Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
District of Columbia Metropolitan Police Department	)	PERB Case No. 21-A-08
Petitioner	)	
v.	)	Opinion No. 1784
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	
Respondent	)	

DECISION AND ORDER

I. Statement of the Case

On January 11, 2021, the District of Columbia Metropolitan Police Department (MPD) filed this Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA).[1] MPD seeks review of an arbitration award (Award) dated December 21, 2020, in which the Arbitrator rescinded the termination of an officer (Grievant) and imposed a 90-day suspension without pay.[2]

MPD seeks review on the grounds that the Award is contrary to law and public policy and that the Arbitrator exceeded her jurisdiction.[3] Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Request is denied for the reasons stated herein.

[1] D.C. Official Code § 1-605.02(6).
[2] Award at 32.
[3] Request at 2.

II. Award

A. Background

The Arbitrator found the following facts. The Grievant joined MPD on April 23, 2012.[4] On July 6, 2018, the Grievant responded to a radio assignment concerning disorderly conduct at a restaurant.[5] When the Grievant entered the restaurant he spoke to the manager, who told him that a number of individuals had previously been in the restaurant and "thrown food and attempted to assault a customer."[6] After speaking to the manager, the Grievant saw a fourteen-year-old boy, who was motioning to the individuals from inside the restaurant. The manager asked the Grievant to remove the boy from the restaurant.[7] The Grievant then approached the boy and demanded that the boy come towards him. When the boy asked, "For what", the Grievant responded, "Cause I said so, come here."[8] Thereafter, the Grievant seized the boy, pulling him out of the restaurant.[9] Outside, the boy escaped the Grievant's grasp and told the Grievant to get off him.[10] The Grievant continuously pushed and provoked the boy.[11] After a brief scuffle, the boy made a threatening statement to the Grievant and the Grievant arrested the boy.[12]

Later that day, following the arrest, a Sergeant obtained an Incident Summary (IS) Number for the incident involving the Grievant and the boy.[13] On August 3, 2018, a Fourth District Lieutenant created and forwarded the Preliminary Investigative Report to the Internal Affairs Division (IAD) of MPD "for a USAO [US Attorney's Office] case presentment."[14] On August 13, 2018, the IAD responded that they received the Prosecutorial Request and that the administrative portion of the investigation would be handled by MPD.[15] On November 21, 2018, the USAO issued a memorandum declining to criminally prosecute the Grievant.[16]

On February 22, 2019, MPD issued a Notice of Proposed Adverse Action (NPAA) charging the following misconduct:

> (1) Violation of General Order Series 120.21, Part VIII, Attachment A, 11, which states, "Using unnecessary and wanton force in arresting or imprisoning any person, or being discourteous, or using unnecessary violence toward any person(s), or the public."

[4] Award at 2.
[5] Award at 2.
[6] Award at 2.
[7] Award at 3.
[8] Award at 3.
[9] Award at 3.
[10] Award at 3.
[11] Award at 3 - 4.
[12] Award at 4.
[13] Award at 6.
[14] Award at 7.
[15] Award at 7.
[16] Award at 9.

> (2) Violation of General Order 120.21 [(General Order 120.21)], Part VIII, Attachment A, 16, which reads: "Failure to obey orders and directives issued by the Chief of Police.
>
> (3) Violation of General Order 901.07, Part IV, A, which states, "All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present, shall, if possible, first attempt to defuse the situation through advice, warning, verbal persuasion, tactical communication, or other de-escalation techniques. Members shall attempt to defuse use of force situations with de-escalation techniques whenever feasible."
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> (4) Violation of General Order 901.07, Part IV, C, 1, which states, "When any force response is employed, members shall: 1. Conduct a visual and verbal check of the subject to ascertain whether the subject is in need of medical care."
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> (5) Violation of General Order 201.26, Part V, C, l(a) which states, in part, "All members shall be courteous and orderly in their dealings with the public. Members shall perform their duties quietly, remaining calm regardless of provocation to do otherwise."
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> (6) Violation of [(General Order 120.21)], which states, "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia."[17]

The NPAA proposed termination.[18] On the same day, the Grievant requested an Adverse Action Hearing.[19] On June 13, 2019, the Panel heard the matter against the Grievant.[20] The Panel found that the Grievant was guilty of several Charges/Specifications.[21] MPD submitted a Final Notice of Adverse Action against the Grievant, notifying the Grievant that he was terminated.[22] The Grievant appealed the Panel's decision to the Chief of Police, who denied the appeal on August 5, 2019.[23] Thereafter, FOP invoked arbitration.[24]

[17] Award at 9 -11.
[18] Award at 12.
[19] Award at 12.
[20] Award at 12.
[21] Award at 12.
[22] Award at 12.
[23] Award at 12.
[24] Award at 12.

