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

In the matter of:

District of Columbia)	
Metropolitan Police Department)	
)	
Petitioner,)	PERB Case No. 14-A-09
)	
v.)	Opinion No. 1561
)	
Fraternal Order of Police/District of Columbia Metropolitan Police Department Labor Committee)	
Grievant: Mayra J. Garcia)	
)	
Respondent.)	

DECISION AND ORDER

On July 28, 2014, Petitioner District of Columbia Metropolitan Police Department (“MPD” or “Petitioner”) filed a timely Arbitration Review Request (“ARR”) of an Arbitration Award (“Award”) that reduced the penalty against Grievant Mayra J. Garcia (“Grievant”) from termination of employment with MPD to forty (40) days suspension. For reasons stated herein, Petitioner’s Review Request is denied.

I. Statement of the Case

On September 29-30, 2007, Grievant and her boyfriend, MPD Officer Daniel McCullough, got involved in an argument and altercation that resulted in the Grievant being arrested. MPD then initiated an administrative investigation. At the conclusion of the investigation, the Grievant was administratively charged with (1) conduct unbecoming an officer, (2) involvement in the commission of an act that could constitute a crime, and (3) “Drinking ‘alcoholic beverage’ ..., or being under the influence of ‘alcoholic beverage’ when off duty.”¹

¹ Among the Offenses defined in MPD General Order No. 1202.1, Part 1 B. 2. is “Drinking ‘alcoholic beverage’ or ‘beverage’ as described in Section 25-103, subsection (5) of the DC Code, District of Columbia Alcoholic Beverage Control Act, while in uniform off duty; or being under the influence of ‘alcoholic beverage’ when off duty.”

On February 1, 2008, MPD advised the Grievant that it was proposing to terminate her employment based on these charges. The Grievant exercised her right to request a departmental hearing and an Adverse Action Panel ("Panel") was convened. The Panel found the Grievant guilty on all charges and recommended the penalty of termination. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "the Union") subsequently appealed the Final Notice of Adverse Action to Chief of Police Cathy Lanier. By letter dated October 7, 2008, Chief Lanier denied the appeal. The Final Agency Action Letter, informed the Grievant that her employment with MPD was being terminated as of the close of business on October 11, 2008. Pursuant to Article 19 of the Collective Bargaining Agreement ("CBA"), the Grievant filed for arbitration.

The parties submitted the following issues to the Arbitrator:

1. Does sufficient evidence exist to support the charges against the grievant?
2. Is termination an appropriate penalty in this case?

Arbitrator Martha R. Cooper issued her Opinion and Award on September 19, 2014.² She agreed with the findings of guilt but reduced the penalty from termination to a forty (40) day suspension. In her decision, she found that there was substantial evidence in the administrative record to support the Panel's findings that the charges made against the Grievant were proven.³ She also found that the Grievant did engage in conduct unbecoming an officer by engaging in conduct that would constitute a crime, when she threw raw marinating meat at Officer McCullough, slapped him in the face, and pulled on his shirt during the altercation at their home on the night in question.⁴ The Arbitrator also found there was substantial evidence to support the Panel's findings that when the Grievant engaged in those and other behaviors that night, she was under the influence of alcohol and was not in full control of her faculties, and her arrest brought discredit upon herself and MPD.

As to the second issue in dispute, the Arbitrator found that the Panel's recommended disciplinary penalty of termination was not supported by substantial evidence.⁵ After determining guilt, the Panel evaluated the twelve "*Douglas factors*"⁶ to determine its recommended penalty.

² No hearing was held by the Arbitrator because she based her review on the record established at the administrative hearing, as supplemented by other documents and arbitration briefs from the parties.

³ Award at 41.

⁴ Id.

⁵ Id.

