

II. Arbitration Award

A. Background

The Grievant in this matter is an MPD Officer who was assigned to the Department's Fifth District (5D) for the entirety of his 20-year career and who received commendations for his exemplary behavior during his time with the Department.³ On April 21, 2015, MPD proposed to terminate him for (1) failing to reschedule a mandatory yearly professional training (PDT) as ordered by the instructor, (2) leaving a PDT class to attend to an urgent personal matter without reporting his emergency leave to his unit and without rescheduling that class, (3) repeatedly ignoring a citizen and failing to complete a police report for her and then lying to a superior about his interaction with that citizen, and (4) having several prior sustained charges of misconduct involving the abuse of alcohol which, when compounded together, constituted an inefficiency charge.⁴

On February 5, 2015, the Grievant requested an Adverse Action Hearing (AAH).⁵ The AAH commenced on May 27, 2015 and the Panel issued a decision (Decision) finding the Grievant guilty of (1) leaving a PDT to attend to an urgent personal matter without notifying 5D of his emergency leave, (2) ignoring a citizen who requested his assistance with obtaining a police report and failing to complete a police report for her, and (3) having several sustained charges for past misconduct relating to alcohol abuse (inefficiency).⁶ The Panel did not find him guilty of failing to reschedule his PDT course or lying to his supervisor about his conversation with the discontented citizen.⁷

The Panel recommended termination based on the inefficiency charge.⁸ On July 2, 2015, MPD issued a Final Notice of Adverse Action to the Grievant.⁹ On July 17, 2015, he appealed the Panel's decision to the Chief of Police, who denied the appeal on August 7, 2015.¹⁰ FOP invoked arbitration.¹¹

³ Award at 8,36 and Opposition at 1.

⁴ Award at 10-13.

⁵ Award at 10-11.

⁶ Decision at 17-20.

⁷ Decision at 19-20.

⁸ Decision at 20.

⁹ Award at 12.

¹⁰ Award at 12.

¹¹ Award at 12.

B. Arbitrator's Findings

The Arbitrator considered seven issues, most of which MPD and FOP described using divergent language:

- (1)
MPD and FOP: Whether the charge of inefficiency was illegally premised on the Grievant's prior adverse actions?
- (2)
MPD and FOP: Whether the Department violated the 90-day rule as set forth under D.C. Official Code § 5-1031 with respect to instituting the Proposed Adverse Action against the Grievant more than 90 days after it became aware of the alleged misconduct?
- (3)
MPD: Whether there was substantial evidence to support the charge of inefficiency?
FOP: Whether the evidence presented by the Department was sufficient to support the charge of inefficiency against the Grievant with respect to there being "repeated and well-founded complaints"?
- (4)
MPD: Whether there was substantial evidence to sustain the charge that Grievant failed to notify his unit of his emergency leave?
FOP: Whether the evidence presented by the Department was sufficient to support the charge that the Grievant failed to notify his unit at the Fifth District of his emergency leave even though his supervisor was aware that the sheriff was evicting the Grievant from his home?
- (5)
MPD: Whether there was substantial evidence to support the charge that Grievant failed to complete a police report?
FOP: Whether the evidence presented by the Department was sufficient to support the charge that the Grievant was required to complete a police report for the citizen on January 9, 2015 about an accident which had occurred three weeks earlier?
- (6)
MPD: Whether there was substantial evidence to support the charge that Grievant ignored the citizen on January 9, 2015?
FOP: Whether the evidence presented by the Department was sufficient to support the charge that the Grievant repeatedly ignored the citizen on January

9, 2015, when she requested him to complete a police report about an accident which had occurred three weeks earlier?

(7)

MPD: Whether termination was the appropriate penalty?

FOP: Whether termination was an appropriate penalty? If not, what was the appropriate penalty?¹²

Regarding the inefficiency charge, FOP argued that MPD may not discipline the Grievant twice for the same conduct, asserting that MPD has no right to present a charge of inefficiency predicated on three previously sustained adverse actions which are entirely independent of (and distinct from) the current allegations brought against the Grievant.¹³ FOP cited *In the Matter of Pernell Blount* to support its position.¹⁴ The Arbitrator agreed with FOP that, for the inefficiency charge to be viewed as a non-duplicative penalty, MPD would need to charge the Grievant with inefficiency at the same time as it proposed discipline for the prior instances of misconduct.¹⁵ MPD did not do so. Therefore, the Arbitrator concluded that the Grievant's previously sustained alcohol-related misconduct was entirely disconnected from his alleged failure to notify his officials of his leave and his alleged lack of friendly customer service, which were the matters before the Adverse Action Panel.¹⁶

