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

)	
In the Matter of:)	
)	
District of Columbia Metropolitan Police)	
Department)	
)	PERB Case No. 20-A-02
Petitioner)	
)	Opinion No. 1737
v.)	
)	
Fraternal Order of Police/ Metropolitan Police)	
Department Labor Committee)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On October 28, 2019, the District of Columbia Metropolitan Police Department (MPD) filed this Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-605.02(6).¹ MPD seeks review of an arbitration award (Award) dated October 1, 2019, in which the Arbitrator found that MPD violated the parties' collective bargaining agreement (CBA) when MPD terminated the Grievant. MPD seeks review on the grounds that the Arbitrator exceeded her jurisdiction and that the Award is contrary to law and public policy.

Upon consideration of the Arbitrator's conclusions, applicable law, and record presented by the parties, the Request is denied for the reasons stated herein.

II. Award

A. Background

On May 6, 2014, the Grievant was scheduled to work an overtime shift at the Potomac Electric Power Company (PEPCO) from 6:30 p.m.-12:00 a.m.² The shift was overstaffed, and the

¹ MPD filed a consent Motion for Extension of Time to submit Reasons Appealing the Award. On November 8, 2019, MPD filed its Statement of Reasons for Arbitration Review Request. Citations to "Pet'r Memo" are to this filing.

² Award at 4.

Grievant volunteered to leave.³ The Grievant returned the police cruiser to the police station and left work at approximately 7:00 p.m.⁴ At approximately 9:00 p.m., the Grievant received a call from her husband about a voicemail message accusing the Grievant of infidelity.⁵ The Grievant later recognized a co-worker's voice on the voicemail message.⁶ The next day, on May 7, 2014, the Grievant filed a Form 1130 and requested four (4) hours of overtime pay despite voluntarily leaving the overtime detail at PEPCO.

Thereafter, the Grievant reported to the MPD Internal Affairs Division (IAD) the co-worker's voicemail message that she heard on May 6, 2014.⁷ IAD interviewed the Grievant. During the interview, the IAD agent described the Grievant as "very melancholy" and "tearful and emotional."⁸ The Grievant reported to the IAD agent that she was working overtime at PEPCO when she received the voicemail message, but she also reported that she had left the overtime detail early.⁹ The IAD agent did not question the Grievant's time discrepancy because the Grievant was being questioned as a complainant. The IAD agent decided to leave the time discrepancy issue for the next IAD agent to clarify.¹⁰

On July 9, 2014, IAD interviewed the Grievant related to the time discrepancy found during the Grievant's first IAD interview.¹¹ The Grievant denied that she told the first IAD agent that she was at the overtime detail when she heard the voicemail message that she had reported.¹² In a follow-up interview on August 5, 2014, the Grievant acknowledged that she left the overtime detail and returned the police cruiser to the police station but refused to provide an estimated time for those activities.¹³ The Grievant also refused to disclose where she was on May 6, 2014, during the reported overtime hours because it was a "personal matter."¹⁴ The Grievant told the interviewing agent that she did not recall why she told the first IAD agent that she heard the voicemail message before she left the overtime detail.¹⁵

On August 7, 2014, IAD found that the Grievant violated MPD orders and directives by claiming four (4) hours of overtime although she did not work, providing untruthful statements, and engaging in deceptive behavior by refusing to divulge her whereabouts on May 6, 2014.¹⁶

³ Award at 4.

⁴ Award at 4.

⁵ Award at 5.

⁶ Award at 5.

⁷ Award at 5.

⁸ Award at 5.

⁹ Award at 5.

¹⁰ Award at 5.

¹¹ Award at 6.

¹² Award at 6.

¹³ Award at 7.

¹⁴ Award at 7.

¹⁵ Award at 7.

¹⁶ Award at 8.

On September 14, 2014, MPD served the Grievant with the Notice of Proposed Adverse Action. MPD charged the Grievant with the following:

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-17 (Fraud in securing appointment or falsification of official records or reports.) Specification No. 1: This violation was due to [the Grievant] filing of Form 1130 for overtime pay when she left the PEPCO detail voluntarily.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-6 (Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to official duties.) Specification No. 1: This violation was due to [the Grievant] presenting Form 1130 for approval to [Sergeant] and indicating she worked the PEPCO detail knowing this was false. Specification No. 2: This violation was due to the Grievant falsely stating to [IAD agent] that she was at the PEPCO detail when her husband called after which immediately, she left work. . . . Specification No. 3: This violation was due to [the Grievant] falsely stating in her July 9, 2014, interview that she was alone on Pennsylvania Avenue when she was with another person whom she refused to identify.

