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

In the Matter of:)	
)	
District of Columbia Metropolitan Police Department,)	
)	
Petitioner,)	PERB Case No. 08-A-01
)	
and)	Opinion No. 925
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Kenneth Johnson),)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case:

The District of Columbia Metropolitan Police Department ("MPD") filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an Arbitration Award ("Award") that reduced the penalty imposed on bargaining unit member Kenneth Johnson ("Grievant"), from a demotion to a 30-day suspension.

Arbitrator Phillip Ray was presented with the two following issues: (1) whether MPD violated the "District of Columbia Fire and Police Disciplinary Procedures Act, commonly referred to as the ninety day rule, by initiating discipline of Grievant beyond the ninety day window [and (2)] [w]as the discipline imposed, demotion of Grievant from Sergeant to officer, for just cause? If not, what shall be the remedy?" (Award at p. 3). Arbitrator Ray found that MPD: (1) "did not violate the District of Columbia Police and Firefighters Disciplinary Action Procedures, Section Five-1031, Commencement of Corrective or Adverse Action" and (2) had cause to discipline the Grievant because he "engaged in unprofessional and inappropriate conduct." (Award at p. 8). However, the Arbitrator opined that the "discipline imposed in this case . . . [was] excessive." (Award at p. 10). As a result, he rescinded the demotion and imposed a 30-day suspension. (See Award at p. 10). MPD contends that the: (1) Arbitrator exceeded his authority and (2) Award is contrary to law and public policy. (See Request at p. 2). The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") opposes the Request.

The issues before the Board are whether "the arbitrator was without or exceeded his or her jurisdiction" or whether "the award on its face is contrary to law and public policy." D.C. Code §1-605.02(6).

II. Discussion

The Grievant was appointed to the MPD on October 6, 1997. He was promoted to Sergeant in September 2004. (See Award at p. 4). "At the time of the grievance he was working the Power Shift in the Fifth District and his administrative responsibilities included supervision of an undercover prostitution detail." (Award at p. 4).

On October 31, 2005, Officer J. White filed a discrimination complaint with MPD's Diversity and EEO Compliance Unit alleging that while assigned to an undercover prostitution detail supervised by the Grievant, she was repeatedly subjected to sexual harassment. (See Award at p. 4). "The complaint was investigated and on February 28, 2006, concluded with the finding that while 'the evidence fail[ed] to support Officer White's allegation that Sergeant Johnson's actions amounted to sexual harassment and retaliation,' it 'd[id] support the premise that Sergeant Johnson engaged in unprofessional and inappropriate conduct.'" (Award at p. 4). Investigator Tapp determined that the Grievant's "behavior caused a negative and humiliating atmosphere for Officer White that has been deemed unsuitable for professional environment." (Award at p. 4).

As a result of the investigative report, the Grievant was charged with misconduct. On March 10, 2006 the "Grievant received a Notice of Proposed Adverse Action charging him with violation of General Order Series 1202, Number 1, Part I-B-16, which prohibits: 'Failure to obey orders or directives issued by the Chief of Police,' and specifically General Order 201, Number 26, Part I-B-232 relating to General Duties and Personal Conduct. The charge specified the October 20, 2005 incident with Officer White and referred to Grievant's loud, harsh voice and the gesturing of his hands toward her head as causing Officer White to believe Grievant was going to physically assault her. Grievant was further charged with violating General Order Series 1202, Number I, Part I-B-12, 'Conduct Unbecoming an Officer.' The charge specified that during 2005, Grievant had addressed female officers under his supervision in an inappropriate manner, referred to himself as the female officers' 'pimp,' and made an inappropriate reference to his penis. MPD proposed to suspend Grievant for thirty workdays." (Award at p. 5).

On March 30, 2006, the Grievant appealed his Notice of Proposed Adverse Action. "He . . . requested that the case be dismissed on its merits and for the [MPD's] violation of the District of Columbia Police and Firefighters Disciplinary Action Procedures, Section Five-1031, Commencement of Corrective or Adverse Action, commonly referred to as the ninety day rule." (Award at p. 5).