The 90-day rule requires MPD to commence a corrective or adverse action within 90 days of the moment it "knew or should have known of the act or occurrence allegedly constituting cause."¹⁷ The Arbitrator noted that the last possible anchor date for discipline based on the Grievant's prior misconduct would be June 5, 2014. Because MPD did not bring charges against the Grievant within 90 days of that date, the Arbitrator concluded that MPD had waived its right to do so and determined that the inefficiency charge should be dismissed as untimely.¹⁸ Therefore, assuming, *arguendo*, that MPD could justifiably discipline the Grievant for his prior instances of misconduct, the Arbitrator found that the 90-day rule would preclude MPD from doing so.

The Arbitrator stated that the real issue at hand was whether substantial evidence existed to support the charge that the Grievant failed to notify his unit when he took emergency leave and departed from the Training Academy early, without completing his PDT class.¹⁹ The Arbitrator noted it was a Sergeant at 5D who initially called the Grievant to notify him of the emergency at his home and it was a Lieutenant who granted the Grievant's request for emergency leave and who said he would forward information to 5D for rescheduling the Grievant's training.²⁰ Therefore, the

¹² Award at 1-2.

¹³ Award at 17.

¹⁴ Award at 17-18. *In Matter of Pernell Blount*, FMCS No. 180820-07577-A at 4-5 (holding that MPD cannot predicate an inefficiency charge on previously sustained adverse actions).

¹⁵ Award at 18.

¹⁶ Award at 18.

¹⁷ D.C. Official Code § 5- 1031(a) (2004).

¹⁸ Award at 20.

¹⁹ Award at 22.

²⁰ Award at 24.

Arbitrator concluded, 5D had knowledge of the Grievant's emergency situation and it was reasonable for the Grievant to have believed he did everything necessary to request leave and be granted leave.²¹ Thus, the Arbitrator determined that the Grievant's management of his emergency leave situation did not warrant any disciplinary action.²²

The Arbitrator reviewed the Panel's application of the *Douglas* factors.²³ Many factors the Panel found aggravating, the Arbitrator found neutral, if not mitigating. For instance, the Panel concluded that factor 7 (the consistency of the penalty with any applicable agency table of penalties)²⁴ was aggravating. The Arbitrator disagreed, however, noting that the Panel failed to cite a single case of comparative discipline and finding that the cases the Union cited showed that termination was not routinely given for similar or worse conduct.²⁵

While the Panel concluded that the penalties were appropriate, the Arbitrator determined that the Panel's *Douglas* factors analysis was insufficient and was composed of standard conclusory statements.²⁶ The Arbitrator agreed that the Grievant engaged in concerning misconduct but held that termination would be a disproportionate penalty.²⁷ Based on her conclusions regarding the Panel's recommendations, the Arbitrator determined that the appropriate penalty was an unpaid 30-day suspension.²⁸ The Award directed MPD to reinstate the Grievant with backpay, interest, and benefits from the date that his 30-day suspension was fully served to the date of his reinstatement, less interim earnings.²⁹ The Award further directed that the Grievant's personnel file be purged of any reference to his termination and amended to reflect a 30-day suspension without pay.³⁰

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in three narrow circumstances: (1) if an arbitrator was without, or exceeded his or her jurisdiction; (2) if the award on its face is contrary to law and public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.³¹ MPD requests review on the grounds that the Arbitrator exceeded her authority and the award is contrary to law and public policy.

MPD argues that the Board should reverse the Award and affirm MPD's final decision.³² It claims the Arbitrator exceeded her authority by considering cases of comparable discipline

²¹ Award at 24.

²² Award at 27.

²³ Award at 33-43. *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981).

²⁴ *Douglas*, 5 M.S.P.B. at 332.

²⁵ Award at 37.

²⁶ Award at 42.

²⁷ Award at 42.

²⁸ Award at 42-43.

²⁹ Award at 44.

³⁰ Award at 44.

³¹ D.C. Official Code § 1-605.02(6).

