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

REPLY BRIEF FOR APPELLANT THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT

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ARGUMENT

Officer Michael Thomas criminally assaulted an unarmed man, deploying deadly force while off-duty—all because an intoxicated civilian triggered his car alarm. The Council of the District of Columbia has made clear, as have several courts around the country, that individuals who have engaged in life-threatening criminal conduct do not belong in law enforcement. Beyond that, in proceedings below, both PERB and the arbitrator misapplied the law and ignored important legal issues. This Court should bring an end to this litigation by reversing the arbitration award as contrary to law and public policy.

Reversal is the only reasonable outcome in this second appeal. PERB has now twice failed to address the legal issues, including ignoring the Court's mandate to consider MPD's specific arguments on remand. After two chances, PERB simply failed to carry out any meaningful review of MPD's claims. The Court must now intervene to clarify for PERB the law and public policy of the District, which is ultimately this Court's role to decide.

I. The Arbitrator's Award Must Be Set Aside As Contrary To The 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.

Whether Michael Thomas's reinstatement as a police officer is contrary to public policy is a question of law for this Court to decide de novo. *See MorphoTrust USA, Inc. v. D.C. Cont. Appeals Bd.*, 115 A.3d 571, 581 (D.C. 2015). In arguing

otherwise, FOP and PERB confuse the standard of review with any deference this Court owes PERB interpretation or application of the phrase "law and public policy." PERB Br. 10; FOP Br. 17-22. To be sure, this Court previously held that "the phrase 'on its face is contrary to law and public policy'" in D.C. Code § 1-605.02(6) is ambiguous, and "[u]nder ordinary principles of administrative law, [the Court] would defer to PERB's reasonable interpretation of what it means for an arbitral award to be on its face contrary to law and public policy." *MPD v. PERB*, 282 A.3d 598, 603 (D.C. 2022) (*Thomas I*). But, on remand, PERB did not provide any actual interpretation of this statutory phrase. It simply cited without analysis a few cases where courts were "divided" on similar issues, described the inquiry as "fact-specific," and then gave a non-exhaustive list of factors that it "might" consider but did not apply. JA 1168-69. This legal hand-waving does not help PERB's cause. Indeed, PERB's approach is consistent with the factors that *MPD* has identified for whether reinstatement would contravene public policy. *See* MPD Br. 30-39.

Even if PERB had offered some interpretation of the relevant language, it would not be entitled to deference. Because "it appears that [PERB] did not conduct any analysis of the language, structure, or purpose of the statutory provision, it would be incongruous to accord substantial weight to the agency's interpretation." *Proctor v. DOES*, 737 A.2d 534, 538 (D.C. 1999) (cleaned up). PERB simply did not bring any expertise to bear when resolving the public policy question. *See Young v. DOES*,

241 A.3d 826, 830 (D.C. 2020) ("The degree of deference to be accorded" varies based on whether "experience and expertise have contributed to the process."). Ultimately, PERB rested on its own bare conclusion of what public policy requires in this instance. But the public policy against criminal use of deadly force by police officers reflects the entire body of law in the District, including constitutional, statutory, and regulatory law as well as judicial precedent. In such situation, this Court is "presumed to have the greater expertise," *Nunnally v. MPD*, 80 A.3d 1004, 1010 (D.C. 2013) (quotation marks omitted), and is undoubtedly "the final authority" on the issue, *MorphoTrust*, 115 A.3d at 581 (internal quotation marks omitted). Put simply, the District's public policy is not codified in the CMPA.

This conclusion is not tantamount to "[a]bolishing the deference owed to PERB," but only recognizes that PERB's decision on remand does not warrant deference. FOP Br. 18. In these circumstances, review is plenary.

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

PERB and FOP conceded in *Thomas I* that the public policy against the criminal use of deadly force by police officers is explicit, well-defined, and dominant. 282 A.3d at 606. The only question then is whether the arbitrator's award reinstating Thomas—who unlawfully shot and seriously injured an unarmed person—violates that public policy. Four main factors are relevant to this consideration: the statutes, regulations, and other authorities that embody the public

policy; whether the employment involves public safety or trust; the egregiousness of the employee's conduct; and whether the employee can be rehabilitated. MPD Br. 30 (citing *Burr Rd. Operating Co. II v. New England Health Care Emps. Union*, 114 A3d 144 (Conn. 2015)).

