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

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In the Matter of:	)	
	)	
Metropolitan Police Department	)	
	)	
	)	PERB Case No. 19-A-02
Petitioner	)	
	)	Opinion No. 1705
v.	)	
	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	
	)	
	)	
Respondent	)	

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**DECISION AND ORDER**

**I. Introduction**

On January 2, 2019, the 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), seeking review of an Arbitrator’s Decision and Award (“Award”) issued on December 12, 2018. The Award sustained, in part, the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) on behalf of Jesse Travers-Smith (“Grievant”). The Award ordered that the Grievant’s termination be reversed and reduced to a 30-day suspension without pay and that he be reinstated and made whole for his losses. The issues before the Board are whether the Arbitrator exceeded his jurisdiction and whether the Award is contrary to law and public policy.

In accordance with section 1-605.02(6) of the D.C. Official Code, the Board is permitted to modify or set aside an arbitration award in only 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.<sup>1</sup> Having reviewed the Arbitrator's conclusions, the pleadings of the parties, and applicable law, the Board concludes that the Arbitrator did not exceed his jurisdiction and that the Award is not contrary to law and public policy. Therefore, the Board denies MPD's Request.

## II. Statement of the Case

The Grievant was employed by MPD as a police officer for approximately four (4) years.<sup>2</sup> As a result of an off-duty incident involving the Grievant's former domestic partner on August 18, 2012, MPD issued a Notice of Proposed Adverse Action on December 26, 2012.<sup>3</sup> The alleged off-duty incident involved a verbal dispute between the Grievant and his former partner that became physical with the Grievant pushing the partner down stairs, pushing the door against her, and head-butting her on the lip. The Grievant requested an Adverse Action Hearing and the matters were heard before an Adverse Action Panel ("Panel") on August 16, 2013.<sup>4</sup> The Panel reviewed three charges. Charge No. 1 provided, in pertinent part, that the Grievant was "deemed to have been involved in the commission of [an] act which would constitute a crime. . . ."<sup>5</sup> Charge No. 2 stated, in pertinent part, that the Grievant was engaged in "[c]onduct unbecoming an officer including acts detrimental to good discipline . . . or violations of any law . . . of the District of Columbia."<sup>6</sup> Charge No. 3 stated, in pertinent part, that that the Grievant "[failed] to obey orders and directive issued by the Chief of Police."<sup>7</sup>

The Panel issued an initial Findings of Fact and Conclusions of Law, finding the Grievant guilty of all three Charges.<sup>8</sup> The Panel recommended termination.<sup>9</sup> The Union appealed the Panel's decision on the Grievant's behalf to the Chief of Police, who administratively dismissed Charge No. 1, Specification 2 and reduced the penalty for Charge 3 to a five-day suspension without pay.<sup>10</sup> The Chief of Police upheld the Grievant's termination based upon the guilty findings on Charge No. 1, Specification 1 and Charge No. 2.<sup>11</sup> Thereafter, the parties proceeded to arbitration.<sup>12</sup>

## III. Arbitration Award

At arbitration, the Arbitrator reviewed the following issues:

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<sup>1</sup> D.C. Official Code § 1-605.02(6).

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

<sup>3</sup> Award at 6.

<sup>4</sup> Award at 7.

<sup>5</sup> Award at 6. Charge No. 1 included two specifications.

<sup>6</sup> Award at 7.

<sup>7</sup> Award at 7.

<sup>8</sup> Award at 7-8.

<sup>9</sup> Award at 8.

<sup>10</sup> Award at 8.

<sup>11</sup> Award at 8.

<sup>12</sup> Award at 9.

- (1) Did the MPD present sufficient evidence to support the Panel's finding of guilty of Charge 1, Specification 1 as it pertains to the head butt, and ultimately, its decision to terminate the Grievant for Just Cause?
- (2) Did the MPD present sufficient evidence to support the Panel's finding of guilty of Charge 2, Specification 1 as it pertains to conduct unbecoming an officer, and ultimately, its decision to terminate the Grievant for Just Cause?
- (3) Is termination the appropriate remedy for one or both of the guilty findings?<sup>13</sup>

In an Award issued on December 12, 2018, the Arbitrator found that the evidence submitted by MPD was insufficient to support Charge No. 1, specifically that the Grievant intentionally head-butted his former partner.<sup>14</sup> However, the Arbitrator found that sufficient evidence supported the Panel's finding that the Grievant made contact with his former partner's lip.<sup>15</sup> The Arbitrator determined that the evidence presented by MPD was sufficient to support Charge No. 2.<sup>16</sup>