³² Request at 16.

which were not part of the administrative record.³³ It also claims she violated law and public policy by approving the reinstatement of an individual who had engaged in repeated and sustained acts of misconduct and whom MPD determined to have demonstrated a lack of fitness for a position in law enforcement.³⁴ In its Opposition, FOP argues that the Arbitrator did not exceed her authority because the Board has previously held that an Arbitrator may consider comparable disciplinary cases not presented to the Panel.³⁵ FOP also argues that the Award is not contrary to law and public policy because MPD has failed to cite any applicable law mandating the Arbitrator reach a different result.³⁶

A. The Arbitrator did not exceed her authority.

When determining whether an arbitrator exceeded her authority in rendering an award, the Board analyzes whether the award “draws its essence from the parties['] collective bargaining agreement.”³⁷ The relevant questions in this analysis are whether the arbitrator acted outside her authority by resolving a dispute not committed to arbitration and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.³⁸

Here, the parties expressly charged the Arbitrator with the task of reviewing whether termination was an appropriate remedy. The Arbitrator determined that a case assigned pursuant to Article 19 of the collective bargaining agreement requires an arbitrator to consider evidence in the record and determine whether there is enough to support a cause for discipline, including review of the charges and analysis of the *Douglas* factors. The Arbitrator based her decision on the record and briefs provided by the parties and determined that several of the penalties the Panel imposed were inappropriately severe. She therefore lessened the penalty imposed on the Grievant from termination to a 30-day suspension.

In its Arbitration Review Request, MPD states that it “seeks reversal of the Award in this case because...the arbitrator exceeded her authority...”³⁹ MPD argues that, in her analysis of *Douglas* factor 7, the Arbitrator “exceeded her jurisdiction under the strictures of the parties’ CBA” and deprived MPD of a fair arbitration proceeding when she considered the comparative discipline cases which FOP provided, as those cases were not part of the record.⁴⁰ MPD concedes that, as the Arbitrator pointed out, it did not cite a single case of comparative discipline in its

³³ Request at 14,16.

³⁴ Request at 14-16.

³⁵ Opposition at 13. *MPD v. FOP/MPDLC*, PERB Case No. 14-A-09, Slip Op. 1561, 2016 WL 555785 (the “*Garcia* matter”).

³⁶ Opposition at 15.

³⁷ *AFGE Local 2725 v. D.C. Housing Auth.*, 61 D.C. Reg. 9062, Slip Op. 1480 at 5, PERB Case No. 14-A-01 (2014).

³⁸ *Mich. Family Resources, Inc. v. Serv. Emp’ Int’l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. 1258 at 4, PERB Case No. 10-A-09 (2012).

³⁹ Request at 12.

⁴⁰ Request at 14.

decision.⁴¹ However, it claims that the onus was on FOP to address the comparative discipline issue at the hearing level or in its appeal to the Chief of Police. MPD argues that because FOP did not do so, MPD had no obligation to articulate an analysis of disparate treatment prior to terminating the Grievant under *Douglas*.⁴² MPD cites D.C. Court of Appeals case *Jahr v. District of Columbia*⁴³ for the proposition that an employee alleging disparate treatment must “show that he or she worked in the same organizational unit as the comparison employees and that they were subject to discipline by the same supervisor within the same general time period.”⁴⁴ MPD argues that, even if the Arbitrator had conducted the proper analysis under *Jahr*, “the fact that the analysis would have been conducted using comparator cases that are outside of the record would have nonetheless rendered the analysis void.”⁴⁵

As FOP noted in its Opposition,⁴⁶ the Board has previously rejected MPD’s argument that the Arbitrator exceeded her authority by “improperly consider[ing] disciplinary decisions for other officers submitted by Grievant for the first time during the arbitration proceeding.”⁴⁷ The Board has held that it is “within the scope of the Arbitrator’s authority, after finding that the Panel’s evaluation of the *Douglas* factors lack[s] substantial support, to consider information about penalties imposed in similar cases to be able to properly evaluate the penalty imposed in” the case at hand.⁴⁸ In a *Douglas* factor analysis, the burden is on the agency “to establish that the penalty it [recommended was] consistent with penalties imposed in like matters.”⁴⁹ MPD failed to meet its burden in this case and the Arbitrator rightfully considered the caselaw presented by FOP. Therefore, she did not exceed her authority.

