No. 24-CV-573

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,
APPELLANT,

V.

DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD, *et al.*,
APPELLEES.

ON APPEAL FROM AN ORDER OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT

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STATEMENT OF THE ISSUES

While off duty in Maryland, then-District of Columbia Metropolitan Police Department ("MPD") Officer Michael Thomas shot Julio Lemus twice with his service pistol. Lemus nearly died, yet he had committed no crime and had no weapon. Concluding that the shooting was criminal and violated its use-of-force policies, MPD terminated Thomas. The police union appealed to an arbitrator, who agreed that Thomas's actions were illegal, life-threatening, and contrary to MPD policy, but ordered MPD to reinstate Thomas to the force, reducing his penalty to a mere 45-day suspension. The issues on appeal are:

1. Whether the arbitration award should be set aside as contrary to the explicit, well-defined, and dominant public policy against the criminal use of deadly force by police officers.

2. Alternatively, whether the arbitration award must be set aside where the arbitrator clearly erred when applying *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), and imposing an arbitrary penalty.

STATEMENT OF THE CASE

After notice and a hearing, MPD removed Thomas effective March 11, 2011. Joint Appendix ("JA") 972-77. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") demanded arbitration on his behalf. JA 993. In November 2017, an arbitrator upheld the disciplinary charges but reduced the

penalty. JA 19-28. MPD petitioned PERB for review. JA 1-18. In May 2018, PERB confirmed the arbitrator's award. JA 1155-59. The Superior Court then affirmed in October 2019, JA 1286-97, and MPD appealed. This Court reversed and remanded. *MPD v. PERB*, 282 A.3d 598, 605-06 (D.C. 2022) ("*Thomas I*"). In March 2023, PERB issued its order on remand, again upholding the arbitrator's award. JA 1161-72. The Superior Court affirmed that decision on May 24, 2024, JA 1311-1326, and MPD timely appealed on June 21, 2024. Clerk's Index 2.

STATEMENT OF FACTS

1. While Off Duty And Acting Without Police Power, Thomas Twice Shoots Lemus, Who Had Committed No Crime And Had No Weapon.

Two years later after his appointment to MPD, in the early morning hours of September 13, 2009, Thomas was with his girlfriend, MPD Officer Hope Mathis, in a Hyattsville, Maryland, home. JA 140, 700-01, 775-76, 801. They were both off duty and outside MPD's jurisdiction. JA 140, 257, 584, 775, 818-19.

Around 5:00 a.m., the key fob alarm for Thomas's car went off. JA 140, 251, 405, 444, 466, 483-84, 777, 802. Thomas looked outside and saw a figure near the front of his car. JA 140, 777-78, 802. Thomas told Mathis that someone was "messing with" his car. JA 140, 236, 245-46, 248, 703, 720, 778, 803-04. He then retrieved his service pistol and, with Mathis, stepped onto the front porch. JA 141, 176-77, 179-82, 236, 246, 248, 703-05, 709, 720-21, 778-79, 782.

Neither Thomas nor Mathis called 911 before they left the house. JA 721,

762, 804, 806-08, 818. This violated their training. JA 537, 540, 761-63. In September 2007, MPD had issued a bulletin emphasizing that, for non-violent property offenses, the "prudent" course was to call the police before acting. JA 151-52, 559,860, 863-65. Thomas agreed that he was engaging Lemus over merely an *attempted* non-violent property crime. JA 655, 793-94, 827-30.

From the porch, Thomas and Mathis saw Lemus standing near the front of Thomas's car. JA 236, 248, 251, 405, 703-04, 780. Lemus, who was 20 years old, had been walking home from a nearby residence. JA 396-97, 417, 425-26, 517. He had gone there the night before and consumed many alcoholic beverages. JA 144, 149, 397, 423-25, 436. On his way home, he stopped near Thomas's car to urinate. JA 398, 444. He had no weapon or tool. JA 133, 398-99, 454.

When Thomas and Mathis left the house, Lemus's back was to them and neither could see what he was doing, nor could they tell whether he was committing a crime or had a weapon. JA 249, 251, 406, 704, 722, 750-51, 756, 780, 803. While on the porch, Thomas identified himself as a police officer to scare Lemus away and instructed Lemus to show his hands, although Thomas knew he had no police authority while in Maryland. JA 140, 236, 248-49, 283, 687, 703-04, 748-49, 779, 818-19, 823-27. When Lemus did not run away, Thomas leapt from the porch and ran toward the back of the car to place himself within 10 to 15 feet of Lemus. JA 140, 246, 250, 252-53, 284, 466, 526, 546, 704, 722, 749, 783, 808-09, 813, 815.

Mathis remained on the porch. JA 236, 246, 704.

When Thomas reached the car, Lemus allegedly turned and stepped toward him. JA 236, 246, 252, 704-05, 750. Thomas drew his service pistol and held it in a "tuck" position, close to his chest and pointed toward the ground, although at this point, he had no reason to believe that Lemus had a weapon. JA 254, 705-06, 785, 812-13. Thomas again identified himself as police officer and instructed Lemus not to move but to show his hands. JA 236, 248-49, 254, 283, 705-06. According to Thomas and Mathis, Lemus did not follow Thomas's commands and reached toward the pocket of his sweatshirt. JA 142, 236, 255, 283, 706-07, 710, 722, 758, 764.

Unsure, but purportedly assuming Lemus had a weapon, Mathis ran into the house to call 911. JA 236, 246, 255, 706-07, 710-11, 722, 758, 764. According to Mathis, ten seconds after she entered the house and before she made the 911 call, she heard two consecutive gunshots. JA 236, 246, 254-56, 707, 722, 724, 728, 737, 759. Despite her assumption that Lemus was armed, and thus without knowing whether Lemus had injured Thomas, it was 87 seconds into the 911 call before Mathis confirmed, and then advised the dispatcher, that there had been a shooting. JA 256, 723-25, 728-29, 733, 760, 765.

According to Thomas, he fired two shots at Lemus when Lemus approached aggressively, reached into his pocket, and would not show his hands. JA 142, 283-84, 787-88, 790, 812, 814. Thomas said that he was afraid of what Lemus might

have—including possibly *a shotgun*—and what he might do, believing his life was in danger. JA 285, 789, 816-17. Thomas also claimed to fear for the safety of others in the home. JA 789, 807, 818. But he never saw Lemus with a weapon, and Mathis never felt a need to arm herself. JA 246, 285, 752-53, 766, 805-06.

Contrary to Thomas's account, Lemus later testified that while facing the car and trying to urinate, he heard Thomas charging toward him. JA 398-99, 405-07, 427, 439, 441. Thomas wore plain clothes and did not identify himself as a police officer. JA 399, 407, 427-28, 439, 441, 876. Lemus turned and raised his hands in a defensive posture. JA 399, 407, 429-30, 438-41. In response, Thomas pulled out his gun, pointed it at Lemus, and moved toward him. JA 399, 407-08, 429-30, 432, 440-41. Fearing that Thomas would shoot him, and without approaching Thomas or reaching into his pocket, Lemus tried to run away, at which point Thomas shot him twice in his left side as he turned to leave. JA 399-400, 408, 411, 414, 416, 430. One round hit Lemus's abdomen and the other his leg. JA 225-28, 412-14, 790.

2. The Hyattsville City Police Department Investigation Concludes With A Decision Not To Charge Either Thomas Or Lemus.

Hyattsville police officers responded to the shooting. JA 133, 495-96, 867-68. They found Lemus lying on the ground near the front of Thomas's car. JA 525. They detected a strong smell of alcohol coming from him and noted that his eyes were blood-shot and his speech slurred. JA 133. No damage to Thomas's car was evident before the shooting or discovered during the investigation. JA 793-94. And

there was no evidence that Lemus had the means to break into the car. JA 454.

Lemus remained in the hospital for nearly three months and underwent six surgeries. JA 410-11, 433. A year later, he was still unable to work. JA 396.

Two days after the shooting, a Hyattsville officer interviewed Lemus in the hospital. JA 144-45, 448, 453, 470. Lemus was heavily medicated for pain. JA 433, 442, 470, 472. Lemus believed he had been the victim of a robbery. JA 470-72, 486. When the officer asked if he recalled the encounter with Thomas, Lemus answered "no." JA 145, 471-72, 481, 484-86. Lemus did so because he did not want to make a statement before speaking with an attorney. JA 409-10, 433-34, 437.

At the end of the Hyattsville police investigation, the Prince George's County State's Attorney's Office declined to prosecute either Thomas or Lemus. JA 229, 235. The office did not charge Thomas because it did not believe it could prevail at trial given Lemus's statement that he could not recall what happened. JA 229, 451, 458-60, 475. Prosecutors did not charge Lemus because there was no evidence that he had committed a crime. JA 235, 453-54, 468.

