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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,)	
)	
and)	PERB Case No. 07-A-08
)	Opinion No. 933
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Grievant Phillip Suggs),)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the case

The District of Columbia Metropolitan Police Department ("MPD" or "Agency"), filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an arbitration award ("Award") which rescinded the termination of Officer Phillip Suggs ("Grievant") and found that the appropriate discipline should be a suspension without pay. (See Award at p. 15). MPD contends that the Award is contrary to law and public policy. (See request at p. 2). Specifically, MPD asserts that the Arbitrator's decision regarding the selected penalty is inconsistent with applicable law. (See Request at pgs. 6-7). The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") 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 Sec.1-605.02(6) (2001 ed).

II. Discussion

“On November 20, 2002, after completing the midnight tour of duty, Grievant returned to his home in Brandywine, Maryland. At approximately 3:00 p.m., Grievant learned that his wife was involved in a motor vehicle accident while driving her mother-in-law’s vehicle. Upon learning that his wife had been in an accident, he became enraged. Grievant demanded that his wife contact his mother, and then left the house to see the scene of the accident.” (Award at pgs. 4-5).

At the time, the Grievant and his wife were seeing a marriage counselor in connection with a violent physical altercation on October 14, 2002. (See Award at p. 5). After Grievant left to view the accident scene, his wife called their marriage counselor. “While speaking to the counselor Grievant returned home. Grievant grabbed the phone from his wife, began cursing and punching her in the back. Following this altercation, Grievant left the house and walked ten to twelve miles to a bar, where he consumed several alcoholic beverages. During his absence, Grievant’s parents as well as the marriage counselor arrived at the home.” (Award at p. 5).

At approximately 7:00 p.m. the Grievant returned home and began to behave in an erratic and violent manner. (See Award at p. 5). Grievant eventually retrieved his service weapon, racked a round into the chamber and exclaimed that he was going to “finish this myself.” (Award at p. 5). “Grievant went outside to the back of the house and put his gun to his head with suicidal intentions, but upon hearing his son’s voice, lowered the weapon. While doing so, a shot was fired. Grievant then ran into the wooded area behind his home.” (Award at p. 5).

Grievant’s wife immediately contacted the Prince Georges County Police Department and upon their arrival, Grievant surrendered to them. Grievant was not arrested, but was transported to Southern Maryland Hospital Center and admitted for psychiatric observation. On November 25, 2002, Grievant was released from the hospital and returned home.

The matter was assigned to the MPD’s Force Investigation Team (“FIT”) for investigation. On or about March 14, 2003, the FIT investigators concluded that the firing of the Grievant’s service weapon was negligent and that its use was not justified and not within MPD policy. “On March 22, 2003, the Director of the Force Investigation Division recommended that the Grievant be cited for Adverse Action on charges stemming from his involvement in negligently discharging his service weapon; being under the influence of alcoholic beverage at the time the pistol was fired; and admitting having engaged in an act of domestic violence.” (Award at p. 6). On July 20, 2004, an Adverse Action hearing was held by a three member panel of the police Trial Board. The Trial Board recommended termination for sustained violations of MPD regulations.

On August 20, 2004, the Assistant Chief for Human Services (“AC/HS”) issued a Final Notice of Adverse Action (“Final Notice”). The Grievant was therein notified that he was found guilty of

the Charges and Specifications as outlined in the Findings of the Panel and that he would be removed from the MPD, effective October 1, 2004. (See Award at p. 4). By letter dated August 30, 2004, Grievant appealed the decision of the AC/HS to the Chief of Police. Grievant argued that termination was an inappropriate penalty for the misconduct in this matter.

On September 13, 2004, the Chief of Police denied the Grievant's appeal. On September 27, 2004, FOP invoked arbitration on behalf of the Grievant. The Arbitrator noted that pursuant to Article 12, § 8 of the parties' collective bargaining agreement ("CBA"), "Grievant's appeal is based solely on the record ("the Record") established in the Departmental Hearing." (Award at p. 6).

