Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department	
Petitioner	PERB Case No. 12-A-04(R)
and	Opinion No. 1509
Fraternal Order of Police, Metropolitan Police Department Labor Committee, (on behalf of Charles Jacobs)	
Respondent	

DECISION AND ORDER ON REMAND

I. Statement of the Case

This matter comes before the Public Employee Relations Board on remand from the Superior Court of the District of Columbia, concerning the Board's decision in *Dist. of Columbia Metro. Police Dep't and. Fraternal Order of Police/Metro. Police Dep't Labor Comm. (on behalf of Charles Jacobs).*[1]

In *MPD and FOP/Labor Committee*, the Metropolitan Police Department appealed to the Board an arbitration award by Arbitrator Arline Pacht, in which she reduced a grievant's termination to a suspension. Pursuant to D.C. Official Code § 1-605.02(6), the Board upheld the arbitration award. MPD appealed the Board's Decision and Order to the Superior Court, alleging

[1] 60 D.C. Reg. 3060, Slip Op. No. 1366. PERB Case No. 12-A-04 (2013).

that the Board failed to adequately review the arbitration award. The Superior Court remanded the case to the Board pursuant to an Order. The Order instructed the Board to:

> more thoroughly examine the Arbitrator's jurisdiction and explicitly consider whether the Arbitrator reasonably and consciously reconciled the potentially inconsistent mandates of Article 12 of the parties' Collective Bargaining Agreement ("CBA") which limits the record of review to the Departmental hearing and Article 19 of the CBA, which does not address or limit what constitutes the record, but limits the scope of the Arbitrator's jurisdiction to only the "precise issue submitted for arbitration."[2]

In addition, the court ordered the Board to "consider the legal precedents concerning disparate treatment under different supervisors, and specifically distinguish cases in which the alleged disparate treatment occurred during the tenure of Chief of Police Charles Ramsey from those in which the treatment took place during the tenure of Chief of Police Cathy Lanier."[3] Lastly, the Superior Court ordered the Board to "address whether the burden of proof for disparate treatment is on the alleged victim of the disparate treatment or on the MPD to prove that the disparate treatment did not occur."[4]

The Board has considered the issues presented by the Superior Court, and for the reasons provided herein maintains its denial of MPD's arbitration review request.

II. Background

The crux of the issues that are discussed on remand involve the penalty determination of the Arbitrator in reaching her decision to reduce the grievant's termination to a suspension. The parties submitted as a joint issue whether the Agency had met its burden of proof for sustaining the charges against the grievant. The Arbitrator found that the Agency had met its burden in all but one charge. In addition, the parties presented the joint issue as to whether the grievant's penalty was appropriate. The Arbitrator found that the penalty of termination was inappropriate for the grievant upon a review of MPD's Adverse Action Panel's (AAP) *Douglas* factor analysis, and reduced the grievant's penalty to a suspension.

MPD filed an arbitration review request of the award to the Board asserting that (1) the arbitrator was without authority to grant the award and (2) the award was contrary to law and public policy. MPD argued that the Arbitrator exceeded her jurisdiction by considering decisions in other adverse action cases that had not been considered by the AAP, because they were rendered after the AAP hearing, and were outside of the record that the Arbitrator could consider, in accordance with the parties' collective bargaining agreement.[5] The Board rejected MPD's argument, determining that the Arbitrator's findings and conclusions drew its essence

---

[2] Case No. 2013 CA 0002188, at p. 1, 12-13.
[3] *Id.* at 13.
[4] *Id.*
[5] *Id.* at 5.

from the parties' collective bargaining agreement and, therefore, was not outside the Arbitrator's jurisdiction.[6]

In addition, MPD requested a review of the arbitration decision on the basis that the award was facially contrary to law and public policy, because the Arbitrator improperly applied a *Douglas* factor analysis by considering subsequent disciplinary cases of employees under different administrations. The Board found that MPD did not cite any particular statute or applicable PERB case law that the Arbitrator misinterpreted on its face. MPD raised the argument that the use of disciplinary cases as comparable cases under different administrations was contrary to law and public policy, because it would discourage a new administration from changing its disciplinary policy.[7] The Board rejected MPD's argument on the basis that the law and public policy exception has an extremely narrow scope of review, and that MPD failed to articulate a law and public policy that demonstrated that the arbitration award compelled the violation of an explicit, well defined public policy grounded in law and/or legal precedent.[8] The Board consequently denied MPD's review request on the basis of law and public policy.[9]

MPD appealed the Board's Decision and Order to the Superior Court. The Superior Court remanded to the Board to discuss the aforementioned issues.

