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 Gregory Morris),	)	
Petitioner,	)	PERB Case No. 04-A-20
and	)	Opinion No. 822
District of Columbia Metropolitan Police Department,	)	
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case:

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") filed an Arbitration Review Request ("Request") in the above-captioned matter. FOP seeks review of an arbitration award ("Award") which sustained the termination of Gregory Morris ("Grievant"), a bargaining unit member. Specifically, the Arbitrator found that the Metropolitan Police Department had cause to terminate the Grievant's employment.

FOP contends that the Award is contrary to law and public policy. The District of Columbia Metropolitan Police Department ("MPD" or "Agency") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy . . . " D.C. Code §1-605.02(6)

II. Discussion

The Grievant was appointed as a officer with the MPD in August 1990. In late 1997, the Grievant had a sexual encounter with a prostitute, Sherri Knowles, who was working in the vicinity of 11th Street and Massachusetts Avenue, N.W. (See Award at p. 1) MPD asserts that the Grievant pulled up in his vehicle and asked Knowles to get in. MPD claims that the Grievant asked the prostitute "for a 'date', which . . . [is] street terminology for sex for money." (Award at p. 1) MPD contends that "[a]t some point, . . . [the] Grievant identified himself as a police officer and showed his badge." (Award at p. 1) Also, it is alleged that the Grievant told Knowles that he was not going to pay for sex. Knowles claimed that she had intercourse with the Grievant. "Later that day, Knowles reported the incident to Officer Felicia Lucas, who advised her to file a formal complaint and to contact MPD's Sex Offense office." (Award at pgs 1-2)

The Grievant acknowledged "that he had sexual relations with Knowles prior to December 1, 1997, but said that he knew her only as 'Tammy;' and had not forced her to have sex with him or refused to pay for her services." (Award at p. 2)

Subsequently, on "December 1, 1997, [the] Grievant was working the midnight shift, 11:00 p.m.-7:30 a.m., as property officer at the Fourth District. Around 2:00 or 2:30 a.m. [the Grievant] left the Fourth District, in uniform and in his personal vehicle, and drove downtown. According to [the] Grievant, he was heading home to Suitland, Maryland, to change his uniform pants, which had been torn. In the vicinity of 13th and L Streets, N.W., [the Grievant] stopped [his car] and asked Knowles to get into his vehicle. Both [the] Grievant and Knowles testified that on this occasion [the] Grievant did not attempt to buy or force sex from Knowles; rather, he complained to her that she had left a condom in his vehicle after their earlier encounter. [The] Grievant then left." (Award at p. 2)

Shortly thereafter, "Knowles happened to see Officer Lucas driving by [and] . . . flagged Lucas down and told her that she had just encountered the police officer who had assaulted her several weeks earlier. [Knowles] gave Lucas a description of the officer's vehicle. A short time later Lucas spotted the Grievant's vehicle and pulled him over." (Award at p. 2)

The Fourth District midnight watch commander, Lt. Alvin Brown, was called to the scene. He took a statement from Knowles. In addition, Detective Timothy Harrison from MPD's Sex Offense Branch, "also interviewed Knowles, as well as two other prostitutes, Josie Lett and LaToya Wessel, whom Knowles had identified to Lucas as also having been sexually assaulted by a police officer. Lett and Wessel subsequently identified [the] Grievant from a photo lineup." (Award at p. 2) Subsequently at 5:15 a.m., Lt. Brown suspended the Grievant's police powers and placed him on administrative leave with pay. (See Award at p. 2)

MPD referred the matter to the United States Attorney for possible criminal prosecution. In November 1999 the United States Attorney decided not to pursue criminal prosecution.

On February 3, 2000, Agent Milagros Morales from MPD's Office of Internal Affairs interviewed the Grievant concerning his encounters with Knowles, Lett and Wessel. Another agent and a Union representative were also present. During the interview, the Grievant denied knowing Knowles, Lett, or Wessel. He also denied engaging in sexual intercourse with any prostitutes, on or off duty.

In light of the above, on April 19, 2000, the Grievant was served with a Notice of Proposed Adverse Action. The proposed adverse action was based on the following charges: (1) conduct unbecoming an officer and misuse of official position for personal gain;[1] (2) engaging in outside employment without authorization; and (3) willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of any superior officer, or making an untruthful statement before any court or hearing.[2]

The Grievant exercised his right to a Departmental hearing, which was held before a three-member Panel on June 8, 2000. On charge 1 (conduct unbecoming a police officer) the Panel found the Grievant guilty of using his official position to gain sexual favors from Knowles. In addition, the Panel found the Grievant guilty of Charge 3 (willfully and knowingly making a false statement).[3] However, the Panel determined that there was insufficient evidence and testimony for it to conclude that the Grievant used his official position to gain sexual favors from Lett and Wessel.