3. MPD Terminates Thomas After Finding That He Had Engaged In Criminal Misconduct And Violated Its Use-Of-Force Directives.

A. MPD's internal affairs supervisors find the shooting of Lemus unjustified, and the Use of Force Review Board concurs.

An MPD internal affairs detective investigated the shooting. JA 336-39. Although the detective concluded that Thomas, acting as a "citizen," was justified

in shooting Lemus, the detective's supervisor Lieutenant Guy Middleton disagreed. JA 206-12, 520, 526, 533, 571. Middleton could not find the shooting proper simply because Thomas said that Lemus reached into his pocket and that Thomas feared for his life. JA 209, 566, 573-74, 576-77. Instead, Middleton believed that Thomas acted unreasonably at the outset by approaching Lemus in response to a possible property crime and by shooting when he had no reason to believe that Lemus had a weapon. JA 545-48, 575, 577, 583-84. Middleton's supervisors concurred. JA 114, 389, 541, 592-93. They referred the matter to the Use of Force Review Board ("UFRB") for a formal determination. JA 206-12, 388-89, 533, 540-42, 836.

The UFRB concluded that Thomas's actions were unjustified and noncompliant with departmental use-of-force policies. JA 191-94, 542-43, 838. It explained that under the totality of the circumstances Thomas's actions were unreasonable considering that he was off duty and outside MPD's jurisdiction, failed to notify local law enforcement before approaching Lemus, and needlessly placed himself close to Lemus. JA 191-94, 835-44. Lemus had also committed no crime and displayed no weapon, and his furtive gestures posed no threat that warranted Thomas shooting him multiple times. JA 191-94, 835-44. Based on its findings, the UFRB recommended that the matter be referred to the Departmental Disciplinary Review Office for disciplinary action. JA 194, 543.

B. MPD proposes to terminate Thomas for criminal misconduct and violations of MPD's use-of-force directives.

After receiving UFRB's recommendation, the Director of MPD's Disciplinary Review Branch issued a Notice of Proposed Adverse Action charging Thomas with two counts of misconduct and proposing his termination. JA 198-203. The first charge asserted that Thomas had violated MPD General Orders by committing an act that constituted a crime. JA 198. The Director found that Thomas had violated Maryland law by recklessly creating a substantial risk of death or serious injury to Lemus. JA 198. The second charge asserted a violation of MPD's General Orders for the use of force. JA 198. The Director determined that Thomas discharged his firearm needlessly. JA 198-99.

Having found Thomas guilty of this misconduct, the Director weighed the 12 factors identified in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), for assessing the appropriate disciplinary penalty and concluded that termination on each charge was warranted. JA 199-202. In particular, the notice advised Thomas of the Director's determination that "[t]he proposed penalty [wa]s consistent with the penalty imposed against other members for like or similar misconduct." JA 20, 200. The notice also informed Thomas of his right to request a review hearing before the Adverse Action Panel, which Thomas did. JA 52, 201.

C. The Adverse Action Panel finds Thomas guilty of both charges and determines that termination is the appropriate penalty for each charge after weighing the *Douglas* factors.

At a two-day hearing in late 2010, the Adverse Action Panel found Thomas guilty of both charges after hearing from 12 witnesses, including Lemus and Thomas, and admitting many exhibits. JA 301-881. It determined that Thomas acted "without legal authority" and found "no indication that Mr. Lemus was involved in illegal activity." JA 949-50. The Panel concluded that Thomas violated Maryland Code, Criminal Law § 3-204(a), which makes it a crime to "recklessly . . . engage in conduct that created a substantial risk of death or serious physical injury to another." JA 951. And it found that Thomas acted recklessly when he failed to contact local law enforcement; left the safety of his home; and confronted Lemus where Lemus had committed no crime, had no weapon, and had no obligation to obey his commands. JA 951. The Panel also found that Thomas violated MPD use-of-force directives because he "had no reason to discharge his firearm." JA 951. As the Panel stated, "Thomas shot an [unarmed] individual, who was not in violation of any law," and such deadly force was not "objectively reasonable." JA 951.

After finding Thomas guilty of the two charges, the Panel determined that the proposed penalty of termination was appropriate by weighing the *Douglas* factors. JA 952-55. *First*, the Panel found that the nature and seriousness of the offense was an aggravating factor, concluding that Thomas's "clearly inappropriate" and

"particularly egregious" actions raised serious concerns about his integrity and judgment as a law enforcement officer. JA 952. *Second*, the Panel concluded that Thomas's job level and type of employment was also an aggravating factor because, as a uniformed police officer, he was expected to use his "specialized training in real-life situations, even while off-duty." JA 952. *Third*, the Panel considered Thomas's disciplinary history to be a neutral factor. JA 952. It found that although there was no evidence of past discipline, the extent of his misconduct here offset that record. JA 952. *Fourth*, the Panel found that Thomas's work record was an aggravating factor. JA 952-53. While there were no issues with his day-to-day performance, the panel concluded that his clear violation of policies and procedures here raised serious concerns about his judgment. JA 952-53. *Fifth*, the Panel concluded that the effect of the misconduct on Thomas's ability to perform at a satisfactory level with supervisory confidence was another aggravating factor. JA 953. The Panel explained that he could be expected to face similar situations in the future but his failure to maintain his composure with Lemus had eroded MPD's confidence in his ability adequately to perform his job. JA 953.

Sixth, the Panel found, without citing specific cases, that the proposed penalty was consistent with that imposed on others for similar misconduct. JA 953. As to the *seventh* factor, the Panel found that termination matched the MPD's Table of Penalties, and thus this factor was also aggravating. JA 953. In fact, removal was

the *only* table penalty available for Thomas's violation of Maryland law. *See* JA 953. *Eighth*, the Panel concluded that the effect of the misconduct on MPD's reputation was an aggravating factor. JA 953. It noted that, although the media had not reported the incident, authorities had documented the events in records outside the agency, adversely affecting MPD's reputation. JA 953. *Ninth*, the Panel found, when considering whether Thomas was on notice of the rules he violated, that his failure to adhere to agency rules and polices mandated by the Chief of Police was an aggravating factor. JA 954. *Tenth*, the Panel found that Thomas lacked any potential for rehabilitation because he had made no effort to avoid a confrontation with Lemus. JA 954. In the Panel's view, this was an aggravating factor. JA 954. *Eleventh*, the Panel found no evidence that would mitigate Thomas's misconduct. JA 954. *Twelfth*, the Panel found that because of the seriousness of the misconduct, termination was the only effective sanction and deterrent. JA 954.

After "carefully consider[ing]" the *Douglas* factors, the Panel concluded that they were aggravating on balance and supported termination on each charge. JA 955. The Director of MPD's Human Resource Management Division accepted the Panel's recommendation and issued Thomas a final termination notice. JA 963-64.

D. Chief Lanier denies Thomas's appeal.

Thomas appealed his termination to then-Chief of Police Cathy Lanier. JA 978-85. He asserted for the first time that the Panel "clearly failed to look at other

adverse action cases for purposes of comparative discipline [under *Douglas* factor 6] when crafting the penalty because termination is not what has previously been recommended under similar circumstances." JA 984-85. Thomas provided one example in which Officer Edward Ford's 2007 termination was reduced to a 45-day suspension after he shot and killed an unarmed suspect who was attacking him while off duty. JA 987-92. No one claimed that Ford's conduct was criminal. JA 988-89.

Chief Lanier denied Thomas's appeal. JA 957-60. She rejected Thomas's claim that "a review of the Panel's analysis under the *Douglas* Factors demonstrates that termination is an inappropriate penalty." JA 958. In finding that termination was appropriate—and that the shooting reflected "incredibly poor judgment"—she noted that some factors in MPD's calculus carried more weight than others, including the severity of the misconduct and other aggravating factors. JA 959. FOP then invoked arbitration under the collective bargaining agreement. JA 993.

4. FOP's Arbitration Request.

FOP asked the arbitrator to consider two issues: whether "the evidence presented by [MPD] was sufficient to support the alleged charges of commission of a crime and unreasonable use of force" and whether "termination [wa]s an appropriate remedy." JA 995. As to the penalty, FOP urged the arbitrator to look to external law and apply *Douglas*. JA 1028-30, 1075-79.

In *Douglas*, the federal Merit Systems Protection Board ("MSPB") found that

it had the limited "authority to mitigate penalties when [it] determines that the agency-imposed penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable." 5 M.S.P.R. at 284. In making this assessment, MSPB reviews "the agency's penalty selection to be satisfied (1) that on the charges sustained by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and (2) that the penalty was based on a consideration of the relevant factors and [that] there has [not] been a clear error of judgment." *Id*. at 301 (cleaned up). Under *Douglas*, the agency must balance the 12 non-exhaustive factors cited above, and the MSPB then ensures that the agency "did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness." *Id.* at 306. "Only if [MSPB] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for [it] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." *Id*.