III. Analysis and conclusions

The Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in 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.[10] The Board has only "limited authority to overturn an arbitral award."[11] Further, there is a "well defined and dominant" policy favoring arbitration of a dispute where the parties have chosen that course.[12] Just as "Congress [has] declared a national policy favoring arbitration," so has the District of Columbia.[13] Indeed, this preference for honoring the parties' agreement to arbitrate disputes underlies the practical "hands-off" approach to review arbitrators' decisions, except in

---

[6] *Id.* at 6-7.
[7] Case No. 2013 CA 0002188 at 7-8.
[8] *Id.* at 7-9.
[9] *Id.* at 7.
[10] D.C. Official Code § 1-605.02(6).
[11] *Fraternal Order of Police v. District of Columbia Pub. Employee Relations Bd.*, 973 A.2d 174, 177 (D.C. 2009).
[12] *District of Columbia Metro. Police Dep't*, 901 A. 2d at 789.
[13] *District of Columbia v. Greene*, 806 A. 2d 216, 221 (D.C. 2002) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). *See, e.g., Masurovsky v. Green*, 687 A.2d 198, 201 (D.C. 1997)("Variously called a presumption, preference or policy, the rule favoring arbitration is identical under the D.C. Uniform Arbitration Act and the Federal Arbitration Act.") (citation omitted)

certain "restricted" circumstances.[14] In addition, the Board will not substitute its own interpretation or that of the parties for that of the duly designated arbitrator.[15]

A. Arbitrator's jurisdiction

The Superior Court has ordered the Board "to more thoroughly examine the Arbitrator's jurisdiction and explicitly consider whether the Arbitrator reasonably and consciously reconciled the potentially inconsistent mandates" of Article 12 and Article 19 of the parties' CBA.[16] Whether the Arbitrator exceeded her jurisdiction under a collective bargaining agreement is determined by whether the arbitrator 'arguably construed' the CBA.[17] For the following reasons, the Board finds that the Arbitrator had jurisdiction over the dispute.

The statutory scope of the Board's jurisdiction to review an arbitration award is a highly deferential standard.[18] The jurisdiction of an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions."[19] When submitting an issue to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based."[20]

One of the tests used by the Board to determine whether an arbitrator has exceeded her jurisdiction is "whether the Award draws its essence from the collective bargaining agreement."[21] The Board adopted the Sixth Circuit's analysis of "essence of the agreement" issues:

> Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in 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

---

[14] *District of Columbia Metro. Police Dep't, supra*, 901 A.2d at 787; *see Fraternal Order of Police, supra*, 973 A.2d at 177 n.2
[15] *District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union 246*, 34 D.C. Reg. 3616, Slip Op. No. 157, PERB Case No. 87-A-02 (1987).
[16] Case No. 2013 CA 0002188 at 1.
[17] *See Mich. Family Resources, Inc. v. SIEU, Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007).
[18] *Id.*
[19] *D.C. Dep't of Public Works v. AFSCME Local 2091*, 35 D.C. Reg. 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988).
[20] *MPD v. FOP/MPD Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000);
[21] *D.C. Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987).

> intervention should be resisted even though the arbitrator made "serious," "improvident," or "silly" errors in resolving the merits of the dispute.[22]

In considering whether the Arbitrator resolved a dispute not committed to arbitration, MPD argues that the Arbitrator acted outside of her jurisdiction by admitting certain evidence that the MPD asserts was improper under the CBA for her review. Notwithstanding, MPD does not dispute that the Arbitrator was presented with the joint issues of whether the Agency met its burden of proof for all of its charges and whether the penalty determination was appropriate, and that the Arbitrator resolved these issues.[23] Therefore, the Board finds that the Arbitrator resolved the issues presented at Arbitration.

