Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
District of Columbia Metropolitan Police Department,	)	
Petitioner,	)	PERB Case No. 24-A-01
v.	)	Opinion No. 1865
Fraternal Order of Police/Metropolitan Police Department Labor Committee	)	
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case

On November 27, 2023, the District of Columbia Metropolitan Police Department (MPD) filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA) seeking review of an arbitration award (Award) dated November 3, 2023.[1] On December 18, 2023, the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP), filed an opposition to the Request (Opposition). In the Award, the Arbitrator reversed the termination of an MPD officer (Grievant).[2] MPD seeks review of the Award on the grounds that the Award is contrary to law and public policy.[3]

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

[1] D.C. Official Code § 1-605.02(6). The Award, while dated May 1, 2023, was emailed to the parties by the Arbitrator on May 2, 2023.
[2] Award at 124.
[3] Request at 2.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. On September 27, 2017, the Grievant conducted searches of two persons (Individual-1 and Individual-2) in two similar but unrelated incidents.[4] The Grievant searched Individual-1 after observing him in possession of an open container of alcohol.[5] During the Grievant's search, Individual-1 verbally protested the search of his genitals and buttocks and attempted to slap the Grievant's hand off of his buttocks.[6] Individual-1 later alleged that while he gave the Grievant consent to pat him down, he did not consent to an expansion of the search and "in particular the forcing of [the Grievant's] fingers between [Individual-1's] buttocks and the grabbing of his genitals on two more occasions while he was handcuffed."[7] The Grievant's search of Individual-1 was videotaped by civilian bystanders.[8] The Grievant did not arrest Individual-1 for either "public consumption/possession of an open container of alcohol" (POCA) or assault on a police officer.[9]

Later on September 27, 2017, after the search of Individual-1, the Grievant and his partner conducted a traffic stop of a vehicle with expired license plate registration tags.[10] The Grievant's partner approached the driver's side of the vehicle and notified the occupants of the expired registration tags.[11] The Grievant approached the passenger side of the vehicle and alerted his partner that the occupants were consuming alcohol.[12] The officers requested the occupants exit the vehicle.[13] Individual-2 exited the passenger side of the vehicle, consented to an initial search of his person, and informed the Grievant that he was on probation for a gun charge.[14] Simultaneously, the Grievant's partner began searching the driver of the vehicle.[15] The Grievant's partner patted down the driver's crotch area and found the driver to be concealing narcotics.[16] The driver attempted to flee from the officers, at which point both officers gave chase, interrupting the Grievant's search of Individual-2.[17] Individual-2 remained standing by the passenger side of the vehicle while the officers pursued the driver.[18] While returning to the stopped vehicle, the Grievant radioed for assistance and returned to Individual-2.[19] The Grievant was informed over radio that

[4] Award at 18. Both searches involved allegedly invasive searches of the suspects, including their groin and crotch areas. Award at 18-19, 21.
[5] Award at 18.
[6] Award at 23.
[7] Award at 19.
[8] Award at 18.
[9] Award at 23.
[10] Award at 20.
[11] Award at 20.
[12] Award at 20.
[13] Award at 20.
[14] Award at 20.
[15] Award at 20.
[16] Award at 20.
[17] Award at 20.
[18] Award at 20.
[19] Award at 20.

the driver, once apprehended, was found in possession of drugs and a gun.[20] While awaiting the requested back-up, the Grievant observed Individual-2 to be "visibly anxious and acting in an agitated manner."[21]

At this time, Individual-2 had his hands on the hood of the vehicle and the Grievant had his hand on Individual-2's back.[22] Individual-2 stated that the Grievant had already searched him and protested being searched again.[23] The Grievant responded that Individual-2 was "acting squirrely" and continued the search.[24] Individual-2 repeated that the Grievant had already searched him, told the Grievant to stop, tried to move away from the Grievant and stated that he didn't have anything illegal.[25] The Grievant responded that "there was a gun in the car, so you understand my suspicion."[26] After the requested back-up arrived, the Grievant resumed his search of Individual-2, including searching "thoroughly about the groin and waistband areas by directing [Individual-2] to spread his legs; [the Grievant] then grabbed [Individual-2's] genitals and manipulated [Individual-2's] buttocks,"[27] which Individual-2 vehemently verbally protested directly to the Grievant as well as to another MPD officer who had arrived at the scene.[28] The Grievant continued to forcefully search Individual-2 over the latter's protestations.[29] The Grievant handcuffed Individual-2 only after completing the search, without finding anything, and stating that he would arrest Individual-2 for criminal possession of an open container of alcohol (POCA).[30] The Grievant's search and arrest of Individual-2 was observed by other MPD officers who had arrived at the scene as well as civilian bystanders.[31]