In making its *Douglas* argument, the FOP urged the arbitrator "to determine whether the agency properly weighed the relevant [*Douglas*] factors to see if the decision was within reasonable limits." JA 1029. And it emphasized that "[t]he Arbitrator may ultimately determine that the Panel's weighing of the *Douglas* Factors was improper" and that MPD's penalty decision was "arbitrary and

capricious." JA 1039, 1077. To this end, FOP urged the arbitrator to undertake "an independent review of the *Douglas* factors." JA 1079.

FOP further argued in its opening brief before the arbitrator that the Panel had been required under *Douglas* factor 6 to review the discipline awarded in similar cases. JA 1033-34. According to FOP, the Panel had not done so because it simply accepted the Director's assertion that his recommended discipline was comparable. JA 1033-34. In its reply, FOP elaborated, urging the arbitrator—over MPD's objection—to find under *Douglas* that the Panel had to identify the comparable cases on which it relied. JA 1081-82. And it asked the arbitrator to consider two new cases where an arbitrator reduced the penalties for officers. JA 1088-1110.

5. The Arbitrator Upholds MPD's Finding Of Guilt But Reduces The Penalty To An Unconditional 45-Day Suspension.

A. The arbitrator finds sufficient evidence that the shooting was criminal and violated MPD's use-of-force policies.

The arbitrator found sufficient evidence supporting MPD's finding of guilt on both charges. JA 24. He first found that Thomas was guilty of criminal misconduct, concluding that he violated Maryland's reckless endangerment statute with life-threatening consequences.

> Lemus was not breaking into the car, damaging the car or committing any crime. [Thomas] did not have the legal authority in another jurisdiction to give police orders to an individual who was not committing a crime. [Thomas] put himself and [Lemus] in harm[']s way by walking off the porch with his gun and approaching [Lemus]. This was compounded by his shooting [Lemus], not once but twice

> nearly resulting in his death. I do not find that the [Panel's] decision that [Thomas] was guilty on both charges is in violation of Graham v[.] Connor. It does not require 20/20 hindsight to conclude, as the Adverse Action Panel and the Chief of Police did, that [Thomas's] actions that fateful day were reckless and that, as Police Chief Lanier concluded ". . . [Thomas] exercised incredibly poor judgement."
>
> I find that [Thomas] was guilty of Charge Number 1 by violating the Maryland statute which defines reckless endangerment and ". . . did recklessly engage in conduct that created a substantial risk of death or serious injury."

JA 24.

Likewise, he found Thomas guilty of disobeying MPD's use-of-force directives by using deadly force where it was not objectively reasonable.

> I find [Thomas] guilty of charge Number 2 ". . . failure to obey orders or directives by the Chief of Police . . . [.]" My conclusion is based on the rules relied on by the trial board[.] "Members of the Metropolitan Police Department may use deadly force in the performance of police duties (1) When it is necessary and objectively reasonable . . [.]" and ". . [.] No member shall draw and point a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that [the situation may escalate to] the point where lethal force would be permitted . . . [.]" I agree with the Panel that [Thomas] shot an individual, who was not in violation of any law and was not armed. The actions of [Thomas], using deadly force[,] were not "objectionably reasonable" provided the facts and circumstance present . . . [.]

JA 24.

B. Assessing MPD's application of the *Douglas* factors, the arbitrator overturns the termination.

In keeping with FOP's contention that termination was not appropriate "because the [P]anel did not properly weigh the factors required by" *Douglas*, JA 23, the arbitrator began by citing *Douglas*'s mandate that the MSPB must weigh 12

factors to determine whether an agency's penalty is reasonable and "assure that the agency did conscientiously consider the relevant factors and did strike a [responsible] balance with[in] tolerable limits of reasonableness." JA 24-25 (quoting *Douglas*, 5 M.S.P.R. at 306). The arbitrator agreed that *Douglas* factors 1 (severity of offense), 2 (type of employment), 4 (work record), 8 (agency reputation), and 9 (notice of rules) were aggravating; factor 3 (disciplinary history) was neutral; termination was required by the table of penalties under factor 7; and there was "no proof" of mitigation under factor 11. JA 25-26.

On *Douglas* factor 6, the arbitrator gave "great weight" to the "'consistency of the penalty with those imposed upon other employees for the same or similar offenses.'" JA 27 (quoting *Douglas*, 5 M.S.P.R. at 305). But as FOP urged, he faulted the Panel because it "cited no other disciplinary decisions in reaching its conclusion" that termination matched the penalty imposed in other cases. JA 26-27.

Although the arbitrator noted that three disciplinary cases were part of the arbitration record, JA 26, he found each to be distinguishable.

> In the Ford case Officer Ford's termination for shooting and killing someone who attacked him after he identified himself as a Police Officer was converted by the MPD to a suspension of forty-five days. FOP exhibit 5[, the Allen and Taylor arbitration award,] did not involve a shooting so is not ". . . like or similar misconduct . . . [.]" The October 2017 arbitration decision[, the Rhinehart arbitration award,] also did not involve a shooting or circumstances anything like the Thomas facts.

JA 27.

The arbitrator also questioned the Panel's conclusions on *Douglas* factors 10 and 12.

> The conclusion by the Panel in Douglas Factor 12 that no other sanction could ". . . deter such conduct in the future by the employee or others . . ." *is questionable*. For example, a long suspension without pay and mandatory retraining of Thomas and, if necessary, counseling and educational meetings with officers with specific disciplinary warnings of severe discipline *might* well have deterred similar conduct of Thomas and others. Such steps *might* also have resulted in Officer Thomas' rehabilitation in satisfaction of Factor number 10.

JA 27 (emphasis added).

From this, the arbitrator concluded that the Panel "did not reach conclusions on Douglas Factors [6], 10 and 12" within "'tolerable limits of reasonableness.'" JA 27 (quoting *Douglas*, 5 M.S.P.R. at 302, 306). However, the arbitrator did not consider, as *Douglas* requires, whether the Panel struck an appropriate balance among all 12 factors "within tolerable limits of reasonableness," nor did he weigh the *Douglas* factors himself when assessing the appropriate penalty. JA 27-28; *cf. Douglas*, 5 M.S.P.R. at 306. Instead, he simply imposed a 45-day suspension because it was "the same as Officer Ford received in *as close to similar misconduct as is in evidence*." JA 28 (emphasis added).

6. PERB Rejects MPD's Appeal, And The Superior Court Affirms.

In its appeal to PERB, MPD argued that the arbitrator's award "on its face [wa]s contrary to law and public policy," D.C. Code § 1-605.02(6), in four key respects. *First*, MPD asserted that, under *Douglas* factor 6, the Panel had no duty to

identify similarly situated comparators unless Thomas alleged that MPD treated similarly situated employees differently, which he never did in the proceedings before the Panel. JA 10. *Second*, MPD asserted that, while the arbitrator disagreed with MPD's assessment of 3 of the 12 *Douglas* factors, he critically failed to find that the balance MPD struck among all 12 factors—many of which he acknowledged were both "significant" and "aggravating"—was not "within tolerable limits of reasonableness." JA 11-12, 25-26. *Third*, MPD challenged the arbitrator's decision to impose a 45-day suspension based *solely* on the penalty imposed in a distinguishable case, rather than considerations relevant to Thomas. JA 12-13. *Fourth*, MPD argued that the arbitrator's decision forcing MPD to reinstate an officer whom the arbitrator agreed was guilty of life-threatening criminal misconduct for unjustifiably shooting an unarmed, non-threatening individual, contravened a dominant public policy. JA 13-17. In confirming the arbitration award, PERB rejected MPD's contentions as "mere disagreement" with the arbitrator's decision. JA 1158; *see* JA 1159.

7. This Court Reverses And Remands.

On appeal, MPD advanced the same four arguments that it had before PERB. *Thomas I*, 282 A.3d at 604, 606. On whether the arbitrator's application of *Douglas* was contrary to law, this Court held that PERB had "addressed *one aspect* of MPD's argument," concluding that "that the arbitrator could permissibly reach his own

decision about the appropriate sanction, rather than being required to defer to the sanction picked by MPD." *Id.* at 602, 604-05 (emphasis added). Notably, however, it was "not at all clear to [the Court] whether the arbitrator understood himself to be exercising general authority to modify the sanction . . . or instead understood himself to be conducting the more limited review authorized under *Douglas*." *Id*. at 605. Thus, the Court found that "issue would warrant clarification" if the "matter [wa]s returned to the arbitrator." *Id*.

