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

In the Matter of:)	
)	
Metropolitan Police Department)	
)	PERB Case No. 18-A-04
Petitioner)	
)	Opinion No. 1667
v.)	
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
)	
Respondent)	

DECISION AND ORDER

I. Introduction

On November 27, 2017, the Metropolitan Police Department (“Department”) filed this Arbitration Review Request (“Request”) pursuant to the Comprehensive Merit Personnel Act (“CMPA”), seeking review of an Arbitrator’s Opinion and Award (“Award”). The Award found that termination was not an appropriate penalty for the charges against Officer Michael Thomas (“Grievant”) and instead imposed a forty-five (45) day suspension.

In accordance with the CMPA, the Board is permitted to modify or set aside an arbitration award in three narrow circumstances: (1) if the 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.¹ The Department argues that the Award is contrary to law and public policy. Having reviewed the Arbitrator’s conclusions, the pleadings of the parties and applicable law, the Board concludes that the award on its face is not contrary to law and public policy. Therefore, the Board denies the Department’s Request.

¹ D.C. Official Code § 1-605.02(6).

II. Statement of the Case

The charges against the Grievant are related to an off-duty incident that occurred at a private residence in Hyattsville, Maryland. Early in the morning of September 13, 2009, the Grievant saw a person, later identified as Julio Lemus (“Mr. Lemus”), standing by the Grievant’s vehicle.² An altercation ensued between the Grievant and Mr. Lemus resulting in the Grievant drawing and discharging his service weapon twice, striking Mr. Lemus in the left thigh and abdomen.³

After an investigation by the Hyattsville Police, the Maryland state attorney decided not to file charges against either the Grievant or Mr. Lemus. On January 15, 2010, the Department served the Grievant with a Notice of Proposed Adverse Action which identified two charges: (1) the Grievant was involved in the commission of an act which would constitute a crime and (2) he failed to obey orders or directives issued by the Chief of Police, specifically no member shall draw and point a firearm at a person unless there is a reasonable perception of a substantial risk that the situation may escalate to the point where lethal force would be permitted.⁴ The notice recommended a penalty of termination.⁵ An Adverse Action Panel (“Panel”) held a hearing on January 14, 2011, and found the Grievant guilty of both charges. A Final Notice of Adverse Action recommended termination as an appropriate penalty. On March 10, 2011, the Union demanded arbitration.

III. Arbitration Award

The Arbitrator first determined whether there was sufficient evidence to support the charges. According to the Arbitrator, it was clear that if the Grievant called 911 to report the incident to the Hyattsville police instead of confronting Mr. Lemus, none of the events culminating in the shooting of Mr. Lemus would have occurred.⁶ The Arbitrator agreed with the Panel’s decision that the Grievant’s actions were reckless and showed poor judgment. The Arbitrator also agreed that the evidence presented by the Department was sufficient to support the alleged charges.⁷

The Arbitrator next determined whether termination was an appropriate penalty. *Douglas v. Veterans Administration*⁸ requires twelve factors to be weighed in determining whether an agency’s penalty in an adverse action case was reasonable. Based on the *Douglas* factors, the Arbitrator found that the Panel did not reach conclusions within “tolerable limits of reasonableness,” citing the consistency of the penalty with those imposed on other employees for

² Award at 1.

³ Award at 2.

⁴ Award at 2-3.

⁵ Award at 3.

⁶ Award at 6.

⁷ Award at 6.

⁸ 5 M.S.P.B. 313 (1981).

the same or similar offenses, the adequacy and effectiveness of alternative sanctions, and the potential for the Grievant's rehabilitation.⁹

The Arbitrator noted that the Panel cited no other disciplinary decision in reaching its conclusion that the termination was consistent with the penalty given to other employees for like or similar conduct. Three disciplinary cases were part of the arbitration record and in all three cases the penalty of termination was reduced to a suspension including one case in which the grievant shot and killed someone in self-defense.¹⁰

The Arbitrator stated that another penalty could have deterred the grievant and others, such as a long suspension without pay, mandatory retraining of the Grievant and, if necessary, counseling and educational meetings with officers with specific warnings of severe discipline for repeat offenses.¹¹ These alternative penalties may have also altered the Panel's conclusions regarding *Douglas* factor 10, the potential for an employee's rehabilitation. In light of the alternative penalties available, the Arbitrator disagreed with the Panel's conclusion that the Grievant could not be rehabilitated.

The Arbitrator ruled that the penalty should be reduced from termination to suspension.¹²

IV. Discussion

The Board has limited authority to overturn an arbitration award.¹³ For the Board to find the Award contrary to law and public policy, the asserting party bears the burden of specifying the "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result."¹⁴

The Department's arguments in favor of overturning the Award repeatedly rely on *Stokes v. District of Columbia*¹⁵ as the standard by which an Arbitration decision should be reviewed.¹⁶ As the Union states in its response, *Stokes* establishes the deferential standard by which the Office of Employee Appeals ("OEA") is to review penalties that agencies impose on employees.¹⁷ The Board has repeatedly held that *Stokes* is not the correct standard to apply to an arbitrator's review of agency decisions when the parties have agreed to submit the case to arbitration.¹⁸ The Board has previously affirmed an arbitrator's decision reducing a police

⁹ Award at 9.