Charge No. 3: Violation of General Order Series 120-21, Attachment A, Part A-12 (conduct unbecoming an officer. . . .) Specification No. 1: This violation was due to [the Grievant] submitting Form 1130 for payment of overtime when she did not work. Specification No. 2: This violation was due to [the Grievant] providing untruthful and evasive answers to IAD agents.¹⁷

The Grievant requested a hearing, and on March 13 and 14, 2015, an Adverse Action Panel (Panel) convened. After the hearing, the Panel found the Grievant “Not Guilty” on Charge No. 2, Specifications Nos. 1 and 3.¹⁸ The Panel found the Grievant “Guilty” on Charge No. 3, Specification No.1, but imposed no penalty.¹⁹ The Panel found the Grievant “Guilty” on Charge No. 1, Specification No. 1 and imposed a 30-day suspension without pay.²⁰ The Panel found the Grievant “Guilty” on Charge No. 2, Specification No. 2 and imposed the penalty of termination.²¹ Finally, the Panel found the Grievant “Guilty” on Charge No. 3, Specification No. 2 and imposed a 15-day suspension without pay.²²

On May 8, 2015, the Grievant appealed to the Chief of Police. The appeal was denied. On June 16, 2015, the Fraternal Order of Police/ Metropolitan Police Department Labor Committee (FOP) invoked arbitration.²³

¹⁷ Award 8-9.

¹⁸ Award at 10.

¹⁹ Award at 10.

²⁰ Award at 10.

²¹ Award at 10.

²² Award at 11.

²³ Award at 10.

B. Arbitrator's findings

The parties' agreed to limit arbitral review to the existing testimony and evidence in the administrative record and the briefs submitted by the parties.²⁴ The issues before the Arbitrator were (1) whether the charges against the Grievant were supported by substantial evidence and (2) whether termination was the appropriate discipline. Additionally, the Arbitrator resolved a preliminary dispute regarding the introduction of comparable discipline cases.

MPD argued that FOP could not introduce new evidence of comparable discipline in its brief because an arbitration is limited to the record compiled during an administrative action.²⁵ The Arbitrator found that an arbitrator's authority arises out of the parties' contractual agreement to submit the case to arbitration and that the parties' collective bargaining agreement required discipline to be imposed only for cause.²⁶ The Arbitrator found that the reason FOP presented the cases in its brief was to show "that some employees engaged in similar or far worse behavior than the Grievant, yet received lesser penalties."²⁷ The Arbitrator held that the cases would be considered because they provided insight into the "proper penalty for objectionable workplace behaviors."²⁸

Thereafter, the Arbitrator determined that the charges against the Grievant were supported by substantial evidence.²⁹ The Arbitrator then reviewed the Panel's weighing of the *Douglas*³⁰ factors to determine whether termination was the appropriate penalty.³¹ FOP argued that the Panel was not objective in its analysis of the *Douglas* factors.³² MPD argued that the Panel properly reviewed and applied each *Douglas* factor even though only relevant factors needed to be considered to determine if a penalty is reasonable.³³ The Arbitrator found that there were enough mitigating circumstances to return the Grievant to work and found that termination was not the appropriate penalty.³⁴

Regarding the specific charges which are at issue: Charge No. 1, Specification No. 1 - The MPD is correct. [the Grievant] said she "worked" the detail knowing it to be untrue; Charge No. 2, Specification No. 2 - This is moderated by the fact that [the Grievant] was tearful and upset in her first interview with [the IAD agent] but, [the Grievant] also lied in subsequent interviews when she had adequate time to correct her conflicting statements; Charge No. 3, Specification No. 1 -This is

²⁴ Award at 11.

²⁵ Award at 12. There was no hearing before the arbitrator, the arbitration was based solely on the administrative record and briefs submitted by the parties.

²⁶ Award at 13.

²⁷ Award at 14.

²⁸ Award at 14.

²⁹ Award at 19.