As for MPD's remaining arguments that the arbitration award was contrary to law, the Court held that a remand was necessary because "PERB did not specifically address those arguments." *Id*. Finally, the Court rejected PERB's contention at oral argument "that an arbitrator's determination as to the appropriate sanction for employee misconduct could never be on its face contrary to law." *Id*. Instead, "[i]n sufficiently extreme circumstances, an arbitrator's selection of penalty could be so arbitrary and capricious as to be on its face contrary to law." *Id*.

As for MPD's contention that reinstating Thomas was contrary to public policy, it was undisputed that there is a dominant public policy against the criminal use of deadly force by police. *Id*. at 606. As to whether reinstatement would violate this policy absent positive law precluding Thomas's reappointment, the Court concluded that courts were split on the issue. *Id*. (collecting cases). But the Court could not resolve the conflict in this case because PERB failed to "adequately

explain[ ] its decision not to set aside the arbitral award as against public policy." *Id*. Thus, the Court concluded that a remand to PERB on this issue was also necessary. *Id.*

8. PERB Issues Its Order On Remand Again Upholding The Arbitration Award, And The Superior Court Affirms.

PERB issued its decision on remand in March 2023 rejecting each of MPD's four arguments, but without soliciting any input from the parties. JA 1161. PERB *first* rejected MPD's contention that the arbitrator erroneously placed the burden on MPD to show that other employees had been terminated for similar misconduct. JA 1166-67. Without mentioning the authority that MPD cited in support, PERB concluded that "[t]he record does not reflect that the Arbitrator imposed an additional burden of proof on MPD outside of exercising his equitable powers to review the Panel's application of the *Douglas* factors." JA 1166.

Second, PERB declined to consider MPD's argument that the arbitrator erred by setting aside MPD's selected sanction under *Douglas*. JA 1164-65. Although this Court held that PERB addressed "one aspect" of MPD's contention—whether the arbitrator was required to defer to MPD's penalty—in PERB's view the Court had affirmed its analysis in its entirety. JA 1164. Thus, PERB did not address whether the arbitrator understood himself to be conducting a limited review under *Douglas*, had erred in applying *Douglas*, or whether a remand to the arbitrator was needed for clarification. JA 1164.

Third, PERB rejected MPD's contention that the arbitrator erred by imposing a 45-day suspension based on a case that was not comparable. JA 1165. PERB concluded that "MPD d[id] not present any applicable law violated by the Arbitrator's consideration of the penalty in *Ford*." JA 1165. In PERB's view "[t]he essence of MPD's argument is its disagreement with the Arbitrator's interpretation of *Ford*, upon which the Arbitrator based his findings and conclusion," not the arbitrariness of his chosen penalty. JA 1165.

Fourth, PERB rejected MPD's argument that Thomas's reinstatement would violate the public policy against the criminal use of deadly force by police officers. JA 1167-69. PERB held that, in the absence of an explicit law precluding reinstatement, it conducts a "particularly narrow," "fact-specific inquiry" into

> whether there is a longstanding practice of requiring the termination of similarly situated employees, the severity of the employee misconduct, the potential for employee rehabilitation, the employee's prior history of misconduct, the likelihood of repeat offense, the employee's amenability to discipline, whether an arbitral award reinstating an employee is conditioned on other forms of discipline, and other fact-specific mitigating factors.

JA 1168-69.

In weighing just two of these factors, PERB found, contrary to the Adverse Action Panel's determination, that "MPD does not assert that it has removed other police officers for similar offenses." JA 1169. Instead, "MPD reinstated the terminated officer in *Ford*, a case in which the Arbitrator found the officer's

misconduct similar to that of the Grievant." JA 1169. PERB also found that "[t]he Arbitrator further noted that there was a good chance of the Grievant's rehabilitation in this case." JA 1169. PERB concluded that "on the facts of the case," MPD had not shown that the arbitrator's award was contrary to public policy. JA 1169. On review, the Superior Court affirmed, parroting PERB's reasoning. JA 1311-26.

STANDARD OF REVIEW

Although MPD's appeal is from a Superior Court order, the Court reviews PERB's decision as if it had come to the Court directly. *Teamsters Loc. Union 1714 v. PERB*, 579 A.2d 706, 709 (D.C. 1990). Whether an arbitration award violates public policy is a legal question this Court reviews de novo. *Fairman v. District of Columbia*, 934 A.2d 438, 442, 445 (D.C. 2007). PERB's construction of the statute it administers is generally entitled to deference, *Genstar Stone Prod. Co. v. Dep't of Emp. Servs.*, 777 A.2d 270, 273 (D.C. 2001), but "such deference presupposes that some expertise beyond the [C]ourt's own is needed" to resolve the question, *U.S. Parole Comm'n v. Noble*, 693 A.2d 1084, 1096 (D.C. 1997) (subsequent history omitted). The Comprehensive Merit Personnel Act ("CMPA") formerly directed the Court to determine if a PERB decision "is supported by substantial evidence and not clearly erroneous as a matter of law." *PERB v. Washington Tchrs. Union Loc. 6*, 556 A.2d 206, 207 (D.C. 1989) (quoting D.C. Code § 1-605.2(12) (1987)). The Council removed this language, Public Employee Relations Board Amendment Act

of 1998, D.C. Law 12-151, § 2(a), 45 D.C. Reg. 4043, 4043 (1998), which in any event applied only to PERB factual findings. *Teamsters*, 579 A.2d at 709 & n.3.

SUMMARY OF ARGUMENT

1. The Court should vacate the award reinstating Thomas as contrary to public policy. Whether an arbitration award violates public policy is a legal question—extending far beyond the CMPA and the parties to this case—that this Court reviews de novo without deference to PERB. Here, it is undisputed that there is an explicit, well-defined, and dominant public policy against the criminal use of deadly force by police officers. Thomas's reinstatement violates this public policy.

First, the relevant statutes and regulations indicate that termination is the only appropriate penalty. As found by the arbitrator, Thomas engaged in a felonious assault under District law. Thomas's reinstatement would undermine the public policy, embodied in a longstanding regulation, categorically excluding individuals who have engaged in such conduct from becoming MPD officers. Similarly, reinstatement would offend a District statute barring the appointment of those who have engaged in serious misconduct. It would also conflict with the District's duty under federal law to take appropriate disciplinary action in excessive force cases.

Other public policy considerations compel termination. Reinstating Thomas would compromise public safety and the public trust by eroding confidence in policing. The egregiousness of Thomas's misconduct cannot be ignored.

Aggravating factors include the severity of the harm Thomas inflicted on Lemus; the fact that his misconduct struck at the core of the public policy against the unlawful use of deadly police force; and the unacceptable message that reinstatement would send to the public and other MPD officers. As the arbitrator agreed, there are no mitigating circumstances here. And based on the arbitrator's findings, there is a substantial risk that Thomas will reoffend.

This case is like many others throughout the country overturning arbitration awards ordering the reinstatement of law enforcement officers who have engaged in criminal assaults. These cases all recognize that reinstatement is incompatible with the public policy against unlawful use of force by police officers.

PERB's flawed analysis gives the Court no reason to reach a contrary conclusion. In its unduly narrow and superficial review PERB failed to identify all the relevant considerations and even then failed to consider all those that it thought mattered. PERB also misapprehended the content of the arbitrator's decision.

2. Alternatively, the award should be set aside as being contrary to law. There are three legal errors that are plain on the face of the arbitration award that PERB erroneously failed to correct.

First, the arbitrator was wrong to reject the Panel's finding on *Douglas* factor 6. The Panel was not required to identify comparable cases. That duty arises under *Douglas* only after the employee shows dissimilar treatment—a showing that

Thomas did not even attempt to make.

PERB offered no valid basis for rejecting MPD's challenge. It did not consider whether the arbitrator correctly applied *Douglas*, finding instead that he was exercising his general equitable powers. But this Court held in *Thomas I* that it could not tell whether the arbitrator was conducting a limited review under *Douglas*. Thus, PERB was precluded from ruling that the arbitrator was not applying *Douglas*.

Second, the arbitrator erred in rejecting termination as a penalty based on his determination that the Panel made mistakes in its analysis of three *Douglas* factors. That is not the standard *Douglas* imposes. Even if the agency errs as to some factors, the ultimate question is whether the agency struck a reasonable balance among all 12—a question the arbitrator never asked or answered.

Again, PERB declined to consider whether MPD's understanding of *Douglas* was correct. Instead, it erroneously held that this Court rejected MPD's argument in *Thomas I*. But, as noted, the Court did not reach the question because it could not tell whether the arbitrator believed himself bound by *Douglas*.

Third, the suspension the arbitrator imposed was so arbitrary as to be contrary to law. The arbitrator irrationally ignored the *Douglas* factors and simply imposed the same penalty as Ford. But Ford did not engage in criminal misconduct and there was nothing otherwise similar about his case. This was plainly contrary to the individualized determination *Douglas* demands. Beyond that, the penalty was so

disproportionate to the severity of the misconduct as to be contrary to law on its face. PERB was wrong to hold the MPD was required to point to positive law mandating termination. Instead, on the facts found by the arbitrator, termination was the only appropriate penalty as a matter of law.