⁶ *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), set the standard for assessing the appropriateness of a disciplinary penalty for federal agencies. It delineated 12 *factors* that an agency should consider when determining the appropriate penalty for an act of employee misconduct. These *factors* include (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency;

Specifically, the Arbitrator concluded that the Panel did not sufficiently consider *Douglas* factors related to the employee's work record ("*Douglas* factor #4") and the consistency of penalty ("*Douglas* factor #6").⁷ The Arbitrator disagreed with the Panel's rating on seven of the twelve *Douglas* Factors.⁸ As a result, she ordered that the penalty of termination be rescinded, and that the Grievant be reinstated to her position as a police officer. She further ordered that the Grievant be suspended without pay for forty (40) days and made whole, including back pay for any lost wages in excess of 40 days.

MPD has filed this Arbitration Review Request seeking to have the Arbitrator's Award reversed on the grounds that (A) the Arbitrator exceeded the authority granted to her by the CBA when she substituted her discretion in selecting a penalty; (B) the Arbitrator exceeded her authority when she considered disciplinary decisions that were not part of the departmental record; and (C) the award is contrary to law and public policy. For reasons, stated below we affirm the Arbitrator's Award.

II. Analysis

D.C. Official Code § 1-605.02(6) authorizes the Board to modify or set aside an 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.⁹ MPD does not contend that the award was procured by fraud, collusion or other similar and unlawful means.

A. *The Arbitrator did not exceed her authority when she substituted her discretion for that of MPD in selecting an appropriate penalty.*

An arbitrator derives his jurisdiction from the collective bargaining agreement and any applicable statutory or regulatory provision.¹⁰ The question of when an arbitrator's award is within that jurisdiction was "addressed in *Steel Workers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960), wherein the Court stated that the test is whether the Award draws its essence from the collective bargaining agreement."¹¹ The test of whether an award draws its

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) the potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. The D.C. Court of Appeals adopted the reasoning of *Douglas* for D.C. agencies in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

⁷ *Douglas* Factor # 4 addresses the employee's past work record. *Douglas* Factor #6 will be discussed later.

⁸ The scale is "Aggravating," "Neutral" or "Mitigating," when evaluating the 12 *Douglas* factors.

⁹ *University of the District of Columbia v. PERB*, 2012 CA 8393 P (MPA)(2014).

¹⁰ *D.C. Water & Sewer Auth. v. AFSCME, Local 2091*, Slip Op. No. 1276 at 3, PERB Case No. 04-A-24 (June 12, 2012).

¹¹ *D.C. Pub. Schs. v. AFSCME, District Council 20 (on behalf of Johnson)*, 34 D.C. Reg. 3610, Slip Op. No. 156 at 5, PERB Case No. 86-A-05 (1987).

essence from the CBA was delineated by the Board in *D.C. Dep't of Corrections v. Fraternal Order of Police/Dep't of Corrections Labor Committee*¹²: “Did the arbitrator act “outside his authority” by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator “arguably construing or applying the contract?”” The arbitrator did not offend any of these requirements, so there is no basis for judicial intervention.

In its Memorandum in Support of its Arbitration Review Request, the Petitioner cited *Stokes v. District of Columbia*¹³ for the proposition that deference should be given to an agency to decide how to discipline its workforce.¹⁴ In *Stokes*, the D.C. Office of Employee Appeals (OEA) disagreed with the D.C. Department of Corrections’ decision to terminate an employee who was found to have committed several violations of agency regulations. OEA concluded that the agency failed to demonstrate that dismissal was the appropriate sanction and reduced the penalty to a 60-day suspension. The D.C. Court of Appeals in *Stokes* ruled that OEA’s decision was arbitrary and capricious, and an abuse of discretion, holding that the agency’s findings should be given deference. MPD equates the reduction in severity of discipline by OEA with the reduction in the severity of discipline by the Arbitrator in this case. In relying solely on the *Stokes* case, MPD ignores one significant difference. In this case, unlike *Stokes*, the parties explicitly authorized the Arbitrator to address the question, “Whether termination is an appropriate penalty?” *Stokes* is not the correct standard to apply to an arbitrator’s review of agency decisions because the parties agreed to submit this case to arbitration. Further, the Superior Court of the District of Columbia has recently held in *MPD v. PERB* 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*.” In that case, the Court upheld a PERB decision that affirmed an arbitrator’s finding reducing an MPD’s officers penalty from termination to a thirty day suspension.¹⁵