After considering the relevant "Douglas factors",[4] the Panel recommended that the Grievant be terminated from the MPD.

On July 27, 2000, MPD issued an Adverse Action Final Notice ("Final Notice"). The Final Notice advised the "Grievant of his right to appeal the action, within 10 days, to the Chief of Police, as well as his right to ask the Union to take the matter to arbitration or to take the

[1] This charge involved MPD's claim that the Grievant used his official position to gain sexual favors from three prostitutes.

[2] This allegation was the result of the Grievant making a statement on February 3, 2000, in which he denied knowing of or engaging in any sexual acts with the three prostitutes that filed a complaint against him.

[3] The Panel noted that it had been advised by the attorney for the MPD that Charge 2 (engaging in outside employment without authorization) had been dropped. As a result, the Panel gave no consideration to this charge.

[4] Douglas v. Veterans Administration, 5 MPSR 280 (1981).

matter himself to the District of Columbia Office of Employee Appeals." (Award at p. 4) On August 11, 2000, the Union appealed the termination to the Chief of Police.

The Chief of Police denied the Grievant's appeal and informed the Grievant that he would be terminated effective August 25, 2000.[5] As a result, the Union invoked arbitration on behalf of the Grievant.

At arbitration FOP argued that there was insufficient evidence in the record to establish the Grievant's guilt with respect to the charges sustained by the Panel. Specifically, FOP asserted that the evidence on which the Panel relied on in sustaining the termination was "based solely on the testimony of Sherri Knowles. In the Union's view, because of conflicts within her testimony and her stated bias against MPD officers, her testimony [was] not credible. With respect to Charge 3 . . . the Union note[d] that at the time of the interview at which [the] Grievant [was] charged with having given a false statement he did not even know Sherri Knowles' real name; he knew her only by her 'street name' of 'Tammy.' [Furthermore,] [e]ven if this [charge] were to be sustained, the Union argue[d], it would not support termination." (Award at p. 6)

FOP also claimed that the "Panel erred in allowing unreliable hearsay evidence concerning two other prostitutes, Josie Lett and LaToya Wessel, into the record. Although the Trial Board found [the] Grievant not guilty with respect to Charge 1, Specifications 1 and 2 – the specifications that rested on evidence provided by Lett and Wessel – the admission of hearsay as to their evidence was prejudicial, and 'allowed the Panel to impermissibly consider the accumulation of such evidence in establishing the sufficiency of Ms. Knowles' allegation'." (Award at p. 6)

In addition, FOP indicated "that approximately 90 minutes of testimony [was] missing from the transcript of the Departmental hearing . . . [As a result, the Union asserted that the] Grievant [was] deprived of a full and complete review on the record in the arbitration as contemplated by Article 19 of the [collective bargaining agreement] between the partes." (Award at p. 6)

Also, FOP claimed that MPD failed to comply with the time requirements noted in D.C. Code §1-617.1(b-1)(1) and Article 12, Section 7 of the parties' collective bargaining agreement ("CBA"). Specifically, FOP argued that "D.C. Code §1-617.1(b-1)(1) required that an adverse action be commenced no more than 45 days after the date the agency knew or should have known of the act or occurrence on which the adverse action [was] based." (Award at p. 7) FOP asserted that although "this provision of the code was repealed in 1998, it applied to an act that occurred in 1997." (Award at p. 7) Furthermore, FOP noted that on November 19, 1999, the United States Attorney declined to prosecute the Grievant; however, "MPD did not notify [the] Grievant of its proposal to terminate his employment until April 19, 2000, well beyond the 45-day time limit." (Award at p. 7)

[5] As discussed, below, there is a dispute about the date of the Chief's response.

Finally, FOP asserted that pursuant to Article 12, Section 7 of the parties' CBA, the Chief of Police is required to act on an appeal within 15 days. However, FOP argued that it appealed the adverse action to the Chief of Police on August 11, 2000, but the Chief's denial of the appeal was not issued until August 22, 2001. Therefore, FOP claimed that MPD violated Article 12, Section 7 of the parties' CBA.

In light of the above, FOP opined that the Grievant should be reinstated with full back pay and benefits.

