

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

_____)	
In the Matter of:)	
)	
District of Columbia)	
Metropolitan Police Department)	
)	
Complainant,)	PERB Case No. 12-A-04
)	
and)	Opinion No. 1366
)	
Fraternal Order of Police,)	
Metropolitan Police Department)	
Labor Committee, (on behalf of Charles Jacobs))	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Metropolitan Police Department (“Agency” or “MPD” or “Petitioner”) filed an arbitration review request (“Request”) in the above-captioned matter. The Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union” or “FOP”) filed an Opposition to the Request (“Opposition”). The Agency seeks review of an arbitration award (“Award”) that mitigated the termination of the Charles Jacobs (“Grievant”) to a 35-day suspension.

II. Discussion

A. The Award

The matter before the Board arises from a grievance filed by the Union on behalf of the Grievant, challenging the Agency’s termination of his employment. (Award at 1). On March 7, 2006, Grievant was served with a Notice of Proposed Adverse Action (“Notice”). (Award at 4). The Notice contained four charges against the Grievant. (Award at 5). The charges were categorized as follows: “commission of an act that would constitute a crime; conduct prejudicial

to the MPD; willful falsehood and failure to obey orders and directives.” (Award at 18).

On May 10, 2006, an Adverse Action Panel (“Panel”) held a hearing on Grievant’s proposed termination. (Award at 4). The Grievant pled guilty to two charges. (Award at 5). On June 22, 2006, Grievant was served with the Panel’s written decision that found him guilty of all remaining charges, except for two specifications, and adding an additional specification under Charge 3 for “willfully and knowingly making an untruthful statement...pertaining to his...official duties...and in the presence of any superior officer...” (Award at 4-5). On July 5, 2006, Grievant appealed the Adverse Action Decision to the Chief of Police. (Award at 4). The Chief of Police denied the Grievant’s appeal in a Final Agency Action letter, dated July 19, 2006, affirming Grievant’s termination as of August 25, 2006. *Id.*

On August 1, 2006, the FOP demanded arbitration on the Grievant’s behalf, pursuant to the MPD and FOP (collectively the “Parties”) collective bargaining agreement (“CBA”). *Id.* In lieu of an evidentiary hearing, the Parties agreed to submit the record of the proceedings before an Adverse Action Panel to Arbitrator Arline Pacht for final resolution. (Award at 1). The parties submitted post-hearing briefs to the Arbitrator, and FOP submitted a reply brief. (Award at 1).

The Parties submitted the following joint issues:

- (1) Did Grievant waive the right to challenge the MPD’s alleged failure to issue a timely decision? If not, did the Department violate the 55 day rule set forth in Article 12, section 6 of the parties’ collective bargaining agreement?;
- (2) Did the panel improperly allow into evidence, testimony and records concerning a previous allegation of similar conduct by Grievant;
- (3) Did the MPD violate Charge 3, Specification 1 by charging Grievant with a new specification after the hearing concluded and without providing him with proper notice;
- (4) Did the Department adduce sufficient evidence to support the charges?; and
- (5) Did the Department Terminate Grievant Improperly?.

(Award at 6).

On the first issue, the Arbitrator found that the Grievant “was not barred from contesting the MPD’s alleged failure to comply with the 55-day rule.” (Award at 7). The Grievant had asserted that MPD “violated the 55 day rule set forth in Article 12, Section 6 of the parties’ collective bargaining agreement...by failing to issue its final decision within 55 days after he requested a hearing as perceived in Article XII, Section 6 of the parties’ collective bargaining agreement...” (Award at 6). The Arbitrator interpreted relevant case law by the Office of Employee Appeals (“OEA”) and the Parties’ Collective Bargaining Agreement (“CBA”), and determined that the 55-day rule was a jurisdictional question that could be raised at any time during the proceedings. (Award at 7). The Arbitrator found that Grievant did not waive the right to contest the 55-day rule. *Id.* The Arbitrator, however, then found that MPD did not violate the

55-day rule. (Award at 9). In light of the evidence presented to the Arbitrator, the Arbitrator concluded that the Grievant had requested a postponement of the originally scheduled March 30th hearing, which was then held on May 10, 2006. *Id.* The Arbitrator found that the Grievant's request to postpone the hearing tolled the 55-day rule, and that MPD's Final Notice issued on June 22, 2006 was in compliance with the 55-day rule. (Award at 9).