Sometime after September 27, 2017, Individual-1 filed a complaint with MPD, which was first investigated by Internal Affairs Division (IAD).[32] IAD determined that the incident merited only a chain of command investigation—characterized as "typically less serious than an investigation conducted by IAD".[33] The chain of command investigation did not result in any findings or discipline issued concerning the scope of the Grievant's search of Individual-1's groin or crotch area.[34] On January 10, 2018, MPD issued a Letter of Prejudice to the Grievant, citing

[20] Award at 21. The parties and the Arbitrator state, without further explanation, that the gun, "after being found as part of the attempt to apprehend [the driver] actually belonged to a member of the MPD." Award at 21. *See also* Grievant's Arbitration Brief at 60, footnote 13; MPD's Arbitration Brief at 9, footnote 3.
[21] Award at 21.
[22] Award at 21.
[23] Award at 21.
[24] Award at 21.
[25] Award at 21.
[26] Award at 21.
[27] Award at 21.
[28] Award at 21-22.
[29] Award at 22.
[30] Award at 22.
[31] Award at 22.
[32] Award at 18.
[33] Award at 18.
[34] Award at 18.

his failure "to obey the orders and directives issued by the Chief of Police" by failing to arrest Individual-1 for POCA.[35]

On August 23, 2018, MPD issued a Notice of Proposed Adverse Action to the Grievant for his conduct with respect to the search of Individual-2.[36] The Grievant filed a request for an Adverse Action Hearing the same day.[37] The Adverse Action Hearing occurred on March 7, 8 and 12, 2019.[38] The Adverse Action Hearing Panel found the Grievant guilty of three of the five charges against him.[39] On March 29, 2019, MPD issued a Final Notice of Adverse Action to the Grievant.[40] On April 17, 2019, the Grievant appealed the Final Notice of Adverse Action to the Chief of Police, who denied the appeal on May 8, 2019.[41] On May 30, 2019, FOP filed a demand for arbitration on behalf of the Grievant.[42]

B. Arbitrator's Findings

The Arbitrator determined the issue to be: "[w]as [the Grievant] terminated for cause and if not, what is the remedy?"[43]

The Arbitrator applied from the District of Columbia Court of Appeals' adoption of standard and multi-factor analysis of *Douglas v. Veterans Admin.*[44] in *Stokes v. District of Columbia*,[45] reiterating the *Stokes* Court's holding that:

[r]eview of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, it is appropriate…to specify how the Agency's penalty should be amended.

The Arbitrator stated that he would "use the [*Douglas*] [f]actors to guide our discussion and analysis of the issues."[46] The Arbitrator found all of the *Douglas* factors to apply favorably or neutrally to the Grievant.[47] The Arbitrator determined that the circumstances of the case did not support the application of the *Douglas* factors regarding: (1) the employee's job level and type of

[35] Award at 19.
[36] Award at 25.
[37] Award at 25.
[38] Award at 25.
[39] Award at 26.
[40] Award at 26.
[41] Award at 27.
[42] Award at 27.
[43] Award at 101. Article 19 E of the parties' CBA states that: "[i]f the parties are unable to agree on a joint statement of the issue the arbitrator/mediator shall be free to determine the issue." Award at 101. FOP submitted a statement of the issues in its brief to the Arbitrator. Grievant's Arbitration Brief at 1. MPD reiterated FOP's statement of the issues in a section of its brief headed "Purported Issues, As Presented By Grievant." MPD's Arbitration Brief at 16.
[44] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).
[45] *Stokes v. District of Columbia.*, 502 A.2d 1006 (D.C. 1985)
[46] Award at 102.
[47] Award at 123.

employment, including contact with the public and prominence of the position;[48] (2) consistency of the penalty with any applicable agency table of penalties;[49] and (3) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future[50] and, therefore, weighed each of those factors as neutral.