³⁰ *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 5 MSPB 313 (1981). Douglas provides twelve factors as guidance to determine the appropriateness of discipline for public sector employees.

³¹ Award at 28.

³² Award at 28.

³³ Award at 28.

³⁴ Award at 33.

moderated by the fact that there was no written policy for PEPCO overtime and there were differing opinions from other officers about overtime payment; Charge No. 3, Specification No. 2 -The MPD is correct. [the Grievant] did provide evasive and untruthful answers.³⁵

The Arbitrator held that the evidence supported the charges of misconduct, but that termination was not the appropriate penalty. The Arbitrator ordered the Grievant reinstated with no back pay. Moreover, the Arbitrator provided, should the Grievant decide to return to MPD, “her seniority and whatever pension benefits she is entitled to from the date of her termination to her return to work should be restored. Her salary should be that which she would have received as of the date of this Award had she not been terminated.”³⁶ The Arbitrator ordered the revocation of termination to be reflected in the Grievant’s personnel file. Finally, the Arbitrator ordered the cost of the case split, finding no prevailing party.³⁷

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) the arbitrator was without or exceeded his or her jurisdiction; (2) the award on its face is contrary to law and public policy; or (3) the award was procured by fraud, collusion, or other similar unlawful means.³⁸ MPD contends that the Arbitrator exceeded her jurisdiction and that the Award is contrary to law and public policy.

A. The Arbitrator did not exceed her jurisdiction.

MPD asserts that the Arbitrator exceeded her jurisdiction and authority by issuing a remedy requiring action by a third party.³⁹ MPD argues that exclusive jurisdiction over its employees’ retirement benefits rests with the District of Columbia Retirement Board (DCRB). MPD argues that DCRB is solely responsible for awarding and paying retirement benefits.⁴⁰ Therefore, MPD contends that requiring the Grievant’s pension benefits to be awarded in a specific manner should be set aside or remanded to the Arbitrator for clarification.⁴¹

FOP argues that the remedy provided in the Award does not direct the DCRB to provide specific pension benefits. FOP contends that the Arbitrator properly exercised her equitable powers and restored the Grievant’s benefits to the point they would have been had she not been terminated.⁴² FOP argues that the Arbitrator properly exercised her authority in reducing the

³⁵ Award at 33.

³⁶ Award at 33.

³⁷ Award at 33.

³⁸ D.C. Official Code § 1-605.02(6).

³⁹ Pet’r Memo at 6.

⁴⁰ Pet’r Memo at 6.

⁴¹ Pet’r Memo at 9.

⁴² Opp’n at 16.

termination and reinstating the Grievant.⁴³ FOP asserts that the Award is clear and should not be remanded for clarification.⁴⁴

The Arbitrator did not exceed her authority in determining the remedy. When determining if an arbitrator exceeded their authority in rendering an award, the Board analyzes whether the award “draws its essence from the parties’ collective bargaining agreement.”⁴⁵ The relevant questions in this analysis are whether the arbitrator acted outside their authority by resolving a dispute not committed to arbitration, and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.⁴⁶ The Board has held that an arbitrator does not exceed their authority by exercising their equitable powers, unless these powers are expressly restricted by the parties’ collective bargaining agreements.⁴⁷

In this case, the remedy draws its essence from the parties collective bargaining agreement.⁴⁸ The Arbitrator provides a “make whole” remedy, putting the Grievant back in the position that she would have been in if she had not been terminated, less back pay. The disputed language in the remedy carries no requirement for any specific actions by DCRB, but rather requires that MPD provide “whatever pension benefits [the Grievant] is entitled to from the date of her termination.”⁴⁹ Further, this remedy is not restricted by the parties’ collective bargaining agreement.

By submitting a grievance to arbitration, parties agree to be bound by the arbitrator’s interpretation of the contract, rules, and regulations; and agree to accept the arbitrator’s evidentiary findings and conclusions.⁵⁰ The Board finds that the remedy in the Award was within the Arbitrator’s jurisdiction to order. Further, the Board finds that the remedy is clear, and does not require the Board to remand the Award to the Arbitrator for clarification.

B. The Award is not contrary to law and public policy.

MPD argues that the Award is contrary to law and public policy because the District has made those who have falsified documents ineligible to serve as police officers.⁵¹ MPD asserts that the instant matter is analogous to a case from the Massachusetts Supreme Judicial Court, in which the court vacated an arbitration award that reinstated an officer who made a false police report, on

⁴³ Opp’n at 18.