On May 24, 2006, Assistant Chief of Police Cockett issued a Final Notice of Adverse Action. It found the "Grievant guilty of Charge Two, violation of General Order Series 1202, Number 1, Part I-B-12, 'Conduct Unbecoming an Officer.' Charge One, relating to General

Duties and Personal Conduct . . . General Order 201, Number 26, Part I-B-23, was dismissed. (Award at p. 5). MPD “found that the ninety day clock had begun on October 21, 2005 when Officer White notified Grievant superiors of his alleged inappropriate behavior. For the cited violation, Assistant Chief Cockett proposed [that the] Grievant be suspended for twenty-five workdays, pending any written appeal to the Chief of Police.” (Award at p. 5).

On June 7, 2006, the Grievant appealed the adverse action to the Chief of Police. (See Award at p. 5). On June 28, 2006, the Chief of Police denied the appeal and amended the penalty to a demotion. (See Award at p. 6). Pursuant to the parties’ collective bargaining agreement (“CBA”), FOP invoked arbitration on behalf of the Grievant. (See Award at p. 6).

At Arbitration FOP asserted that MPD “violated the District of Columbia Police and Firefighters Disciplinary Action Procedures, Section Five-1031, Commencement of Corrective or Adverse Action, by serving Grievant with the Notice of Adverse Action after ninety days of when it ‘knew or should have known of the act or occurrence allegedly constituting cause.’ It argue[d] that the latest start date for the ninety day clock is October 21, 2005, the day after Grievant and Officer White disagreed over the handling of a domestic dispute call, and the day Officer White spoke with Grievant’s superiors.” (Award at p. 7).

In addition, FOP contended “that even if the Arbitrator accepts . . . [MPD’s] timeline of October 31, 2005 for starting the ninety day clock, [MPD] fail[ed] to meet the preponderance of evidence test that Grievant is guilty of the charge, ‘Conduct Unbecoming an Officer.’ It further assert[ed] that the penalty of demotion [was] inappropriate in light of mitigating circumstances, consideration of the Douglas Factors,¹ and penalties the [MPD] recommended prior to the appeal to the Chief of Police.” (Award at p. 7).

Also, FOP argued that the “Grievant [was] a highly rated and commended member of the [MPD] with no previous disciplinary issues who had been friends with Officer White who brought charges against him with the MPD Office of Diversity and EEO Compliance. [FOP] assert[ed] that while [the] Grievant may have occasionally used inappropriate language, it was neither to the extent nor intent alleged by the [MPD] and occurred mostly during the prostitution detail. [FOP claimed] that the complaint against Grievant stems in large measure from his performance evaluation of Officer White and his disagreement with her over her handling of a domestic dispute call.” (Award at p. 7).

MPD countered that during calendar year 2005 the Grievant addressed female officers under his supervision in an inappropriate manner. Specifically, MPD asserted that the “Grievant continually demeaned Officer J. White when she was working the prostitution detail by addressing her with the derogatory terms, ‘Ho,’ ‘Bitch,’ and ‘Hussy’ and continually referring to himself as her ‘pimp.’ [MPD argued] that [the] Grievant[’s] misconduct was ongoing, exhibited in front of the Officer’s coworkers and continued after Officer J. White asked [the] Grievant to stop demeaning her.” (Award at p. 6).

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

MPD claimed that the Grievant's conduct "violated MPD General Order 1202.1, Disciplinary Procedures and Processes, Part I-B-12, 'Conduct Unbecoming an Officer.' [MPD] assert[ed] that [the] Grievant[']s misconduct interfered with 'the efficiency or integrity of government operations' as specified in the District of Columbia Personnel Regulations, Chapter 16, Part I, Section 1603.3." (Award at p. 6).