The Arbitrator further noted MPD's "threshold burden of proof" on showing the consistency of the penalty in the Grievant's case with those imposed upon other employees for the same or similar offenses.[51] The Arbitrator determined that MPD did not meet its burden, while FOP provided multiple cases of comparative discipline showing MPD "routinely imposed much less severe penalties (or none at all) for others who were investigated for their search techniques."[52] The Arbitrator found that the Adverse Action Hearing Panel erred by "ignoring the best possible evidence which was the [Individual-1] search,"[53] and concluded that MPD's termination of the Grievant was not consistent with other penalties for the same or similar offenses.[54]

The Arbitrator concluded that, as the majority of the *Douglas* factors were mitigating in favor of the Grievant and the rest neutral, MPD did not have cause to terminate the Grievant.[55] The Arbitrator ordered that: (1) the Grievant's termination be immediately revoked, and that such revocation be reflected in the relevant and legally permissible personnel/employment records; (2) the Grievant is to be "[m]ade 100% whole in all ways as if he were never terminated,"[56] including lost wages, lost potential overtime wages, benefits, reinstatement of any leave forfeited by termination, pre- and post-judgment interest on all monetary relief, and the reinstatement of any lost seniority; (3) the Grievant be returned to active duty and his position as an NSID officer; (4) MPD is ordered to pay the arbitration costs; and (5) the Arbitrator would retain jurisdiction for any questions or disputes regarding the first four items of his order.[57]

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 only 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.[58] MPD requests review on the grounds that the Award is contrary to law and public policy.[59]

[48] Award at 107.
[49] Award at 108.
[50] Award at 123.
[51] Award at 108.
[52] Award at 108.
[53] Award at 108.
[54] Award at 108.
[55] Award at 124.
[56] Award at 124.
[57] Award at 124-125.
[58] D.C. Official Code § 1-605.02(6).
[59] Request at 2.

A. The Award is not contrary to law.

MPD requests the Board's review of the Award on the grounds that the Award is contrary to law because: (1) the Award is ambiguous and subject to more than one interpretation; and (2) the Arbitrator misapplied the *Douglas* factors and D.C. Court of Appeals case law.[60] MPD asserts that the Arbitrator "did not explicitly find that MPD either established or failed to establish proof of wrongdoing despite his requirement to do so" because the Arbitrator rendered his own analysis of the *Douglas* factors without stating that he had established wrongdoing.[61]

The Board has previously considered and rejected MPD's argument regarding the sufficiency of an Arbitrator's explanations of his findings.[62] Further, the Arbitrator's application of the *Douglas* factors supports a finding that the Arbitrator considered the Adverse Action Hearing Panel's *Douglas* factor analysis and concluded that the Panel's analysis was insufficient based on the facts of the case. The Arbitrator explicitly restated the standard for the appropriateness of a penalty and applied that standard to his analysis of the facts.[63] The Arbitrator discussed the potential for further training and for the Grievant's rehabilitation throughout the analysis in the Award.[64] Ultimately, the Arbitrator concluded that MPD's inconsistent training and MPD's mishandling of the investigation against the Grievant outweighed any alleged wrongdoing by the Grievant.[65]

MPD argues that the Arbitrator misapplied *Douglas* and the D.C. Court of Appeals' holding in *Stokes v. District of Columbia*, which set forth that agency decisions that are supported by substantial evidence and that are not clearly erroneous as a matter of law should not be set aside.[66] MPD correctly asserts that the Arbitrator engaged in a substantive reweighing of the *Douglas* factors rather than the more limited administrative review allowed by *Stokes*.[67] However, the Boad must defer to an arbitrator's interpretation of external law incorporated into a contract.[68] The Board may not set aside an award solely because an arbitrator "may have made some legal error in reaching his conclusions,"[69] but rather only in "sufficiently extreme circumstances" where an arbitrator's "selection of penalty could be so arbitrary and capricious as to be on its face contrary

