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

In the Matter of:)	
)	
Fraternal Order of Police/Department of Corrections Labor Committee)	
)	
Petitioner)	PERB Case No. 22-A-05
)	
v.)	Opinion No. 1817
)	
District of Columbia Department of Corrections)	CORRECTED
)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On July 5, 2022, the Fraternal Order of Police/Department of Corrections Labor Committee (FOP) filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA)¹ seeking review of a May 25, 2022 arbitration award (Award). In the Award, the Arbitrator denied FOP’s grievance and upheld the decision of the District of Columbia Department of Corrections (DOC) to terminate a correctional officer (Grievant). FOP requests review on the grounds that the Award is contrary to law and public policy.² DOC filed an opposition (Opposition), requesting that the Board deny FOP’s Request.

Upon consideration of the Arbitrator’s conclusions, applicable law, and the record presented by the parties, the Board concludes that the Award is not contrary to law or public policy. Therefore, the request is denied.

¹ D.C. Official Code § 1-605.02(6).

² See Request at 4. FOP does not explicitly argue that the Award is contrary to law and public policy. However, FOP asserts that D.C. Official Code § 1-605.02(6) “states in relevant part that an appeal from an award may be modified or set aside if ‘...the award on its face is contrary to law or public policy.’” Based on context, the Board concludes that FOP alleges the Award is contrary to law and public policy.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. The Grievant began his career as a correctional officer at DOC approximately 11 years before the November 28, 2020, incident that led to his termination.³ Prior to the incident, in August 2020, the Grievant served two suspensions.⁴ The Grievant was the FOP Chairman at the time he was terminated.⁵ In his capacity as Chairman, the Grievant had publicized conditions in the Central Detention Facility during the coronavirus pandemic.⁶

The Grievant's termination charges arose from the use of pepper spray while guarding an inmate on a Central Detention Facility unit.⁷ During the incident, the Grievant left the unit and returned with pepper spray, which he discharged on the inmate several times.⁸ The first time was in response to the inmate's aggressive behavior, the second was after the inmate had retreated and faced a wall, and the third was in response to the inmate throwing a mixture of chemicals, feces, and urine at the Grievant.⁹

The Grievant completed an Employee Report of Significant Incident/Extraordinary Occurrences form (DCDC-1) regarding the incident.¹⁰ In his DCDC-1, the Grievant stated that the Grievant left the unit after the inmate displayed aggressive behavior, and returned "about 5 minutes later."¹¹ DOC investigated the incident.¹² During the investigation, the Grievant told DOC that he left the unit to "calm down."¹³ Video surveillance footage showed the Grievant left the unit for less than two minutes before returning with pepper spray.¹⁴ On February 23, 2021, DOC issued a report (Report), concluding that the Grievant "improperly applied force" when he used pepper spray on the inmate.¹⁵

On March 30, 2021, DOC issued an advance notice proposing to terminate the Grievant for violating DOC's Use of Force Policy "through the improper and excessive deployment of [pepper spray] against an inmate" and for failing to provide a truthful account of his actions.¹⁶ On

³ Award at 10.

⁴ Award at 10. The Grievant served a three-day suspension for unwarranted use of pepper spray on an inmate, and a one-day suspension for failure to wear a face shield.

⁵ Award at 10.

⁶ Award at 10.

⁷ Award at 9-14.

⁸ Award at 11-12.

⁹ Award at 11-12, 18.

¹⁰ Award at 12.

¹¹ Award at 12.

¹² Award at 13.

¹³ Award at 23.

¹⁴ Award at 11, 23.

¹⁵ Award at 13 (quoting Report).

¹⁶ The Award does not discuss the advance notice. However, DOC's Exhibit B is an informal memo from a hearing officer to the DOC Director, dated May 11, 2021, which discusses the advance notice.

