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

In the Matter of:)	
)	
Fraternal Order of Police/Department of Corrections Labor Committee)	
)	
Petitioner)	PERB Case No. 22-A-06
)	
v.)	Opinion No. 1818
)	
District of Columbia Department of Corrections)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On June 21, 2022, the Fraternal Order of Police/Department of Corrections Labor Committee (FOP) filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA)¹ seeking review of an arbitration award (Award) dated May 31, 2022. In the Award, the Arbitrator denied FOP’s grievance and upheld the decision of the District of Columbia Department of Corrections (DOC) to terminate a correctional officer (Grievant). FOP requests review on the grounds that the Award is contrary to law and public policy.² DOC filed a response (Response), requesting the Board to deny FOP’s Request.³

¹ D.C. Official Code § 1-605.02(6).

² See Request at 6. FOP does not explicitly argue that the Award is contrary to law and public policy. However, FOP asserts that D.C. Official Code § 1-605.02(6) “states in relevant part that an appeal from an award may be modified or set aside if ‘...the award on its face is contrary to law or public policy.’” Based on context, the Board concludes that FOP alleges the Award was contrary to law and public policy.

³ On July 5, 2022, DOC filed a motion to dismiss, arguing that FOP failed to cure deficiencies in its Request. In general, the Board will not overlook a petitioner’s failure to comply with a claim-processing rule where the respondent properly invokes the rule. *MPD v. FOP/MPD Labor Comm.*, 67 D.C. Reg. 11472, Slip Op. No. 1756 at 3, PERB Case No. 20-A-07 (2020) (citing *Neill v. PERB*, 234 A.3d 177, 186 (D.C. 2020)). However, the Board has discretion to waive claim-processing rules for good cause, provided there is no prejudice to either party. See *MPD v. FOP/MPD Labor Comm.*, 65 D.C. Reg. 11111, Slip Op. No. 1678 at 4, PERB Case No. 18-A-05 (2018) (citing *Neill v. PERB*, 93 A.3d 229, 238 (D.C. 2014)). The requirement that an arbitration review request provide evidence of service of an award is to ensure that an arbitration review request is timely filed. In the present case, FOP filed its Request twenty-

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 or public policy. Therefore, FOP's request is denied.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. The Grievant was a correctional officer at DOC for approximately 25 years and had no prior disciplinary record.⁴ The Grievant was assigned to the Correctional Detention Facility at the time of the incident and "had taken mandatory training in use of force and reporting requirements."⁵

On November 19, 2019, the Grievant and another correctional officer were at United Medical Center (UMC) guarding an inmate who had received medical treatment.⁶ While changing the inmate into a prison uniform to return to the Correctional Detention Facility, the inmate started to struggle.⁷ The Grievant punched the inmate in the face.⁸ UMC medical staff responded to the room and treated the inmate for a facial injury.⁹ The Grievant contacted his supervisor, who arrived on the scene shortly thereafter.¹⁰ The Grievant did not inform his supervisor that he had punched the inmate.¹¹

Later that day, the other correctional officer who was present for the incident completed an "Employee Report of Significant Incident/Extraordinary Occurrences" (DCDC-1), in which he stated that the Grievant had punched the inmate.¹² The Grievant also completed a DCDC-1 the following day, but omitted reference to the inmate's injury.¹³ The supervisor subsequently showed the other correctional officer the Grievant's inconsistent DCDC-1 and instructed the other

one days from the date on the Award signed by the Arbitrator. DOC has not asserted or provided evidence that FOP untimely filed its Request. The Board finds that FOP's failure to provide evidence of the Award's service on the parties does not prejudice DOC. Therefore, the Board waives this requirement for good cause. DOC also argued that the Board should dismiss the Request on the basis that FOP did not include any part of the record, other than the Award. However, the Board Rules do not require the petitioner to include any portion of the arbitration record with its request, aside from the award. *See* Board Rule 538.2. Therefore, the Board will not dismiss FOP's Request on this basis.

⁴ Award at 4, 21.

⁵ Award at 4.

⁶ Award at 4.

⁷ Award at Award at 17.

⁸ Award at 17.

⁹ Award at 12.

¹⁰ Award at 5.

¹¹ Award at 21.

¹² Award at 5.