On the second issue, the Arbitrator found the admission of evidence of Grievant's prior misconduct was not improper. (Award at 8, 11). The Arbitrator found that the admission of Grievant's prior conduct was used by the Panel only for *Douglas* factor analysis of the "clarity with which the employee was on notice of any rules that were violated in committing the offence or as the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others." (Award at 10-11). As the information was not used by the Panel to determine the Grievant's culpability of the charges against him, the Arbitrator decided that the admission of evidence of Grievant's prior conduct for the purposes of penalty determination was not improper. (Award at 11).

On the third issue, the Arbitrator decided that the Panel's amendment of Charge 3 after the hearing before the Panel was improper. *Id.* The Panel found Grievant not guilty of Charge 3, Specification 1, however, after the hearing, the Panel amended Charge 3 to include Specification 2 for testifying before the Panel that "...on November 10, 2005, he did not ask Officer Darin Rush to dissuade his wife from reporting the domestic assault that occurred on October 25, 2005." *Id.* (citing TR 568). The Panel found the Grievant guilty of the amended Charge 3. (Award at 11). After interpreting the relevant statutes, regulations, and case law, the Arbitrator found "[a]lthough an Adverse Action Panel may alter a charge based on evidence that emerges during the hearing, it must do so with the notice to the Grievant while the hearing is in progress." (Award at 12). The Arbitrator decided that Grievant did not have sufficient notice during the hearing to believe that the charge may arise and, consequently, did not have the opportunity to respond to the potential charge during the hearing. (Award at 13-14). The Arbitrator found that MPD failed to provide the Grievant with advance notice of the charge and an opportunity to respond. (Award at 14). Consequently, the Arbitrator dismissed Charge 3, Specification 2. *Id.* The Grievant argued to the Arbitrator that due process rights required that the Arbitrator dismiss all of the adverse action findings. *Id.* The Arbitrator rejected the Grievant's argument. *Id.* The Arbitrator found that dismissal of the adverse action was "unduly severe for it would require the dismissal of specifications that were found to have merit and where Grievant acknowledged his guilt." *Id.* The Arbitrator then recommended that MPD "redact all records maintained by the [Metropolitan Police] Department in which references to the errant specification may appear and any reference to or reliance on this specification in the Panel's consideration of the *Douglas* factors will be expunged." *Id.*

On the fourth issue, the Arbitrator ruled that MPD had sufficient evidence to support its charges against the Grievant. (Award at 14). Based on the record, the Arbitrator determined that MPD had proved the charges by a preponderance of the evidence with the exception of the amendment to Charge 3, as discussed above. (Award at 14-17).

Finally, on the fifth issue, the Arbitrator ruled that the termination of the Grievant was not an appropriate penalty. (Award at 18). The Arbitrator determined that the Panel "assessed

the record evidence in accordance with the twelve factors identified in *Douglas*,¹ as called for in the MPD Trial Board Handbook.” (Award at 18) (footnote added). After review of the charges, MPD’s Table of Penalties, and the Panel’s penalty determination, the Arbitrator stated:

Relying principally on Mrs. Jacobs’ allegations of domestic violence after which she obtained a TPO, the Panel concluded that the appropriate penalty, as set forth in the [Metropolitan Police] Department’s Table of Penalties, warranted Grievant’s termination for violating Charge 1, specification 1. The penalty for Charge 2, specification 1 involving Grievant’s physical and verbal abuse of Mrs. Jacobs ranged from a one day suspension to removal, and for Charge 4, specification 1, the penalty for failing to obey orders and directives addressing Grievant’s failure to report his receipt of the TPO varied from a reprimand to removal.

