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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 Micheaux Bishop),	)	PERB Case No. 15-A-03
Petitioner,	)	Opinion No. 1593
v.	)	
District of Columbia Metropolitan Police Department,	)	Decision and Order
Respondent.	)	
	)	
	)	

**DECISION AND ORDER**

On December 22, 2014, Petitioner Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”), on behalf of Micheaux Bishop (hereinafter “Grievant”), filed an Arbitration Review Request (“Request”) seeking review of an Arbitration Award<sup>1</sup> (“Award”) that upheld Grievant’s termination from 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, in whole or in part, where (1) the arbitrator was without, or exceeded, his jurisdiction, (2) the award on its face is contrary to law and public policy, and/or (3) the award was procured by fraud, collusion, or other similar and unlawful means.

The Board finds that the Arbitrator did not exceed his jurisdiction, that the Award is not on its face contrary to law and public policy, 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 1 (hereinafter cited as “Award”).

## I. Statement of the Case

On October 11, 2009, MPD's Chief of Police received an email from a citizen informant (hereinafter "Informant") who asserted that Grievant was the girlfriend of Omar Bowman, who had been arrested for drug trafficking.<sup>2</sup> At an unspecified time prior to Informant's email, the FBI had observed Grievant accompanying Bowman on multiple occasions.<sup>3</sup>

On October 14, 2009, MPD revoked Grievant's police powers and assigned her to a "non-contact duty" status.<sup>4</sup> That same day, the FBI interviewed Grievant to determine what she knew about Bowman's criminal activities. The FBI concluded that Grievant had not been aware of Bowman's activities until her meeting with the FBI. Once informed, Grievant cooperated fully with the FBI and assisted with Bowman's apprehension.<sup>5</sup>

Concurrent with the FBI's investigation, MPD conducted its own internal investigation based on Informant's email.<sup>6</sup> Grievant was informed that Informant who sent the email wished to remain anonymous, and that MPD had reason to believe that the complainant's identity should remain anonymous.<sup>7</sup> Grievant informed MPD's investigator that she and Bowman had become intimate in July 2009 when Bowman was separated from his wife.<sup>8</sup> She stated that once she became aware of his indictment for drug trafficking, she ended the relationship.<sup>9</sup> On January 6, 2010, MPD informed Grievant that her case had been closed with no disciplinary action recommended.<sup>10</sup>

Grievant thereafter requested and received a copy of MPD's investigative report, which erroneously disclosed Informant's name.<sup>11</sup> Within days, Informant contacted MPD to report that Bowman's mother had confronted her, showed her copies of the email Informant had sent to the Chief of Police, and told Informant that she was disappointed that Informant had told MPD about her son's relationship with Grievant.<sup>12</sup> Informant reported that this caused her to be fearful for her and her family's safety.<sup>13</sup>

MPD then opened a second investigation to determine if Grievant had been the one who disclosed Informant's identity.<sup>14</sup> On January 29, 2010, during an investigatory interview pursuant to that second investigation, Grievant admitted to MPD's investigator that she told

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<sup>2</sup> Award at 1; Request at 2-3; Opposition at 2-3.

<sup>3</sup> Opposition at 2.

<sup>4</sup> Award at 2; Request at 2.

<sup>5</sup> Award at 2.

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

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

<sup>8</sup> *Id.* at 3.

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

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

<sup>11</sup> *Id.* at 4.

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

<sup>13</sup> *Id.*

<sup>14</sup> See Request, Attachment 2 at 8-24.

Bowman's mother that Informant was the one who sent the email to the Chief of Police. Grievant further admitted that she had continued to maintain a close relationship with Bowman, including regular telephone calls, visits to her home, and trips out to dinner.<sup>15</sup>

On May 14, 2010, MPD issued Grievant a Notice of Proposed Adverse Action letter proposing termination of her employment based on two specified charges; (1) conduct unbecoming an officer for maintaining a close interpersonal relationship with Bowman even after learning he had been indicted for drug trafficking, and (2) engaging in conduct prejudicial to the reputation of the police force for disclosing a confidential informant's identity to a non-MPD individual.<sup>16</sup>

On November 10 and December 21, 2010, at Grievant's request, a departmental hearing before an MPD Adverse Action Panel ("Panel") was held.<sup>17</sup> The Panel found Grievant guilty of both charges and recommended termination for Charge No. 1 and a 10-day suspension without pay for Charge No. 2.<sup>18</sup> On February 14, 2011, MPD issued Grievant a Final Notice of Adverse Action letter suspending her for 10 days and terminating her employment.<sup>19</sup> Grievant unsuccessfully appealed the termination to the Chief of Police, and then requested arbitration.<sup>20</sup>