In addressing the third issue, the Arbitrator concluded that the Panel's recommendation of termination for each charge was not an appropriate penalty based on the former partner's credibility and the Panel's application of the 12-factor test in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981) ("*Douglas Factors*").<sup>17</sup> First, the Arbitrator noted that he found "significant inconsistencies" in the former partner's recollection of the incident on August 18, 2012.<sup>18</sup> In addition, the Arbitrator concluded that the Panel failed to "conscientiously consider all of the *Douglas Factors*."<sup>19</sup> Of particular concern to the Arbitrator, was that the Panel "provided absolutely no evidence to support its conclusion that the recommendation to terminate the Grievant was consistent with penalties assessed to other officers in like or similar circumstance[s]."<sup>20</sup> Further, the Arbitrator noted that it is the obligation of the Panel to provide credible evidence that the penalty imposed was consistent with other agency actions.<sup>21</sup> The Arbitrator also noted that the Panel failed to explain the inconsistency in the Grievant's former supervisor testifying that "he would welcome the opportunity to work with the Grievant," and the Panel's finding that the Grievant's actions would make it difficult for any supervisor to trust him.<sup>22</sup>

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<sup>13</sup> Award at 3.

<sup>14</sup> Award at 23, 37.

<sup>15</sup> Award at 23, 37.

<sup>16</sup> Award at 37.

<sup>17</sup> Award at 37.

<sup>18</sup> Award at 23.

<sup>19</sup> Award at 38.

<sup>20</sup> Award at 38.

<sup>21</sup> Award at 27-29.

<sup>22</sup> Award at 38.

As a result, the Arbitrator determined that termination was “too severe.”<sup>23</sup> Inasmuch as the Arbitrator sustained the Panel’s findings that the Grievant engaged in a heated domestic dispute and made contact with his former partner’s lip, and based on the Arbitrator’s review of the Panel’s analysis of the *Douglas* Factors, the Arbitrator determined that the appropriate remedy was a 30-day suspension.<sup>24</sup> The Arbitrator directed MPD to reinstate the Grievant to his former position and make him whole for his losses effective December 13, 2013.<sup>25</sup>

On January 2, 2019, MPD filed the present Request, seeking review of the Arbitrator’s Award. On January 22, 2019, the Union submitted Opposition to Arbitration Review Request.

#### IV. Discussion

##### A. The Board finds that the Arbitrator did not exceed his jurisdiction when he failed to defer to the Panel’s factual conclusions and penalty determination.

First, MPD argues that the Arbitrator exceeded his jurisdiction by overturning the Grievant’s termination even though “substantial evidence in the record supports the Panel’s decision and that the decision was not clearly erroneous as a matter of law.”<sup>26</sup> MPD also contends that the Arbitrator exceeded his jurisdiction by not relying on the Panel’s factual findings and *Douglas* Factors analysis.<sup>27</sup> In its Request, MPD points to ten (10) of the Panel’s credibility determinations that it argues should have been given greater weight by the Arbitrator.<sup>28</sup> Consequently, MPD argues, the Award’s *Douglas* Factors analysis should be rejected in favor of the Panel’s since the Arbitrator’s *Douglas* analysis hinged on the Arbitrator’s credibility determinations.<sup>29</sup> Further, MPD requests that the Board apply the standard that applies to the Office of Employee Appeals (“OEA”) articulated in *Stokes v. District of Columbia*<sup>30</sup> that an arbitrator defer to the disciplinary decisions by an agency.<sup>31</sup>

The Arbitrator’s authority to review the Grievant’s termination in the instant case constitutes an exercise of his equitable powers arising out of the parties’ collective bargaining agreement.<sup>32</sup> This Board has held that an arbitrator does not exceed his jurisdiction by exercising his equitable powers, unless these powers are expressly restricted by the parties’ collective

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<sup>23</sup> Award at 38.

<sup>24</sup> Award at 38-39.

<sup>25</sup> Award at 39. The Grievant was only entitled to back day retroactive the date that the 30 day suspension would have been fully served.

<sup>26</sup> Request at 15.

<sup>27</sup> Request at 15, 16, 19-22.

<sup>28</sup> Request at 19-21.

<sup>29</sup> Request at 21-22.

<sup>30</sup> 502 A.2d 1006, 1010 (D.C. 1985).

<sup>31</sup> Award at 16-21.