B. Arbitrator's Findings

During the arbitration, the Arbitrator considered the following issues:

(1) Whether the Metropolitan Police Department violated D.C.[Official] Code § 5-1031 (the "90-day rule")?
(2) Whether the Adverse Action Panel's ("Panel's") guilty findings are supported by substantial evidence in the record?
(3) Whether termination is an appropriate penalty?[25]

On the first issue, the Arbitrator concluded that MPD did not violate the 90-day rule.[26] The Arbitrator found that the Summary Incident Report dated July 6, 2018, revealed that MPD was clearly notified of the use of force incident on July 6, 2018.[27] In addition, the Arbitrator found that the Preliminary Investigative Report drafted by the Lieutenant contained details that explicitly related to the underlying facts of the disciplinary matter.[28] Therefore, the Arbitrator found that MPD clearly had notice of the act giving rise to the disciplinary matter on July 6, 2018, and that the 90-day rule began on the same day.[29] The Arbitrator further found that the 90-day rule was tolled from August 3, 2018 to November 21, 2018, while the case was being reviewed by the USAO for prosecutorial merit.[30] The Arbitrator calculated that there were 20 days from July 6, 2018 to August 3, 2018, and 61 days from November 21, 2018 to February 22, 2019, for a total of 81 days.[31] Therefore, the Arbitrator concluded that MPD did not violate the 90-day rule.[32]

Addressing the second issue, whether the Panel's findings of guilt were supported by substantial evidence in the record, the Arbitrator found the Grievant not guilty of Charge No. 1, Specification 1. However, the Arbitrator found the Grievant guilty of Charge No. 2, Specification 1, 2, and 4.

Lastly, in addressing the Grievant's termination as an appropriate penalty, the Arbitrator concluded that *Douglas* factors Six, Ten, and Twelve were mitigating, and therefore, the penalty of termination was not appropriate.[33] *Douglas* factor Six considers the "consistency of the penalty with any applicable agency table of penalties."[34] The Arbitrator found that the Panel's review of *Douglas* factor Six lacked support in the record because the Panel did not show that the penalty was consistent with those imposed in similar situations. Thus, the Arbitrator classified *Douglas*

[25] Award at 2.
[26] Award at 25. The 90-day rule requires MPD to commence a corrective or adverse action within 90 days of the moment it knew or should have known of the act or occurrence allegedly constituting cause.
[27] Award at 24.
[28] Award at 24.
[29] Award at 24.
[30] Award at 25.
[31] Award at 25.
[32] Award at 26.
[33] Award at 31. The arbitrator misnumbered *Douglas* factor Six, "consistency of the penalty with those imposed upon other employees for the same or similar offenses," *Douglas*, 5 MSPB at 332, referring to it as *Douglas* factor Seven. We correctly refer to it as *Douglas* factor Six throughout this decision.
[34] *Douglas*, 5 M.S.P.B. at 332.

factor Six as mitigating. *Douglas* factor Ten considers the potential for an employee's rehabilitation.[35] The Panel reasoned that the Grievant's second disciplinary offense involving conduct "unbecoming and failure to obey orders" and the lack of evidence of the efficacy of his counseling, *Douglas* factor Ten was aggravating.[36] However, the Arbitrator found that the Grievant testified about how his counselor helped him take full responsibility of his actions and that the Grievant described how he could have handled the incident involving the boy differently.[37] Additionally, there were many witnesses who provided favorable testimony regarding the Grievant's character.[38] The Arbitrator concluded that there was evidence to show that the Grievant can be rehabilitated,[39] and therefore that *Douglas* factor Ten was mitigating.[40] *Douglas* factor Twelve considers "the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others."[41] The Arbitrator found that the Panel's review of *Douglas* factor Twelve was "minimal, at best," and that the evidence established the Grievant's commitment to continued service with the MPD."[42] Therefore, the Arbitrator found that *Douglas* factor Twelve was a mitigating factor.[43]

Having determined that *Douglas* factors Six, Ten, and Twelve were mitigating, the Arbitrator concluded that there was insufficient evidence in the record for the penalty of termination.[44] Considering the Grievant's misconduct in light of the Douglas factors, the Arbitrator determined that the appropriate remedy for the Grievant's termination was a ninety (90)-day suspension without pay. [45]

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in three narrow circumstances: (1) if an arbitrator was without, or exceeded his or her jurisdiction; (2) if the award on its face is contrary to law and public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.[46] MPD requests review on the grounds that the Arbitrator exceeded her jurisdiction and that the award is contrary to law and public policy.