Even though the Arbitrator did not explicitly construe Article 12 or Article 17 in her arbitration award or reconcile the two provisions with regards to the admission of the alleged improper evidence, the Board finds that MPD's jurisdictional argument speaks to the Arbitrator's use of evidence that was arguably outside the record for her to consider under the parties' contract. The Board finds that the MPD's argument that the Arbitrator improperly permitted evidence does not rise to a challenge of the Arbitrator's jurisdiction on the basis that the Arbitrator resolved an issue not committed to arbitration. MPD's contention amounts to an objection to the Arbitrator's evaluation of certain evidence and the significance that should be accorded with respect to the Award. As stated above, even if this was a serious error, this did not divest the Arbitrator of jurisdiction to resolve the issues presented to her. Furthermore, the Board has held on numerous occasions that such evidentiary objections do not raise the asserted statutory basis for review.[24]

The Board notes that MPD did not assert nor did it provide any evidence that it objected to the inclusion of the two subsequent cases of discipline to the Arbitrator that it now disputes as part of the record that the Arbitrator had jurisdiction to consider. A review of the arbitration review request record reveals that MPD raised an objection to the admission of that evidence for the first time in its arbitration review request. By submitting the matter to arbitration, MPD agreed to be bound by the evidentiary findings of the Arbitrator. Even though MPD argues that the Arbitrator was outside of her jurisdiction in her consideration of the evidence, she determined the issues under the contract and weighed the evidence before her. MPD failed to object to the inclusion of the cases in dispute until after it received an unfavorable arbitration award. Because MPD did not object to the evidence before the Arbitrator, thereby leaving her without an opportunity to correct the alleged defect.

---

[22] *Nat'l Ass'n of Government Employees, Local R3-07 v. D.C. Office of Communications*, 59 D.C. Reg. 6832, Slip Op. No. 1203, PERB Case No. 10-A-08 (2011) *(citing Michigan Family Resources, Inc. v. SEIU Local 517M*, 475 F.3d 746, 753 (2007)). [FN2]

[23] MPD has not asserted, and the Board does not find, that the Arbitrator committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award by allowing potentially impermissible evidence.

[24] *See, e.g., University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, Slip Op. No. 320, PERB Case No. 92-A-04 (1992).

Even if the Board considers that the Arbitrator erred by considering the cases, the Board evaluates the arbitration award to determine if a fair hearing has been conducted in accordance with its limited statutory basis of review.[25] The Board has found that where an Arbitrator has considered improper evidence, "such misbehavior does not deprive the objecting party of a fair hearing or taint the entire decision where the decision is also supported by the evidence presented at hearing."[26] The parties agreed to forego an evidentiary hearing and instead submitted a record of the AAP to the Arbitrator for final resolution.[27] By agreement, the FOP filed its post-hearing brief on April 1, 2011, and MPD filed its post-hearing brief May 10, 2011. On June 8, 2011, FOP submitted a reply brief to the Arbitrator.[28] MPD did not submit a reply brief. As discussed above, MPD did not object to the evidence before the Arbitrator. Further, in evaluating whether grievant's proposed penalty was consistent with those imposed on other employees for similar offenses and in accord with General Order 1202.1, the Arbitrator noted, "[N]either the Panel nor the Department identified any supporting decisions, thereby failing to providethe Arbitrator with a way to determine whether the facts and findings in this matter are comparable with those in other cases...."[29] Notwithstanding, the Arbitrator rendered her decision on the entire record and considered not only the cases that MPD argues were improper, but weighed and reviewed all of the *Douglas* factors in determining the appropriateness of penalty for the grievant. In light of MPD's failure to object to the evidence and that the Arbitrator's decision was based on the entirety of the record before her, the Board finds that MPD was not deprived of a fundamentally fair hearing. Consequently, the Board cannot find that by such action the Arbitrator exceeded her jurisdiction.