ARGUMENT

I. The Arbitrator's Award Must Be Set Aside Because Reinstating Thomas Is Contrary To The Well-Defined And Dominant Public Policy Against The Criminal Use Of Deadly Force By A Police Officer.

A. A court may not uphold an arbitration award that, in its own determination, is contrary to public policy.

"As with any contract, . . . a court may not enforce a collective bargaining agreement that is contrary to public policy." *W.R. Grace & Co. v. Loc. Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983). Thus, if an arbitrator's award violates an explicit public policy, a court has an independent obligation to reject it. *Id.*

"[Q]uestions of public policy are left to the courts, not the arbitrator." *County of De Witt v. AFSCME*, 699 N.E.2d 163, 166 (Ill. App. Ct. 1998); *see Bureau of Special Investigations v. Coal. of Pub. Safety,* 722 N.E.2d 441, 443 (Mass. 2000). This is because deciding whether an award violates public policy "necessarily transcends the interests of the parties to the contract[] and extends to the protection of other stakeholders and the public at large, who may be adversely impacted by the decision to reinstate the employee*." Burr Rd. Operating Co. II v. New England*

Health Care Emps. Union, 114 A.3d 144, 158 (Conn. 2015). Thus, courts determine "de novo the question whether the remedy fashioned by the arbitrator is sufficient to vindicate the public policies at issue." *Id*. at 159; *see City of Chicago v. FOP*, 181 N.E.3d 18, 26 (Ill. 2020); *Phila. Hous. Auth. v. AFSCME*, 52 A.3d 1117, 1121 (Pa. 2012).

This judicially created public policy exception exists independent of any statutory provision. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) ("A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy."). It applies with full force in the context of the Federal Arbitration Act even though that act does not contain an express public policy exception. *See* 9 U.S.C. § 10(a); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007); *Zimmer Biomet Holdings, Inc. v. Insall*, 108 F.4th 512, 516 (7th Cir. 2024). Similarly, it applies under the District's uniform arbitration acts although they do not have express public policy exceptions either. *See Fairman*, 934 A.2d at 442-43; *Lopata v. Coyne,* 735 A.2d 931, 938 (D.C.1999); *A1 Team USA Holdings, LLC v. Bingham McCutchen LLP*, 998 A.2d 320, 323-27 & n.7 (D.C. 2010).

In contrast to those arbitration acts, the CMPA has an express public policy

exception to the enforcement of arbitration awards involving public employees, requiring that an award be set aside if it is "on its face is contrary to law and public policy." D.C. Code § 1-605.02(6); *see PERB v. FOP*, 987 A.2d 1205, 1208 (D.C. 2010). This only enhances the Court's role in reviewing such awards on public policy grounds. Although PERB makes the initial public policy determination, any deference to PERB turns in part on "the degree to which the agency's administrative experience and expertise have contributed to the process." *Genstar Stone*, 777 A.2d at 273; *see United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). And "when the agency's decision rests on a question of law," as here, the Court is "'presumed to have the greater expertise.'" *Nunnally v. MPD*, 80 A.3d 1004, 1010 (D.C. 2013) (quoting *WMATA v. D.C. Dep't of Emp't Servs.,* 683 A.2d 470, 472 (D.C. 1996)).

This Court possesses the greater expertise in deciding whether an arbitration award violates public policy. Only the Court has the breadth of legal knowledge to recognize the public policy of the District, as established by the entirety of statutory and regulatory law and judicial precedent. PERB, like the arbitrator, also lacks any specialized insight into the impact of the award on the full spectrum of stakeholders. Thus, no special deference is owed to PERB's determination. *See Oubre v. D.C. Dep't of Emp. Servs.*, 630 A.2d 699, 702 (D.C. 1993). This is especially true where the Council has not comprehensively and exclusively spelled out the public policy at issue within the CMPA itself. *See Teamsters*, 554 A.2d at 322-23 (affording

PERB deference where "the only public policy involved [wa]s the policy established by the Council and found in the CMPA itself"); *D.C. Fire & Emergency Med. Servs. Dep't v. PERB*, 105 A.3d 992, 996 (D.C. 2014) (declining to defer to PERB "in interpreting statutes other than the CMPA"). Instead, "when public policy is at issue, it is the [C]ourt's responsibility to protect the public interest at stake." *AFSCME v. Dep't of Cent. Mgmt. Servs.*, 671 N.E.2d 668, 685 (Ill. 1996).

B. There is an explicit, well-defined, and dominant public policy against police officers' criminal use of deadly force.

Whether an arbitration award should be set aside as being contrary to law or public policy involves two steps: a court must first identify a public policy that is "well defined and dominant," *PERB*, 987 A.2d at 1208, and then find that the award itself violates this public policy, *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62-63 (2000). Under the first step, whether a public policy is "well defined and dominant" "is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest." *PERB*, 987 A.2d at 1208 (quoting *MPD v. PERB*, 901 A.2d 784, 789 (D.C. 2006)).

Here, PERB and FOP were correct to concede in *Thomas I* that there is an explicit, dominant, and well-defined public policy against the criminal use of deadly force by the police. *Thomas I*, 282 A.3d at 606. This public policy is explicitly found in the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395-96 (1989). "The policy is also dominant." *City of Seattle v. Seattle Police Officers' Guild*, 484

P.3d 485, 496 (Wash. Ct. App. 2021). This is underscored by the District's decision to criminalize the unreasonable use of force by police officers. D.C. Code § 5-123.02 ("Any officer who uses unnecessary and wanton severity in arresting or imprisoning any person shall be deemed guilty of assault and battery."); 6-A DCMR § 207.10 (making clear that if a police officer unjustifiably "shoot[s] at, wound[s], or kill[s] another, he or she would be guilty not only of violating the law, but also of violating his or her oath of office"). And the policy against excessive force is well-defined. *City of Boston v. Boston Police Patrolmen's Ass'n*, 78 N.E.3d 66, 74 (Mass. 2017); *see City of Springfield v. Springfield Police Benevolent & Protective Ass'n*, 593 N.E.2d 1056, 1060 (Ill. App. Ct. 1992).

C. The arbitration award reinstating Thomas must be set aside because it is contrary to this dominant public policy.

On the second question, whether reinstating Thomas would violate the public policy against the criminal use of deadly force by police officers, the Court should consider "four principal factors: (1) any guidance offered by the relevant statutes, regulations, and other embodiments of the public policy at issue; (2) whether the employment at issue implicates public safety or the public trust; (3) the relative egregiousness of the [employee's] conduct; and (4) whether the [employee] is incorrigible." *Burr Rd.*, 114 A.3d at 155. These factors establish that, absent compelling mitigation not present here, reinstatement would be contrary to the dominant public policy against police officers' criminal use of deadly force.

1. The relevant statutes and regulations indicate that the only acceptable penalty for Thomas's misconduct is termination.

"The first factor requires [the Court] to consider whether the relevant statutes, regulations, and other manifestations of the public policy at issue themselves recommend or require termination of employment as the sole acceptable remedy for a violation thereof." *Id.* at 155-56. Here, both District and federal law strongly suggest that termination is the only acceptable penalty for Thomas's misconduct.

First, under MPD's personnel regulations, individuals who engage in the criminal use of deadly force are categorically disqualified from becoming MPD officers in the first place—whether convicted of the offense or not. When Thomas was hired, as now, an individual was "ineligible to become a police officer if [he] ha[d] [e]ngaged in any conduct which would constitute a felony in the District of Columbia, whether or not the conduct resulted in the arrest of the candidate or the filing of criminal charges." 6-B DCMR § 873.11(a); *see* MPD, Notice of Final Rulemaking, 45 D.C. Reg. 451, 457-58 (1998). On its face, this regulation reflects a public policy against hiring persons who have committed felonies to be police officers. As such, laws like this that "forbid[] persons found to have engaged in such conduct from becoming police officers . . . , by implication," preclude them "from remaining police officers" after engaging in criminal misconduct. *City of Boston v. Boston Police Patrolmen's Ass'n*, 824 N.E.2d 855, 861-62 (Mass. 2005).