(Award at 18). The Arbitrator then proceeded to analyze each *Douglas* factor, including in her analysis the Panel’s consideration of each *Douglas* factor and the Parties’ arguments. (Award at 18-26). With regards to penalty determination, the Arbitrator found termination was inappropriate, because the Grievant was “an apt candidate for rehabilitation” and the Panel failed to provide any comparable cases or properly address the relationship between Grievant’s job performance and several false statements as called for by the *Douglas* factors.” (Award at 27). The Arbitrator decided to “set aside the MPD’s decision to terminate Grievant and order his reinstatement with full back pay and benefits less any earnings he may have made from the date of his termination to the date of his reinstatement.” *Id.* Further, the Arbitrator ordered:

given sustained finds of Grievant’s misconduct, a lesser penalty of 35 work days suspension without pay is appropriate in as much as it corresponds with penalties imposed in similar cases. In addition, in light of Grievant’s false testimony during the Adverse Action hearing, a consecutive penalty of 10 work days without pay is hereby imposed. Taken together, Grievant will be suspended for a total of 45 days to begin after the starting date of his reinstatement. In addition, I hereby order that Officer Jacobs enrolls in an approved anger management program for a period of at least one year.

(Award at 27-28).

B. Analysis

The Comprehensive Merit Personnel Act (“CMPA”) authorizes the Board to modify or set aside an arbitration award in three limited 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. D.C. Code § 1-605.02(6) (2001 ed.). MPD requests that the Board reverse the Arbitrator’s award, because “(1) the [A]rbitrator was without authority to grant the award[,] and (2) the award is

¹ *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (MSPB 1981).

contrary to law and public policy.” (Request at 1).

1. The Arbitrator did not exceed her authority when she reduced the Grievant’s penalty.

The Parties presented as a joint issue to the Arbitrator: “Was the penalty of termination appropriate?”. (Request at 6, Award at 6). The Arbitrator found that termination was an excessive penalty for the Grievant. (Award at 27). MPD, however, asserts that the Arbitrator “exceeded her authority by considering material outside the record,” when the Arbitrator considered decisions in other adverse action cases that occurred after the Panel’s decision to terminate the Grievant. (Request at 7). MPD argues that “the arbitrator analyzed *de novo* whether the Panel recommended a fair and appropriate penalty under the circumstances,” and that “[t]he arbitrator’s independent review is a significant departure from the review generally conducted to determine whether an agency’s decision to impose a particular penalty was clearly erroneous.” *Id.*

Further, MPD argues that the Arbitrator’s analysis of the *Douglas* factors of other employees’ disciplinary actions was outside of the record before the Panel and, therefore, impermissible for the Arbitrator to consider. (Request at 8). In its Request, MPD argues that the Arbitrator’s contractual authority is limited by Article 12, § 8 (January 28, 2005) of the Parties’ CBA, which states that “[i]n cases where a Departmental hearing has been held, any further appeal shall be based solely on the record established in the Departmental hearing.” (Request at 8). In its Opposition, FOP argues that MPD has cited to the incorrect provision of the Parties’ contract, and that Article 19 governing grievance procedures provides the correct grant of authority. (Opposition at 4).

The Board has long held that by agreeing to submit the settlement of a grievance to arbitration, it is the Arbitrator’s interpretation, not the Board’s, for which the parties have bargained. *See University of the District of Columbia and University of the District of Columbia Faculty Association*, 39 D.C. Reg. 9628, Slip Op. No. 320, PERB Case No. 92-A-04 (1992). In addition, the Board has found that by submitting a matter 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 on which the decision is based.” *District of Columbia Metro. Police Dep’t v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metro. Police Dep’t and Fraternal of Police, Metro. Police Dep’t Labor Comm. (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. No. 738 PERB Case No. 02-A-07 (2004). Moreover, the “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 D.C. Reg. 3616, Slip Op. No. 157, PERB Case No. 87-A-02 (1987).

The Board has used the following test to determine whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award: “whether the Award draws its essence from the collective bargaining agreement.” *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (on Behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012)

(quoting *D.C. Public Schools v. AFSCME, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156, PERB Case No. 86-A-05 (1987)). See also *Dobbs, Inc. v. Local No. 1614, International Brotherhood 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*, 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 “serious,” “improvident” or “silly” errors in resolving the merits of the dispute.

