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

In the Matter of:	)	
	)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Robert Loproto),	)	PERB Case No. 15-A-04
	)	Opinion No. 1523
Union,	)	
	)	
v.	)	
	)	
District of Columbia Metropolitan Police Department,	)	Decision and Order
	)	
Agency.	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On January 5, 2015, Petitioner Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”), on behalf of Robert Loproto (“Grievant”), filed an Arbitration Review Request (“Request”) seeking to set aside an Arbitration Award<sup>1</sup> (“Award”) issued in a grievance arbitration against the District of Columbia Metropolitan Police Department (“MPD”). FOP bases its Request upon the Board’s authority under D.C. Official Code § 1-605.02(6) to modify, set aside, or remand an award where (1) the arbitrator was without, or exceeded, his jurisdiction, and/or (2) the award was procured by fraud, collusion, or other similar and unlawful means.

The Board finds that the Arbitrator did not exceed his jurisdiction and that the Award was not procured by fraud, collusion, or other similar and unlawful means. FOP’s Request is therefore denied.

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<sup>1</sup> See (Request, Attachment 6) (hereinafter cited as “Award”).

## II. Background

On December 22, 2004, MPD issued Grievant a Notice of Proposed Adverse Action letter proposing termination of his employment based on five (5) specified charges.<sup>2</sup> On March 10, 11, and 16, 2005, MPD held a departmental hearing before an MPD Adverse Action Panel (“Panel”).<sup>3</sup> The Panel found the Grievant guilty of Charges 1, 3, and 5 (with all associated specifications) and recommended termination.<sup>4</sup> On April 11, 2005, MPD issued Grievant a Final Notice of Adverse Action letter terminating his employment.<sup>5</sup> Grievant unsuccessfully appealed the termination to the Chief of Police, and then requested arbitration.<sup>6</sup>

In 2012, the parties appointed Paul Greenberg to arbitrate the grievance.<sup>7</sup> The parties filed their respective briefs and the record closed on March 22, 2013.<sup>8</sup> On December 6, 2013, FOP emailed the Arbitrator asking when the decision would be issued.<sup>9</sup> The Arbitrator responded on January 30, 2014, stating he expected to deliver the decision by March 3, 2014. When that date passed without the decision being issued, FOP emailed the Arbitrator on April 9, 2014, asking for another update. The Arbitrator did not respond. On July 8, 2014, FOP emailed the Arbitrator again asking for another update. In that email, FOP also asked the Arbitrator to notify the parties if he would not be able to issue the decision by August 8, 2014, so that they could appoint another arbitrator.<sup>10</sup> The Arbitrator replied on July 23, 2014, stating that he had worked on the decision, but needed additional time to complete it. He said he would work on it after August 4, 2014.<sup>11</sup> On August 4, 2014, the Arbitrator emailed FOP again stating that he would actually continue working on the decision the following week.<sup>12</sup>

On the morning of November 21, 2014, FOP sent the Arbitrator an email stating that FOP had decided to remove him as arbitrator.<sup>13</sup> FOP instructed Mr. Greenberg to stop all work on the case and to destroy the records he had been sent.<sup>14</sup> Later that afternoon, MPD emailed the Arbitrator stating that FOP had not consulted with MPD about the “asserted removal” and that MPD did not consent to it. MPD also stated that it was not aware of any authority that allowed FOP to unilaterally remove the Arbitrator, and instructed Mr. Greenberg to continue working on the matter until directed otherwise by the Federal Mediation and Conciliation Service

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<sup>2</sup> *Id.* at 8.

<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Id.*

<sup>5</sup> (Request at 4).

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 5, 7.

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; see also Attachment 4, Attachment 1 at 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 8; see also Attachment 4, Attachment 1 at 5.

<sup>14</sup> *Id.*

("FMCS").<sup>15</sup> Shortly thereafter, FOP emailed the Arbitrator again stating that the removal was "for cause" and warned Mr. Greenberg that if he issued an award, FOP would not honor it or pay his fees.<sup>16</sup> FOP also asserted that it would petition FMCS for Mr. Greenberg's removal "whether or not the MPD consents."<sup>17</sup> On November 23, 2014, the Arbitrator replied to the parties expressing his regret for the delays, but stated that the award would be completed by December 8, 2014.<sup>18</sup>

On December 3, 2014, FOP asked FMCS to remove Mr. Greenberg from the case. FOP expressed doubt that Mr. Greenberg could issue a fair and unbiased decision based on the emails FOP had exchanged with him.<sup>19</sup> FMCS notified FOP that it would not forcefully remove Mr. Greenberg as arbitrator, but advised FOP that if Mr. Greenberg wanted to recuse himself from the matter, he could do so.<sup>20</sup>

On December 15, 2014, Mr. Greenberg emailed the parties stating that, in his view, FOP could not unilaterally divest him of his duly appointed jurisdiction to decide the case, and that there was no valid reason for him to recuse himself.<sup>21</sup> Thereafter, Mr. Greenberg issued his Award denying FOP's grievance, finding that "[a]lthough there may be room to debate whether some of the charges and specifications proffered against Grievant would—standing alone—warrant discharge..., the weight of the established allegations supports [MPD's] conclusion that Grievant engaged in serious misconduct and that termination is the appropriate sanction."<sup>22</sup>