¹³ Award at 5.

correctional officer to complete a new DCDC-1.¹⁴ The other correctional officer completed a second DCDC-1 that did not state that the Grievant had punched the inmate.¹⁵

DOC investigators interviewed the Grievant, the other correctional officer, the correctional officers' supervisor, and UMC medical staff.¹⁶ On January 27, 2020, DOC issued a report (Report), finding that the "Grievant violated DOC Policy 1280.21 Section 12 (a-1) which requires '[an] employee...who is directly involved in...a significant incident...[to] make immediate notification to a...Supervisor.'"¹⁷ The Report further found that by omitting the "type of force" he used on his DCDC-1, the Grievant violated DOC Policy 2200.1F Section 2(a), "which requires employees to 'perform their duties in an ethical and accountable manner by maintaining high standards of honesty, integrity, impartiality and professional conduct.'"¹⁸ Additionally, the Report concluded that the "Grievant violated DC DOC Standard Operating Procedure 5010.9H Section 14, which prohibits the use of 'unreasonable force.'"¹⁹

On March 4, 2020, DOC issued a 15-day advance notice, informing the Grievant of his proposed removal.²⁰ DOC charged the Grievant with violating the District Personnel Manual (DPM) as follows:

Charge 1: DPM 1607.2(1)(15) – Conduct Prejudicial to the District Government, "Assaulting, fighting threatening, attempt to inflict or inflicting bodily harm while on District property or while on duty."

Charge 2: DPM 1607.2(b)(1) – False Statement/Records, "Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations."²¹

Additionally, DOC found the Grievant guilty of violating DOC's internal policies and procedures concerning ethics, use of force, and incident reporting.²² The Report included DOC's *Douglas*²³ factor analysis, in which DOC concluded that termination was the only appropriate penalty for the Grievant's actions.²⁴ On May 13, 2020, DOC issued an official notification (Final

¹⁴ Award at 12.

¹⁵ Award at 5.

¹⁶ Award at 6.

¹⁷ Award at 5-6.

¹⁸ Award at 6.

¹⁹ Award at 6.

²⁰ Award at 6.

²¹ Award at 7 (quoting Advance Notice).

²² Award at 7

²³ 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.

²⁴ Award at 8-10. Neither the Award nor the parties' submissions state whether the Grievant submitted a response to the Advance Notice.

Notice) of the DOC Director's decision to terminate the Grievant.²⁵ The Final Notice informed the Grievant that his removal would be effective May 19, 2020.²⁶ FOP invoked arbitration.²⁷

B. Arbitrator's Findings

The Arbitrator considered the following issues:

- (1) Whether DOC met its burden of proof in this matter?
- (2) Whether there is a basis for disturbing the penalty?²⁸

The Arbitrator evaluated the sufficiency of the evidence supporting each of the charges against the Grievant. The Arbitrator reviewed Charge 1 and found the Grievant's testimony that he had not punched the inmate lacked credibility.²⁹ The Arbitrator found that the other correctional officer testified credibly that the Grievant had punched the inmate.³⁰ The Arbitrator determined that neither the Grievant nor the other correctional officer were in immediate danger when the Grievant punched the inmate and found that lesser force would have sufficed to achieve the inmate's compliance.³¹ The Arbitrator concluded that the employer had met its burden of proof (1) that the Grievant punched the inmate in the face,³² and (2) that the punch constituted the use of unnecessary or excessive force.³³ Therefore, the Arbitrator found the Grievant guilty of Charge 1.

The Arbitrator reviewed Charge 2. Relying on the findings for Charge 1 in addition to the Grievant's failure to report punching the inmate, the Arbitrator determined that DOC met its burden of proof that the Grievant had "fail[ed] to provide timely and accurate reports of the incident."³⁴ Thus, the Arbitrator found the Grievant guilty of Charge 2.

After finding that the Grievant was guilty of Charges 1 and 2, the Arbitrator considered whether termination was an appropriate penalty.³⁵ The Arbitrator examined DOC's application of the *Douglas* factors.³⁶ The Arbitrator considered whether there was "any basis to disturb the penalty of removal."³⁷ The Arbitrator determined that DOC "consider[ed] all 'relevant factors' in a fair and unbiased manner when making its decision" and, thus, acted in accordance with Article

²⁵ Award at 11, 21.