Here, the arbitrator upheld MPD's determination that Thomas's shooting of

Lemus was reckless and criminal. JA 24. This misconduct, had it occurred while in the District, would have been a felony—*at least* felony assault in violation of D.C. Code § 22-404(a)(2) (2009), if not assault with a deadly weapon, *id*. § 22-402, or an aggravated assault, *id*. § 22-404.01(a). In 2009, the felony assault statute provided that "[w]hoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another" is subject to imprisonment up to three years. *Id*. § 22-404(a)(2). "'[S]ignificant bodily injury' means an injury that requires hospitalization or immediate medical attention." *Id*.[1] Each element of this offense is satisfied here. As the arbitrator found, Thomas's unlawful assault recklessly caused significant bodily injury requiring Lemus to be hospitalized for three months. JA 24. Having been found guilty by the arbitrator of misconduct that "would constitute a felony in the District," whether or not the conduct resulted in arrest or prosecution, Thomas was categorically "ineligible" to become a police officer. 6-B DCMR § 873.11(a). His reinstatement would necessarily subvert the policy, embodied in this regulation, against employing felons-in-fact as MPD officers.

Second, the Council recently enacted D.C. Code § 5-107.01, which reinforces the minimum standards for MPD officers. It similarly provides that applicants are

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[1] The current criminal code defines felony assault in the same manner in all relevant respects. D.C. Code § 22-404(a) (2024).

"ineligible for appointment as a sworn member of [MPD] if the applicant [w]as previously determined by a law enforcement agency to have committed serious misconduct, as determined by the Chief by General Order." D.C. Code § 5-107.01(f)(1). The "impetus for" this policing reform legislation "dates back to the summer of 2020" when "Breonna Taylor, a 26-year-old Black woman, was fatally shot by members of the Louisville Metro Police Department" and "George Floyd, a 46-year-old Black man, was killed [by] the Minneapolis Police Department." Council of the District of Columbia, Comm. on the Judiciary and Pub. Safety, Report on Bill 24-320, the "Comprehensive Policing and Justice Reform Amendment Act of 2022," at 2 (Nov. 30, 2022). In ensuring the minimum standards for officers, the Committee explained that it "continues to believe that hiring officers with a history of misconduct undermines public confidence in our police force." *Id*. at 31. This statute further reflects a strong policy against employing officers who have engaged in serious misconduct and, specifically, the unlawful use of deadly force like the arbitrator found Thomas to have committed here

Third, courts also "ask whether the offense committed by the employee involves the sort of conduct . . . that would expose the employer to substantial liability if it were to reoccur." *Burr Rd.*, 114 A.3d at 156. A reoccurrence of Thomas's misconduct plainly would expose the District to substantial liability. Indeed, Congress subjected the District to potential liability under 42 U.S.C. § 1983

and has likewise made it "unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of [constitutional] rights." 34 U.S.C. § 12601(a). If Thomas or another officer engages in the criminal use of deadly force, Thomas's reinstatement would provide easy fodder to argue that such misconduct is customary in the District. Indeed, these laws "impose[] an affirmative duty on municipal employers to sufficiently discipline officers who violate use-of-force policies," exposing them to substantial liability in the future if they fail to do so. *See City of Seattle*, 484 P.3d at 496-97. Reinstatement would be contrary to this affirmative statutory duty.

2. Reinstating Thomas as a police officer would compromise both public safety and the public trust.

The second factor considers "whether the nature of the employment at issue implicates public safety or the public trust." *Burr Rd.*, 114 A.3d at 156. Thomas's employment implicates both. "Nationally, in the vast majority of cases in which courts have vacated for public policy reasons arbitration awards reinstating terminated employees, the grievant has been a public sector employee, primarily working in fields such as law enforcement, education, transportation, and health care, in other words, fields that cater to vulnerable populations or help ensure the public safety." *Id*. "This reflects the fact that the threat to public policy involved in reinstating a terminated employee is magnified when the offending employee provides an essential public service, and especially when he is employed by,

represents, and, ultimately, is answerable to the people." *Id*. Thomas's employment as an MPD officer could not be more critical to ensure public safety. Beyond that, "[o]ne of the most important police functions is to create and maintain a feeling of security in communities. To that end, it is extremely important for the police to gain and preserve public trust, maintain public confidence, and avoid an abuse of power by law enforcement officials." *City of Boston*, 824 N.E.2d at 861 (internal quotation marks omitted). Reinstating Thomas following his criminal use of deadly force would erode public trust and confidence in MPD's ability to avoid abuses of power.

Thomas's reinstatement would also undermine the public's faith in the criminal justice system as a whole. "The image presented by police personnel to the general public . . . also permeates other aspects of the criminal justice system and impacts its overall success." *Civil Serv. Comm'n v. Johnson,* 653 N.W.2d 533, 538 (Iowa 2002) (internal quotation marks omitted). "People will not trust the police—on the street or in court—unless they are confident that police officers are genuine in their determination to uphold the law." *City of Boston*, 824 N.E.2d at 863. "[P]olice legitimacy would be damaged severely by reports that the city continued to employ a police officer who had illegally" used deadly force, and this might "prejudice the public against an otherwise flawless criminal prosecution." *Id*.

3. The egregiousness of Thomas's misconduct warrants termination.

The third factor considers the relative egregiousness of the employee's

misconduct with reference to "myriad considerations," including:

> (1) the severity of the harms imposed and risks created by the grievant's conduct; (2) whether that conduct strikes at the core or falls on the periphery of the relevant public policy; (3) the intent of the grievant with respect to the offending conduct and the public policy at issue; (4) whether reinstating the grievant would send an unacceptable message to the public or to other employees regarding the conduct in question; (5) the potential impact of the grievant's conduct on customers/clients and other nonparties to the employment contract; (6) whether the misconduct occurred during the performance of official duties; and (7) whether the award reinstating the employee is founded on the arbitrator's determination that mitigating circumstances, or other policy considerations, counterbalance the public policy at issue.

Burr Rd., 114 A.3d at 157-58. Each weighs heavily against Thomas's reinstatement.

To begin, the harm caused by Thomas and the risk that he posed were severe. He nearly took Lemus's life by twice shooting him. The injuries inflicted were grievous, resulting in a lengthy hospitalization, extensive medical treatment, and a prolonged recovery for Lemus. Indeed, compared to other types of police misconduct, it is the criminal use of deadly force that poses the greatest risk of harm to the citizenry, as this case illustrates. Moreover, in shooting an unarmed man who presented no threat, Thomas's actions struck "at the core" of the public policy against the criminal use of deadly force by police officers, as well as his most basic responsibilities to uphold public trust and safety. As for Thomas's intent, his conduct was at the very least reckless, as the arbitrator found, and certainly reflected an utter disregard for several aspects of his police training.

Beyond all this, reinstating Thomas would send an unacceptable message to

the public and other employees regarding his conduct. It would reflect a tolerance for the *criminal* use of deadly force by law enforcement officers. And it would create a "one free shooting" rule assuring officers that they may shoot unarmed and non-threating members of the public at least once without fear of termination, which is entirely incompatible with the underlying public policy against the criminal use of deadly force by police. *See De Witt*, 699 N.E.2d at 166.

The impact of Thomas's actions also extended beyond the parties to the collective bargaining agreement and directly impacted a member of the public whom Thomas was sworn to protect. Not only did his actions harm Lemus, but they also undermined public trust in MPD's ability to uphold the law and ensure public safety. Though off duty during the encounter, Thomas purported to act as a police officer, invoking the authority conferred by his employment. Finally, the award reinstating Thomas was not based on the arbitrator's finding of mitigating circumstances or any other countervailing policy consideration. To the contrary, the arbitrator did not fault MPD's determination that there was no mitigating evidence or other policy concerns weighing against termination. Thus, the egregiousness of Thomas's misconduct further shows reinstatement is contrary to public policy.

4. Reinstatement creates a substantial risk that Thomas will reengage in the offending conduct.

In deciding whether the employee is so "incorrigible" as to require termination, the question is whether, "in light of the [employee]'s full employment

history, . . . there [is] a substantial risk that, should a court uphold the arbitration award of reinstatement, this particular employee will reengage in the offending conduct." *Burr Rd.*, 114 A.3d at 159. Relevant considerations include "whether the penalty imposed by the arbitrator is severe enough to deter future infractions by the grievant or others." *Id*. Here, the arbitrator's findings establish that there is a substantial risk that Thomas will reoffend if reinstated and that others will go undeterred.

In this case, MPD found on *Douglas* factor 10 that Thomas could not be rehabilitated given his basic failings, including that he made no effort to defuse the situation with Lemus and avoid a confrontation or notify the police before acting. JA 954. On *Douglas* factor 12, MPD found that termination was the only effective sanction and deterrent given the nature of Thomas's misconduct and his failure to acknowledge it. JA 954. While labeling these conclusions "questionable," the arbitrator did not find an insubstantial risk that Thomas would re-offend. JA 27. To the contrary, the arbitrator found only, at best, that Thomas and others "might" be deterred by "a long suspension without pay and mandatory retraining . . . and, if necessary, counseling and educational meetings with officers with specific disciplinary warnings of severe discipline." JA 27. The arbitrator also found that "[s]uch steps *might* also have resulted in [Thomas's] rehabilitation." JA 27 (emphasis added). This was clearly insufficient—especially since the arbitrator did

not require that Thomas submit to any such steps. Where "an arbitrator awards full reinstatement as a remedy for the contractual violation without any findings that the worker poses no risk to" those he is charged with protecting, "the award simply cannot stand." *AFSCME*, 671 N.E.2d at 681. A mere suspension, plainly inadequate given the egregiousness of the misconduct and the absence of any compelling mitigation, makes it likely that Thomas will re-offend and that other officers will be undeterred from committing the same misconduct.