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[35] *Id.*
[36] Award at 30.
[37] Award at 30.
[38] Award at 31.
[39] Award at 31.
[40] Award at 31.
[41] Award at 29 – 31 (citing *Id.* at 332) ((7) consistency of the penalty with any applicable agency table of penalties . . . (10) potential for the employee's rehabilitation . . . (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.))
[42] Award at 31.
[43] Award at 31.
[44] Award at 31.
[45] Award at 33.
[46] D.C. Official Code § 1-605.02(6).

A. The Arbitrator did not exceed her authority with respect to her analysis of Charge No. 1, Specification No. 1.

When determining whether an arbitrator exceeded her authority in rendering an award, the Board analyzes whether the award "draws its essence from the parties [']collective bargaining agreement."[47] The relevant questions in this analysis are whether the arbitrator acted outside her authority by resolving a dispute not committed to arbitration and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.[48]

MPD argues that the Arbitrator exceeded her jurisdiction when she found that MPD did not prove the Grievant guilty of Charge No. 1, Specification No. 1, by substantial evidence.[49] MPD specifically argues that the Arbitrator exceeded her jurisdiction because she completely "re-wr[ote] the General Orders, or rather, stat[ed] that the plain language of the General Order is something other than what it reflects."[50] MPD argues that the Arbitrator incorrectly stated that General Order 120.21 can be violated only when unnecessary and wanton force is found.[51] MPD argues that General Order 120.21 can be violated by "[u]sing unnecessary and wanton force in arresting or imprisoning any person, or being discourteous, or using unnecessary violence toward any person (s), or the public."[52] For its part, FOP asserts that MPD is attempting "to re-argue the facts surrounding the incident and its own interpretation of General Order 120.21 represents a mere disagreement with the Award, which should be rejected by PERB."[53]

Here, the issues presented to the Arbitrator included whether MPD's charges were proven by substantial evidence. The Arbitrator determined that MPD's charge against the Grievant, as specified by MPD in the NPAA, focused on "unnecessary force."[54] The Arbitrator determined that the language of the General Order 120.21 stated "unnecessary and wanton force" was required for a charge of unnecessary force. The Arbitrator reviewed the entire record and found that MPD failed to prove by substantial evidence that Grievant's use of force was "unnecessary and wanton force."[55] Furthermore, even though the Panel stated that General Order 120.21, was violated, there was "no mention of whether Grievant's use of force satisfied any definition of wanton."[56] Therefore, the Arbitrator found that the Panel did not satisfy "an essential element of Charge No. 1, Specification No. 1," and dismissed the charge. The Board finds that the parties specifically bargained for the Arbitrator's interpretation of the agreement, including interpretation of

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[47] *AFGE Local 2725 v. D.C. Housing Auth.*, 61 D.C. Reg. 9062, Slip Op. No. 1480 at 5, PERB Case No. 14-A-01 (2014).
[48] *Mich. Family Resources, Inc. v. Serv. Emp' Int'l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. 1258 at 4, PERB Case No. 10-A-09 (2012).
[49] Award at 28.
[50] Request at 14.
[51] Award at 14.
[52] Request at 14.
[53] Opposition at 12.
[54] Award at 26.
[55] Award at 26.
[56] Award at 27.

applicable law,[57] and that the issue of whether MPD proved its charges by substantial evidence was specifically committed to the Arbitrator to resolve. Therefore, the Board denies MPD's Request on these grounds.

B. The Arbitrator's analysis of the *Douglas* factors did not exceed her jurisdiction or make the Award contrary to law and public policy.

MPD requests the Board's review on the grounds that the Arbitrator's reweighing of the *Douglas* factors exceeded her jurisdiction and rendered the Award contrary to law. MPD argues that the Arbitrator was required to review MPD's penalty to ensure that MPD considered all relevant factors within the "limits of reasonableness," and that the Arbitrator's analysis misapplied the holding in *Douglas* and was therefore contrary to law.[58] MPD also argues that the Arbitrator exceeded her jurisdiction when she reversed MPD's termination because the Arbitrator did not find that MPD exceeded reasonableness when the Arbitrator found only three *Douglas* factors mitigating.[59] FOP argues that the Arbitrator did not exceed her jurisdiction because she made a decision based on the evidence before her.[60]

Here, MPD does not dispute that the issue presented to the Arbitrator for resolution was the appropriateness of the penalty. In determining the appropriateness of the penalty, the Arbitrator utilized the *Douglas* factors framework to determine that MPD's penalty was not appropriate. The Arbitrator relied upon the record and the parties' briefs. MPD has not presented any argument that the Arbitrator considered an issue not committed to her by the parties' collective bargaining agreement. Therefore, the Board finds that the Arbitrator did not exceed her jurisdiction.