In addition, MPD contended that the action taken against the Grievant was timely. Specifically, MPD argued that the "incident(s) giving rise to the Notice of Adverse Action was revealed on October 31, 2005 when a complaint was filed against [the] Grievant with the MPD Office of Diversity and EEO Compliance. [Furthermore, MPD asserted that the] Grievant was served the Notice of Proposed Action on March 10, 2005 which [was] within the ninety day rule stipulated in the District of Columbia Police and Firefighters Disciplinary Action Procedures, Section Five-1031, Commencement of Corrective or Adverse Action." (Award at p. 6).

With respect to the Grievant's demotion, MPD argued that the: (1) penalty imposed was within the guidelines specified in MPD General Order 1202.1 Disciplinary Procedures and Processes, Part I-B, Offenses and Penalties; and (2) Chief of Police on appeal considered the Grievant's misconduct sufficient to warrant his demotion. (See Award at p. 6).

In an Award issued on September 19, 2007, the Arbitrator rejected FOP's timeliness argument by noting the following:

I find the [MPD] did not violate the District of Columbia Police and Firefighters Disciplinary Action Procedures. Section five-1031. Commencement of Corrective or Adverse Action, when it served Grievant Notice of Adverse Action on March 10, 2006. The Notice came eighty-eight days, not including Saturdays, Sundays, or legal holidays after Officer J. White filed a discrimination complaint against Grievant with the MPD Office of Diversity and EEO Compliance on October 31, 2005.

The [FOP's] argument is not persuasive that the [MPD] knew or should have known of Grievant misconduct on or before October 21, 2005, the day after the disagreement between Officer White and Grievant. While it is reasonable to conclude the [MPD] knew of the circumstances surrounding Charge Number One which specified the October 20, 2005 incident during which Grievant confronted Officer White in an inappropriate manner, it is not reasonable to conclude the [MPD] knew either the extent or circumstances of the misconduct specified in Charge Two until Officer White's formal complaint. The [MPD], realizing the ninety day clock had begun October 21, 2005 when Officer White approached Grievant's superiors about Grievant misconduct specified in Charge One, appropriately dismissed Charge One during the Appeal process. The "Conduct Unbecoming an

Officer” Charge specified distinct events and circumstances unrelated to Charge One and stands alone.

The [FOP] argues that by Officer White speaking with other supervisors assigned to the Fifth District about Grievant misconduct as early as July, 2005, the ninety day clock was tolled before October 31. I agree that Officer White spoke to others about her problems with Grievant, but I fail to find the specificity to sustain tolling the clock earlier than when she filed the complaint against Grievant. The events that occurred during 2005 and gave rise to Charge Two, “Conduct Unbecoming an Officer,” were not reasonably established to conclude the [MPD] was either aware or should have been aware until the October 31, 2005 complaint against Grievant. (Award at p. 8).

Having determined that MPD commenced the adverse action in a timely manner, the Arbitrator focused on the merits of the case. The Arbitrator rejected FOP’s substantive challenge that MPD did not meet its burden that the Grievant violated General Order 1202.1. (See Award at p. 8). As a result, he found that MPD had cause to discipline the Grievant. In reaching this conclusion, Arbitrator Ray stated:

With respect to the [issue of] cause, I find the [MPD] meets the preponderance of evidence test that Grievant violated General Order 1202.1. Disciplinary Procedures and Processes, Part I-B-12. The evidence and testimony in these proceedings clearly establish that Grievant engaged in unprofessional and inappropriate conduct. The investigation pursuant to Officer White’s complaint found that during 2005 Grievant addressed Officer White and other female Officers while working under his supervision on a prostitution detail in an inappropriate manner using the derogatory terms “ho” and “hussies” on a continual and consistent basis. In addition, Grievant referred to himself as Officer White’s “pimp”. I find no convincing evidence to dispute those findings. Grievant[’s] language was disrespectful, offensive, harsh, and in the case of a supervisor addressing a subordinate, intimidating. Grievant[’s] language created a humiliating atmosphere for Officer White.