D. Other courts have similarly rejected arbitration awards directing reinstatement on public policy grounds.

This award is no different than others reinstating law enforcement officers that courts have overturned on public policy grounds. *See*, *e.g.*, *City of Seattle,* 484 P.3d at 504 (setting aside an award reinstating a police officer who punched a handcuffed woman as contrary to the public policy against excessive force); *In re Bukowski*, 50 N.Y.S.3d 588, 594 (N.Y. App. Div. 2017) (overturning an award reinstating a correctional officer who had kicked an inmate in the groin causing serious permanent injuries as contrary to the public policy against the use of "unjustified, excessive physical force by correction officers"); *City of Boston*, 824 N.E.2d at 861 (overturning an award reinstating a police officer who "falsely arrested two individuals on misdemeanor and felony charges, lied in sworn testimony and over a period of two years about his official conduct, and knowingly and intentionally squandered the resources of the criminal justice system on false pretexts"); *Dep't of*

Cent. Mgmt. Servs. v. AFSCME, 554 N.E.2d 759, 766 (Ill. App. Ct. 1990) (overturning an arbitration award reinstating a correctional officer who battered a prisoner because "[p]ublic policy demands that prison authorities have the power to discharge those engaging in such activity").

Indeed, Thomas's misconduct in this case represents one of the most extreme examples of the criminal use of deadly force—he shot a non-threatening man *twice* while outside his jurisdiction and off duty. "No employer, even one bound by a collective bargaining agreement, should be forced to retain an employee so diametrically opposed to that employer's mission." *Pa. State Sys. of Higher Educ. v. Pa. State Sys. of Higher Educ. Officers Ass'n*, 320 A.3d 158, 2024 WL 1901174, at *7 (Pa. Commw. Ct. 2024).

E. PERB's determination does not support a contrary conclusion.

Although PERB rejected MPD's public policy challenge, its analysis was flawed and incomplete, consisting of just a few conclusory sentences. JA 1169. Thus, even if PERB's opinion were not subject to de novo review (which it is), PERB's determination would be arbitrary and capricious. To begin, rather than looking at the broad implications of reinstating Thomas, including the impact on the general public, PERB undertook a "particularly narrow" and superficial review, identifying just a handful of considerations that it deemed relevant and omitting many others discussed above. JA 1168-69. Even then, PERB did not consider all

the factors that it identified. JA 1169. For example, while PERB recognized that that MPD relied heavily—in PERB's words, "wholly"—on the severity of Thomas's misconduct, PERB's decision did not address this factor whatsoever. JA 1169. Similarly, PERB named "fact-specific mitigating factors" as a consideration, without identifying any or acknowledging that the arbitrator agreed with MPD's finding that there was no mitigation in this case. JA 1169; *see* JA 26-27. And PERB did not consider Thomas's amenability to discipline, particularly where he disavowed any wrongdoing. JA 1169; *see* JA 22-23.

As for the factors PERB did consider, it got the analysis wrong in several respects. *First*, PERB was incorrect in finding that "MPD does not assert that it has removed other police officers for similar offenses." JA 1169. To the contrary, the Panel specifically found that "[t]he proposed penalty is consistent with the penalty imposed against other members for like or similar misconduct." JA 953. And PERB is simply quibbling with the obvious: MPD has terminated such officers.[2] Indeed,

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[2] *See*, *e.g.*, *Minor v. MPD*, OEA No. 1601-0052-18 (Aug. 26, 2019) (upholding the termination of an officer who, following a traffic altercation while off duty, was charged with assault with a deadly weapon for choking and pointing his service pistol at a civilian); *Merritt v. MPD*, OEA No. 1601-0048-14 (Aug. 26, 2015) (upholding the termination of an officer who was charged with assaulting his wife after fracturing her wrist); *MPD v. Pinkard*, 801 A.2d 86, 87-88 (D.C. 2002) (reversing a decision reinstating an officer who had been terminated after being convicted of battering his wife); *MPD v. FOP*, 2001 WL 36167401, at *4 (PERB Dec. 4, 2001) (upholding the termination of an officer for negligently firing his weapon and killing a civilian).

termination is the *only* permissible discipline in the relevant table of penalties.

Second, PERB found that the arbitrator determined that Ford had engaged in "misconduct similar to that of" Thomas. JA 1169. Not so. What the arbitrator found was that Ford's misconduct was "as close to similar misconduct as is in evidence." JA 28. But "as close to similar" is not "similar." And as far as the record reveals, there is almost *no* similarity with Ford's case. True, Ford shot someone while off duty. But he faced only one charge—failure to obey MPD General Orders. JA 987-89. MPD did not charge Ford with (and find him guilty of) criminal misconduct—for which the only penalty-table sanction was termination. JA 987-91. What is more, Ford shot an assailant who was attacking him, JA 988-89, in contrast to Thomas, who shot a man who posed no threat at all. Ford also had police powers when he acted—he was off duty but in the District. JA 988-89. Thomas purported to exercise police powers that he did not have in Maryland. *See* JA 582-84 (explaining the significance of this distinction). Moreover, while both Ford and Thomas disobeyed orders, Ford instructed a bystander to call 911 before he fired his weapon, JA 988- 89, while Thomas did no such thing. Finally, Thomas presented no other information that could possibly show that Ford's other relevant circumstances were similar to his own.

Third, PERB incorrectly stated that the arbitrator found "a good chance of [Thomas's] rehabilitation in this case." JA 1169. To the contrary, the arbitrator

found that he "might" be rehabilitated and only with certain conditions on his reinstatement—conditions that the arbitrator declined to impose. JA 27-28.

Fourth, PERB failed to explain how support could be lacking for the self-evident proposition that reinstating Thomas—who had feloniously assaulted Lemus with lethal force—would erode public confidence and trust in MPD. JA 1169. Nor did PERB explain why a 45-day suspension was consistent with the public policy against the criminal use of deadly force by police. JA 1169; *see Thomas I*, 282 A.3d at 606 (reversing where PERB failed to adequately explain its decision not to set aside the arbitrator's award as against public policy).

For all these reasons, PERB's decision is unpersuasive and unworthy of any degree of deference. Instead, it should be reversed, and the arbitration award ordering Thomas's reinstatement should be set aside as contrary to the public policy against the criminal use of deadly force by police officers.

II. Alternatively, Even If Reinstatement Is Not Necessarily Contrary Public Policy, The Award Still Must Be Vacated As Contrary To Law.

The arbitration award should be independently set aside as contrary to law. The parties urged the arbitrator to apply *Douglas*. JA 24-27, 1029, 1053-54, 1077, 1081-82. In its briefing before PERB, MPD identified the legal errors that are plain on the face of the arbitrator's award: the arbitrator held MPD to an incorrect burden of proof on *Douglas* factor 6; the arbitrator set aside MPD's penalty determination without first finding—as *Douglas* demands—that MPD's decision was outside the

tolerable bounds of reasonableness; and the arbitrator imposed a penalty so arbitrary as to be contrary to law. JA 10-13. These are precisely the types of errors that PERB must correct. *See FOP v. PERB*, 973 A.2d 174, 177-78 (D.C. 2009) ("[O]ne circumstance in which an arbitrator's award 'on its face is contrary to law and public policy' . . . is where, in arriving at the award, the arbitrator looks to an external law for guidance and purports to apply that law, but overlooks or ignores the law's express provisions."); *Thomas I*, 282 A.3d at 605 ("In sufficiently extreme circumstances, an arbitrator's selection of penalty could be so arbitrary and capricious as to be on its face contrary to law."). PERB, however, erred in rejecting each of MPD's claims.

A. *Douglas* did not require MPD to prove that similarly situated officers were treated the same.

The arbitrator rejected the Panel's finding on *Douglas* factor 6—that the proposed penalty of termination was "consistent with the penalty imposed against other members for like or similar misconduct"—because "the Panel cited no other disciplinary decision in reaching its conclusion." JA 27; *see* JA 953. According to the arbitrator, while the Panel did "consider" this factor, its "consideration without proof, *when proof is required*" did not comport with *Douglas*. JA 27 (emphasis added). But *Douglas* required no such proof.

An agency's burden to show that similarly situated employees were treated the same arises only *after* the disciplined employee shows disparate treatment.