[60] Request at 12.
[61] Request at 12.
[62] *See* D.C. Official Code § 1-605.02(06). *See also MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1852 at 2, PERB Case Nos. 23-A-05 and 23-A-06 (2023) (citing *FOP/MPD Labor Comm. (on behalf of Officer Timothy Harris) v. MPD*, 59 D.C. Reg. 11329, Slip Op. No. 1295 at 6, PERB Case No. 09-A-11 (2012) (holding that an arbitrator is not required to explain the reason for their decision nor is an award unenforceable merely because they fail to explain certain bases for their decision)).
[63] Award at 101-102.
[64] Award at 110, 111-112, 119, 123.
[65] Award at 116-117.
[66] Request at 12-13.
[67] *Stokes v. District of Columbia* at 1010.
[68] *MPD v. FOP/MPD Labor Comm. (on behalf of Officer Darrell Best)*, 59 D.C. Reg. 12689, Slip Op. No.1325 at 11, PERB Case No. 09-A-14 (2012) (citing *District of Columbia Metropolitan Police Department v. Public Employee Relations Board*, 901 A.2d 784, 789 (D.C. App. 2006) (holding that where construction of a contract implicitly or directly requires application of "external law," the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it).
[69] *Id.*

to law."[70] Furthermore, the Board has repeatedly held that Stokes is not the correct standard to apply to an arbitrator's review of agency decisions where an arbitrator's authority arises out of the parties' contractual agreement to submit the case to arbitration.[71] Here, as the parties agreed to submit the issue of the appropriateness of the Grievant's termination to the Arbitrator to decide in accordance with the parties' collective bargaining agreement (CBA), the Arbitrator is not required to defer to the Administrative Action Hearing Panel's *Douglas* factor analysis despite the Award's citation to *Stokes*.[72] Where a case is submitted to arbitration pursuant to "a collective bargaining agreement between…parties who, subject only to the limitations of D.C. Code § 1-605.02(6), have 'bargained for [the arbitrator's] construction of the contract,'"[73] "the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the contract reader, his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties to the contract."[74]

MPD further argues that the Arbitrator misinterpreted multiple *Douglas* factors.[75] Regarding the consistency of the penalty with those imposed on others, MPD asserts that the Arbitrator incorrectly stated that "MPD had the threshold burden of proof in this disciplinary matter" when MPD had only the burden to "establish *cause* for taking adverse action. Once MPD established that its disciplinary action against Grievant was taken for cause, the onus was on Grievant to raise the issue of disparate treatment, and the burden was on Grievant to substantiate his disparate treatment claim."[76] The Board has previously held that:

> [i]n a *Douglas* factor analysis, the burden is on the Agency to prove its facts by a preponderance of the evidence. As stated in *Douglas*, "an agency's decision to impose the particular sanction rests upon the considerations of fact, those facts must be established under the preponderance standard and the burden is on the agency to so establish them,[77]

including "consistency with other agency actions and agency rules."[78] Furthermore, the Arbitrator considered and credited FOP's presentation of "several cases of comparative discipline demonstrating how the MPD routinely imposed much less severe penalties (or none at all) for others who were investigated for their search techniques"[79] and further found that the Adverse Action Hearing Panel had "ignored the best possible evidence which was the [Individual-1]

[70] *Dist. of Columbia Metro. Police Dep't v. Dist. Of Columbia Pub. Employee Relations Bd*, 282 A.3d 598, 605 (D.C. App. 2022).
[71] *MPD v. FOP/MPD Labor Comm.*, Slip Op No. 1765 at 7, PERB Case No. 21-A-01 (2021) (citing *Stokes v. D.C.*, 502 A.2d 1006 (D.C. 1985)).
[72] *MPD v. FOP/MPD Labor Comm.* Slip Op. No.1325 at 11.
[73] *FOP/DOC Labor Comm. v. DOC*, 61 D.C. Reg. 11301, Slip Op. No. 955 at 9, PERB Case No. 08-A-06 (2014) (quoting *MPD v. D.C. PERB*, 901 A.2d 784, 789 (D.C. 2006)).
[74] *Id*. (quoting *MPD v. D.C. PERB*, 901 A.2d 784, 789 (D.C. 2006)) (internal quotations omitted).
[75] Request at 13-14.
[76] Request at 13.
[77] *MPD v. FOP/MPD Labor Comm. (on behalf of Charles Jacobs)*, 63 D.C. Reg. 2093, Slip Op. No. 1509 at 8-9, PERB Case No. 12-A-04(R) (2016).
[78] *Id.*
[79] Award at 108.