<sup>32</sup> *Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 64 D.C. Reg. 7604, Slip Op. No. 1625 at 2, PERB Case No. 16-A-11 (2017); See, *Washington Teachers’ Union, Local No. 6, Am. Fed’n of Teachers v. D.C. Pub. Sch.*, 77 A.3d 441, 446 (D.C. 2013).

bargaining agreement.<sup>33</sup> Absent such an express restriction in the parties' collective bargaining agreement, this Board has also held that "an arbitrator does not exceed [his] authority by exercising [his] equitable powers . . . to decide what mitigating factors warrant a lesser discipline than that imposed."<sup>34</sup>

In the present case, Article 12, Section 8 of the parties' collective bargaining agreement states, in pertinent part, that an employee may appeal to arbitration and when doing so the arbitrator has the authority to review the evidentiary ruling of the Panel.<sup>35</sup> The standard of review for an arbitrator's review of a Panel's decision is the "Preponderance of Evidence."<sup>36</sup> In the current matter, the Arbitrator evaluated each of the three issues that the parties presented at the arbitration hearing, including whether termination was an appropriate remedy.<sup>37</sup> After evaluating whether the evidence supported the charges, the Arbitrator determined that the Panel did not meet its burden of proof to sustain Charge No. 1 but met its burden of proof to sustain Charge No. 2. Given these findings and based on the Arbitrator's review of the Panel's analysis of the *Douglas* Factors, the Arbitrator found an appropriate remedy. Accordingly, MPD cannot show that the Arbitrator exceeded his jurisdiction in resolving the issues in this matter because the Arbitrator was explicitly authorized to do so by the parties' collective bargaining agreement.

As MPD correctly notes in its Request, this case "hinged largely on the credibility of the Grievant and that of his [former partner]."<sup>38</sup> This factual dispute was presented to the Arbitrator who resolved it by "credit[ing] the Grievant's version of events over that of [the Grievant's former partner]."<sup>39</sup> The Board finds no reason to upset the Arbitrator's factual findings. It is well settled that disputes over the Arbitrator's evaluation of the evidence does not raise an issue for review.<sup>40</sup> The weight and the significance of evidence are within the Arbitrator's discretion and do not state a statutory basis for review.<sup>41</sup>

Finally, the Board has repeatedly held that *Stokes v. District of Columbia* is not the correct standard to apply to an arbitrator's review of an agency's decision because an arbitrator's authority arises out of the parties' contractual agreement to submit the case to arbitration rather than the statutes creating OEA interpreted in *Stokes*.<sup>42</sup> MPD should be aware that in *MPD v.*

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<sup>33</sup> *Metro. Police Dep't*, Slip Op. No. 1625 at 2.

<sup>34</sup> *Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 39 D.C. Reg. 6232, Slip Op. No. 282 at pgs. 3-4, PERB Case No. 97-A-02 (1998).

<sup>35</sup> Request, Attachment 4, p. 50.

<sup>36</sup> Award at 13.

<sup>37</sup> Award at 2.

<sup>38</sup> Request at 13.

<sup>39</sup> Request at 14.

<sup>40</sup> *Metro. Police Dep't v. Fraternal Order of Police/ Metro Police Dep't Labor Comm.*, 63 D.C. Reg. 2093, Slip Op. No. 1509 at 4, PERB Case No. 12-A-04(R) (2014).

<sup>41</sup> See *Univ. of D.C. v. Univ. of D.C. Faculty Ass'n*, 39 D.C. Reg. 9628, Slip Op. 320 at 2, PERB Case No. 92-A-04 (1992).

<sup>42</sup> *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 63 D.C. Reg. 4573, Slip Op. No. 1561 at 3, PERB Case No. 14-A-09 (2016); *Metro. Police Dep't v. Fraternal Order of Police/Metro Police Dep't Labor Comm.*, 63 D.C. Reg. 12573, Slip Op. No. 1591 at 6, PERB Case No. 15-A-06 (2016); *Metro Police*

PERB, the Superior Court of the District of Columbia held that “PERB reasonably found that [the Arbitrator] was not bound by the standards that apply to OEA’s review of agency decisions set forth in *Stokes*.”<sup>43</sup> In that case, the Court upheld a PERB decision that affirmed an arbitrator’s finding reducing a police officer’s penalty from termination to a thirty day suspension.<sup>44</sup>

For the reasons discussed, the Board finds that MPD’s argument that the Arbitrator exceeded his jurisdiction lacks merit. Therefore, the Board will not set aside or modify the award on this ground.