⁴⁴ Opp’n at 18.

⁴⁵ *AFGE Local 2725 v. DCHA.*, 61 D.C. Reg. 9062, Slip Op. No. 1480 at 5, PERB Case No. 14-A-01 (2014).

⁴⁶ *Mich. Family Resources, Inc. v. Serv. Emp’ Int’l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. 1258 at 4, PERB Case No. 10-A-09 (2012).

⁴⁷ *See, e.g., MPD v. FOP/MPD Labor Comm. ex rel. Wigton*, 64 D.C. Reg. 133394, Slip Op. No. 1643 at 3, PERB Case No. 17-A-07 (2017).

⁴⁸ Article 19(E), Section 5(5) (stating “Arbitration awards shall not be made retroactive beyond the date of the occurrence of the event upon which the grievance or appeal is based.”).

⁴⁹ Award at 33.

⁵⁰ *MPD v. FOP/MPD Labor Comm. ex rel. Sims*, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000).

⁵¹ Pet’r Memo at 5.

the grounds that the arbitration award was contrary to law and public policy.⁵² Further, MPD argues that 6-B DCMR § 873.11(m) makes any person “who knowingly made any false statement or falsified any document concerning any matter” ineligible to serve as a police officer.⁵³ MPD contends that the Arbitrator reinstated the Grievant after the Arbitrator found that the Grievant falsified a document. MPD argues any remedy to reinstate the Grievant is void as contrary to public policy.⁵⁴

FOP counters MPD’s arguments and asserts that MPD presents a mere disagreement with the Award, which is not a valid basis for challenging or overturning the Award.⁵⁵ FOP argues 6-B DCMR §873.11 pertains to the “Processing of Entry-Level Candidates for Police Officer Positions.”⁵⁶ FOP argues that the regulation does not apply to tenured officers being reinstated into the position.⁵⁷

The Award is not contrary to law and public policy. The law and public policy exception is “extremely narrow.”⁵⁸ The narrow scope limits potentially intrusive judicial reviews under the guise of public policy.⁵⁹ MPD 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.”⁶⁰ The violation must be so significant that law and public policy mandate a different result.⁶¹ The Board may not modify or set aside the Award as contrary to law and public policy in the absence of a clear violation on the face of the Award.⁶²

Here, MPD fails to identify any specific law and public policy that has been violated. The cited Massachusetts court decision is not binding on the Board. Further, the regulations in 6-B DCMR §873.11 do not prevent the reinstatement of police officers by arbitrators. The regulation applies to processing entry-level police officer candidates before their qualification for a probationary position.⁶³ MPD disagrees with the Arbitrator’s conclusion concerning the appropriate penalty to be imposed. The Board has held that a disagreement with an arbitrator’s

⁵² Pet’r Memo at 4 (citing *City of Bos. C. Bos. Police Patrolmen’s Ass’n*, 824 N.W.2d 855, 862 (2005)).

⁵³ 6-B DCMR § 873.11(m).

⁵⁴ Pet’r Memo at 5.

⁵⁵ Opp’n at 7.

⁵⁶ Opp’n at 10.

⁵⁷ Opp’n at 10.

⁵⁸ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019) (citing *Am. Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986), accord *MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 8, PERB Case No. 09-A-05 (2014); *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. No. 925 at 11-12, PERB Case No. 08-A-01 (2012)).

⁵⁹ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Fraternal Order of Police/Dep’t of Corr. Labor Comm. v. District of Columbia Pub. Emp. Relations Bd.*, 973 A.2d 174, 177 (D.C.2009).

⁶³ 6-B DCMR §873.4.

choice of remedy does not render the Award contrary to law and public policy.⁶⁴ Therefore, the Board finds that the Award is not contrary to law and public policy.

IV. Conclusion

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

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
2. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By a unanimous vote of Board Chairperson Douglas Warshof, Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

February 20, 2020

Washington, D.C.

⁶⁴ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6734, Slip Op. No. 1705 at 7, PERB Case No. 19-A-02(2019) (citing *DCHA v. Bessie Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999)).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 20-A-02, Op. No. 1737 was sent by File and ServeXpress to the following parties on this the 26th day of February 2020.

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