search."[80] MPD's arguments both misconstrue the burden of proof and ignore the Arbitrator's careful consideration of the evidence put forward by FOP.

Finally, MPD argues that the Arbitrator misinterpreted the *Douglas* factor regarding the consistency of a penalty with applicable agency penalty tables.[81] MPD asserts that this *Douglas* factor "only seeks to confirm that an agency's chosen penalty is within the penalty range set forth in MPD's General Orders and that a maximum penalty of removal falls within the penalty range.[82] MPD further asserts that by failing to confine his analysis to "whether MPD's chosen penalty is within the legally allowable range," the Arbitrator has "dispense[d] his own brand of industrial justice."[83]

The Arbitrator's conclusion that this *Douglas* factor is neutral in this case is not contrary to law.[84] First, an arbitrator need not analyze an employee's discipline using all twelve *Douglas* factors, but rather only the factors deemed relevant.[85] The Arbitrator here concluded that "consistency does not exist" in MPD's application of its own table of penalties to similar cases—specifically, the two separate searches conducted by the Grievant on September 27, 2017.[86] Furthermore, the Arbitrator conducted an in-depth analysis of all twelve *Douglas* factors, including the Adverse Action Hearing Panel's previous analysis of each factor, and determined based on his analysis that MPD did not have cause to terminate the Grievant.[87] MPD's objection to the Arbitrator's weighing of this *Douglas* factor—mere repetition of arguments MPD put forward in its Arbitration Brief[88]—does not render the Award contrary to law.[89]

The Board's review of an arbitration award on the grounds that it is contrary to law and public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling.[90] The narrow scope limits potentially intrusive judicial review under the guise of public policy.[91] The petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result."[92] By agreeing

[80] Award at 108.
[81] Request at 14.
[82] Request at 14.
[83] Request at 15.
[84] Further, an assertion that an arbitrator has dispensed his or her own brand of industrial justice rather than an award drawing its essence from the parties' CBA is an argument that the Arbitrator has exceeded his jurisdiction, which MPD otherwise has not asserted as grounds to overturn the Award in this case. Request at 2.
[85] *FOP/DOC Labor Comm. (on behalf of Hugh Cummings) v. DOC*, 60 D.C. Reg. 5801, Slip Op. No. 1347 at 7, PERB Case No. 10-A-22 (2013).
[86] Award at 108-109.
[87] Award at 124.
[88] MPD's Arbitration Brief at 54. The Board has established that "[a]n argument previously made, considered, and rejected is a 'mere disagreement' with the initial decision." *DHS v. AFSCME, District Council 20, Local 2401*, Slip Op. No. 1845 at 9, PERB Case No. 23-A-04 (2023) (citing *FOP/DOC Labor Comm. V. DOC*, 70 D.C. Reg. 6720, Slip Op. No. 1835 at 2, PERB Case No. 23-U-03 (2023)).
[89] *MPD v. FOP/MPD Labor Comm.*, 62 D.C. Reg. 9178, Slip Op. No. 1516 at 3, PERB Case No. 14-A-12 (2015) (citing *MPD v. FOP/MPD Labor Comm. (on behalf of Grievant Phillip Suggs)*, PERB Case No. 07-A-08 (2008)).
[90] *MPD v. FOP/MPD Labor Comm.*, 59 D.C. Reg. 3959 Slip Op. No. 925 at 12, PERB Case No. 08-A-01 (2012).
[91] *Id.*
[92] *Id.*

to arbitrate, the parties bargain for an arbitrator's interpretation of the law, not the Board's.[93] The Board may not modify or set aside an Award as contrary to law in the absence of a clear violation on the face of the Award.[94] MPD has not sufficiently demonstrated a clear violation of law on the face of the Award. Therefore, the Board finds that the Award is not contrary to law.