At arbitration MPD argued that it considered the relevant *Douglas*¹ factors and that termination was an appropriate penalty in this case. Specifically, MPD asserted "that based upon a review of the record in this matter, the conduct which is the subject of this disciplinary action has significantly diminished Grievant's value as a police officer and his continued employment undermines the integrity of the Department and does not promote the efficiency of the service." (Award at p. 5). Relying on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), MPD contended that the reviewing tribunal "may not substitute its independent judgement for that of any agency in deciding whether a particular penalty is appropriate." (Award at p. 7). Citing *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (Grievant Clarence Allen)*, AAA No. 16390 001 97 (Sharnoff 1998), MPD argued the following:

The Arbitrator's role in the penalty phase of an Adverse Action proceeding is to review whether the Employer's exercise of its discretion was accomplished in a manner that was arbitrary, capricious, unreasonable, discriminatory, exhibited personal favoritism, was disparate, or otherwise constituted an abuse of discretion. Absent such improper exercise of discretion, the Employer's weighing and balancing of all of the relevant factors should not be disturbed. . . . The critical point is that it must be demonstrated that all of the relevant factors, in fact, were considered. (Award at pgs. 7-8).

MPD asserted "that each of the *Douglas* factors was applied". (Award at p. 8). Therefore, MPD claimed that consistent with Arbitrator Sharnoff's Award in the Allen case, MPD's weighing and balancing of all of the relevant factors should not be disturbed. In light of the above, MPD argued that the grievance should be denied.

FOP countered that MPD did not properly apply the *Douglas* factors. Specifically, FOP argued that the Trial Board's recommendation lacked sufficient analysis as legally required to support

¹*Douglas v. Veterans Administration*, 5 MSPB 313 (1981).

removal. (See Award at p. 10). As a result, FOP claimed that the proper penalty should be a suspension.

On August 20, 2007, Arbitrator John Simpkins found that MPD failed to establish "cause" for terminating the Grievant. (See Award at p. 14). As a result, Arbitrator Simpkins, reduced the penalty from termination to a suspension without pay for the "time off". (See Award at p.15).

In reaching this conclusion the arbitrator observed the following:

It is apparent that the Grievant was unable to control the stress he was experiencing, and vented his anger by striking his wife and contemplating suicide on two noted occasions, October 14, 2002 and November 20, 2002, respectively. On this latter occasion he held a Department issued hand gun to his head contemplating suicide. This conduct, while very serious, manifests the need for psychiatric counseling, more than termination in view of what is apparently a valued employee with a good work record.

* * *

At the outset it must be noted that Grievant's discipline and discharge was not related to any on-the-job incident. He was off-duty at the time of the violations he acknowledged committing. The conduct engaged in affected his employment as a police officer and he has not sought to defend or excuse his behavior. Surely, domestic violence misconduct is serious and can impact the Department's reputation. The nature of the domestic altercation and kind of violence must be considered inasmuch as all acts of domestic violence would not give rise to discipline not to mention justification for termination of a police officer. (Award at pgs. 11-12).

In addition the arbitrator indicated that "the grievant was an exemplary police officer with whom both supervisors, co-worker and partners alike took pleasure in working with and without reservation would supervise and partner with again if he is returned to work. These police comrades and supervisors characterize and regard Grievant as being diligent, conscientious, hard-working, honest, above average, of a good attitude, and the kind of officer who will always watch your back." (Award at p. 14). Also, the arbitrator noted that the FOP "did not question, defend or excuse the conduct which resulted in the Grievant's termination." (Award at p. 11) . Instead, FOP "questions the propriety of the Grievant's termination as a member of the D.C. Police Department." (Award at p. 11).

In light of the above, the Arbitrator Simpkins concluded as follows:

[T]here is no dispute that Grievant engaged in the conduct which resulted in his discharge. He has not contested his conduct but rather, the penalty as being too severe. The Employer maintains that the penalty is appropriate and assessed in accordance with the *Douglas* factors which were adopted by the District of Columbia as the standard for assessing the appropriateness of a penalty. The maintenance of discipline, efficiency and the integrity of its police officers are the reasons presented as justifying Grievant's separation.