In 2011, the parties appointed Warren M. Laddon to arbitrate the grievance.<sup>21</sup> The stipulated issues before the Arbitrator were:

1. Whether the MPD violated the 90-day Rule set forth in D.C. Code Section 5-1031?
2. Whether MPD's actions violated due process of law?
3. Whether sufficient evidence exists to support the alleged charges?
4. Whether termination is an appropriate remedy?<sup>22</sup>

On December 1, 2014, the Arbitrator issued the Award, finding that: (1) Grievant's Notice of Proposed Adverse Action letter stemmed from MPD's second investigation that commenced in January 2010 and therefore did not violate the 90-day rule;<sup>23</sup> (2) MPD's actions

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<sup>15</sup> Award at 4-5.

<sup>16</sup> *Id.* at 5-7.

<sup>17</sup> *Id.* at 7; *see also* Request, Attachment 2 at 152.

<sup>18</sup> Award at 10-13; *see also* Request at 6; *and* Request, Attachment 2 at 914-938. The Panel also found Grievant guilty of a third charge that it added subsequent to the hearing. Request, Attachment 2 at 935. However, that new charge was later dismissed by the Assistant Chief of Police. Request at 5-6.

<sup>19</sup> Request at 6.

<sup>20</sup> *Id.* Since the Chief of Police had been personally involved in this matter, Grievant's appeal was instead heard and decided by the Assistant Chief of Police. *Id.*

<sup>21</sup> Request at 8.

<sup>22</sup> Award at 14; *see also* Request at 8; *and* Opposition at 8.

<sup>23</sup> Award at 16-22.

did not violate Grievant's due process rights;<sup>24</sup> (3) Grievant's admission to MPD's investigator that she engaged in the alleged misconduct constituted substantial evidence to support the charges;<sup>25</sup> and (4) termination was the appropriate penalty.<sup>26</sup>

On December 22, 2014, FOP filed the instant Arbitration Review Request, asserting that the Award was procured through bias; is contrary to law and public policy; and exceeded the Arbitrator's authority.<sup>27</sup>

## II. Analysis

D.C. Official Code § 1-605.02(6) authorizes the Board to modify or set aside a grievance 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>28</sup> FOP seeks a review of the Award on all three grounds.

### A. FOP's Bias Claims Do Not Constitute a Statutory Basis for PERB to Review the Award

FOP asserts that the Award was procured through bias because:

- (1) the Arbitrator criticized and denigrated FOP when he stated that "[e]very first year associate knows that it is a waste of time, and frequently worse than that, to attempt to prove your case with the testimony of an adverse witness";<sup>29</sup>
- (2) the Arbitrator made factually untrue statements such as stating the Grievant had admitted her "guilt" to MPD's investigator even though she had pled "not guilty" to the charges;<sup>30</sup>
- (3) the Arbitrator expressed disdain for FOP's position when he stated that he would have been even more harsh on the Grievant had he been on Grievant's Panel;<sup>31</sup>
- (4) the Arbitrator was inconsistent and unfair in his evaluation of the evidence such as when he criticized FOP for not providing any comparative disciplinary cases during the arbitration, but then rejected other evidence that FOP did try to present on grounds that it was outside of the established record;<sup>32</sup> and

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<sup>24</sup> *Id.* at 22-28.

<sup>25</sup> *Id.* at 29-31.

<sup>26</sup> *Id.* at 31-34.

<sup>27</sup> Request at 1-2, 8, 11, 18.

<sup>28</sup> *See also* PERB Rule 538.3.

<sup>29</sup> Request at 9.

<sup>30</sup> *Id.* at 9-10.

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.*

- (5) the Arbitrator injected his personal opinion into the Award such as when he rejected FOP's argument that termination violated MPD's progressive discipline requirements because of the "current conditions in this country with respect to police departments and their relationship with the public they are employed to serve."<sup>33</sup>

The Board has held that disagreement with an arbitrator's conclusions does not, by itself, warrant a finding that the arbitrator lacked neutrality; nor does it provide a sufficient statutory basis for PERB to review the award under the "fraud, collusion, or other similar and unlawful means" provision in D.C. Official Code § 1-605.02(6).<sup>34</sup> Further, a petitioner must raise its bias claim with the arbitrator prior to filing an arbitration review request before PERB.<sup>35</sup> Finally, the petitioner must present evidence that the arbitrator (1) resolved questions outside of those presented to him by the parties, that he misanalysed or misapplied the law, and/or that he made factual findings not supported by the record; and (2) that the arbitrator colluded with the prevailing party, that he had a prior undisclosed relationship with one of the parties or their attorneys, and/or that he had an undisclosed personal interest in the outcome of the decision.<sup>36</sup>