Once it is determined that termination is not the appropriate remedy, it becomes reasonable for the arbitrator to determine what the appropriate remedy should be. The Superior Court upheld PERB’s finding that “the Panel’s misapplication of several *Douglas* factors properly led [the Arbitrator] to decide that termination ... would be beyond the tolerable bounds of reasonableness and, thus, an inappropriate penalty.”¹⁶ The Arbitrator, in this case, conducted a thorough analysis of the *Douglas factors*,¹⁷ and determined that termination was excessive and

¹² 60 D.C. Reg. 7185, Slip Op. No. 1380 at 2, PERB Case No. 10-A-03 (April 30, 2013).

¹³ *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

¹⁴ *Stokes* at 1011.

¹⁵ *District of Columbia Metro. Police Dep't. v. District of Columbia Public Employee Relations Board*, 2014 CA 007679 P(MPA) at 9 (December 16, 2015).

¹⁶ *Id.* at 8.

¹⁷ The Arbitrator disagreed significantly with the Panel’s evaluation of several of the *Douglas* factors. The Panel rated *Douglas* Factor #3 as “Aggravating” and the Arbitrator rated it as “Mitigating” noting that there was no reference in Grievant’s past disciplinary history of any alcohol-related offenses. The Panel rated Grievant’s past work record, *Douglas* factor #4, as “neutral” and the Arbitrator rated it as “mitigating,” stating the Panel never seriously considered Grievant’s work record, i.e. annual evaluations, number of years employed and testimony of several witnesses with positive assessments of Grievant’s work performance. For *Douglas* factor #6, to be discussed

found that the severity of the penalty should be reduced and that the Grievant should be reinstated and made whole. It was reasonable for the Arbitrator to reexamine the *Douglas* factors because the appropriateness of the penalty was explicitly presented to her for consideration by the parties

MPD argues that if the Arbitrator believed MPD exceeded the limits of reasonableness in the selection of penalty, that the Arbitrator should have remanded the matter to MPD to select a different penalty. In concluding that the penalty of termination was not supported by substantial evidence, the Arbitrator was obligated to review the agency's penalty decision.¹⁸ Again, in authorizing the Arbitrator to review the appropriateness of the penalty, the parties did not limit the bounds of that authority. The parties also did not direct the Arbitrator to remand if she found termination to be an inappropriate penalty. MPD offered no support in its brief for the premise that the Arbitrator should have remanded the case to MPD. The Board has affirmed many Arbitrator decisions in which MPD employee terminations were reduced to suspension.¹⁹ Under District of Columbia law, the Board is authorized to remand a case only if the Arbitrator was without or exceeded her jurisdiction.²⁰

Consequently, we find that the Arbitrator acted within her authority when she adjusted the severity of the penalty after concluding that MPD exceeded the limits of reasonableness by imposing the penalty of termination.

B. The Arbitrator did not exceed her authority when she considered disciplinary decisions that were not part of the departmental record.

The Arbitrator quoted the relevant contractual provisions are follows:

ARTICLE 4 MANAGEMENT RIGHTS

in detail later, the Arbitrator stated the Panel's rating of "neutral" was not supported by substantial evidence. The Panel considered *Douglas* factor #10, potential for Grievant's rehabilitation, to be an "aggravating" factor but the Arbitrator rated it "mitigating," because the Panel ignored evidence of the potential for rehabilitation.

¹⁸ *D.C. Dep't of Corrections v. Fraternal Order of Police/Dep't of Corrections Labor Committee* 60 D.C. Reg. 7185, Slip Op. No. 1380 at 2, PERB Case No. 10-A-03 (April 30, 2013).