B. The Award is not contrary to law and public policy.

MPD bears the burden of demonstrating that the award itself violates established law or compels an explicit violation of “well defined public policy grounded in law and or legal precedent.”⁵⁰ The D.C. Court of Appeals has reasoned that, “[a]bsent a clear violation of law[,] one evident on the face of the arbitrator’s award, the [Board] lacks authority to substitute its judgment for the arbitrator’s.”⁵¹ Overturning an arbitration award due to law and public policy is an “extremely narrow” exception to the rule that reviewing bodies must defer to the arbitrator’s

⁴¹ Request at 12.

⁴² Request at 12-13. *Dist. of Columbia Metro. Police Dept. v. Dist. of Columbia Office of Employee Appeals*, 88 A.3d 724, 730 n.3 (D.C. 2014), as amended (May 22, 2014), as amended (May 22, 2014) (“Metro”) (citing *Boucher v. U.S. Postal Serv.*, AT-0752-10-0453-B-1, 2012 WL 5566446 (M.S.P.B. Nov. 15, 2012); see also *Vargas v. U.S. Postal Serv.*,

SF-0752-98-0496-I-1, 1999 WL 812384 (M.S.P.B. Oct. 5, 1999) (“[t]here is no general requirement that a comparative discipline analysis be completed in all disciplinary matters under *Douglas*...”).

⁴³ Request at 13-14. *Jahr*, 968 F.Supp.2d 186, 192 (D.D.C. 2013)

⁴⁴ Request at 13.

⁴⁵ Request at 13.

⁴⁶ Opposition at 13.

⁴⁷ *MPD v. FOP/MPDLC*, PERB Case No. 14-A-09, Slip Op. 1561 at 5, 2016 WL 555785 (the “*Garcia* matter”).

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 5-6.

⁵⁰ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

⁵¹ *Fraternal Order of Police/Dep't of Corr. Labor Comm. v. District of Columbia Pub. Emp. Relations Bd.*, 973 A.2d 174, 177 (D.C.2009)

interpretation of the contract.⁵² “[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.’”⁵³

MPD concedes that the most recent charges the Grievant faced were dissimilar from the prior instances of sustained misconduct included in the inefficiency charge.⁵⁴ However, MPD claims that this point is immaterial, arguing that the inefficiency charge was *not* based on repeated acts of *similar* misconduct, but on repeated acts of *sustained* misconduct.⁵⁵ Under *Pitchford v. Dep't of Justice*, MPD argues, an adverse action based on a charge of *continued* inefficiency does not constitute administrative double jeopardy and does not require all instances of misconduct to be similar.⁵⁶ However, as FOP states in its Opposition, *Pitchford* is distinguishable because it was a Merit Systems Protection Board (MSPB) matter that did not involve arbitration.⁵⁷ MPD has failed, therefore, to show that the Arbitrator violated law.

MPD claims the Award violates law and public policy because it interferes with the Agency's right to terminate individuals who have demonstrated their lack of fitness for a position in law enforcement and who pose a threat to the public.⁵⁸ MPD argues that the Arbitrator's rigid application of the 90-day rule improperly placed importance on the Department's delay in bringing the inefficiency charge, while downplaying the Department's interest in ridding itself of an employee deemed unfit for a law enforcement position.⁵⁹ But, while MPD concedes that it violated the 90-day rule,⁶⁰ it does not cite any authority to support the claim that the Arbitrator's enforcement of that rule should be disregarded. Disagreement alone does not warrant reversal of an arbitration award. The Board has held that a disagreement with an arbitrator's choice of remedy does not render the Award contrary to law and public policy.⁶¹ 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 aforementioned reasons, MPD's Request is denied.

IV. Conclusion

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.

⁵² *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019) (citing *Am. Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986), accord *MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 8, PERB Case No. 09-A-05 (2014); *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. No. 925 at 11-12, PERB Case No. 08-A-01 (2012)).

⁵³ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

⁵⁴ Request at 14.

⁵⁵ Request at 14.

⁵⁶ *Pitchford*, 14 M.S.P.R. 608, 615 (1983).

⁵⁷ Opposition at 15.

⁵⁸ Request at 15-16. *Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 2016 CA 9253 P(MPA)(2018).

⁵⁹ Request at 15-16.

⁶⁰ Request at 13.

⁶¹ *DCHA v. Bessie Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999).

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
2. Pursuant to Board Rule 559, 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 Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

January 29, 2021

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 21-A-05, Op. No. 1769 was sent by File and ServeXpress to the following parties on this the 3rd day of February 2021.

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