* * *

The evidence demonstrates that the trial board considered the *Douglas* factors but in doing so pondered certain hypotheticals and assumptions as factual. Principal among these considerations was Grievant's "attempted" suicide. The only evidence of suicide was thoughts of taking his life or contemplation. There is no evidence that he took any steps to carry out any thoughts in this regard. The discharge of his gun while having thoughts of suicide only occurred as he was abandoning the notion of taking his life or contemplation. There is no evidence that he took any steps to carry out any thoughts in this regard. The discharge of his gun while having thoughts of suicide only occurred as he was abandoning the notion of taking his life. There is no evidence that the pistol fired in an "attempt" to carry out an act of suicide. Thus, a finding that he actually "attempted" to carry out his thoughts of suicide is speculative and non-factual. Contemplation or entertaining thoughts of any kind is not conduct. Thus, it cannot be "conduct unbecoming" as characterized by the Trial Board. Accordingly, reliance on Grievant having attempted suicide as a serious aggravating factor in the *Douglas* considerations, mis-applies *Douglas*.

* * *

It is troubling indeed that the panel and the Department found that Grievant's termination was appropriate and in line with penalties imposed for similar infractions, yet failed to cite a single instance where termination was found to be an appropriate penalty. In this regard, the Union cites *Fraternal Order of Police, Grievant Bobby White v. D.C. Metropolitan Police*, AAA Case No. 16-390-00162-93, the arbitrator analyzing the *Douglas* factors found suspension appropriate when the accused officer had discharged his firearm during an off-duty altercation with his fiancée in a public place while intoxicated. Surely, the Department is aware of this precedent which

interprets and applies its regulations and policy. Accordingly, in view of the *White* case coupled with the absence of support for the Department's assessment of this critical *Douglass* factor, the Union's position that a lesser alternative penalty was appropriate under the circumstances is reinforced.

Similarly, the Department considered a lesser penalty and determined it not to be an option. The panels' reasoning which was adopted by the Department is that it did not have a one hundred percent (100%) guarantee (1) that the charges to which the Grievant admitted would not be committed in the future, and (2) that he would not use the weapon it issued to harm himself or his wife. Evidence that this quantum of assurance is the standard received in similar offenses is lacking. In the absence of evidence as to this level of assurance the trial board's findings adopted by the Department can only be viewed as arbitrary and unreasonable. Under the circumstances the claim that rehabilitation would not succeed is highly speculative and unpersuasive. The implausible nature of the panel's findings will not support a finding of cause for an extreme penalty of discharge. The mitigating factors of Grievant's treatment and counseling are therefore reinforced. Reinstatement, therefore, is not inappropriate under the circumstances.

Accordingly, sufficient cause is lacking for Grievant's termination. He will be reinstated provided that he submits both medical and psychological documentation of his fitness for duty and submits to any medical and psychological examinations and tests which may be requested by his employer. Reinstatement shall be without back pay but with no loss of seniority. The time off shall be treated as disciplinary suspension without pay. All benefits to which the grievant would have been entitled are reinstated *nunc pro tunc*.

(Award at pgs. 12-14).

MPD contends that in the present case, Arbitrator Simpkins acknowledged that the Grievant committed the misconduct for which he was charged; however, Arbitrator Simpkins determined that termination was not the appropriate penalty. MPD argues that Arbitrator Simpkins's decision regarding the selected penalty is inconsistent with applicable law. (See Request at p. 10). Specifically, MPD asserts that the legal standard for the appropriateness of a penalty was established

by the Merit System Protection Board in *Douglas v. Veterans Administration*.² MPD notes the reasoning and factors established in *Douglas* have been adopted by the District of Columbia Court of Appeals under *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). MPD states that pursuant to *Stokes* an arbitrator is precluded from substituting his judgment regarding a penalty for misconduct for that of the MPD where the MPD engaged in responsible balancing of the relevant factors and the penalty did not exceed the limits of reasonableness. (See Request at pgs. 8-10). MPD contends that “[w]hen assessing the appropriate penalty in this matter, the Panel considered and assessed each of the enumerated *Douglas* factors.” (See Request at p. 11). In light of the above, MPD contends that Arbitrator Simpkins committed error by disagreeing with the penalty imposed and applying a rationale based on his opinion on the appropriateness of the termination penalty and substituting his judgment for that of MPD. (See Request at p. 11).