MPD countered "that the decision of the Panel to recommend the Grievant's termination [was] based on substantial evidence." (Award at p. 7) Specifically, MPD argued that the "Grievant's guilt with respect to Charge 1, Specification 3, was established through the testimony of Sherri Knowles. [Furthermore,] [t]he Panel clearly found Knowles' testimony to be credible, and there was ample evidence in the record to support such a finding. With respect to Charge 3, Specification 1, the MPD assert[ed] that [the] Grievant admitted at the Departmental hearing that he had been untruthful when he was questioned in February 2000 about knowing a prostitute and having sex with her." (Award at p. 7)

With respect to the alleged violation of the 45-day rule, MPD noted that FOP was banned from raising this matter in arbitration because it did not raise it at the Departmental hearing. Notwithstanding FOP's waiver, MPD claimed that it complied with the 45-day rule. In addition, MPD asserted that there was no violation of the 15-day rule contained in Article 12, Section 7 of the parties' CBA. Specifically, MPD argued that although the date stamp on the Chief's denial of the appeal is August 22, 2001, the year is clearly in error. In support of this argument, MPD noted that the letter denying the appeal set the date for the Grievant's termination as August 25, 2000, and FOP's demand for arbitration was dated September 8, 2000. In view of the above, MPD claimed that the notation referring to August 22, 2001 was a typographical error and that it was clear that the Chief's letter was dated August 22, 2001.

Finally, MPD argued that the omission of some testimony from the transcript of the Departmental hearing did not deprive the Grievant of his right to a complete review. Also, MPD asserted that no error was committed with respect to admission of hearsay testimony.

In an Award issued on July 6, 2004, the Arbitrator rejected FOP's arguments by noting the following:

> The issue of the alleged violation of the 45-day rule was not presented by the Union at the Departmental hearing or in the appeal to the Chief of Police of the Final Notice. Accordingly, the Union is barred, by the express terms of the Agreement, from raising this issue in arbitration. I reach no conclusion as to the merits of the other arguments put forth by either of the parties with respect to this issue . . . [With regard to the alleged violation of the 15-day rule],

> [t]he Union raised this issue for the first time in its arbitration [b]rief. Inasmuch, as this was an issue that, by its very nature, could not have been considered at the Departmental hearing or in the appeal to the Chief of Police of the Final Notice, I find that this matter is reviewable in arbitration, notwithstanding the provisions of Article 19, Section E.5.2, of the Agreement. I find the record persuasive that the 15-day rule was not violated. [Specifically, the] Grievant appealed the Final Notice to the Chief of Police on August 11, 2000. Article 12, Section 7, of the Agreement requires the Chief of Police to issue a decision on the appeal within 15 days, or by August 26, 2000. The copy of the Chief's denial of the appeal that is in the record shows a date of August 22, 2001. All the available evidence indicates that this was a simple clerical or typographical error, and that the year should be 2000. (Award at p. 9, Emphasis in original.)

With regard to the gap in the transcript, the Arbitrator noted that "[i]t [was] certainly unfortunate that the verbatim transcript of the Departmental hearing contained a gap of approximately 90 minutes, covering all or part of the testimony of three witnesses. The question is whether this is harmful error. I find that it is not." (Award at p. 10)

The Arbitrator also rejected FOP's argument concerning the admission of hearsay evidence. In reaching this conclusion, the Arbitrator indicated that "the Panel made no use of the hearsay testimony concerning Lett and Wessel in finding [the] Grievant guilty of [the specification involving Knowles]. [In addition, the Arbitrator concluded that the] Union [failed to demonstrate] that [the] Grievant's procedural rights were violated by the Panel's decision to allow [the] hearsay testimony." (Award at p. 11).

The Arbitrator addressed FOP's claim that there was insufficient evidence in the record to establish the Grievant's guilt with respect to the charge that he used his official position to gain sexual favors from Sherri Knowles. Specifically, the Arbitrator focused on FOP's argument that the evidence on which the Panel relied in sustaining the termination with regard to this allegation was based solely on the testimony of Sherri Knowles, a witness who the Union asserted was not credible. The Arbitrator reasoned that the question concerning this issue is "whether the Panel erred in crediting Knowles' evidence in the face of its shortcomings and the denials of the Grievant . . . " (Award at p. 11) The Arbitrator indicated "that it is not appropriate for an arbitrator acting in an appellate capacity to second-guess the credibility determinations made by the Panel who heard the oral testimony of all witnesses, including both Knowles and the Grievant. [Moreover, he concluded] that the Panel [did not act] in error when it chose to credit Knowles' testimony and to discredit [the] Grievant's based, in part, on its observation that it found some of his testimony evasive and self-serving." (Award at p. 11) In view of the above, the Arbitrator rejected FOP's argument.

Kristopher Baumann, Chairman
FOP/MPD Labor Committee
1524 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

U.S. MAIL

Sheryl V. Harrington
Secretary