June 14, 2021, DOC issued an official notification (Final Notice) of the DOC Director's decision to terminate the Grievant, effective June 21, 2021.¹⁷ The Final Notice included an analysis of the *Douglas*¹⁸ factors to support DOC's conclusion that termination was the only appropriate penalty for the Grievant's actions.¹⁹ FOP invoked arbitration.²⁰

B. Arbitrator's Findings

The parties submitted the following issues to the Arbitrator for consideration:

- (1) Whether the Grievant was terminated for cause?
- (2) If not, what shall be the remedy?²¹

The Arbitrator established that DOC had the burden of proof that there was just cause to terminate the Grievant.²² The Arbitrator stated that DOC terminated the Grievant primarily because the Grievant used pepper spray on an inmate "in the absence of a threat of imminent harm," in violation of DOC's Use of Force Policy.²³

Based on the inmate's initial behavior toward the Grievant, the Arbitrator found that the Grievant's first use of pepper spray "to deescalate the situation" was appropriate.²⁴ However, the Arbitrator determined that the second use of pepper spray was "not responsive to a threat of imminent harm and seemed punitive, which is not permitted under the Use of Force Policy."²⁵ The Arbitrator concluded that the third use of pepper spray also violated DOC's Use of Force Policy, which "expressly prohibits using [pepper] spray '[i]n response to [an inmate] throwing urine, feces or other substances on an officer after the incident has occurred.'"²⁶ Additionally, the Arbitrator found that the Grievant violated the DPM when the Grievant untruthfully testified, at arbitration,

¹⁷ Award at 14.

¹⁸ In *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), the Merit Systems Protection Board established a list of twelve factors an agency must consider when determining an appropriate penalty to impose for employee misconduct.

¹⁹ Award at 14. DOC based its penalty determination, in part, on the Grievant's two previous suspensions. Award at 23.

²⁰ Award at 1.

²¹ Award at 2.

²² Award at 14.

²³ Award at 18. DOC's Use of Force Policy established a continuum of different levels of force a correctional officer may use against inmates. Award at 5-6 (citing DOC Policy and Procedure 5011.3 Section 13). The continuum states that "[a]ny use of force shall begin with the lowest practical level of the force continuum and escalate only if needed...to protect the safety of staff and [inmates]." Award at 5-6 (quoting DOC Policy and Procedure 5011.3 Section 13). DOC's Use of Force Policy prohibits officers from using chemical or inflammatory agents (such as pepper spray) "in the absence of a threat of imminent harm." Award at 6 (quoting DOC Policy and Procedure 5011.3 Section 16(f)(5)).

²⁴ Award at 20.

²⁵ Award at 20. DOC Policy and Procedure 5011.3 Section 16(f)(5)(1) prohibited the use of chemical/inflammatory agents "[a]s punishment or in retaliation for violation of facility rules, disrespectful language or conduct and behavior."

²⁶ Award at 20 (quoting DOC Policy and Procedure 5011.3 Section 16(f)(2)).

that he left the unit to “calm down.”²⁷ Relying on video surveillance footage, the Arbitrator determined that the Grievant quickly and purposefully sought out the pepper spray before immediately returning to the unit, and did not take time to calm himself.²⁸

At arbitration, FOP argued that the Grievant should be reinstated because DOC modified its Use of Force Policy in July 2020 without consulting FOP or retraining employees.²⁹ The Arbitrator dismissed this argument, finding that the Grievant’s actions would have been impermissible under either version of the Use of Force Policy.³⁰ FOP also argued that previous attacks from inmates had exacerbated the Grievant’s fear of imminent harm from the inmate.³¹ The Arbitrator found that although the Grievant may have acted out of fear, the record showed that his actions were also motivated by anger, which is not permitted under the Use of Force Policy.³² In addition, FOP argued that DOC terminated the Grievant in retaliation for the Grievant’s actions as FOP Chairman.³³ The Arbitrator found there was insufficient evidence to support FOP’s retaliation claim.³⁴

After finding that the Grievant was guilty of using excessive force and making an untruthful statement, the Arbitrator considered whether termination was an appropriate penalty.³⁵ The Arbitrator examined DOC’s application of the *Douglas* factors and considered whether there was any basis to disturb the penalty of termination.³⁶ The Arbitrator determined that DOC “properly found that termination was supported.”³⁷ Therefore, the Arbitrator found that there was no basis to disturb the penalty.³⁸

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.³⁹

²⁷ Award at 19, 22 (citing DPM 1607.2(a)).