¹⁹ *Dist. Of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Committee (on behalf of Tracy Kenzie)*, 61 DC Reg. 12364 (2014), Slip Op. No. 1493, PERB Case No. 14-A-06 (October 30, 2014). *Am. Fed'n of Gov't Employees, Local 2725 v. Dist. Of Columbia Housing Auth.*, 61 DC Reg. 9062 (2014), Slip Op. No. 1480, PERB Case No. 14-A-01 (July 24, 2014). *Dist. Of Columbia Housing Auth. V. Am. Fed'n of Gov't Employees, Local 2725 (on behalf of Senta Hendrix-Smith)*, 60 DC Reg. 13706 (2013), Slip Op. No. 1415, PERB Case No. 13-A-07 (September 3, 2013). *Dist. Of Columbia Public Schools v. Washington Teachers' Union, Local 6 (on behalf of Lyntrel Smith)*, 60 DC Reg. 12096 (2013), Slip Op. No. 1406, PERB Case No. 12-A-08 (July 29, 2013). *Dist. Of Columbia Office of Chief Fin. Officer and Am. Fed'n of State, County and Municipal Employees, Dist. Council 20, Local 2776 (on behalf of Robert Gonzales)*, 60 DC Reg. 7218 (2013), Slip Op. No. 1386, PERB Case No. 12-A-06 (April 30, 2013). D.C. Official Code 1-605.02(6).

²⁰ D.C. Official Code 1-605.02(6).

The Department shall retain the sole right, authority, and complete discretion to maintain the order and efficiency of the public service entrusted to it, and to operate and manage the affairs of the Metropolitan Police Department in all respects including, but not limited to, all rights and authority held by the Department prior to the signing of this Agreement.

Such management rights shall not be subject to the negotiated grievance procedure or arbitration. The Union recognizes that the following rights, when exercised in accordance with applicable laws, rules, and regulations, which in no way are wholly inclusive, belong to the Department:

....
5. To suspend, demote, discharge, grant or deny step increases and take other disciplinary actions against employees for cause;
....

ARTICLE 12 DISCIPLINE

Section 1

1. (a) The parties agree that discipline is a management right that has not been abridged except as specifically outlined in this Article.
(b) Discipline may be imposed only for cause, as authorized in D.C. Official Code § 1-616.51.

Section 2.

1. Corrective Action – A D 750, a letter of prejudice, and an official reprimand.
2. Adverse Action – any fine, suspension, removal from service, or any reduction of rank or pay of any employee who is not serving a probationary period.

Section 8

....
Upon receipt of the decision of the Chief of Police on adverse actions, the employee may appeal to arbitration as provided in Article 19. Employees must use the negotiated grievance procedure (NGP) for a suspension of less than ten (10) days. In cases where a Departmental hearing has been held, any further appeal shall be based solely on the record established in the Departmental hearing. In such a case, the appellate tribunal has the authority to review the evidentiary ruling of the

Departmental Hearing Panel, and may take into consideration any documentary evidence which was improperly excluded from consideration from the Departmental Hearing Panel.

....

ARTICLE 19
GRIEVANCE PROCEDURE

....

E. ARBITRATION

...

Section 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.

....

7. The statement of the arbitrator's fee and expenses shall accompany the award. The fee and expense of the arbitrator shall be borne by the losing party, which shall be determined by the Arbitrator.

...

MPD argues that "the arbitrator improperly considered disciplinary decisions for other officers submitted by Grievant for the first time during the arbitration proceeding."²¹ The issue raised here is whether an additional argument should have been considered by the Arbitrator. Article 12, Section 8 of the CBA establishes specific evidentiary rules in the disciplinary procedure. Article 19 (E) 5-4 of the CBA regarding arbitration under the Grievance Procedure section states: The arbitrator shall not have the power to add to, subtract from or modify the provisions of this agreement (CBA) in arriving at a decision of the issue presented and *shall confine his decision solely to the precise issue submitted for arbitration* (emphasis added).