Grievant acknowledges that when working the prostitution detail he spoke inappropriately to female Officers under his supervision. He testified that his comments were done in a joking manner and recalled the Officers laughing at the time he made the comments. He said he did not consider the comments as offensive, although they could be viewed as unprofessional. He argued the context and environment in which his comments were made should not be considered uncommon and do not rise to the level of adverse

action. The delineation between humorous and inappropriate should not be difficult for a professional with over eight years experience with MPD and the distinction between demeaning and humorous even less so. It should have been readily apparent to Grievant, had he listened to counsel by his peers and the reactions of his subordinates to his derogatory comments, that his behavior was exceedingly inappropriate. Although a new Sergeant at the time, Grievant should have been fully aware that as an official, he was expected to serve as a role model for officers under his supervision and not engage in unprofessional conduct. Investigator Tapp found correctly when she wrote, "It is difficult to determine how an officer performing her duty and being called a 'hussie/and ho' is funny."

The [FOP's] argument that until her complaint Grievant was on friendly terms with Officer White and the complaint was triggered by her average performance evaluation by Grievant and his disagreement with her over a domestic dispute call is not persuasive. Evidence and testimony suggests that Officer White did participate in social events where Grievant was in attendance. These events, however, included other department personnel and it is reasonable to conclude Officer White was not excluded and felt secure enough with others in attendance to participate. Additionally, there is no evidence to support Grievant['s] claim that Officer White's complaint was prompted by either her performance evaluation or her disagreement with Grievant over the handling of a domestic dispute incident. (Award at pgs. 8-9).

Concerning FOP's argument that the penalty was too severe, Arbitrator Ray found that a demotion was an excessive penalty in this case. In support of his position, he noted the following:

In allowing for an appropriate disciplinary penalty I have considered mitigating as well as aggravating circumstances, and am persuaded by the [FOP's] argument that the penalty of demotion is inappropriate. I reach that decision based on mitigating circumstances, consideration of the Douglas Factors and the [MPD's] own penalty recommendations prior to the appeal of the Chief of Police.

Grievant has been consistently rated by his evaluators as an official who "exceeds expectation." In addition, he has been commended by the [MPD] on numerous occasions for his performance of duties. Witnesses testified to his competence, knowledge and hard work. Testimony established that "for the most part the work

atmosphere" under Grievant supervision "was professional." The same testimony characterized Grievant as "rough," "abrupt," and as "someone who tried to do the right thing, but sometimes went about it the wrong way."

The March 10, 2006 Notice of Proposed Adverse Action which specified two Charges proposed to suspend Grievant for thirty workdays. On Appeal, Charge One was dismissed. Charge Two sustained and Grievant suspension reduced to twenty-five workdays. The Chief of Police denied Grievant Final Appeal and amended the penalty to a demotion.

Among the Douglas Factors, I am particularly influenced by the "Potential for the employee's rehabilitation." In light of Grievant past work record, his performance on the job, his ability to perform at or above a satisfactory level, and aforementioned mitigating circumstances surrounding the offense, I am persuaded Grievant with proper counseling and coaching can again be an effective Sergeant. (Award at pgs. 9-10).

For the reasons discussed above, Arbitrator Ray concluded that: (1) MPD did not violate the ninety day rule; (2) MPD had cause to discipline the Grievant; and (3) the penalty in this case should be a reduced from a demotion to a 30-day suspension. (See Award at pgs 8 and 10).

MPD claims that the: (1) arbitrator exceeded his authority; and (2) award on its face is contrary to law and public policy. (See Request at p. 2).

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited 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."

D.C. Code §1-605.02(6).

MPD asserts that "[d]espite the overwhelming evidence both of [the] Grievant's guilt and the egregiousness of the misconduct in which he engaged, Arbitrator Ray reduced the penalty imposed against [the] Grievant from demotion to a 30-day suspension." (Request at p. 3). MPD claims that by reducing the penalty, the Arbitrator exceeded his authority. Specifically, MPD asserts that Arbitrator Ray: (1) misapplied performance evaluations as a

mitigating factor in reducing the penalty; and (2) erroneously considered other proposed penalties in this case as a basis for reducing the Grievant's discipline. (See Request at pgs. 4-5). In support of its position, MPD argues the following:

In his decision, Arbitrator Ray noted that Grievant received ratings of "exceeds expectations" for rating years 2003, 2005 and 2006. . . However, Arbitrator Ray fails to note that the only year for which Grievant was evaluated as a supervisor was rating year 2005. It was in that rating year that Grievant engaged in acts that Arbitrator Ray found to be unprofessional, inappropriate, disrespectful, offensive, harsh, and intimidating. See Award at 10. It is the same rating year that Arbitrator Ray found that Grievant's conduct created "a humiliating atmosphere for Officer White." . . . Arbitrator Ray failed to acknowledge that since the investigation establishing Grievant's sustained and egregious misconduct was not finalized until rating period 2006 . . . , it was not reflected in Grievant's 2005 performance evaluation. Indeed, due to his demotion, 2005 was the only period during which Grievant performed as a Sergeant and in a supervisory category. Grievant's other performance ratings were for his work as an officer, where he did not have any supervisory responsibilities. Thus, Arbitrator Ray's reliance on performance ratings both as a mitigating factor and in his consideration of the *Douglas* factors (see Award at 10) was misplaced.

* * *

In his Award, Arbitrator Ray references the fact that the Proposed Notice of Adverse Action sought to impose a 30-day suspension, and the Final Notice of Adverse Action sought to impose a 25-day suspension. . . Arbitrator Ray notes that the Chief of Police amended the penalty to a demotion. . . Arbitrator Ray cited this as a basis for reducing [the] Grievant's penalty.

Title 6A of the District of Columbia Municipal Regulations (DCMR) § 800 establishes the authority of the Chief of Police. It specifically provides that the "chief of Police . . . shall be responsible for the proper and efficient conduct, control, and *discipline* of the force." 6A DCMR § 800.1. . . The penalties identified in both the Proposed and Final Notices were recommended by Assistant Chief of Police Shannon Cockett. . . When the matter was presented to the then-Chief of Police for his consideration, he exercised his authority under 6A DCMR § 800.1. and determined that demotion was the appropriate penalty. . . .

Since the Chief of Police is the official vested with the authority over discipline of the force, Arbitrator's Ray consideration of the penalties proposed by Assistant Chief Cockett in mitigation exceeded his authority as an arbitrator. (Request at pgs. 4-5, emphasis in original).

Based on the above and the Board's statutory basis for reviewing arbitration awards, MPD contends that Arbitrator Ray exceeded his authority. We disagree.

MPD is requesting that the Award be reversed because the arbitrator exceeded his authority. One of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining agreement." *D.C. Public Schools v. AFSCME, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). See also *Dobbs, Inc. v. Local No. 1614, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987). The U.S. Court of Appeals for the Sixth Circuit in *Michigan Family Resources, Inc. v. Service Employees International Union Local 517M*,² has explained what it means for an award to "draw its essence" from a collective bargaining agreement by stating the following standard:

[1] Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration?; [2] Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award?; "[a]nd [3] [I]n resolving any legal or factual disputes in the case, was the arbitrator arguably construing or applying the contract"? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made

²In *MPD and FOP/MPD Labor Committee*, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001), the Board expounded on what is meant by "deriving its essence from the terms and conditions of the collective bargaining agreement" by adopting the U.S. Court of Appeals' Sixth Circuit decision in *Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135*, which explained the standard by stating the following:

An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement; and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765 (6th Cir. 1986).

However, the *Cement Division* standard has been overruled in *Michigan Family Resources*.

“serious,” “improvident” or “silly” errors in resolving the merits of the dispute.

475 F.3d 746, 753 (6th Cir. 2007).

In the present case, “[n]othing in the record. . . suggests that fraud, a conflict of interest or dishonesty infected the arbitrator’s decision or the arbitral process. [In addition,] no one disputes that the collective bargaining agreement committed this grievance to arbitration or disputes that this arbitrator was. . . selected by the parties to be eligible to resolve this dispute. The arbitrator, in short, was acting within the scope of his authority.” *Id.* at 754.