On January 5, 2015, FOP filed the instant Arbitration Review Request, asserting that the Award was the result of bias against FOP, and that the Arbitrator was without authority to issue the Award because FOP had removed him "for cause."<sup>23</sup> FOP bases its bias claim on the Board's authority in D.C. Official Code § 1-605.02(6) and PERB Rule 538.3(c) to modify, set aside, or remand an award where the award "was procured by fraud, collusion, or other similar and unlawful means."<sup>24</sup>

The issues before the Board are: (1) whether bias qualifies as an "other similar and unlawful mean" under which the Board can modify, set aside, or remand the Award; and (a) if so, whether the Award exhibits evidence of bias to warrant setting it aside; and (2) whether the Arbitrator was without authority to issue the Award based on FOP's unilateral effort to remove him.

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<sup>15</sup> *Id.*, Attachment 4, Attachment 1 at 4-5.

<sup>16</sup> *Id.*, Attachment 4, Attachment 1 at 4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 8-9; *see also* Attachment 4, Attachment 1 at 4.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.*, Attachment 5.

<sup>22</sup> Award at 25.

<sup>23</sup> (Request at 2, 10).

<sup>24</sup> FOP contends that "[b]ias is clearly a similar unlawful means for an Arbitrator to use in rendering a decision which should require his decision to be invalidated." (Request at f. 2).

## II. Analysis

D.C. Official Code § 1-605.02(6) authorizes the Board to modify or set aside an arbitration award in only three limited 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.<sup>25</sup>

### A. FOP's Unsupported Bias Claim Does Not Constitute a Statutory Basis for Review of the Award

In *District of Columbia Fire and Emergency Medical Services and International Association of Firefighters, Local 36 (on behalf of Firefighters Mayo and Roach)*, 59 D.C. Reg. 3818, Slip Op. No. 895, PERB Case No. 06-A-20 (2007), the Board found that the petitioner's bias allegation was based on nothing more than a disagreement with the arbitrator's credibility determinations, and therefore did not qualify as a statutory basis upon which PERB could review the award.<sup>26</sup> The Board further reasoned that it could not review petitioner's bias argument because the petitioner had not previously raised the allegation with the arbitrator prior to filing its arbitration review request.<sup>27</sup>

Here, even though FOP did present its bias argument to the Arbitrator,<sup>28</sup> FOP does not present any evidence in its Request that shows the Award itself is biased. For example, FOP does not allege that the Arbitrator resolved any questions outside of those presented to him by both MPD and FOP; that he misanalysed or misapplied any of the *Douglas* factors<sup>29</sup> in his review of the Panel's findings and recommendations; or that he made any factual findings that were not supported by the record. Moreover, FOP does not allege that the Arbitrator colluded with MPD, that he had any prior relationship with either MPD or FOP or their attorneys, or that he had any personal interest in the outcome of the decision.

Additionally, the Board, in its review of the record and the Award, has likewise not found

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<sup>25</sup> See also PERB Rule 538.3.

<sup>26</sup> See p. 5.

<sup>27</sup> *Id.*; see also *University of the District of Columbia v. University of the District of Columbia Faculty Association / NEA (on behalf of Barbara Green)*, 36 D.C. Reg. 3635, Slip Op. No. 220 at ps. 3-4, PERB Case No. 88-A-03 (1989) (holding that a mere disagreement with an arbitrator's conclusions does not, by itself, warrant a finding that the arbitrator lacked neutrality; nor does it provide a sufficient basis for PERB to be able to review the award under the "similar and unlawful means" provision in the CMPA).

<sup>28</sup> FOP requested that FMCS forcefully remove Arbitrator Greenberg from the grievance, but FMCS denied the request. (Request at 8-9). Further, FOP raised its concerns to the Arbitrator, but Mr. Greenberg declined to recuse himself. Mr. Greenberg asserted that while there are valid instances where an arbitrator's impartiality can be rightfully questioned—*i.e.*, if the arbitrator fails to disclose ties to one of the parties or attorneys, or if the arbitrator has a personal interest in the outcome of the decision—this case was not one of them. *Id.*, Attachment 5. Mr. Greenberg then assured the parties that FOP's attempt to remove him had "no impact whatsoever" on his ability to decide the case impartially. He asserted that prior to FOP's attempts to remove him, he had already "completed substantial work on the Decision," and that while his analysis "certainly was 'tweaked' during the editing process, the outcome of the Decision was not affected at all, and any revisions to the rationale were modest." *Id.*

<sup>29</sup> Award at 21-24 (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (MSPB 1981)).

any evidence of bias.

Indeed, the only arguments that FOP makes to support its assertion that the Arbitrator's Award is biased are that the Award was issued just two weeks after FOP asked FMCS to forcefully remove Mr. Greenberg,<sup>30</sup> and that the Award declined to overturn the Panel's findings. Those arguments, by themselves, do not demonstrate bias.