Here, there is no evidence that FOP presented its bias arguments to the Arbitrator prior to filing its Arbitration Review Request. This alone provides a sufficient basis to find that PERB cannot review the award under the "fraud, collusion, or other similar and unlawful means" provision in D.C. Official Code § 1-605.02(6).<sup>37</sup> However, even if FOP had presented its bias allegations to the Arbitrator, FOP's claims would still fail because FOP did not present any evidence in its Arbitration Review Request that the Arbitrator colluded with MPD, that he had a prior undisclosed relationship with either FOP or MPD or their attorneys, and/or that he had any personal interest in the outcome of the decision.<sup>38</sup>

Thus, the Board finds that FOP's bias claims fail to present a statutory basis upon which PERB can review the Award under the "fraud, collusion, or other similar and unlawful means" provision in D.C. Official Code § 1-605.02(6).<sup>39</sup>

#### B. The Award is Not Contrary to Law and Public Policy

In order for the Board to find that an arbitrator's award is on its face contrary to law, the asserting party bears the burden to specify the "applicable law and definite public policy that

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<sup>33</sup> *Id.* at 10-11.

<sup>34</sup> *Univ. of the Dist. of Columbia v. Univ. of the Dist. of Columbia Faculty Ass'n / NEA (on behalf of Barbara Green)*, 36 D.C. Reg. 3635, Slip Op. No. 220 at p. 3-4, PERB Case No. 88-A-03 (1989).

<sup>35</sup> *D.C. Fire and Emergency Med. Serv. and Int'l Ass'n of Firefighters, Local 36 (on behalf of Firefighters Mayo and Roach)*, 59 D.C. Reg. 3818, Slip Op. No. 895 at p. 5, PERB Case No. 06-A-20 (2007).

<sup>36</sup> *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 62 D.C. Reg. 10503, Slip Op. No. 1523 at p. 4-5, PERB Case No. 15-A-04 (2015).

<sup>37</sup> *See FEMS and IAF, Local 36*, 59 D.C. Reg. 3818, Slip Op. No. 895 at p. 5, PERB Case No. 06-A-20.

<sup>38</sup> *See FOP v. MPD*, 62 D.C. Reg. 10503, Slip Op. No. 1523 at p. 4-5, PERB Case No. 15-A-04.

<sup>39</sup> *See FEMS and IAF, Local 36, supra*, Slip Op. No. 895 at p. 5, PERB Case No. 06-A-20; *see also UDC v. UDC Faculty Ass'n*, 36 D.C. Reg. 3635, Slip Op. No. 220 at p. 3-4, PERB Case No. 88-A-03.

mandates that the Arbitrator arrive at a different result.”<sup>40</sup> Furthermore, the Board has held that “disagreement with the Arbitrator’s interpretation ... does not make the award contrary to law....”<sup>41</sup>

Additionally, PERB’s review of an arbitration award on grounds that it is contrary to public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to the arbitrator’s ruling.<sup>42</sup> Indeed, “the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy.”<sup>43</sup> A petitioner must therefore demonstrate that the award “compels” the violation of an explicit, well defined public policy grounded in law and/or legal precedent.<sup>44</sup> Further, the violation must be so significant that the law or public policy “mandates that the arbitrator arrive at a different result.”<sup>45</sup> Finally, mere “disagreement with the arbitrator’s interpretation ... does not make the award contrary to ... public policy.”<sup>46</sup>

1. The Award’s Finding That MPD Did Not Violate the 90 Day Rule Was Not Contrary to Law or Public Policy

FOP contends that MPD failed to issue Grievant her Notice of Proposed Adverse Action letter within 90 days of first becoming aware of Grievant’s alleged misconduct, as required by D.C. Official Code § 5-1031 (hereinafter “the 90 day rule”).<sup>47</sup> The 90 day rule requires that unless the act or occurrence allegedly constituting cause is the subject of a criminal investigation,

...[n]o corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.

