would constitute the commission of a crime." This presents a separate sub-issue for determination; namely, *whether an Arbitrator must use a "beyond a reasonable doubt" standard in a disciplinary matter based on alleged criminal conduct or acts that would constitute a crime.*

Where the Board has not ruled on an issue, it looks to the precedent of other labor relations bodies and states. See, University of the District of Columbia v. University of the District of Columbia Faculty Association, 37 DCR 5666, Slip Op. No. 248, PERB Case No. 90-A-02 (1990). In this case, the Board relied on the Federal Labor Relations Authority precedent for guidance. In the U.S. Department of Defense Education Activity v. Federal Education Association case, one of the issues raised in the Arbitration Review Request was whether the Arbitrator improperly applied a standard of proof. 56 FLRA 779 [16] (2000). In rendering its

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[16]The FLRA also outlined its standard concerning an Arbitrator's application of the appropriate Standard of Proof in American Federation of Government Employees, Local 2250 and U.S. Department of Veterans Affairs Medical Center Muskogee, Oklahoma, 52 F.LR.A. 320 (1996).

decision, the FLRA noted that " it is well-established under Authority precedent that if a standard of proof is set forth in law, rule, regulation, or a collective bargaining agreement, an arbitrator's failure to apply the prescribed standard will constitute a basis for finding the award deficient, as contrary to law, rule, regulation, or as failing to draw its essence from the agreement." Id. "However, in the absence of a specified standard of proof, arbitrators have the authority to establish whatever standard they consider appropriate and the Authority will not find an award deficient because a party claims that an incorrect standard was used." Id.

In the present case, MPD's regulations concerning the disciplinary process and its Hearing Procedures outline the appropriate standard of proof to be used in a disciplinary proceeding based on criminal charges. In addition, the regulations and procedures specifically state that the preponderance of the evidence standard is to be used, even where the charge involves acts that would constitute the commission of a crime. (See, Request at pgs 10-11 and Hearing Procedures at pgs. 5-7). In view of the relevant FLRA case law, we find that the Arbitrator exceeded his authority by applying another standard. Furthermore, the Board's precedent, cited by FOP, specifies that the Arbitrator gets his authority from the parties' agreement and any applicable statutory and regulatory provision. In our view, the Arbitrator clearly failed to follow the MPD's regulations and procedures. We find that the Arbitrator exceeded his authority. Therefore, MPD has established a basis for our review.

A sub-issue raised by this Request is *whether an Arbitrator must use a higher burden of proof, such as "beyond a reasonable doubt", in a disciplinary matter based on alleged criminal conduct or acts that would constitute a crime.* We find that the higher burden of proof is not required. While the Board has not rendered a decision on this precise issue, several courts have found that an arbitrator is not required to use a higher burden of proof in a disciplinary proceeding simply because the disciplinary charges are based on alleged criminal acts. See, Theodore Papapetropoulous v. Milwaukee Transport Services, Inc.[17], 795 F2d 591 (7th Cir. 1986) (where an employee challenged the Arbitrator's decision based on, *inter alia,* his assertion that the Arbitrator improperly used a preponderance of the evidence standard, instead of a higher standard of proof since the action alleged involved a criminal act); and Darrell D. McNair v. U.S. Postal Service , 768 F2d 730 (5th Cir. 1985) (where an Arbitrator applied a standard higher than the preponderance of the evidence standard and the courts ruled that he was not required to do so.). The courts in Papapetropoulous and McNair reasoned that a disciplinary proceeding was still administrative in nature; therefore, there was no requirement that a higher criminal standard

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[17] In Papapetropoulous, the court stated that "it seems to us that if an employee could be fired based on a preponderance of the evidence that his work is unsatisfactory or that he was chronically late for work, he should be able to be fired for illegal conduct based upon the same standard of proof." 795 F2d 591 (U.S. Court of Appeals 7th Cir. 1986)

be used.[18] Id. Furthermore, where the appropriate standard of proof to be used in disciplinary proceeding is established by the parties' collective bargaining agreement or applicable regulations and procedures, the arbitrator should use the standard specified by the parties' agreement or those applicable regulations and procedures. See, U.S. Department of Defense Education Activity v. Federal Education Association ,56 FLRA 779 (2000). In the present case, the applicable regulations and procedures required that a preponderance of the evidence standard be used, even though the disciplinary charges involved criminal conduct. The Arbitrator did not use the preponderance of the evidence standard. Therefore, we find that MPD has articulated a statutory basis for review.

In view of the above, we remand the Decision to the Arbitrator for a determination on whether "just cause" was found as to Charge 2, using the appropriate "preponderance of the evidence" standard.

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[18] In addition, we note that neither the Arbitrator's decision nor FOP's Response provides support for the position that a specific finding on the element of intent must be made before a decision on discipline could be reached in this matter. We also note that our research did not establish that such a requirement (finding "intent") exists in order to sustain a disciplinary charge based on alleged criminal acts. See, Theodore Papapetropoulous v. Milwaukee Transport Services, Inc., 795 F2d 591 (U.S. Court of Appeals 7th Cir. 1986) Darrell D. McNair v. U.S. Postal Service , 768 F2d 730 (U.S. Court of Appeals 5th Cir. 1985)

ORDER

IT IS HEREBY ORDERED THAT:

1. The Arbitration Review Request is granted.

2. This matter is remanded to the Arbitrator for a finding consistent with this Opinion.

3. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

November 24, 2004

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 03-A-06 was transmitted via Fax and U.S. Mail to the following parties on this the 24th day of November 2004.

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