After determining that sufficient evidence was presented to support the charges against the Grievant, the precise issue the parties submitted to the Arbitrator was whether termination was the appropriate penalty. We find that it is reasonable to conclude that the language in Article 12 § 8 concerns only the disciplinary proceedings. It is not a prohibition on considering additional arguments during the arbitration that was not presented in the disciplinary hearing. The "further appeal" referenced in Article 12 seems to apply to an appeal of the Panel's decision to the Chief of Police.

MPD argues that the Arbitrator improperly considered cases about discipline of other officers in her analysis of *Douglas* factor #6 that were not considered by the Panel. *Douglas* factor #6 considers "Consistency of penalty with those imposed upon other employees for the

²¹ ARR at 8.

same or similar offense.”²² MPD further argues that the Grievant “did not submit any disciplinary decisions of other officers for consideration either to the Panel during the hearing of her case or in her appeal to Chief Lanier,” and any such information after the disciplinary hearing should not be considered by the Arbitrator because of Article 12 of the CBA.²³ The Panel stated, in relation to *Douglas* factor #6, “the penalty imposed is consistent with those for similar offenses and is not deemed to be excessive under the circumstances.” But it presented no examples to support that conclusion. The Board has held, “in a *Douglas* factor analysis, the burden is on the Agency to prove its facts by a preponderance of the evidence.”²⁴ In this case, the actual comparative evidence of penalties was not considered by the Panel and the Arbitrator found the Panel failed to meet its burden “to establish that the penalty it [recommended was] consistent with penalties imposed in like matters.”²⁵ Under the terms of Section 12 of the CBA contrary to MPD’s suggestion, the Grievant would have been prohibited from presenting comparison cases to Chief Lanier on appeal, after learning that the Panel had referenced no such comparisons. The Arbitrator was left with no alternative but to rely on other evidentiary determinations to assess the reasonableness of the Panel’s conclusion with respect to *Douglas* factor #6.

In addition, the Board has held that an arbitrator does not exceed her authority by exercising her equitable power, unless it is expressly restricted by the parties’ collective bargaining agreement.²⁶ Furthermore, the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, that arbitrators bring their “informed judgment” to bear on the interpretation of collective bargaining agreements, and that is “especially true when it comes to formulating remedies.”²⁷

In her consideration of *Douglas* Factor # 6, the Arbitrator compared the sanction applied to Grievant with penalties imposed between 2003 and 2013 on eight officers, sometimes for more serious offenses, and the penalties ranged from 30-90 day suspensions. In a recent PERB decision, an arbitrator reduced an MPD officer’s termination to a 60-day suspension conditioned on the officer enrolling in an anger management course.²⁸ The officer was found guilty of second-degree assault and conduct unbecoming an officer while off-duty. All of these cases

²² See f.3.

²³ MPD cites no authority that would require or even allow Grievant to present evidence of other officers’ disciplinary decisions to the Panel or the Chief. Further, we wonder about Grievant even having access to those decisions that the Panel could easily review.

²⁴ *District of Columbia Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Committee, (on behalf of Charles Jacobs)*, Slip Op. No. 1509 at 8, PERB Case No. 12-A-04(R)(November 20, 2014). Citing *Douglas* at 297, 325.

²⁵ Award at 35.

²⁶ See *District of Columbia Metropolitan and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). See also *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (upholding an arbitrator’s award when the arbitrator concluded that MPD had just cause to discipline grievant, but mitigating the penalty, because it was excessive).

²⁷ 363 U.S. 593, 597 (1960).