Thus, the Board finds that FOP's arguments constitute nothing more than a disagreement with the Arbitrator's decision. Accordingly, FOP's Request does not present a statutory basis upon which PERB can review the Award.<sup>31</sup>

B. The Arbitrator Did Not Exceed His Authority When He Issued the Award

To determine if an arbitrator has exceeded his jurisdiction and/or was without authority to render an award, the Board evaluates "whether the award draws its essence from the collective bargaining agreement."<sup>32</sup> The U.S. Court of Appeals for the Sixth Circuit, in *Michigan Family Resources, Inc. v. Service Employees International Union Local 517M*, explained what it means for an award to "draw its essence" from a collective bargaining agreement by stating the following standard:

[1] Did the arbitrator act 'outside his authority' by resolving a dispute not committed to arbitration?; [2] Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award?"; "[a]nd [3] [I]n resolving any legal or factual disputes in the case, was the arbitrator arguably construing or applying the contract"? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made "serious," "improvident" or "silly" errors in resolving the merits of the dispute.<sup>33</sup>

In this case, FOP asserts that because it, "unilaterally or otherwise, removed Greenberg from this arbitration after he *violated* his authority by exceeding the express time limit contained

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<sup>30</sup> As previously noted in footnote 28 herein, Mr. Greenberg had already "completed substantial work on the Decision" before FOP sent its request to FMCS. (Request, Attachment 5). Therefore, the Board finds that the timing of when Mr. Greenberg issued the Award in relation to FOP's letter to FMCS is not sufficiently suspect to support FOP's allegation that the Arbitrator's entire Award is biased.

<sup>31</sup> See *FEMS and IAF, Local 36, supra*, Slip Op. No. 895 at p. 5, PERB Case No. 06-A-20.

<sup>32</sup> *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (on Behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2010) (quoting *District of Columbia Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156, PERB Case No. 86-A-05 (1987)); see also *Dobbs, Inc. v. Local No. 1614, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987).

<sup>33</sup> 475 F.3d 746, 753 (6th Cir. 2007).

within the [collective bargaining agreement<sup>34</sup>], Arbitrator Greenberg had no authority to issue the decision in this case.”<sup>35</sup> Article 19, E, Section 5(6) of the parties’ collective bargaining agreement states:

The arbitrator shall render his/her decision in writing, setting forth his/her opinion and conclusions on the issues submitted, within thirty (30) days after the conclusion of the hearing. The decision of the arbitrator shall be binding upon both parties and all employees during the life of this Agreement.<sup>36</sup>

Although the Arbitrator unquestionably failed to issue the Award within thirty days after the record closed,<sup>37</sup> the Board disagrees with FOP’s contention that that stripped him of his authority to issue the Award at all. Indeed, the parties’ collective bargaining agreement is silent about consequences for missing the deadline. Furthermore, FOP has not cited—nor has PERB found—any legal authority that would allow FOP to unilaterally divest the duly-appointed Arbitrator of his jurisdiction just because he missed the deadline. The parties jointly selected and appointed Mr. Greenberg and agreed to be bound by his decision. Accordingly, it requires the joint consent of both parties to forcefully remove him.

Additionally, FOP has not alleged or shown that the Arbitrator resolved any disputes that were not committed to him by the parties. FOP has not alleged or shown that the Arbitrator committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award. Finally, with the exception of its argument about the thirty-day deadline in Article 19, E, Section 5(6), FOP has not alleged or shown that the Award itself violates any provision in the parties’ collective bargaining agreement.

Thus, in accordance with the previously stated standard in *Michigan Family Resources, supra*, the Board finds that in spite of missing the thirty-day deadline and FOP’s errant efforts to remove him, the Arbitrator “arguably” construed or applied the parties’ contract, and therefore did not exceed his authority when he issued the Award.

### C. Conclusion

Based on the foregoing, FOP’s Arbitration Review Request is denied and the matter is dismissed in its entirety with prejudice.

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<sup>34</sup> See (Request, Attachment 7) (hereinafter cited as “CBA”).

<sup>35</sup> (Request at 10) (emphasis in original).

<sup>36</sup> CBA at 25.

<sup>37</sup> Despite its denial of FOP’s Arbitration Review Request, the Board wishes to note that it certainly sympathizes with FOP’s well-warranted frustrations over the Arbitrator’s extensive delays. In Mr. Greenberg’s letter to the parties addressing FOP’s efforts to remove him, the Arbitrator warned that “significant damage” would be caused to the dispute resolution process if a single party was permitted to unilaterally remove an arbitrator. (Request, Attachment 5). While that point is well-taken, an arbitrator that takes nearly two years to issue an award in a removal case also runs the risk of causing “significant damage” to the dispute resolution process.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. FOP's Request is denied and the matter is dismissed in its entirety with prejudice.
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 Chairperson Charles Murphy, and Members Donald Wasserman, Keith Washington, Yvonne Dixon, and Ann Hoffman.

May 21, 2015

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 15-A-04, Opinion No. 1523, was transmitted through File & ServeXpress to the following parties on this the 27<sup>th</sup> day of May, 2015.

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