475 F.3d 746, 753 (6th Cir. 2007). See *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (on Behalf of Kenneth Johnson)*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012).

In the present case, MPD does not dispute that the issue before the Arbitrator was the appropriateness of the Grievant’s penalty, which was a joint issue presented by the Parties to the Arbitrator. In addition, MPD does not allege that there was any fraud, conflict of interest, or an act of dishonesty by the Arbitrator. Therefore, the issue to be determined is whether the Arbitrator was arguably construing or applying the CBA. The contract was presented to the Arbitrator in its entirety. Since MPD and FOP dispute the language of different provisions of the contract as to the what is considered the record before the Panel, the Arbitrator’s decision can arguably be construed to have arisen from her interpretation of the contract. The Arbitrator’s decision to look at information of similarly situated employees as persuasive information in *Douglas* factor analysis, including disciplinary actions prior to and after the Grievant’s Panel hearing, is arguably construing and/or applying the contract.

In addition, the Board has held that an arbitrator does not exceed her authority by exercising her equitable power, unless it is expressly restricted by the parties’ collective bargaining agreement. See *District of Columbia Metropolitan and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). See also *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (upholding an arbitrator’s award when the arbitrator concluded that MPD had just cause to discipline grievant, but mitigating the penalty, because it was excessive). Furthermore, the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, that arbitrators bring their “informed judgment” to bear on the interpretation of collective bargaining agreements, and that is “especially true when it comes to formulating remedies.” 363 U.S. 593, 597 (1960).

MPD has not provided any provision of the Parties’ CBA that restricted the Arbitrator’s

exercise of equitable power. Further, the Arbitrator's decision to consider persuasive cases of other employees' disciplinary actions in determining the reasonableness of the Grievant's termination was within her equitable powers. The Board finds that MPD's Request is merely a disagreement with the Arbitrator's findings and conclusions. The Board has previously stated that a "disagreement with the Arbitrator's interpretation . . . does not make the award contrary to law and public policy." *District of Columbia Metropolitan and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008) (quoting *AFGE, Local 1975 and Dept. of Public Works*, 48 D.C. Reg. 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995)).

MPD's arbitration review request on the grounds that the Arbitrator exceeded her authority when she considered subsequent disciplinary actions of other employees for *Douglas* factor analysis is denied.

2. The Arbitrator's award is not facially contrary to any law.

MPD argues that the Arbitrator's award is facially contrary to law, because the Arbitrator "misinterpreted the well-settled law governing disparate treatment claims." (Request at 10). MPD contends that the Arbitrator misinterpreted disparate treatment analysis of the *Douglas* factors, by considering the discipline of two other employees who were not actually similarly situated to the Grievant. *Id.* MPD asserts that the Grievant and the subsequent, disciplined employees worked under different Chiefs of Police and, therefore, worked under different administrations and different disciplinary policies, which made the employees differently situated to the Grievant. (Request at 11). MPD does not provide in its Request any particular disciplinary policy or contact provision that gave rise to its purported change in disciplinary policy.

In order to find that an arbitrator's award is facially contrary to law, the asserting party bears the burden to specify the "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 11329, Slip Op. No. 1295, PERB Case No. 09-A-11 (2012); *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 47 D.C. Reg. 717, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). In its Request, MPD does not cite any particular relevant statute or applicable PERB caselaw in its argument that the Arbitrator misinterpreted any law on its face. The Board finds that MPD's ground for review only involves a disagreement with the Arbitrator's findings and conclusion. Therefore, MPD has not met its burden.