FOP and PERB erroneously contend that this Court cannot consider these factors because "reliance on *Burr* [was] waived" when MPD failed to cite that case in its appeal to PERB. PERB Br. 31; FOP Br. 26, 31-32. This argument lacks merit. To begin, courts "have distinguished between claims and arguments, holding that although claims not presented in the trial court will be forfeited . . . , parties on appeal are not limited to the precise arguments they made in the trial court." *Tindle v. United States*, 778 A.2d 1077, 1082 (D.C. 2001) (internal quotation marks omitted). The "claim" here is that Thomas's reinstatement violates the public policy against the criminal use of excessive force. This claim was plainly before PERB—and the Court remanded with instructions that PERB consider it. *Thomas I*, 282 A.3d at 602, 606.

Moreover, the factors on which MPD relies mirror those identified in PERB's decision. *See D.C. Dep't of Hum. Servs. v. Butler*, 335 A.3d 551, 569 (D.C. 2025) (explaining that "even if a claim was not pressed below, it properly may be addressed on appeal so long as it was passed upon"). Indeed, PERB now describes *Burr* as "no more than another case among the span PERB considered in articulating the standard

applicable in the District." PERB Br. 31. Although PERB's analysis of the factors listed was woefully flawed and incomplete, PERB "passed upon" and adopted essentially the same considerations as MPD raises.

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

Beyond those criminalizing assaultive conduct by police officers, *see*, *e.g.*, D.C. Code § 5-123.02, personnel statutes and regulations embody the public policy against the criminal use of excessive force by police officers, *see*, *e.g.*, 6-B DCMR § 873.11(a); D.C. Code § 5-107.01. MPD Br. 31-34. PERB mistakenly dismisses these authorities because none "explicitly" precludes Thomas's reinstatement, suggesting they would be relevant only if the award "order[ed] Thomas to shoot [some]one." PERB Br. 27. Harkening back to PERB's position at oral argument in *Thomas I* that it was "powerless to overturn an arbitral award reinstating a police officer who had committed cold-blooded mass murder," 282 A.3d at 605, PERB continues to show a shocking indifference to the egregious misconduct here—as well as a complete misunderstanding of its reviewing role. *See E. Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 63 (2000) (holding that a public policy violation need not rest on a law that explicitly requires termination). Meanwhile, FOP argues that Thomas was not criminally prosecuted and that the shooting may even have been justified. FOP Br. 27. But FOP's reliance on such facts is a pointless

attempt to side-step the arbitrator's binding determination that the shooting was unjustified and *criminal*. JA 24.

Moreover, contrary to FOP's assertion (Br. 35), reinstatement would violate the District's legal duty as employer, thus subjecting the District to direct liability if Thomas reoffends through any future excessive force "aris[ing] out of a job-related situation." *See Phelan v. City of Mt. Rainier*, 805 A.2d 930, 940 (D.C. 2002) (discussing cases). And Thomas's reinstatement could expose the District to substantial liability even apart from whether he reoffends. His reinstatement could be offered as proof of a municipal policy or practice of indifference to excessive force supporting a claim of constitutional liability in a future case involving a different officer. *See Disorbo v. Hoy*, 74 F. App'x 101, 104 (2d Cir. 2003) (finding "ample basis" for municipal liability under 42 U.S.C. § 1983 because the jury "reasonably could have inferred that the City's failure to discipline adequately . . . created an atmosphere whereby the police department tolerated misconduct and even police brutality."). Neither PERB nor FOP has an answer to the fact that Thomas's reinstatement would offend the public policy that these legal provisions embody.

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

Second, considering the essential public safety functions Thomas performed, his reinstatement would erode public confidence in law enforcement and MPD's

ability to prevent abuses of power. MPD Br. 34-35. FOP and PERB contend that these propositions lack "evidence," PERB Br. 32; FOP Br. 24, 36; *see* JA 1168-69, ignoring both recent national experience and basic common sense. It is self-evident that reinstating Thomas—who deployed criminal, lethal force—would seriously risk eroding public confidence and trust in MPD. *See*, *e.g.*, Comprehensive Policing and Justice Reform Amendment Act of 2022, D.C. Council, Report on Bill 24-320, at 31 (Nov. 30, 2022) (explaining that the Committee "continues to believe that hiring officers with a history of misconduct undermines public confidence in our police force"); *Rivera v. Union Cnty. Prosecutor's Off.*, 270 A.3d 362, 375-76 (N.J. 2022) ("[M]isconduct that involves the use of excessive or deadly force, . . . can . . . erode confidence in law enforcement.").