²⁸ *Fraternal Order of Police/Metro. Police Dep’t/Labor Committee v. Metro. Police Dep’t (Termination of Officer Jeffrey Mena)*, FMCS Case No. 13-52954-A.

suggest that the Panel was not accurate when it stated in relation to *Douglas* factor #6 that “the penalty imposed is consistent with those for similar offenses and is not deemed to be excessive under the circumstances.”²⁹ It was within the scope of the Arbitrator’s authority, after finding that the Panel’s evaluation of the *Douglas* factors lacked substantial support, to consider information about penalties imposed in similar cases to be able to properly evaluate the penalty imposed in this case. Factual and evidentiary determinations are squarely within an arbitrator’s discretion.³⁰ We find that the Arbitrator did not exceed her authority by considering the additional evidence.

C. *The Award is not contrary to law and public policy.*

A petitioner claiming that an arbitration award is contrary to law and public policy has the burden to specify applicable law and definite public policy that mandate that the arbitrator arrive at a different result.³¹ The Board’s scope of review, particularly concerning the public policy exception, is extremely narrow. To justify judicial intervention, a petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well-defined, and dominant public policy grounded in law or legal precedent and not from general considerations of supposed public interest.³² Furthermore, the petitioning party has the burden to specify the “applicable law and definite public policy that mandate that the Arbitrator arrive at a different result.”³³ Absent a clear violation of law evident on the face of the arbitrator’s award, the Board lacks authority to substitute its judgment for that of the arbitrator.³⁴

Petitioner asserts that the Arbitrator invoked and then misinterpreted the well-settled law governing disparate treatment claims by finding that the burden was on the Panel to establish that the recommended penalty was consistent with those imposed in like matters.³⁵ Indeed, as stated previously, the Board ruled in *District of Columbia Metro. Police Dep’t and Fraternal Order of Police, Metro. Police Dep’t Labor Committee, (on behalf of Charles Jacobs)*³⁶ that “in a *Douglas* factor analysis, the burden is on the Agency to prove its facts by a preponderance of the evidence.”

²⁹ Award at 35.

³⁰ See *Verizon v. Communications Workers of America*, 571 F.3d 1296, 1302-3 (2009), citing *Howard Univ. v. Metro. Campus Police Officer’s Union*, 512 F.3d 716, 720 (D.C. Cir. 2008).

³¹ *Univ. of the Dist. Of Columbia v. Am. Fed’n of State, County and Mun. Employees, Council 20, Local 2087*, 59 D.C. Reg. 15167, Slip Op. No. 1333 at 3, PERB Case No. 12-A-01(2012), cited in *Dist. Of Columbia Dep’t of Corrections v. Fraternal Order of Police/Dep’t of Corrections Labor Committee*, DC Reg. 7185 (2013), Slip Op. No. 1380, PERB Case No. 10-A-03 (April 30, 2013).

³² See *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 US 29, 126 LRRM 3113 (1987).

³³ *District of Columbia Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Committee*, 59 D.C. Reg. 11329, Slip Op. No. 1295, PERB Case No. 09-A-11 (2012). *Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Committee*, 47 DC Reg. 717, Slip Op. No. 633 at 2, PERB Case No. 00-A-04 (2000); see also *District of Columbia Public Schools and American Fed’n of State, County and Municipal Employees, District Council 20*, 34 DC Reg. 3610, Slip Op. No. 156 at 6, PERB Case No. 86-A-05 (1987).

³⁴ *Fraternal Order of Police/Dep’t Of Corrections Labor Committee v. PERB*, 973 A.2d 174, 177 (D.C. 2009).

³⁵ ARR at 9.

³⁶ *District of Columbia Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Committee, (on behalf of Charles Jacobs)*, Slip Op. No. 1509 at 8, PERB Case No. 12-A-04(R)(November 20, 2014)