**B. The Board finds that the Arbitrator’s Award is in accordance with law and public policy.**

MPD claims that the Arbitrator’s Award is contrary to law and public policy because it ordered MPD to reinstate the officer notwithstanding the Arbitrator’s finding that the officer was guilty of “Conduct Unbecoming” for engaging in a verbal dispute that escalated into physical contact.<sup>45</sup> Given these findings, MPD contends that it is a violation of public policy to require that MPD reinstate the Grievant.<sup>46</sup> MPD references a general public policy argument against reinstating an officer who engaged in misconduct. For support, MPD cites to a case from the Connecticut Supreme Court and the Illinois Supreme Court wherein the courts refused to reinstate municipal employees who violated state statutes on the grounds that their reinstatement violated public policy. MPD also references its General Orders and District domestic violence laws.

Overturing an arbitration decision on the basis of public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to the arbitrator’s interpretation of the contract.<sup>47</sup> “[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.’”<sup>48</sup> A petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well-defined, public policy grounded in law or legal precedent.<sup>49</sup> The violation must be so significant that the law or public policy “mandates that the Arbitrator arrive at a different result.”<sup>50</sup> Furthermore, MPD has the burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at a

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*Dep’t v. Fraternal Order of Police/Metro Police Dep’t Labor Comm.*, 63 D.C. Reg. 12364, Slip Op. No. 1493 at 5, PERB Case No. 14-A-06 (2014);

<sup>43</sup> *Metro. Police Dep’t v. Pub. Emp. Relations Bd.*, 2014 CA 007679 P(MPA) (Dec. 16, 2015).

<sup>44</sup> *Id.*

<sup>45</sup> Request at 14.

<sup>46</sup> Request at 14.

<sup>47</sup> *Am. Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986).

<sup>48</sup> *Id.* at 8.

<sup>49</sup> See *United Paperworks Int’l Union v. Misco, Inc.*, 484 U.S. 29 at 43 (1987).

<sup>50</sup> *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. 2, PERB Case No. 00-A-04 (2000) (citing *AFGE, Local 631 v. Dep’t of Public Works*, 45 D.C. Reg. 6617, Slip Op. 365 at p. 4 n. 4, PERB Case No. 93-A-03 (1998); also see *D.C. Pub. Schs. v. Am. Fed’n of State, County and Mun. Emps., Dist. Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p.6, PERB Case No 86-A-05 (1987).

different result.”<sup>51</sup> As the Court of Appeals has stated, we must “not be led astray by our own (or anyone else’s) concept of ‘public policy’ no matter how tempting such a course might be in any particular factual setting.”<sup>52</sup>

By agreeing to submit a grievance to arbitration “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ agreement, related rules, and regulations, as well as the evidentiary findings on which the decision is based.”<sup>53</sup>

MPD fails to identify any specific public policy that has been violated, but instead relies solely on general considerations of supposed public policy, and not well-defined policy of legal precedent. Therefore, MPD has failed to point to any clear or legal public policy which the Award contravenes. 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.<sup>54</sup> MPD disagrees with the arbitrator’s conclusion concerning the appropriate penalty to be imposed. This is not a sufficient basis for concluding that the Award is contrary to law and public policy. For the aforementioned reasons, MPD’s Request is denied.

## V. Conclusion

The Board rejects MPD’s arguments and finds no cause to set aside or modify the Arbitrator’s 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

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<sup>51</sup> *Metro. Police Dep’t v. Fraternal Order of Police/Metro Police Dep’t Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

<sup>52</sup> *Dep’t of Corr. v. Teamsters Local 246*, 54 A.2d 319, 325 (D.C. 1989).

<sup>53</sup> *Fraternal Order of Police v. Dept. of Corr.* 59 D.C. Reg. 9798, Slip Op. 1271 at 2, PERB Case No. 10-A-20 (2012); *See Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633 at p. 3, PERB Case No. 00-A-04 (2000); *Metro Police Dep’ v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 51 D.C. Reg. 4173, Slip Op. 738, PERB Case No. 02-A-07 (2004).

<sup>54</sup> *D.C. Housing Authority v. Bessie Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999).

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By the unanimous vote of Board Chairperson Charles Murphy and Member Ann Hoffman, Mary Anne Gibbons, Barbara Somson, and Douglas Warshof.

April 18, 2019

Washington, D.C.



**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 19-A-02, Op. No. 1705 was sent by File and ServeXpress to the following parties on this the 18th day of April, 2019.

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