That leaves the question of whether the arbitrator was engaged in interpretation: Was he “arguably construing” the collective bargaining agreement? “This view of the ‘arguably construing’ inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties’ decision to hire their own judge to resolve their disputes, a view that respects the finality clause in most arbitration agreements, . . . (stating that ‘the arbitrator shall have full authority to render a decision which shall be final and binding upon both parties’), and a view whose imperfections can be remedied by selecting [different] arbitrators.” *Id.* at 753-754. In the present case, the arbitrator’s opinion has all the hallmarks of interpretation. He refers to, and analyzes the parties’ positions, and at no point does he say anything indicating that he was doing anything other than trying to reach a good-faith interpretation of the contract. “Neither can it be said that the arbitrator’s decision on the merits was so untethered from the agreement that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his ‘own brand of industrial justice.’ ” *Id.* at 754. “An interpretation of a contract thus could be ‘so untethered to’ the terms of the agreement, to borrow a phrase from our Circuit Justice, *Garvey*, 532 U.S. at 512, 121 S.Ct. 1724 (Stevens, J., dissenting), that it would cast doubt on whether the arbitrator indeed was engaged in interpretation. Such an exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that.” *Id.*

Also, we have held that “[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator’s interpretation, not the Board’s, that the parties have bargained for.” *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. 02-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ agreement. . . as well as his evidentiary findings and conclusions. . . ” *Id.* Moreover, “[this] 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 246*, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). In the present case, the parties submitted their dispute to Arbitrator Ray and MPD’s claim that the Arbitrator exceeded his authority only involves a disagreement with the Arbitrator’s findings and conclusions. This does not present a statutory basis for reversing the Arbitrator’s Award. *See, District of Columbia Department of Mental Health and Psychologists Union, Local 3758 of the D.C. Department of Mental Health, 1199 National Union of Hospital and Health Care Employees, American*

Federation of State, County and Municipal Employees, AFL-CIO (on behalf of John Bruce), Slip Op. No. 850, PERB Case No. 06-A-17 (2006).

We find that Arbitrator Ray was within his authority to rescind the Grievant's demotion. We have held that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." *D.C. Department of Public Works and AFSCME, Local 2091*, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). In addition, we have found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.³ See, *District of Columbia Metropolitan and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Furthermore,

the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.* 363 U.S. 593, 597 (1960), that arbitrators bring their "informed judgement" to bear on the interpretation of collective bargaining agreements, and that is "especially true when it comes to formulating remedies." [Also,] [t]he. . . courts have followed the Supreme Court's lead in holding that arbitrators have implicit authority to fashion appropriate remedies. . . (*Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6. (May 13, 2005)).

In the present case, MPD does not cite any provision in the parties' collective bargaining agreement that limits the Arbitrator's equitable power. Therefore, once Arbitrator Ray concluded that MPD had cause to discipline the Grievant and that the penalty imposed was excessive, he had the authority to determine what he deemed to be the appropriate penalty.

As a second basis for review, MPD claims that the Award on its face is contrary to law and public policy because "[d]espite the *Douglas* requirement dictating a responsible balancing of all relevant factors, Arbitrator Ray's decision makes reference to only one (1) factor, and finds it to weigh in mitigation of the penalty imposed." (Request at p. 7). Specifically, MPD asserts the following:

The final factor upon which Arbitrator Ray relies in overturning Grievant's demotion is his confidence in Grievant's potential for rehabilitation. . . . 'Potential for rehabilitation' is one of the factors cited in the seminal case of *Douglas* . . . (Request at p. 5).