²⁸ Award at 19, 21-24.

²⁹ Award at 21.

³⁰ See Award at 21. The new Use of Force Policy did not change the levels of force in the Use of Force continuum.

³¹ Award at 21.

³² Award at 21-22 (relying upon DOC Policy and Procedure 5011.3 Section 16(f)(4), which prohibited the use of chemical/inflammatory agents “[i]n order to display anger....”).

³³ Award at 22-23. FOP did not allege any facts or provide any evidence to support its retaliation claim.

³⁴ Award at 23.

³⁵ Award at 22-24.

³⁶ Award at 23-24.

³⁷ Award at 23.

³⁸ Award at 21.

³⁹ D.C. Official Code § 1-605.02(6). FOP raised the Board’s power to decide unfair labor practice and standards of conduct complaints pursuant to D.C. Official Code § 1-605.02(3) and (9). Request at 4-5. However, the Board’s jurisdiction over such complaints is not applicable to the appeal before the Board.

FOP requests review of the Award on the grounds that the Award is contrary to law and public policy.⁴⁰

FOP bears the burden of demonstrating that the Award itself violates established law or compels an explicit violation of “well defined public policy grounded in law and or legal precedent.”⁴¹ The D.C. Court of Appeals has reasoned that, “[a]bsent a clear violation of law[,] one evident on the face of the arbitrator’s award, the [Board] lacks authority to substitute its judgment for the arbitrator’s.”⁴² The violation must be so significant that law and public policy mandate a different result.⁴³ Overturning an arbitration award due to law and public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to the arbitrator’s interpretation of the contract.⁴⁴ “[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.’”⁴⁵

FOP requests review of the Award “due to lack of any credible evidence.”⁴⁶ However, FOP does not cite to any law related to its argument. FOP does not dispute that the parties bargained for the Arbitrator’s interpretation of the contract, rules, and regulations, and agreed to accept the Arbitrator’s evidentiary findings and conclusions. The Board has held that it will not substitute its own interpretation of such evidence for that of the arbitrator.⁴⁷ Therefore, FOP’s disagreement with the Arbitrator’s credibility determinations is not a basis for overturning the Award.

FOP asserts that “the entire process by which disciplinary punishment was meted out was unfair and the punishment of termination was excessive even assuming *arguendo* that any of the finding [*sic*] of an infraction may have been justified.”⁴⁸ FOP does not allege that the Award violated any specific law, legal precedent, or public policy. The Board has rejected similar arguments that a penalty determination was excessive and unfair where the petitioner failed to cite specific law or public policy to support its claim.⁴⁹ 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.⁵⁰ Therefore, FOP has not demonstrated a basis for the Board to overturn the Award.

For the reasons stated, the Board finds that the Award is not contrary to law and public policy.

⁴⁰ See Request at 4.

⁴¹ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No. 1702 at 4, PERB Case No. 18-A-17 (2019).

⁴² *FOP/DOC Labor Comm. v. PERB*, 973 A.2d 174, 177 (D.C.2009).

⁴³ *MPD*, Slip Op. No. 1702 at 4.

⁴⁴ *Id.* (citing *Am. Postal Workers Union v. USPS*, 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. 09-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)).

⁴⁵ *Id.*

⁴⁶ Request at 2.

⁴⁷ *MPD v. FOP/MPD Labor Comm. ex rel. Sims*, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000).

⁴⁸ Request at 4.

⁴⁹ *E.g.*, *FOP/MPD Labor Comm. v. MPD*, 59 D.C. Reg. 3374, Slip Op. No. 827, PERB Case No. 04-A-21 (2012).

⁵⁰ *DCHA v. Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999). FOP argues that termination was an excessive penalty but does not argue that the Arbitrator’s *Douglas* factor analysis was flawed.

IV. Conclusion

The Board rejects FOP's arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, FOP's Request is denied, and the matter is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

September 15, 2022

Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.