FOP argued before the Arbitrator that both charges against Grievant should be dismissed because they each sprang from and were the natural outgrowths of Grievant’s relationship with

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<sup>40</sup> *Dist. of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 59 D.C. Reg. 11329, Slip Op. No. 1295, PERB Case No. 09-A-11 (2012); see also *Dist. of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000).

<sup>41</sup> *Dist. of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, Slip Op. No. 933, PERB Case No. 07-A-08 (Mar. 12, 2008); see also *Dist. of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm. (on behalf of Thomas Pair)*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at p. 7-8, PERB Case No. 09-A-05 (2014).

<sup>42</sup> *Dist. of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm. (on behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012).

<sup>43</sup> *Id.* (quoting *Am. Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

<sup>44</sup> See *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

<sup>45</sup> *MPD v. FOP*, 47 D.C. Reg. 7217, Slip Op. No. 633, PERB Case No. 00-A-04.

<sup>46</sup> *MPD v. FOP*, Slip Op. No. 933, PERB Case No. 07-A-08.

<sup>47</sup> Request at 12.

Bowman, which MPD first had notice of on October 11, 2009, when Informant emailed the Chief of Police.<sup>48</sup> The Arbitrator rejected FOP's contention, reasoning that MPD had actually conducted two separate investigations into Grievant's misconduct. He found that MPD closed its first investigation into Grievant's relationship with Bowman after Grievant asserted to MPD's investigator that she had not been aware of Bowman's criminal activity until after he was indicted, and that she had ended their friendship as soon as she learned of it. However, when it was reported to MPD in January 2010 that Informant's identity had been disclosed to Bowman's mother, MPD opened a second and separate investigation to determine if Grievant was responsible for compromising Informant's identity. The Arbitrator found that it was during MPD's January 29, 2010 investigatory interview with Grievant that she admitted that she had disclosed Informant's identity to Bowman's mother, and that she had continued to maintain a "close interpersonal relationship" with Bowman despite being aware of his criminal activity.<sup>49</sup> Citing to Grievant's admissions, the Arbitrator reasoned that "January 29, 2010 [was] the first time MPD knew or should have known that the acts alleged in the Specifications in the Charges were true and factual."<sup>50</sup> Accordingly, calculating from January 29, 2010, the Arbitrator concluded that MPD's issuance of Grievant's Proposed Adverse Action letter on May 14, 2010, was timely issued within 90 days, not counting Saturdays, Sundays, or legal holidays.<sup>51</sup>

In its Arbitration Review Request, FOP again argues that the stated cause for both charges stems from Grievant's alleged relationship with Bowman, which FOP argues MPD first had notice of on October 11, 2009, when Informant emailed the Chief of Police.<sup>52</sup> FOP further asserts that Grievant did not become aware of Bowman's criminal activity until October 14, 2009, when she was interviewed by the FBI.<sup>53</sup> Using that October 14, 2009 date as the benchmark, FOP calculates that MPD was required under the 90-day rule to serve the proposed adverse action letter on Grievant by no later than February 26, 2010. However, since MPD did not serve the letter until May 14, 2010, FOP maintains that MPD violated the 90-day rule and that the Arbitrator ignored the statutory requirement when he found that MPD Proposed Adverse Action letter was timely.<sup>54</sup>

FOP relies on two D.C. Court of Appeals cases to support its contentions.<sup>55</sup> In *Finch v. Dist. of Columbia*, 894 A.2d 419 (D.C. 2006), the Court characterized the 90-day rule as a "statute of limitations."<sup>56</sup> In *Dist. of Columbia Fire and Med. Serv. Dep't v. Dist. of Columbia Office of Emp. Appeals*, 586 A.2d 419 (D.C. 2010), the Court found that the purpose of the 90-day rule was to "bring 'certainty' to employees over whose heads a potential adverse action might otherwise linger indefinitely."<sup>57</sup> Analyzing the facts of the case before it, the Court found

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<sup>48</sup> Award at 16-17.

<sup>49</sup> *Id.* at 16-22.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> *Id.* at 22.

<sup>52</sup> Request at 12.

<sup>53</sup> *Id.*

<sup>54</sup> Request at 12-13.

<sup>55</sup> *Id.* at 13-15.

<sup>56</sup> *Id.* at 13.