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

MPD has shown that the egregiousness of Thomas's misconduct renders reinstatement contrary to public policy. MPD Br. 35-37. Here, PERB responds that egregious misconduct alone is not enough to establish a public policy violation, explaining—astonishingly—that it "remains to be seen" whether even an officer's membership in a domestic terrorist organization like the KKK would be enough. PERB Br. 29-30. Apart from the self-refuting nature of PERB's position, MPD does not rely on egregious misconduct alone, but considers it as one among four key factors. *See* MPD Br. 30-39.

As for FOP, it argues that there were "several mitigating circumstances" for Thomas's misconduct. FOP Br. 35; *see* PERB Br. 9. But the arbitrator disagreed, upholding MPD's determination under *Douglas* factor 11 that there was no mitigation. JA 26-27. And PERB's decision identified none. *See* JA 1169.

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

The arbitrator did not determine that Thomas himself was unlikely to re-offend. Instead, the arbitrator found that a combination of various steps that he did not order—including "mandatory retraining of Thomas," "counseling and educational meetings," and, ironically, "specific disciplinary warnings of severe discipline"—"*might* well have deterred similar conduct of Thomas and others" and "*might* also have resulted in [his] rehabilitation." JA 27 (emphasis added). The mere possibility that Thomas "might" be deterred and rehabilitated with multiple interventions is no finding of a "good chance" he would be, as PERB erroneously says the arbitrator found. JA 1169; PERB Br. 6, 31-32. Nor does it reflect a determination, as FOP claims, that a suspension was "sufficient to deter" Thomas and others from similar misconduct. FOP Br. 48. And the suggestion that Thomas has not re-offended in the past 15 years, FOP Br. 34, is presumably because no one has entrusted him with police powers since the shooting. Nothing in the record defeats the obvious inference from Thomas's misconduct that reinstating him to the police force unacceptably places the public at risk.

* * * *

The circumstances in which an arbitral award should be overturned as conflicting with public policy are, of course, extremely narrow. FOP Br. 22. But in this extreme case, reinstating Thomas would contravene a well-defined and dominant policy against employing law enforcement officers who have criminally deployed deadly force. Contrary to FOP and PERB's contentions, recognizing this reality will not create a sea-change in the law. Rather, as other state courts have done, applying this public-policy exception would protect public safety in extreme and rare circumstances—like those presented by Thomas's case.

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

PERB agrees that an arbitration award is contrary to law "if, '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.'" PERB Br. 11 (quoting *Thomas I*, 282 A.3d at 604). Despite this understanding and the Court's mandate that it consider whether the arbitrator's decision was contrary to law, PERB failed to do so (again). As MPD argued, the arbitrator looked to *Douglas* for guidance and purported to apply it but, as the face of the arbitration award indicates, overlooked and ignored its requirements in three respects. First, the arbitrator erroneously required MPD to prove it treated similarly situated officers the same. Second, the

arbitrator failed to make the findings *Douglas* requires before setting aside MPD's decision to fire Thomas. Third, the arbitrator selected an arbitrary penalty.

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

The arbitrator rejected the Adverse Action Panel's finding on *Douglas* factor six—that termination was "consistent with the penalty imposed against other members for like or similar misconduct"—only because "the Panel cited no other disciplinary decision in reaching its conclusion." JA 27, 953. The determination that the Panel had to do so is contrary to law. Thomas was on notice that MPD had determined that his termination matched the penalty it had imposed in similar cases, but he did not allege disparate treatment at the Panel hearing or make an initial showing that MPD had treated similar officers differently. JA 20, 26, 51, 200, 301-932. Under the *Douglas* framework, MPD therefore had no obligation to produce evidence to the Panel showing that Thomas was treated the same. *MPD v. D.C. Off. of Emp. Appeals*, 88 A.3d 724, 730 n.3 (D.C. 2014), *as amended* (May 22, 2014); *Boucher v. U.S. Postal Serv.*, 118 M.S.P.R. 640, 649 (2012).