* * *

Arbitrator Ray makes no mention of any of the other factors, including: the nature and seriousness of the offense; its relation to the Grievant's supervisory duties, supervisory position, and

³We note that if MPD had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

supervisory responsibilities; the fact that the misconduct was intentional, was committed maliciously, and was frequently repeated; the Grievant's job level and type of employment, including his supervisory role and his contacts with the public; the effect of the offense upon the Grievant's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the Grievant's ability to perform assigned duties, the consistency of the penalty with any applicable agency table of penalties; the notoriety of the offense or its impact upon the reputation of the agency, and the clarity with which the Grievant was on notice of the rules that were violated in committing the offense, and had been warned about the conduct in question. All of these factors are not only relevant to the penalty imposed in this case, but also constitute aggravating circumstances justifying the penalty of demotion. (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 ruling. "[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." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See, *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Moreover, 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 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). The petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *Id.* Also see, *District of Columbia Public Schools and 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). As the Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." *Department of Corrections v. Teamsters Local 246*, 554 A.2d 319, 325 (D.C. 1989). In the present case, MPD claims that the Award violates public policy. (See Request at pgs. 2 and 7). However, MPD does not identify a "definite public policy" that the Award contravenes. Therefore, MPD has failed to provide a statutory basis for reversing the Award based on a violation of public policy.

In addition, MPD asserts that the Award is on its face contrary to law. However, MPD does not specify any "applicable law" that mandates that the Arbitrator arrive at a different result. Instead, MPD argues that "[s]ince Arbitrator Ray did not include in his analysis a balancing of all the relevant *Douglas* factors, his award does not comport with the holding of *Douglas*, and therefore is contrary to law." (Request at p. 7). We believe that MPD's ground for review only involves a disagreement with Arbitrator Ray's application of the *Douglas* factors, as well as his findings and conclusions. MPD requests that we adopt its interpretation of the *Douglas* factors and the evidence presented. This we cannot do.

In attempting to show that the Award is contrary to law, MPD also argues that the Award violates Title 6A of the District of Columbia Municipal Regulations (“DCMR”)§ 800. Specifically, MPD asserts that “Arbitrator Ray’s consideration of the penalties proposed by Assistant Chief Cockett in mitigation . . . ignored the chief of Police’s legal obligation under 6A DCMR § 800.1, and as such his decision was contrary to law.” (Request at p. 5). In support of its position MPD states the following:

Title 6A of the District of Columbia Municipal Regulations (DCMR) § 800 establishes the authority of the Chief of Police. It specifically provides that the “chief of Police . . . shall be responsible for the proper and efficient conduct, control, and *discipline* of the force.” 6A DCMR § 800.1. . . The penalties identified in both the Proposed and Final Notices were recommended by Assistant Chief of Police Shannon Cockett. . . When the matter was presented to the *then*-Chief of Police for his consideration, he exercised his authority under 6A DCMR § 800.1. and determined that demotion was the appropriate penalty. . . . (Request at p. 5, emphasis in original).

The language contained in 6A DCMR § 800.1 authorizes the Chief of Police to discipline police officers. However, the language in § 800.1 does not state that a penalty imposed by the Chief of Police can not be reversed or modified. Since 6A DCMR § 800.1 does not prohibit an arbitrator from reversing or modifying a penalty imposed by the Chief of Police, we find that MPD has not cited any specific law or public policy that was violated by the Award. It is clear that MPD’s argument involves a disagreement with the Arbitrator’s ruling. This Board has held 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 at pgs. 2-3, PERB Case No. 95-A-02 (1995). In the present case, the parties submitted their dispute to the Arbitrator. MPD’s disagreement with the Arbitrator’s findings and conclusions, is not a ground for reversing the Arbitrator’s Award. See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPD 0008 (May 13, 2005) and *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 01 MPA 18 (September 17, 2002). In conclusion, MPD has the burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at different results.” *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, MPD failed to do so.

In view of the above, we find that there is no merit to MPD’s arguments. Moreover, we believe that the Arbitrator Ray’s conclusions are based on a thorough analysis of the record, and cannot be said to be clearly erroneous or contrary to law or public policy. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

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

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

July 12, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.08-A-01 was transmitted via Fax and U.S. Mail to the following parties on this the 12th day of July 2010.

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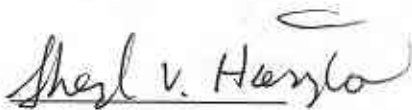
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