<sup>57</sup> *Id.* at 14-15 (quoting 586 A.2d at 425).

that the 90-day clock began to run when FEMS first interviewed the employee under investigation and other witnesses and thereby became reasonably aware that the employee had more likely than not engaged in the alleged misconduct. Although FEMS argued that there were conflicts in the employee's and other witnesses' statements that took time to resolve, the Court found that those alleged conflicts, if they existed at all, were minimal and did not justify FEMS taking more than five months before officially initiating its proposal to remove the employee.<sup>58</sup> Accordingly, the Court affirmed the Office of Employee Appeals' ("OEA") reversal of the employee's termination, finding that OEA's determination that FEMS violated the 90-day rule was "consistent with the legislative intent" of the statute.<sup>59</sup>

Citing these cases, FOP asserts that:

In a case such as this, even if [MPD] later becomes privy to information that would have led to administrative charges being brought against the employee (had it known of the information earlier), the public policy considerations of finality and closure (for both sides) legally prevents the MPD from charging the Grievant with adverse action. Indeed, if [the Arbitrator] were permitted to reach the merits of an adverse action that was illegally instituted, it would 1) rebuff the Court of Appeals' recent decision on this issue and 2) render the mandatory language in D.C. [Official] Code § 5-1031 meaningless. Point of fact, the 90-day rule would become a suggestion rather than an enforceable rule. Without proper mandatory construction, MPD would have absolutely no incentive to bring actions within 90 business days if the Board were to rule that the merits of the arbitration must be reached even though the allegation being investigated was known more than 90 business days ago. Therefore, [the Arbitrator's] ruling on the 90-day rule must be set aside.<sup>60</sup>

The Board disagrees. Grievant's Proposed Adverse Action letter expressly charged Grievant with maintaining a close interpersonal relationship with Bowman "after" she learned of his criminal activity.<sup>61</sup> FOP asserts that Grievant did not become aware of Bowman's criminal activity until October 14, 2009. Thus, the Arbitrator correctly concluded that MPD could not have known that Grievant had maintained her close friendship with Bowman *after* learning of his criminal activity until she admitted to it during the January 29, 2010 investigative interview.

FOP's argument assumes that Grievant was terminated based on her entire relationship with Bowman from before and after she learned of his criminal activities, but the record shows that that was not the case. MPD's first investigation into Grievant's relationship with Bowman

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<sup>58</sup> 586 A.2d at 425-426.

<sup>59</sup> *Id.* at 426.

<sup>60</sup> Request at 15-16.

<sup>61</sup> *Id.* at 4.



was closed after MPD concluded that Grievant had not done anything wrong because she had not been aware of Bowman's criminal history when she was dating him—a finding that was substantiated by the FBI. However, when Informant notified MPD in mid-January 2010 that Grievant had disclosed her identity to Bowman's mother, MPD did not re-open its first investigation, but rather opened a new, separate, and distinct second investigation with a different case number.<sup>62</sup> Since this second investigation was based on a new allegation of misconduct, a new 90-day clock began to run that was separate and independent from the clock that ran pursuant to MPD's first investigation.<sup>63</sup> Similarly, when MPD learned on January 29, 2010, that Grievant had continued to maintain a close interpersonal relationship with Bowman despite now knowing he had been indicted for drug trafficking, a new 90-day clock began to tick for that new act of misconduct as well.<sup>64</sup>

Thus, the Board rejects FOP's contention that when MPD closed its first investigation, the 90-day rule prevented MPD from ever disciplining Grievant for any new or future acts of misconduct concerning her relationship with Bowman. Indeed, even if MPD had concluded in its first investigation that Grievant had known about Bowman's criminal history when she dated him, but had failed to initiate disciplinary proceedings against Grievant within the prescribed 90-day deadline, that still would not have given Grievant *carte blanche* leave to continue seeing Bowman and/or to continue engaging in any related misconduct in perpetuity. Certainly, the public policy considerations of finality and closure for an employee's act of misconduct occurring more than 90 days ago cannot prevent an agency from timely disciplining that employee when he/she commits new acts of misconduct later on and/or if the employee continues to engage in the inappropriate behavior.<sup>65</sup> Here, it is undisputed that Grievant first learned on October 14, 2009, that Bowman had been indicted for drug trafficking. Despite that knowledge, Grievant admitted to MPD on January 29, 2010, that she had continued to maintain a close interpersonal relationship with him. Furthermore, during that same January 29<sup>th</sup> investigative interview, Grievant also admitted that she had disclosed Informant's identity to a non-MPD individual despite knowing that Informant wanted to remain anonymous. Both of these deeds were new, separate, and distinct acts of misconduct that were each independently subject to their own 90-day deadlines.<sup>66</sup>

Accordingly, using January 29, 2010 as the benchmark, MPD had until June 9, 2010, under the requirements of the 90-day rule to initiate disciplinary proceedings against Grievant for those new acts of misconduct. Therefore, the Board finds that the Arbitrator did not act contrary to law or public policy when he concluded that Grievant's May 14, 2010 Proposed Adverse

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<sup>62</sup> See Request, Attachment 2 at 8-24.