²⁶ Award at 11.

²⁷ Award at 1.

²⁸ Award at 1.

²⁹ Award at 17-19.

³⁰ Award at 16-17.

³¹ Award at 20.

³² See Award at 16-19.

³³ Award at 19-20.

³⁴ Award at 21.

³⁵ Award at 21.

³⁶ Award at 8-11.

³⁷ Award at 21.

XI of the CBA, the DPM, and the CMPA.³⁸ Therefore, the Arbitrator found that there was no basis to disturb the penalty.³⁹

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 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.⁴⁰ FOP requests review of the Award on the grounds that the Award is contrary to law and public policy.⁴¹

FOP bears the burden of demonstrating that the Award itself violates established law or compels an explicit violation of “well defined public policy grounded in law and or legal precedent.”⁴² The D.C. Court of Appeals has reasoned that, “[a]bsent a clear violation of law[,] one evident on the face of the arbitrator’s award, the [Board] lacks authority to substitute its judgment for the arbitrator’s.”⁴³ The violation must be so significant that law and public policy mandate a different result.⁴⁴ Overturning an arbitration award due to law and public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to the arbitrator’s interpretation of the contract.⁴⁵ “[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of ‘public policy.’”⁴⁶

FOP requests review of the Award “due to lack of any credible evidence.”⁴⁷ However, FOP does not cite to any law related to its argument.⁴⁸ FOP does not dispute that the parties bargained for the Arbitrator’s interpretation of the contract, rules, and regulations, and agreed to accept the Arbitrator’s evidentiary findings and conclusions.⁴⁹ The Board has held that it will not substitute its own interpretation of such evidence for that of the arbitrator.⁵⁰ Therefore, FOP’s

³⁸ Award at 21 (quoting *Lovato v. Dep’t of the Air Force*, 48 M.S.P.R. 198 (1991)).

³⁹ Award at 21.

⁴⁰ D.C. Official Code § 1-605.02(6). FOP raised the Board’s power to decide unfair labor practice and standards of conduct complaints pursuant to D.C. Official Code § 1-605.02(3) and (9). Request at 6. However, the Board’s jurisdiction over such complaints is not applicable to the appeal before the Board.

⁴¹ See Request at 6.

⁴² *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No. 1702 at 4, PERB Case No. 18-A-17 (2019).

⁴³ *FOP/DOC Labor Comm. v. PERB*, 973 A.2d 174, 177 (D.C.2009).

⁴⁴ *MPD*, Slip Op. No. 1702 at 4.

⁴⁵ *Id.* (citing *Am. Postal Workers Union v. USPS*, 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)).

⁴⁶ *Id.*

⁴⁷ Request at 1.

⁴⁸ See generally Request.

⁴⁹ See generally Request.

⁵⁰ *MPD v. FOP/MPD Labor Comm. ex rel. Sims*, 47 D.C. Reg. 7217, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000).

disagreement with the Arbitrator's credibility determinations is not a basis for overturning the Award.

FOP asserts that "the entire process by which disciplinary punishment was meted out was unfair and the punishment of termination was excessive even assuming *arguendo* that any of the finding [*sic*] of an infraction may have been justified."⁵¹ FOP does not allege that the Award violated any specific law, legal precedent, or public policy. The Board has rejected similar arguments that a penalty determination was excessive and unfair where the petitioner failed to cite specific law or public policy to support its claim.⁵² The Board has held that a disagreement with an arbitrator's choice of remedy does not render the Award contrary to law and public policy.⁵³ Therefore, FOP has not demonstrated a basis for the Board to overturn the Award.

For the reasons stated, the Board finds that the Award is not contrary to law and public policy.

IV. Conclusion

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.

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, Mary Anne Gibbons, and Peter Winkler.

September 15, 2022

Washington, D.C.

⁵¹ Request at 6.

⁵² *E.g., FOP/MPD Labor Comm. v. MPD*, 59 D.C. Reg. 3374, Slip Op. No. 827, PERB Case No. 04-A-21 (2012).

⁵³ *DCHA v. Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999). FOP argues that termination was an excessive penalty but does not argue that the Arbitrator's *Douglas* factor analysis was flawed.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, 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.