On remand, PERB was required to "address MPD's specific argument[]" on this point. *Thomas I*, 282 A.3d at 605. Yet PERB failed to consider whether the arbitrator misapplied the *Douglas* framework by placing the burden on MPD. PERB and FOP offer several excuses for this failure, but they all lack merit.

1. MPD did not waive its claim that the arbitrator misapplied the *Douglas* framework.

First, FOP asserts that MPD "waived" this claim by not raising it before the arbitrator. FOP Br. 37-38. But FOP's argument comes far too late. The time to have made it was before PERB, not for the first time in this Court and even then only after a remand where this Court directed PERB to consider the claim. Thus, FOP waived its waiver argument. *See Sims v. United States*, 213 A.3d 1260, 1267 n.11 (D.C. 2019). More importantly, PERB did not deem the claim waived. Instead, PERB claims (incorrectly) that it "squarely addressed" and reasonably resolved the question of whether the arbitrator erroneously placed the burden on MPD. PERB Br. 12-13. Because PERB did not find the claim waived, this Court should not either.

2. *Thomas I* forecloses PERB's suggestion that the arbitrator's misapplication of *Douglas* is irrelevant.

Second, to avoid the question whether the arbitrator correctly applied *Douglas*, FOP and PERB assert that the arbitrator's consideration of this *Douglas* factor was "an exercise of his equitable powers arising out of the parties' collective bargaining agreement." FOP Br. 38 (quoting JA 1166); PERB Br. 11-14. They emphasize that the arbitrator was not "strictly constrained to applying" *Douglas*, because this was an arbitration, not a case "before the MSPB [Merit Systems Protection Board] or OEA." PERB Br. 13-14; FOP Br. 40-41. Thus, to FOP and

PERB, it does not matter whether the arbitrator got the analysis right. *See*, *e.g.*, FOP Br. 43-44. These contentions miss the mark in several respects.

Importantly, the attempt to sidestep whether the arbitrator correctly applied *Douglas* ignores this Court's mandate in *Thomas I*. There, this Court has already held 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. Instead, clarification from the arbitrator would be warranted. *Id*. Given this Court's inability to reach a definitive conclusion, PERB could not have done so either on this same record. *See* PERB Br. 14-15; FOP Br. 38-39.

Going even further astray, FOP contends that because it is unclear from the award whether the arbitrator was applying *Douglas*, PERB's only choice was to affirm. FOP Br. 39-40. Not so. As this Court has already indicated, the appropriate course would have been to remand to the arbitrator for clarification. *Thomas I*, 282 A.3d at 605. Inexplicably, PERB failed to do so. Tellingly, PERB was unable to say that, had the arbitrator been applying *Douglas*, he got the analysis right (which would have been the only way to avoid a remand to the arbitrator on this issue).

But even if a remand to the arbitrator were not required, PERB still gets it wrong: the arbitrator did in fact apply the more limited review authorized under *Douglas*. This is, after all, what the arbitrator was asked to do. As PERB puts it,

the "parties committed themselves to a system governed by . . . the issues submitted to the [a]rbitrator." PERB Br. 13. And it was *FOP* that asked the arbitrator to base his decision on an application of *Douglas*. JA 1075, 1077; *see* JA 23. Indeed, the *only* basis FOP offered the arbitrator for overturning Thomas's termination was the Panel's allegedly flawed *Douglas* analysis. JA 1029-39, 1079, 1081-83. In doing so, FOP was the first to invoke *Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985), and *Douglas* as the standard that the arbitrator should apply here. JA 1029; *see* FOP Br. 45-46 & n.2. This framing of the issue made *Douglas* controlling.

The arbitrator plainly understood that FOP was asking for an assessment of the appropriateness of the penalty only under *Douglas*. JA 22-23. He based his award on an assessment of the *Douglas* factors and nothing more. JA 25-27. PERB's assertion that the arbitrator merely "[a]lluded to, but [did] not rely[] on, the *Douglas* factors" is blatantly incorrect. PERB Br. 2. And that the arbitrator justified his reliance on *Douglas* by pointing out that "[s]everal of the Douglas factors are routinely considered by arbitrators" and that "even without the Douglas Factors, Arbitrators give great weight to" the consistency of the penalty among employees, JA 25, 27, does not show the arbitrator was exercising equitable powers rather than applying *Douglas*, PERB Br. 14-15, but just the opposite. It shows the importance that he placed on those *Douglas* factors.