<sup>63</sup> See *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Metro. Police Dep't*, 62 D.C. Reg. 12587, Slip Op. No. 1531 at p. 4, PERB Case No. 15-A-10 (2015) aff'd, *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd.*, Case No. 2015 CA 006517 P(MPA) (D.C. Super. Ct. Sep. 13, 2016) (holding that a later act of misconduct necessitates the running of a separate 90-day clock even if it is connected or related to an earlier act of misconduct for which a 90-day clock has already run and expired).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Action letter was timely under the 90 day rule.

Additionally, the Board finds that there is nothing in the Award that is contrary to the Court of Appeals' findings in *Finch* and *FEMS*. In *FEMS*, there was only one act of misconduct and only one investigation that the agency took too long to act upon. In this case, MPD clearly conducted two different and independent investigations based on factually separate and distinct allegations of misconduct.<sup>67</sup> At no point during either investigation did MPD ever convey a lack of certainty or finality; nor did it unduly linger in issuing Grievant's Proposed Adverse Action letter. Accordingly, the Board rejects FOP's contention that the Court of Appeals' holdings in *Finch* or *FEMS* mandate that the Arbitrator arrive at a different result.<sup>68</sup>

2. The Arbitrator Did Not Violate Law or Public Policy When He Ignored FOP's Douglas Factors Due Process Claim

FOP alleges that the Arbitrator ignored and failed to address its argument concerning MPD's inclusion of an analysis pursuant to *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313 (1981) in Grievant's Proposed Adverse Action letter.<sup>69</sup> FOP asserted before the Arbitrator, as it does in the instant Arbitration Review Request, that by including a *Douglas* factors analysis in Grievant's Proposed Adverse Action letter, MPD violated Grievant's due process rights by prematurely and prejudicially attributing guilt to the Grievant's charges and potentially tainted the ability of MPD's Adverse Action Panel to objectively review Grievant's case.<sup>70</sup>

This is not the first time FOP has raised this argument. In 2011, prior to Grievant's hearing before the Panel, FOP filed an unfair labor practice complaint alleging that MPD committed an unfair labor practice when it denied FOP's attorney's request to strike the *Douglas* factors analysis from Grievant's Proposed Adverse Action letter. The Board dismissed the complaint, holding that it was up to MPD's Adverse Action Panel to determine what evidence it could or could not consider, not PERB.<sup>71</sup>

Additionally, in 2015, FOP filed an Arbitration Review Request on behalf of another officer, William Harper, asserting, much as it has here, that MPD's inclusion of a *Douglas* factors analysis in Officer Harper's proposed adverse action letter compromised the officer's due process rights because it contaminated the deliberations of MPD's adverse action panel and compromised the panel's ability to reach its own conclusions about Officer Harper's guilt or innocence.<sup>72</sup> The Board agreed with the arbitrator's rejection of FOP's argument, reasoning that Officer Harper's adverse action panel "should have had no problem with independently

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<sup>67</sup> *Id.*

<sup>68</sup> See *MPD v. FOP*, 59 D.C. Reg. 11329, Slip Op. No. 1295, PERB Case No. 09-A-11; see also *MPD v. FOP*, 47 D.C. Reg. 7217, Slip Op. No. 633, PERB Case No. 00-A-04.

<sup>69</sup> Request at 16-18.

<sup>70</sup> *Id.*

<sup>71</sup> *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Metro. Police Dep't*, 60 D.C. Reg. 9245, Slip Op. No. 1392 at p. 5, PERB Case No. 11-U-25 (2013).

<sup>72</sup> *FOP v. MPD*, 62 D.C. Reg. 12587, Slip Op. No. 1531 at p. 4-6, PERB Case No. 15-A-10, aff'd, *FOP v. PERB*, Case No. 2015 CA 006517 P(MPA).

questioning and objectively analyzing the various conclusions reached by MPD as to the charges made and the penalties recommended.”<sup>73</sup> Accordingly, the Board found that MPD’s inclusion of a *Douglas* factors analysis in Officer Harper’s proposed adverse action letter was not contrary to any applicable law or definite public policy that mandated the arbitrator arrive at a different result.<sup>74</sup> The D.C. Superior Court recently affirmed the Board’s findings, reasoning in part that including a *Douglas* factors analysis in Officer Harper’s proposed adverse action letter “provided additional detail to the notice of the reasons MPD proposed for termination that afforded Harper the opportunity to respond to the specific rationale for MPD’s decision.”<sup>75</sup>