MPD argues that the Award is contrary to law based on the Arbitrator's analysis of the *Douglas* factors. MPD asserts that the Arbitrator misapplied the holding in *Douglas* and should have analyzed MPD's penalty only to determine if MPD's penalty was within the bounds of reasonableness. The Arbitrator found that MPD did not appropriately consider the *Douglas* factors in its penalty determination. MPD's argument merely disputes the Arbitrator's findings. MPD also argues that the Arbitrator "conflated *Douglas* factor 6 and 7."[61] As noted above, however, the Arbitrator merely made a clerical error in referring to factor Six as factor Seven; there was no conflation, and the error did affect the Arbitrator's determination that MPD's penalty was inappropriate.[62] The Board has held that a mere disagreement with an arbitrator's choice of remedy does not render the Award contrary to law and public policy.[63] Therefore, the Board finds that the Award is not contrary to law and public policy nor exceeds her jurisdiction.

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[57] See *MPD v. PERB*, 901 A.2d 784, 789 (D.C. 2006).
[58] Request at 17.
[59] Opposition at 13.
[60] Opposition at 13.
[61] Request at 17.
[62] Opposition at 14.
[63] *In the Matter of: Am. Fed'n of Gov't Employees, Local 872*, 2016 WL 6137992 at *3, PERB Case No16-A-10, Opinion No. 1588 (July 27, 2016).

C. The Award does not violate law and public policy based on MPD's value statement.

The law and public policy exception is "extremely narrow."[64] The narrow scope limits potentially intrusive judicial review under the guise of public policy.[65] MPD has the burden to demonstrate that the Award itself violates established law or compels an explicit violation of "well defined public policy grounded in law and or legal precedent."[66] The violation must be so significant that law and public policy mandate a different result.[67]

MPD argues that the Arbitration Award is contrary to public policy because the Award violated an established public policy, specifically MPD's value statement that officers of the law are required to preserve the peace, protect life, and uphold the law.[68] In addition, MPD argues that there is evidence that the Grievant used excessive force against the boy and failed to uphold MPD's value statement.[69] Conversely, FOP argues that MPD's value statement is not "well defined" and nothing more than a "general consideration of supposed public interest."[70] Additionally, FOP argues that PERB has already rejected the argument that "the public policy to preserve peace, protect life, and uphold the law is sufficiently specific to serve as a basis for overturning an arbitration award."[71]

Here, MPD fails to identify any specific law or public policy requiring police officers to "preserve the piece, protect life, and uphold the law."[72] MPD relies on its value statement but, as established, that value statement is insufficient to overturn an arbitration award and is not well-defined public policy in the law.[73] Additionally, MPD has failed to point to any clear law, public policy, or precedent that 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. MPD disagrees with the Arbitrator's conclusion concerning the appropriate penalty to be imposed. This disagreement 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.

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[64] *American Postal Workers Union, AFL-CIO v. United States Postal Service*,789 F.2d 1, 8 (D.C. Cir. 1986). *Accord MPD v. FOP/MPD Labor Comm. ex rel. Pair,* 61 D.C. Reg. 11609, Slip Op. No. 1487 at 8, PERB Case No. 9-A-05 (2014); MPD *v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. No. 925 at 11-12, PERB Case No. 08-A-01 (2012).
[65] *American Postal Workers* at 8.
[66] *Id.*
[67] *Id.*
[68] Request at 21-22.
[69] Request at 21-22.
[70] Opposition at 22.
[71] *Metro. Police Dep't*, PERB Case No. 18-A-14, Opinion No. 1688 at 4
[72] Opposition at 15 - 16. (*citing D.C. Metro. Police Dep't v. D.C. Pub. Employee Bd*., 901 A.2d 784, 789-90 (D.C. 2006)).
[73] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. and Metro. Police Dep't*, PERB Case No. 18-A-14, Opinion No. 1688 at 4 (Nov.15, 2018).

IV. Conclusion

The Board rejects MPD's arguments and finds no cause to modify, set aside, or remand the 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

By unanimous vote of Board chairperson Douglas Warshof, Board members Barbara Somson, Mary Anne Gibbons, and Peter Winkler

April 15, 2021
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 21-A-08, Slip Op. No. 1784 was sent by File and ServeXpress to the following parties on this 22nd day of April 2021.

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