B. The Award is not contrary to public policy.

MPD argues that the Arbitrator's reversal of the Grievant's termination is contrary to a dominant public policy requiring police officers to uphold the law.[95] MPD asserts that because the Grievant conducted an unreasonable search of Individual-2, allowing the Grievant to continue employment as an MPD officer "would be directly at odds with this public policy, as supported by law and ethical standards."[96] MPD asserts that the Grievant's conduct violated several MPD General Orders.[97] MPD also relies on legal precedent from *City of Ansonia*[98] and *City of Ironton*,[99] Connecticut and Ohio state court cases that reversed arbitral awards reinstating police officers terminated for sexual misconduct and falsifying records, respectively, on public policy grounds.[100] MPD asserts that these cases support its argument that the Grievant's reinstatement "will only serve to erode public trust and confidence in the Department."[101]

MPD argues that the Grievant's reinstatement violates General Order 201.26, Part V-A-5, which prohibits officers "from engaging in lewd or immoral conduct,"[102] as well as D.C. Official Code § 22-3000 *et seq*., which "lists the various forms of criminal sexual abuse in the District of Columbia."[103] MPD further argues that the Grievant's reinstatement further violates the standards of General Order 201.26 and General Order 201.36, which include policies that MPD officers "preserve the peace, protect life and property, prevent crime, apprehend offenders, recover property and enforce all laws and ordinances of the District of Columbia and the United States of

[93] *MPD v. FOP/MPD Labor Comm.*, 70 D.C. Reg. 4123, Slip Op. No. 1833 at 5, PERB Case No. 18-A-04 (2023) (citing *Dist. Of Columbia Metro. Police Dep't v. Dist. Of Columbia Pub. Employee Relations Bd.*, 282 A.3d 598 at 604 (D.C. 2022).
[94] *See D.C. DYRS and DCHR v. FOP/D.C. DYRS Labor Comm.*, 68 D.C. Reg. 46, Slip Op. No. 1800 at 8, PERB Case No. 21-A-09 (2021) (holding that an arbitrator did not exceed his jurisdiction in deciding an issue stipulated by the parties where the language of the CBA did not expressly limit the arbitrator's equitable power).
[95] Request at 15.
[96] Request at 15.
[97] Request at 18.
[98] *City of Ansonia v. Earl Stanley*, 854 A.2d 101 (Conn. Super. Ct. 2004) (reversing the arbitral reinstatement of a police officer accused of sexual misconduct because the Court found that the police officer's continued employment violated a clearly defined public policy requiring good conduct by police officers).
[99] *City of Ironton v. Beth Rist*, 2010 WL 4273235 (Ohio Ct. App. 2010) (reversing the arbitral reinstatement of a police officer who falsified a police report because the Court found that the award violated the public policy of honesty in performance of public official duties).
[100] Request at 16-17.
[101] Request at 19.
[102] Request at 17.
[103] Request at 17.

America,"[104] "maintain the highest standard of conduct,"[105] "observe, uphold, and enforce all laws,"[106] and "be 'keenly aware of the fact that public support and cooperation is essential if members are to effectively fulfill their police responsibilities.'"[107] General Order 201.26 also "explains that '[t]he extent to which the public will cooperate with the MPD is dependent upon its respect for, and confidence in, the MPD and its members.'"[108] MPD asserts that the Grievant's search of Individual-2 "went viral and…caused outrage in the community where the search occurred."[109]

The Board's scope of review is particularly narrow concerning the public policy exception.[110] A petitioner must demonstrate that an award "compels" the violation of a "[well-defined] and dominant" public policy that is ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[111] The issue is not whether the employee's misconduct violated public policy but rather whether enforcing the arbitral award would do so.[112]