Even though the Arbitrator in this case did not address FOP’s *Douglas* factors argument, the D.C. Superior Court’s recent affirmation of PERB’s rejection of an almost identical argument raised by FOP in a similar case leaves the Board in a clear position to find that the Arbitrator’s failure to address that particular argument was not fatal to his overall conclusion that MPD did not violate Grievant’s due process rights. Accordingly, the Board sees no significant or compelling reason to invoke its “extremely narrow” public policy exception to overturn the Award.<sup>76</sup>

### C. The Arbitrator Did Not Exceed His Authority

FOP asserts that the Arbitrator exceeded his authority and violated Article 19(E), § 5(4) of the parties’ Collective Bargaining Agreement (“CBA”)<sup>77</sup> when he ruled that two documents that FOP tried to rely on at arbitration—a sworn affidavit by an MPD Sergeant,<sup>78</sup> and the Hearing Examiner’s Report and Recommendation from the factually related PERB Case No. 11-U-24<sup>79</sup>—could not be considered part of the arbitration record because Article 12, § 8 in the CBA states that “[i]n cases where a Departmental hearing has been held, any further appeal shall

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<sup>73</sup> *Id.* at 5-6.

<sup>74</sup> *Id.*

<sup>75</sup> See *FOP v. PERB*, Case No. 2015 CA 006517 P(MPA) at p. 9-13 (quoted text on p. 12).

<sup>76</sup> See *MPD v. FOP (on behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01; see also *United Paperworkers*, 484 U.S. at 36; and *MPD v. FOP*, 47 D.C. Reg. 7217, Slip Op. No. 633, PERB Case No. 00-A-04.

<sup>77</sup> CBA Article 19(E), § 5(4): “The Arbitrator shall not have the power to add to, subtract from or modify the provisions of this Agreement in arriving at a decision of the issue presented and shall confine his decision solely to the precise issue submitted for arbitration.” See Request, Attachment 7.

<sup>78</sup> The sworn affidavit was given by First District Sgt. Raymond Middleton, who attested that after Grievant’s Panel hearing ended, but before the Panel issued its Findings of Fact and Conclusions of Law, he had spoken with one of the Panel members who told him that the Panel had verbally voted not to terminate Grievant. He further asserted that after the Panel issued its official written findings recommending termination, he spoke with the Panel member again, who told him that the Panel members had been given additional evidence in the interim that showed Grievant had lied about ending her relationship with Bowman, and that that had caused the Panel to change its vote to recommend termination. See Request, Attachment 3.

<sup>79</sup> The Hearing Examiner’s Report and Recommendation in PERB Case No. 11-U-24 found that MPD committed an unfair labor practice when it failed and refused to timely provide FOP with certain documents FOP had requested that were relevant and necessary to evaluate and consider the allegations in Grievant’s case. In *Fraternal Order of Police/Metro. Police Dep’t Labor Comm. v. D.C. Metro. Police Dep’t*, Slip Op. No. 1585, PERB Case No. 11-U-24 (June 30, 2016), the Board upheld and sustained the hearing examiner’s findings.

be based solely on the record established in the Departmental hearing.”<sup>80</sup> FOP contends that the Arbitrator’s refusal to consider the two documents improperly restricted the record because:

- (1) the Arbitrator’s authority was derived from Article 19 (governing “Grievance Procedure”), not Article 12 (governing “Discipline”);
- (2) Article 19(E), § 5(2) states that “[t]he parties to the grievance or appeal shall not be permitted to assert in such arbitration proceeding any ground or to reply on any evidence not previously disclosed to the other party”;
- (3) FOP’s sworn affidavit had been previously disclosed to MPD as part of Grievant’s Motion for Reconsideration of the Assistant Chief of Police’s decision to uphold the Panel’s recommendation of termination; and
- (4) the Hearing Examiner’s Report in PERB Case No. 11-U-24 was a legal case and therefore did not have to be contained in the record in order to be referenced.<sup>81</sup>

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>82</sup> The U.S. Court of Appeals for the Sixth Circuit, in *Michigan Family Res., Inc. v. Serv. Emp. Int’l Union, Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007), provided the following standard to determine if an award “draws its essence” from a collective bargaining agreement:

[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.