3. The Arbitrator's award is not contrary to public policy.

MPD argues that the Arbitrator's use of the subsequent disciplinary actions to prove disparate treatment contravenes public policy. (Request at 11). MPD relies upon the Federal Rules of Evidence that bar the admissibility of subsequent remedial measures to prove culpability. (Request 11-12). MPD reasons "public policy would caution against permitting evidence of subsequent disciplinary actions taken under a new administration to show disparate

treatment because permitting such evidence would discourage a new administration from changing its disciplinary policy—such as, for example, reducing the penalty for a particular type of misconduct.” (Request at 12). Further, MPD contends that the Arbitrator’s use of “subsequent disciplinary decisions to evaluate whether a penalty is reasonable contravenes the well-defined public policy ‘encouraging people to take, or at least not discouraging them from taking, steps in further of added safety.’” (Request at 11) (quoting *Mahnke v. Washington Metro. Area Transit Authority*, 821 F.Supp.2d 125 (D.D.C. 2011)).

The review of 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.” *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 59 D.C. Reg. 3959, Slip Op. No. 925, PERB Case No. 08-A-01 (2012) (quoting *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 an arbitration award “compels” the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See *United Paperworks 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.” *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 47 D.C. Reg. 717, Slip Op. No. 633, PERB Case No. 00-A-04 (2000). Further, as stated above, 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.* See also *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156, PERB Case No. 86-A-05 (1987).

In its argument that the admission of evidence of subsequent disciplinary actions of other employees is against public policy, MPD argues that the Board should extend the public policy behind federal evidentiary rules barring admissibility of evidence of subsequent remedial measures to an arbitrator’s consideration of subsequent discipline of comparison employees. MPD’s argument fails on several grounds. First, an arbitration proceeding is generally not bound by the Federal Rules of Evidence, and there is no evidence in record that the Parties were bound by these Rules. Second, the *Manhke* case that MPD cites in its Request does not support MPD’s proposition. The court in *Mahnke* stated:

The Court cautions, however, that Rule 407 [Subsequent Remedial Measures] “does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as ... impeachment.” FED.R.EVID. 407. The purpose of Rule 407 is to encourage remedial measures, but it is not to be used by a party to disavow its own findings or take positions inconsistent with its past representations.

821 F.Supp.2d at 152. In the present case, the information concerning subsequently disciplined employees was not used by the Arbitrator to determine negligence or culpability of the Grievant’s actions. The Arbitrator considered the evidence for another purpose, which was to determine a reasonable penalty. Consequently, the Board finds that MPD has not asserted a

public policy exception to the Arbitrator's use of evidence of subsequent disciplinary actions other employees for the purposes of penalty determination.

Further, MPD argues the Arbitration Award is contrary to law and public policy because the Arbitrator applied subsequent administrative adjudications retroactively. (Request at 12). MPD argues that the "Panel's decisions are arguably administrative adjudications with precedential effect, those decisions do not apply retroactively to closed cases." (Request at 13). MPD has not stated any particular statute, regulation, departmental policy, or contractual provision, the interpretation of which would bar the Arbitrator's consideration of employees, who were disciplined after the Grievant's termination, as persuasive information for *Douglas* factor analysis. The Board finds that MPD fails to meet its burden that the Award is contrary to public policy.

III. Conclusion

The Board has reviewed the Arbitrator's conclusions, the pleadings of the parties and applicable law, and concludes that the Award on its face is not contrary to law and public policy and therefore we lack the authority to grant the requested review.

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.

February 21, 2013

CERTIFICATE OF SERVICE

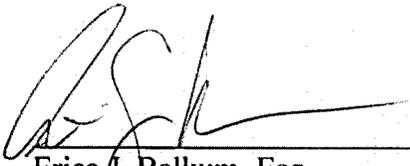
This is to certify that the attached Decision and Order in PERB Case 12-A-04 was transmitted via U.S. Mail to the following parties on February 22, 2013.

Marc L. Wilhite, Esq.
Pressler & Sentfle, P.C.
1432 K. Street, N.W.
Washington, D.C. 20005

U.S. MAIL

Shermineh C. Jones, Esq.
Assistant Attorney General
441 4th Street, N.W.
Suite 1180-N
Washington, D.C. 20001

U.S. MAIL



Erica J. Balkum, Esq.
Attorney-Advisor
Public Employee Relations Board
1100 4th Street, SW
Suite E630
Washington, DC 20024
Telephone: (202) 727-1822
Facsimile: (202) 727-9116