B. Disparate treatment

The Board's scope of review in arbitration review requests is extremely narrow, particularly in the case of the law and public policy exception.[30] A petitioner must demonstrate that the award "compels" the violation of an explicit, well-defined public policy grounded in law or legal precedent.[31] Absent a clear violation of law evident on the face of the arbitrator's award, the Board lacks authority to substitute its own judgment for that of the arbitrator.[32] Disagreement with an arbitrator's findings is not a sufficient basis for concluding that an award is contrary to law and public policy.[33] MPD argued that the Arbitrator's award was contrary to law and public policy, because the Arbitrator analyzed consistency of the penalty under *Douglas* by comparing disciplinary cases arising from two different administrations.

---

[25] *DCPS and WTU*, Slip Op. No. 349, PERB Case No. 93-A-01 (1994).
[26] *Id.*
[27] Award at 1.
[28] *Id.*
[29] *Id.* at 23.
[30] *See MPD v. FOP/MPD Labor Committee*, 60 D.C. Reg. 3052, Slip Op. No. 1365 at p. 5, PERB Case No. 11-A-02 (2013).
[31] *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).
[32] *Fraternal Order of Police/Dep't of Corrections Labor Committee v. Public Employee Relations Board*, 973 A.2d 174, 177 (D.C. 2009).
[33] *MPD v. FOP/MPD Labor Committee*, 31 D.C. Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A-05 (1984).

The Superior Court found that there is a "defined public policy in which one administration cannot be compelled to adhere to the disciplinary policies of another" and that "this precedent is sufficiently specific to warrant review under public policy" of the Arbitrator's determination on disparate treatment.[34] As further explained below, the Arbitrator's decision does not compel one administration to adhere to the disciplinary policies of another and, thus, the Arbitrator's award is not contrary to the public policy set forth by the Superior Court.

In citing legal precedent as support for the public policy in favor of allowing new administrators to adjust disciplinary policies within agencies, the Superior Court primarily relies upon *Jahr v. District of Columbia*, 968 F.Supp.2d 186, 192, (D.C. 2013), in which a District of Columbia paramedic brought a Title VII case based on disparate treatment, but where the court found collateral estoppel precluded the employee from bringing that case. The employee was estopped because he had brought the same case through the Office of Employee Appeals (OEA) which had been appealed to the District of Columbia Court of Appeals. The employee was terminated by the District of Columbia Fire and Emergency Medical Services Department for dishonesty and inexcusable neglect of duty.[35] The employee appealed his suspension through the Office of Employee Appeals ("OEA").[36] The OEA made a factual determination as to whether the *Douglas* factors, including the consistency of the penalty factor, supported the employee's claims that he had been subject to disparate treatment, which the Superior Court and Court of Appeals affirmed under an "arbitrary, capricious, or . . . abuse of discretion" standard of review.

In this case, the parties submitted the determination as to whether the discipline imposed was proper to the arbitrator based on her fact-finding, her determination of the issues, and her interpretation of the collective bargaining agreement. As the Arbitrator stated, "When considering a penalty that would be appropriate in the instant case, the [Adverse Action] Panel assessed the record evidence in accordance with the twelve factors identified in *Douglas,* as called for in the MPD Trial Board Handbook."[37] The parties submitted the joint issue of whether the penalty of termination was appropriate in the grievant's case. In determining the appropriateness of the grievant's penalty, the Arbitrator reviewed the AAP's application of the *Douglas* factors, as well as applied the twelve factors as found in *Douglas v. Veterans Administration.*[38]

The Superior Court ordered the Board to consider legal precedents regarding disparate treatment under different supervisors. The precedent that the Superior Court relies upon for the public policy of disparate treatment largely involves allegations of discrimination under Title VII, which are not at issue in the present case. The purpose behind the *Douglas* factor analysis is to "ensure that 'managerial discretion has been legitimately invoked and properly exercised.'"[39]

---

[34] Case No. 2013 CA 0002188 at 10-11.
[35] *Jahr v. D.C. Office of Emple. Appeals*, 19 A.3d 334, 336 (D.C. 2011).
[36] *Id.*
[37] Award at 18.
[38] 5 M.S.P.B. 313, 5 M.S.P.R. 280 (1981).
[39] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (quoting *Douglas*, 328, 301).

The "similarly situated" element of *Douglas* is to ensure that penalty determinations are made consistently among employees. Thus, the similarly situated employee analysis is often used in conjunction with consistency of the penalty under an Agency's table of penalties.