Boucher v. U.S. Postal Serv., 118 M.S.P.R. 640, 649 (2012), *overruled on other grounds by Singh v. United States Postal Serv.*, No. SF-0752-15-0014-I-1, 2022 WL 1772249, at *4 (M.S.P.B. May 31, 2022); *see MPD v. D.C. Off. of Emp. Appeals*, 88 A.3d 724, 730 n.3 (D.C. 2014), *as amended* (May 22, 2014) ("'[T]he agency's burden [under *Douglas*] . . . is triggered by the appellant's initial showing that . . . the agency treated similarly-situated employees differently.'" (quoting *Boucher*, 118 M.S.P.R. at 649); *see, e.g.*, *Davis v. U.S. Postal Serv.*, 120 M.S.P.R. 457, 463 (2013). But Thomas never made that showing to the Panel.

Thomas knew about MPD's assessment that his termination was consistent with the penalty imposed on other officers for similar misconduct—the Director said exactly that in the notice of proposed termination. JA 51. Thomas appealed that notice to the Panel. But he never asserted before the Panel that similarly situated officers received lesser discipline. Thus, he failed to trigger both MPD's burden to prove similar treatment and the Panel's obligation to make additional findings on what was otherwise an uncontested issue. *Cf. Eckert v. D.C. Police & Firefighters' Ret. & Relief Bd.*, 925 A.2d 550, 553 (D.C. 2007) (finding the circumstances sufficient to alert the Board as to a contested issue and the need for factual findings).

PERB offered no valid reason for rejecting MPD's challenge. PERB did not even consider whether the arbitrator correctly interpreted or applied *Douglas*. JA 1166. Instead, PERB appears to have concluded that the arbitrator, rather than

applying *Douglas*, was exercising his general equitable powers to modify the penalty. JA 1166. It stated that "[t]he record does not reflect that the Arbitrator imposed an additional burden of proof on MPD *outside of exercising his equitable powers* to review the Panel's application of the *Douglas* factors." JA 1166 (emphasis added). But this conclusion was foreclosed by *Thomas I*. There, this Court found that it could not determine from the award "whether the arbitrator understood himself to be exercising general authority to modify the sanction selected by MPD or . . . conducting the more limited review authorized under *Douglas*." *Thomas I*, 282 A.3d at 605. As the Court explained, this was a question that would have to be answered by the arbitrator. *See id*. Thus, *Thomas I* precluded PERB from ruling that the arbitrator was relying on his equitable powers rather than applying *Douglas,* absent a remand to the arbitrator for clarification.

B. Before setting aside the termination, the arbitrator made no finding that MPD's penalty failed to strike a responsible balance within tolerable limits of reasonableness.

The arbitrator rejected termination as a penalty because "the Panel did not reach conclusions on Douglas factors [6], 10, and 12 within 'tolerable limits of reasonableness.'" JA 27 (ellipses omitted) (quoting *Douglas*, 5 M.S.P.R. at 306). But this falls well short of what *Douglas* requires before a reviewer may set aside an agency-imposed sanction.

The question is not whether the agency properly assessed each individual

factor, and flaws in the analysis of one or more factors do not alone justify setting aside a penalty. Nor do they support a conclusion that the agency's overall weighing of the *Douglas* factors was "improper," JA 1077, let alone "arbitrary and capricious," JA 1039.[3] Instead, the question is whether "the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness." *Douglas*, 5 M.S.P.R. at 306. Indeed, "only if" the reviewer "finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness," can he set aside the agency's penalty. *Id*. at 306.

Here, the arbitrator did not find that MPD failed to "conscientiously consider" the *Douglas* factors. To the contrary, the arbitrator rejected Thomas's argument that the Panel failed to assess the relevant *Douglas* factors. JA 25. And while the arbitrator faulted (incorrectly) MPD's assessment of *Douglas* factor 6, he found no evidence that MPD treated similarly situated employees differently. What is more, the arbitrator merely found the Panel's conclusion on factor 12 to be "questionable,"

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[3] *See*, *e.g.*, *Batara v. Dep't of Navy*, 123 M.S.P.R. 278, 283 (2016) ("Even if we agreed with the administrative judge that the deciding official failed to afford proper weight to [certain evidence], such that his penalty determination is not entitled to deference, we still would find, based on our independent analysis of the appropriate penalty, that removal is reasonable in this case."); *Saiz v. Dep't of Navy*, 122 M.S.P.R. 521, 526 (2015) ("Even if we agreed . . . that the deciding official operated under the mistaken belief that any drug violation mandated removal . . . we would still find that removal is a reasonable penalty in this case. . . .").

not wrong. JA 1143. Similarly, on factor 10, the arbitrator found that lesser corrective action "might" have rehabilitated Thomas, not that it would. JA 1143. Even if these findings could somehow amount to a determination that MPD did not "conscientiously" assess the three *Douglas* factors, this does not end the inquiry. Rather, *Douglas* requires the arbitrator to then assess the remaining factors to decide whether termination is within the tolerable limits of reasonableness before setting aside MPD's penalty determination—a step the arbitrator simply skipped. *See*, *e.g.*, *Portner v. Dep't of Justice*, 119 M.S.P.R. 365, 371-75 (2013).

Once again, in rejecting MPD's challenge, PERB did not find that MPD's interpretation of *Douglas* was wrong. Instead, it simply refused to consider the argument, erroneously concluding that this Court had held in *Thomas I* that PERB's earlier "ruling on this issue was reasonable." JA 1164. But the Court never reached the question. It merely held that the arbitrator was not necessarily required to follow *Douglas* and "defer" to MPD's penalty. *Thomas I*, 282 A.3d at 605. Critically, the Court did not decide "whether the arbitrator understood himself . . . to be conducting the more limited review authorized under *Douglas*." *Id*. As noted, the Court concluded that only the arbitrator could clarify whether he had done so. *Id*. Thus, PERB was wrong to hold that MPD's challenge was foreclosed by *Thomas I*.

C. The arbitrator's selection of a penalty was so arbitrary as to be contrary to law.

The arbitrator's substitution of a mere 45-day suspension was "so arbitrary

and capricious" as to be contrary to law, *id*., for two reasons. *First*, the arbitrator's reasoning was irrational. Ignoring the *Douglas* factors and the hearing record, he imposed a 45-day suspension and ordered reinstatement—with no conditions—for no other reason than it was "the same as Officer Ford received in as close to similar misconduct as is in evidence." JA 28. But MPD found Thomas—and not Ford—guilty of criminal misconduct. JA 951-53. And Thomas submitted nothing to show that, beyond being involved in an off-duty shooting, he and Ford have anything in common. Even assuming some such similarity, that still could not rationally justify reducing Thomas's penalty to that imposed on Ford without further considering the circumstances of Thomas's case. *See Ellis v. U.S. Postal Serv.*, 121 M.S.P.R. 570, 577-78 (2014). Here, the arbitrator ignored those circumstances—particularly the severity of Thomas's misconduct and the absence of mitigation. *See* JA 26-28. PERB cannot dismiss MPD's challenge as simple "disagreement with the Arbitrator's interpretation of *Ford*." JA 1165. Rather, the arbitrator's capricious choice of a penalty is a complete failure to exercise "responsible judgment in each case" based on its own circumstances. *Douglas*, 5 M.S.P.R. at 303.

Second, the penalty chosen here—a mere 45-day suspension—is so disproportionate to the severity of Thomas's misconduct as to be contrary to law. PERB's determination to the contrary is arbitrary, capricious, and irrational. Given the arbitrator's recognition of Thomas's appalling actions and the absence of *any*

mitigation, a greater sanction was required—his termination. *See supra* pp. 30-39. In rejecting MPD's challenge to the arbitrariness of the arbitrator's penalty, PERB simply refused to accept what this Court said in *Thomas I*: that "[i]n sufficiently extreme circumstances, an arbitrator's selection of penalty could be so arbitrary and capricious as to be on its face contrary to law." 282 A.3d at 605. Instead, PERB doubled down, holding that "[t]o set aside an award as contrary to law, the party bears the burden to present applicable law that mandates that the arbitrator arrive at a different result." JA 1165. PERB was wrong. MPD was not required to point to positive law mandating termination but only to show that the arbitrator's selected penalty was so arbitrary and capricious on its face that it cannot stand. Although PERB failed to address this question, the answer is that—on the facts as found by the arbitrator—termination is the only appropriate penalty in this case. If termination is required in any case, surely it must be mandatory where a law enforcement officer engaged in a violent, reckless, life-threatening criminal act against a member of the public with no mitigating circumstances.

CONCLUSION

The Court should reverse PERB's decision and remand with instructions that the arbitrator's award reinstating Thomas be vacated as contrary to law and public policy. Alternatively, and at minimum, the Court should reverse and remand for clarification from the arbitrator.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 8, 2025, this brief was served through this Court's electronic filing system to:

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