An arbitral award reversing termination will violate established public policy that is embodied in explicit law precluding the employee's reinstatement.[113] In the absence of such explicit law, determining whether an arbitral award violates public policy is a fact-specific inquiry.[114] The Board may look to several factors to determine whether an arbitral award violates public policy, including whether there is a longstanding practice of requiring the termination of similarly situated employees, the severity of the employee misconduct, the potential for employee rehabilitation, the employee's prior history of misconduct, the likelihood of repeat offense, the employee's amenability to discipline, whether an arbitral award reinstating an employee is conditioned on other forms of discipline, and other fact-specific mitigating factors.[115]

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[104] Request at 18.
[105] Request at 18.
[106] Request at 18.
[107] Request at 18.
[108] Request at 18.
[109] Request at 18.
[110] *FOP/DOC 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).
[111] *Id.* (citing *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986).
[112] *See FOP/MPD Labor Comm. v. MPD*, 70 D.C. Reg. 9645, Slip Op. No. 1843 at 11, PERB Case No. 23-A-01 (2023); *See also MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1833 at 8.
[113] *See MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1765 at 7; *See also MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1833 at 8.
[114] *See MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1833 at 8.
[115] *See City of Aurora v. Association of Professional Police Officers*, 124 N.E.3d 558, 573 (Ill. App. Ct. 2d Dist. 2019) (finding persuasive the arbitrator's finding that a terminated officer was amenable to discipline, and the fact that the arbitrator fashioned an award that considered both seriousness of the officer's acts and mitigating circumstances, such as the officer's work history); *see also Washington County Police Officers' Ass'n v. Washington County, 335 Or. 198, 63 P.3d 1167 (2003*); *City of Minneapolis v. Police Officers' Federation*, 566 N.W.2d 83 (Minn. App. 1997).

MPD has not demonstrated that the Award compels the violation of public policy. The General Orders[116] cited by MPD do not support a public policy that precludes the Grievant's reinstatement. The Arbitrator reasonably concluded that MPD's explicit decision to conduct a "lesser" level of investigation for the Individual-1 search, to remove any reference to the search of Individual-1 and rather discipline the Grievant only for failing to arrest Individual-1 "can only be said to have blessed, approved, legitimized and sanctioned the Grievant's search of Individual-2."[117] Further, the Grievant has not been criminally charged under the latter statute regarding criminal sexual abuse.

MPD relies on the legal precedent of unrelated jurisdictions with inapplicable case law regarding other states' trial courts' authority to set aside arbitration awards and facts distinguishable from the case at hand.[118] Of note, the Board has previously rejected MPD's citation to these two specific cases to assert reinstatement of a terminated police officer would violate public policy and erode public trust.[119]

MPD has failed to provide adequate support for its assertion that the Grievant's continued employment would erode public trust and confidence in MPD, considering MPD's comparatively light response to the search of Individual-1, which resulted in both public condemnation of the search and a lawsuit by the ACLU.[120] As the Arbitrator noted, MPD failed to find *any* evidence of misconduct by the Grievant subsequent to the two September 27, 2017 searches.[121] MPD found that the Grievant has the potential for rehabilitation[122] and the Adverse Action Hearing Panel's issued a recommendation for MPD to institute further training on conducting searches in compliance with the General Orders for all officers.[123] Therefore, the Board finds that MPD has not presented facts which demonstrate that the Award violates public policy.

IV. Conclusion

For the reasons stated, 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.

[116] MPD General Orders 201.26; 201.36; and 502.01.
[117] Award at 104-105.
[118] See *MPD v. FOP/MPD Labor Comm.*, 67 D.C. Reg. 9279, Slip Op. No. 1738 at 5, PERB Case No. 20-A-03 (2020) (rejecting MPD's assertion that an analogous case from the Massachusetts Supreme Judicial Court vacating an arbitration award that reinstated an officer who made a false police report established a well-defined public policy and holding that court precedent from another jurisdiction is not binding on the Board).
[119] *MPD v. FOP/MPD Labor Comm.*, Slip Op. No. 1833 at 7.
[120] Award at 19.
[121] Award at 25.
[122] Award at 112.
[123] Award at 123.

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.

March 21, 2024

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.