Petitioner contends further that to establish disparate treatment, an employee must prove that he or she was similarly situated to other employees who were treated differently. Petitioner posited that (1) employees who work in a separate division are not similarly situated³⁷; (2) employees without similar disciplinary records are not similarly situated³⁸; and (3) employees must be subject to discipline by the same supervisor within the same general time period³⁹ to be considered similarly situated. These cases cited by Petitioner all arose from the Office of Employee Appeals in the context of appropriate salary disputes. As stated previously, OEA cases do not have precedential value in PERB decisions.⁴⁰ In addition, MPD suggests, without citation, that for employees to be considered similarly situated they should have served under the same Chief of Police and been assigned to the same MPD District office. These limitations taken together would make it almost impossible to identify a “similarly situated” employee for comparison when analyzing *Douglas* factors. The Board finds that the Arbitrator did not violate public policy when she evaluated *Douglas* factors #6 and #7⁴¹ and reached a different conclusion than the Panel

The Board has held that “MPD was not deprived of a fundamentally fair hearing,” when “neither the Panel nor the Department identified any supporting decisions, thereby failing to provide the Arbitrator with a way to determine whether the facts and findings in this matter are comparable with those in other cases.”⁴² In this case, the Arbitrator considered the evidence presented by the parties and based her analysis of the application of the *Douglas* factors on that evidence.

By submitting 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.”⁴³ The Board has held that a mere “disagreement with the Arbitrator’s interpretation ... does not make the award contrary to law and public policy.”⁴⁴ In the instant case, MPD has failed to specify applicable law and definite public policy that mandates the Arbitrator arrive at a different result.

³⁷ *Hutchinson v. Office of Employee Appeals*, 710 A.2d 227, 236-37 (D.C. 1998).

³⁸ *Jahr v. Office of Employee Appeals*, 19 A.3d 334, 341 n.7 (D.C. 2011).

³⁹ *Jahr v. District of Columbia*, Civ. Action No. 00-02423 (EGS), 2013 WL 5182646 at *4 (D.C.C. Sept. 16, 2013).

⁴⁰ *District of Columbia Metro. Police Dep’t v. District of Columbia Public Employee Relations Board*, 2014 CA 007679 P(MPA) at 9 (December 16, 2015).

⁴¹ Douglas factor #6 – Consistency of penalty with those imposed upon other employees with the same or similar offenses; Douglas factor #7 – Consistency of the penalty with any applicable agency table of penalties.

⁴² *District of Columbia Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Committee, (on behalf of Charles Jacobs)*, Slip Op. No. 1509 at 6, PERB Case No. 12-A-04(R)(November 20, 2014).

⁴³ *District of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 47 DC Reg. 7217, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Comm. (Grievance of Angela Fisher)*, 51 DC Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

⁴⁴ *District of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Committee*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008); see also *District of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Committee (on behalf of Thomas Pair)*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 7-8, PERB Case No. 09-A-05 (2014) and

As the Court of Appeals has stated, the Board must “not be led 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.”⁴⁵ In the absence of a clear violation of law and public policy apparent on the face of the Award, the Board may not modify or set aside the Award as contrary to law and public policy. MPD has offered no such clear violation of law and public policy. Therefore, MPD’s allegation must be dismissed.

III. Conclusion

The Board has reviewed the Arbitrator's conclusions, the pleadings of the parties, and applicable law, and concludes that the Arbitrator did not exceed her authority and the Award on its face is not contrary to law and public policy. The Board finds that the Arbitrator’s conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. For the reasons discussed, no statutory basis exists for setting aside the Award. The ARR is therefore denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department's 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 unanimous vote of Board Chairperson Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, and Member Keith Washington.

Washington, D.C.

January 21, 2016

Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm., 31 DC Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A-05 (1984).

⁴⁵ *District of Columbia Dep't of Corrections v. Teamsters Union Local 246*, 54 A.2d 319, 325 (D.C. 1989).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-A-09, Opinion No. 1561, was served by File & ServXpress on the following parties on this the 2nd day of February, 2016.

Marc L. Wilhite
PRESSLER & SENFTLE, P.C.
1432 K Street, N.W., 12th Floor
Washington, DC 20005

Lindsay M. Neinast
Assistant Attorney General
441 4th Street, N.W., Suite 1180 North
Washington, DC 20001

/s/ Sheryl Harrington

PERB