Here, there is no evidence that the Arbitrator resolved any disputes other than the four specific questions the parties jointly placed before him. Additionally, as discussed, *supra*, FOP has not demonstrated in any way that the Arbitrator’s Award was the result of fraud, that he had

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<sup>80</sup> Request at 18.

<sup>81</sup> *Id.* at 18-20.

<sup>82</sup> *MPD v. FOP (on behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (quoting *Dist. of Columbia Pub. Sch. v. AFSCME, Dist. 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, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 813 F.2d 85 (6th Cir. 1987).

a conflict of interest, or that he otherwise acted dishonestly in issuing the Award.<sup>83</sup>

With regard to the Arbitrator's determination that he could not consider FOP's sworn affidavit and the Hearing Examiner's Report and Recommendation from PERB Case No. 11-U-24 because of the constraints placed on him by Article 12, § 8 of the CBA, the Board finds that the Arbitrator's decision was, at the very least, an arguable construal and application of how Article 12, § 8 relates to Article 19(E), § 5(4), and not a modification of any particular terms in the CBA.<sup>84</sup> Indeed, the parties presented the Arbitrator with competing interpretations of what they thought the applicable provisions meant, and after duly acknowledging and weighing their positions, the Arbitrator interpreted Article 12, § 8 to mean that since MPD had held a hearing in this matter, he could not consider FOP's documents because the case before him had to be based solely on what was established at that hearing.<sup>85</sup> In so doing, the Arbitrator did not create any new contractual language, and he did not claim or exercise any authority for which there was no basis in the CBA. Furthermore, even if his interpretation of Article 12, § 8 could be characterized as a "serious," "improvident" or "silly" error in light of Article 19(E), § 5(4)—and the Board is not saying that it was—it was still nevertheless an interpretation, and is therefore beyond PERB's ability or authority to question. As the Board has held on many occasions, when parties submit matters to arbitration, they appoint the Arbitrator to be the reader and interpreter of their CBA and agree to be bound by his interpretations.<sup>86</sup> Accordingly, since the parties specifically bargained to be bound by the Arbitrator's interpretations of their CBA, the Board cannot substitute its own interpretation of the parties' agreement for that of the duly appointed Arbitrator.<sup>87</sup>

Therefore, since the Arbitrator's decision not to consider FOP's documents was arguably a construal, application, and interpretation of a specifically cited provision in the parties' CBA, and since the parties expressly appointed the Arbitrator to make those types of interpretations in rendering the Award, the Board finds that the Arbitrator's decision not to consider FOP's documents drew its essence from the CBA, and was therefore not in excess of the Arbitrator's authority.<sup>88</sup>

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<sup>83</sup> See *Michigan Family Res., Inc.*, 475 F.3d at 753.

<sup>84</sup> See *Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm. (on behalf of Tania Bell)*, Slip Op. No. 1591 at p. 5, PERB Case No. 15-A-16 (Aug. 23, 2016).

<sup>85</sup> Award at 16.

<sup>86</sup> *Fraternal Order of Police/Metro. Police Dep't Labor Comm. (on behalf of Timothy Harris) v. Dist. of Columbia Metro. Police Dep't*, 59 D.C. Reg. 11329, Slip Op. No. 1295 at p. 5, PERB Case No. 09-A-11 (2012) (internal citations omitted).

<sup>87</sup> *Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm. (on behalf of Jeffrey V. Robinson)*, 59 D.C. Reg. 9778, Slip Op. No. 1261 at p. 2, PERB Case No. 10-A-19 (2012) (internal citations omitted). The Board notes that one narrow exception to this is if the arbitrator's interpretation is on its face contrary to a specific applicable law and/or definite public policy that mandates him to arrive at a different result. *Id.* However, as discussed, *supra*, FOP has not alleged any grounds in this case that would justify an invocation of that exception.

<sup>88</sup> See *Michigan Family Res., Inc.*, 475 F.3d at 753.

D. Conclusion

Based on the foregoing, the Board finds that FOP has not shown that the Award was procured through bias; that the Award is contrary to law and public policy; and/or that the Arbitrator exceeded his authority. Accordingly, FOP's Arbitration Review Request is denied and the matter is dismissed in its entirety with prejudice.

**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 Yvonne Dixon, Ann Hoffman, and Douglas Warshof. Member Barbara Somson was not present.

September 22, 2016

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 15-A-03, Opinion No. 1593, was transmitted through File & ServeXpress to the following parties on this the 28<sup>th</sup> day of September, 2016.

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