The gravamen of MPD’s Request is based on its interpretation and applicability of *Stokes* to this Award. In *Stokes*, an Administrative Law Judge (“ALJ”) of the District of Columbia Office of Employee Appeals (“OEA”) mitigated the disciplinary termination of an electrical foreman at the District of Columbia Department of Corrections Youth Center (“DOC”) to a 60-day suspension. DOC appealed OEA’s decision to the Superior Court of the District of Columbia. The Superior Court reversed OEA’s decision and concluded that DOC’s discharge of the employee was reasonable. The employee appealed to the District of Columbia Court of Appeals. The Court of Appeals concluded, based on D.C. Code §§ 1-606.1 and 1-606.3 (1981), that:

[a]lthough the Act does not define the standards by which the OEA is to review these decisions, it is self-evident from both the statute and its legislative history that the OEA is not to substitute its judgment for that of the agency and its role . . . is simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.” . . . Although the OEA has a “marginally greater latitude of review” than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. The “primary discretion” in selecting a penalty has been entrusted to agency management, not the [OEA]. (Citations omitted). *Stokes*, 1009-1010 and 1011).

Thus, the Court of Appeals’ analysis in *Stokes* is based on the court’s interpretation and application of D.C. Code §§ 1-606.1 and 1-606.3 (1981 ed.) which created the OEA as “a quasi-judicial body empowered to review final agency decisions affecting, *inter alia*, performance ratings, adverse actions, and employee grievances.” (*Stokes*, 1009).

²See fn 1, *supra*.

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In the present case, the arbitrator's review of MPD's termination of Phillip Suggs arises out of the parties' CBA and not D.C. Code §§ 1-606.1 and 1-606.3 (1981 ed.).³ In this regard, this Board has found that by submitting a matter to arbitration, "the parties also agree to be bound by the Arbitrator's decision which necessarily includes the Arbitrator's interpretation of the parties' agreement and related rules and/or regulations as well as his evidentiary findings and conclusions upon which the decision is based." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). "The Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).

The arbitrator's power to review the actions of MPD in the instant case constitutes an exercise of his equitable powers arising out of the parties' CBA. This Board has held that an arbitrator does not exceed his authority by exercising his equitable powers, unless these powers are expressly restricted by the parties' CBA.⁴ See, D.C. Metropolitan Police Department and FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). Absent such an express restriction in the parties' CBA, 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." D.C. Metropolitan Police Department and FOP/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282 at pgs. 3-4, PERB Case No. 97-A-02 (1998).

The matter before Arbitrator Simpkins in this proceeding was "[w]hether the appropriate penalty for the Grievant's violations [was] termination, or suspension with required counseling?"⁵ (Award at p. 11). The arbitrator identified several mitigating factors which warrant reduction of the imposed penalty. As a result, he reduced the termination to a suspension and imposed certain conditions which must be satisfied prior to the Grievant's reinstatement. (See Award at p. 15). MPD does not cite to any provision of the parties' CBA that limits the arbitrator's equitable power. Instead, MPD contends that the reasonableness of the penalty imposed is consistent with the *Douglas* factors analysis. In addition, MPD argues that the arbitrator committed error when he applied a rationale based on his opinion on the appropriateness of the termination and substituted his judgment for that of MPD. We believe that MPD's claim represents only a disagreement with the arbitrator's

³Now codified at D.C. Code §§ 1-606.01 and 1-606.03 (2007).

⁴We note, that if the parties' CBA limits the arbitrator's discretion to determine penalties, that limitation will be enforced.

⁵"By agreement of the parties, this arbitration was submitted solely on the briefs, reply briefs, administrative investigation records, Police Trial Board transcript and exhibits presented by the parties." (Award at p. 2, n. 1).

award. This Board has previously stated that a “disagreement with the Arbitrator’s interpretation . . . does not make the award contrary to law and public policy.” AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995). Furthermore, the record reveals that neither party challenged the arbitrator’s determination of the issue before him. We find that the absence of language in the parties’ CBA establishing express limits on the arbitrator’s equitable power and the parties’ failure to challenge the arbitrator’s identification of the issue to be determined, establish that the arbitrator did not exceed his authority by exercising his powers to mitigate the Grievant’s termination to a suspension.