¹⁰ Award at 8.

¹¹ Award at 9.

¹² Award at 9.

¹³ *FOP/Dep't of Corr. Labor Comm. v. D.C. Pub. Emp. Rels. Bd.*, 973 A.2d 174, 177 (D.C. 2009).

¹⁴ *MPD and FOP/Metro. Police Dep't Labor Comm.*, 47 D.C. Reg. 717, Slip Op. 633 at 2, PERB Case No. 00-A-04 (2000); *See also D.C. Pub. Sch. v. AFSCME., District Council 20*, 34 D.C. Reg. 3610, Slip Op. 156 at 6, PERB Case No. 86-A-05 (1987).

¹⁵ 502 A.2d 1006 (D.C. 1985).

¹⁶ Appeal at 8-9.

¹⁷ Response at 15.

¹⁸ *AFGE, Local 872 v. D.C. Water and Sewer Authority*, 63 D.C. Reg. 6477, Slip Op No. 1566 at 7, PERB Case No. 15-A-09 (2016); *D.C. Metro Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm. (on behalf of Garcia)*, 63

officer's penalty from termination to a thirty-day suspension. The Superior Court of the District of Columbia went on to hold that the Board reasonably found that the Arbitrator was not bound by the standards that apply to OEA's review of agency decisions set forth in *Stokes*.¹⁹ As stated earlier, and in many previous PERB Decisions and Orders, the arbitrator's authority does not arise from *Stokes*, but from the parties' contractual agreement to submit the case to arbitration.²⁰

In this case, the parties presented two issues to the Arbitrator: (1) whether the evidence presented by the Department was sufficient to support the alleged charges and (2) whether termination was an appropriate remedy.²¹ The Arbitrator concluded that there was sufficient evidence to support the alleged charges but did not agree that termination was an appropriate remedy. Arbitrators have wide latitude to construct equitable remedies, as long as those remedies are not expressly limited by the parties' collective bargaining agreement.²² The Board has held that a mere disagreement with the Arbitrator's interpretation does not make an award contrary to law and public policy.²³ The Department has failed to specify applicable law and definite public policy that mandates the Arbitrator arrive at a different result.

Finally, the Department argues that the Award is contrary to the public policy requiring police officers to preserve the peace, protect life and uphold the law. The Department argues that reinstating the Grievant would violate this public policy because the misconduct fits squarely within the behavior proscribed by District of Columbia law and the Department's General Orders.²⁴ The Board has adopted the U.S. Court of Appeals for the District of Columbia Circuit's holding that a violation of public policy "must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest."²⁵ The D.C. Circuit went on to explain that the "exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards

D.C. Reg. 4573, Slip Op. No. 1561 at 3, PERB Case No. 14-A-09 (2016); *D.C. Metro Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm. (on behalf of Brown)*, Slip Op. No. 757 at 3, PERB Case No. 03-A-06 (2004).

¹⁹ *D.C. Metro. Police Dep't v. D.C. Pub. Emp. Rels. Bd.*, 2014 CA 007679 P(MPA) (December 16, 2015).

²⁰ *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm.(on behalf of Bell)*, 63 D.C. Reg. 12581, Slip Op. No. 1591, PERB Case No. 15-A-16 (2016); *FOP/Metro. Police Dep't Labor Comm. (on behalf of Cummings) v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 5801, Slip Op. No. 1347, PERB Case No. 10-A-22 (2012); *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm. (on behalf of Suggs)*, Slip Op. No. 933, at 7-8, PERB Case No. 07-A-08 (Mar. 12, 2008); *Metro. Police Dep't v. Nat'l Ass'n of Gov't Employees, Local R3-5 (on behalf of Burrell)*, 59 D.C. Reg. 2983, Slip Op. No. 785 at 5, PERB Case No. 03-A-08 (2006).

²¹ Award at 1.

²² See *FOP/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 5326, Slip Op. No. 1373, PERB Case No. 11-A-05 (2013); *D.C. Metro. Police Dep't v. FOP/Metro. Police Dep't Labor Comm.*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

²³ *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm.*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008); see also *District of Columbia Metro. Police Dep't v. F.O.P./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 *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).

²⁴ Award at 16.

²⁵ *FOP/Dep't of Corr. Labor Comm. v. D.C. Dep't of Corr.*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at p. 2, PERB Case No. 10-A-20 (2012) (citing *American Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

under the guise of public policy.”²⁶ The Board may not modify or set aside the Award as contrary to law and public policy in the absence of a clear violation on the face of the Award.²⁷ The Department has offered no such clear violation of law and public policy. Therefore, the Department’s challenge must be dismissed.

V. Conclusion

Based on the foregoing, the Board finds that the Arbitrator’s Award is not contrary to law and public policy. Accordingly, the Department’s Arbitration Review Request is denied and the matter is dismissed in its entirety with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The 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

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

May 17, 2018

Washington, D.C.

²⁶ *Id.*

²⁷ *FOP/Dep’t of Corr. Labor Comm. v. PERB*, 973 A.2d 174, 177 (D.C. 2009).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-04, Op. No. 1667 was transmitted to the following parties on this the 17th day of May, 2018.

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