The Arbitrator considered the *Douglas* factors – consistency of the penalty with those imposed upon other employees for the same or similar offenses and consistency of the penalty with any applicable agency table of penalties – along with the other *Douglas* factors and the evidence both sides presented at the arbitration in finding that the MPD's penalty of termination was an inappropriate penalty. The Board has been presented with numerous cases involving *Douglas*, and as a quasi-judicial body, we have exclusive, limited statutory authority to review appeals from arbitration. Nonetheless, application of *Douglas* is drawn on an *ad hoc* basis. *Douglas* will be reviewed and applied in different manners based on the information presented to an arbitrator at the arbitration. Further, MPD failed to argue nor did it present any evidence that the subsequent Administration promulgated any information on a different disciplinary policy or that *Douglas* would be applied in any manner differently. As stated above, when submitting an issue to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based."[40]

The arbitrator here made the factual determination regarding the consistency of MPD's application of its penalties. Even though the Arbitrator may have considered cases from other administrations when weighing the evidence before her, she did not hold that agencies are prevented from adjusting discipline under new administrations. As such, nothing in the award would prevent MPD or any other District agency from adjusting its disciplinary policies when there is a new administration. As well, the award would not prevent MPD or any other District agency from explaining that departure from prior penalties was made based on a change in the administration. Indeed, the MPD did not make such and argument and, thus, the arbitrator's decision does not provide any guidance on that type of argument. The Board finds that the Arbitrator's award and application of *Douglas* is not on its face contrary to the public policy described by the Superior Court and, thus, finds no law and public policy grounds to modify the Award.

In addition, the Superior Court remanded this case back to the Board to determine who bears the burden of proof under the *Douglas* factors. In a *Douglas* factor analysis, the burden is on the Agency to prove its facts by a preponderance of the evidence.[41] 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. This is to determine if facts related to aggravating circumstances in the individual case, the employee's past work record, nature of the employee's responsibilities, specific effects of the employee's conduct on the agency's mission or reputation, *consistency with other agency actions* and agency rules, or similar factual considerations which may be

---

[40] *MPD v. FOP/MPD Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000);
[41] *Douglas,* 5 M.S.P.B. 313 at 297, 325.

deemed relevant by the agency to justify the particular punishment."[42] In addition, "when the appellant challenges the severity of the penalty, or when the Board's presiding official perceives that there are genuine issues of justice or equity, the agency will be called upon to represent such further evidence as it may choose to rebut the appellant's challenge or to satisfy the presiding official." Furthermore, the Board notes that the Arbitrator had found that one charge against the grievant was not sustained. According to *Douglas*, "[w]henever the agency's action is based on multiple charges some of which are not sustained, the presiding official should consider carefully whether the sustained charges merited the penalty imposed by the agency."[43]

The Board finds that the Arbitrator's application of the burden of proof of the *Douglas* factors did not contravene law or public policy.

IV. Conclusion

The Board finds that the Arbitrator's conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. For the reasons discussed, no statutory basis exists for setting aside the Award; the Request is therefore, denied.

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

By unanimous vote of Board Chairperson Charles Murphy, Member Donald Wasserman, and Member Keith Washington

Washington, D.C.

November 20, 2014

---

[42] *Id.* at 297, 325.
[43] *Id.* at 334.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 12-A-04 (R) was transmitted to the following parties on this the 21st day of January 2015.

Andrea G. Comentale
Corey P. Argust, Esq.
441 4th Street, NW
Suite 1180 South
Washington, DC 20001

VIA FILE & SERVEXPRESS AND U.S. MAIL

Marc L. Wilhite, Esq.
Pressler & Senftle, P.C.
1432 K Street, NW
Twelfth Floor
Washington, D.C. 20005

VIA FILE & SERVEXPRESS AND EMAIL

Mark Viehmeyer, Director
Office of Labor Relations Representative
Metropolitan Police Department
300 Indiana Avenue, N.W.
Room 4126
Washington, D.C. 20001

VIA FILE & SERVEXPRESS AND EMAIL

/s/ Sheryl V. Harrington
Administrative Assistant