In addition, MPD asserts that the Arbitrator Simpkins’ ruling that the Trial Board Panel’s findings failed to support a termination for cause, violates the definition of “for cause” set forth in 6 DCMR §1601 et seq. 47 DCR 7094 (September 1, 2000).⁶ (See Request at p. 8). MPD’s argument is a repetition of the argument considered and rejected by the arbitrator. Therefore, we believe that MPD’s ground for review only involves a disagreement with the arbitrator’s ruling. The parties submitted their dispute to Arbitrator Simpkins and MPD’s disagreement with his interpretation of 6 DCMR §1601 et seq. does not make the award contrary to law and public policy. See, AFGE, Local 1975 and Department of Public Works, *supra*.

For the reasons discussed above, we find that MPD’s claim that the Award is contrary to law lacks merit. Therefore, we can not reverse the Award on this ground.

MPD also contends that “the arbitrator’s assessment of the penalty imposed in this matter is contrary to established law in this jurisdiction and is therefore, a violation of public policy. It is from the decision of the Arbitrator that [MPD] files this Arbitration Review Request and seeks to have the decision of the Arbitrator reversed.” (Request at pgs. 6-7). Citing Department of Corrections v. Teamsters Union Local 246, 554 A.2d 319, 323 (D.C. 1989), MPD asserts that “the public policy

⁶MPD also suggests that Arbitrator’s Simpkins Award is not consistent with the standard noted in Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (Grievant Clarence Allen), AAA No. 16390 001 97 (Sharnoff 1998). We note that the District of Columbia Court of Appeals has stated that: “[i]n bargaining for an arbitrator to make findings of fact and to interpret the Agreement, the parties chose a forum that is not bound by precedent. Arbitration decisions do not create binding precedent even when based on the same collective bargaining agreement. See, e.g. Hotel Ass’n of Washington, D.C., Inc. v Hotel & Restaurant Employees Union, Local 25, [] 295 U.S. App. D.C. 285, 286-88, 963 F. 2d 388, [389-391], (D.C. Cir. 1992).” District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 901 A.2d 784, 789 (D.C. 2006). Contrary to MPD’s contention, Arbitrator Simpkins was not bound by other arbitral decisions.

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which must be addressed in matters brought pursuant to the CMPA is 'the policy established by the Council and found in the CMPA itself.' . . . In other words, an [arbitration award] violates public policy when it is inconsistent with and/or contrary to relevant law." (Request at p. 7).

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of the contract." American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F.2d 1, 8 (D.C. Cir. 1986). "[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.'" Id. at 8. A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well-defined, public policy grounded in law or legal precedent. See United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29 at 43 (1987); Washington- Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971). The violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing AFGE, Local 631 and 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 District of Columbia Public Schools and the American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p.6, PERB Case No 86-A-05 (1987). Furthermore, MPD has the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). 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." District of Columbia Department of Corrections v. Teamsters Local 246, 54 A.2d 319, 325 (D.C. 1989). In the present case, MPD has failed to specify any definite public policy that the Award contravenes. Instead, MPD states that "an [arbitration award] violates public policy when it is inconsistent with and/or contrary to relevant law." (Request at p. 7). MPD's public policy argument relies solely on general considerations of supposed public policy, and not a well-defined policy or legal precedent. Thus, MPD has failed to point to any clear or legal public policy which the Award contravenes. Therefore, we conclude that MPD has failed to present a ground for review as to this claim.

We find that the arbitrator's conclusions are based on a thorough analysis and cannot be said to be contrary to law and public policy. In the instant case, 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 reasons discussed above, MPD's Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Arbitration Review Request is hereby denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

March 12, 2008

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-A-08 was transmitted via Fax and U.S. Mail to the following parties on this the 12th day of March 2008.

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