3. PERB failed to address MPD's claim that the arbitrator improperly imposed the burden of proof on MPD on *Douglas* factor six, and in any event, MPD's claim is correct.

Third, because PERB said nothing about the merits of MPD's claim in its decision, this Court should reject PERB's post hoc analysis of MPD's claim. *See* PERB Br. 16-19; *Walsh v. D.C. Bd. of Appeals & Rev.*, 826 A.2d 375, 379 (D.C. 2003). Indeed, "the integrity of the administration process requires that courts may not accept appellate counsel's post hoc rationalizations for agency action." *Greene v. Real Est. Comm'n*, 263 A.2d 634, 635 n. 4 (D.C. 1970) (quoting *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965)). Similarly, the Court should reject FOP's arguments as well because this Court cannot affirm on a basis that does not appear in PERB's decision. *See Apartment & Off. Bldg. Ass'n of Metro. Wash. v. Pub. Serv. Comm'n of D.C.*, 129 A.3d 925, 930 (D.C. 2016); *Bowles v. DOES*, 121 A.3d 1264, 1268 (D.C. 2015). But even on the merits, FOP and PERB's arguments are lacking.

FOP does not disagree that it was Thomas's burden to show disparate treatment before the Panel and to identify similarly situated comparators but failed to do so. FOP Br. 44. Instead, FOP contends that the Court's ultimate holding in *Boucher* that "an agency-employer cannot justify its penalty by leaving the record unclear" "undermines" MPD's argument. FOP Br. 44. That is incorrect.

The employee in *Boucher* identified *at the administrative fact-finding hearing* co-workers who had engaged in similar misconduct but were not disciplined. 118 M.S.P.R. at 644-45. The *Boucher* majority faulted the agency for failing show at the hearing why the two employees, which it believed were similarly situated, had been treated differently—holding that "an agency cannot . . . justify its penalty determination by leaving the record unclear on the question whether the deciding official knew if that penalty was consistent with those imposed on employees for the same or similar offenses." *Id.* at 650. *Boucher*'s concern with the agency's "unclear" record has no place here. The arbitrator did not fault the Panel for failing to explain why Thomas's comparators were treated differently. Instead, the arbitrator faulted the Panel for not *sua sponte* identifying comparators who were treated the same. But by requiring the Panel to identify such comparators when Thomas's appeal to the Panel did not challenge MPD's initial finding of no disparate treatment, the arbitrator violated the law (and clearly so).

Further, contrary to PERB's contention, the Adverse Action Panel process *is* analogous to an OEA or MSPB proceeding. PERB Br. 18-19. It is the only administrative fact-finding hearing that occurs before arbitration, and the procedures are similar. Thomas received notice of the reasons for his removal ahead of the Panel hearing. JA 51. It was not through the "Panel" that MPD "claimed that the consistency of the penalty factor" justified the termination, PERB Br. 19—it was

through the advance notice of termination. JA 51. Moreover, the full investigative record was available to Thomas, affording him full "discovery." PERB Br. 18; *see* JA 195-300. Finally, the Panel's determination was made following an adversarial hearing where Thomas was represented by counsel, and its decision was based on the record made there. JA 301-956; PERB Br. 19.

PERB also errs when claiming that Thomas properly raised the issue of disparate treatment in his *appeal* of the Panel decision to the Chief of Police. PERB Br. 19-20. PERB offers no support for the proposition that it was procedurally proper for Thomas to present new evidence at that stage or that this appeal was "parallel" to a hearing before OEA or MSPB. PERB Br. 20. Even then, Thomas devoted just one sentence to the question and made no attempt to explain how Ford's case was comparable. JA 984-85. Thomas's perfunctory reference to Ford was plainly insufficient to make this showing or to even warrant consideration by the Chief of Police. *See Cunningham v. District of Columbia*, 235 A.3d 749, 758 (D.C. 2020) (declining to consider an argument mentioned "within a single sentence on appeal").

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.

Douglas tasked the arbitrator with determining whether "the agency did conscientiously consider the relevant factors and did strike a responsible balance

within tolerable limits of reasonableness." *Douglas v. Veterans Admin.,* 5 M.S.P.R. 280, 306 (1981). "[O]nly if" the arbitrator found that MPD failed to "weigh the relevant factors, or that [its] judgment clearly exceeded the limits of reasonableness" would it have been "appropriate for the [arbitrator] to then specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." *Id*.

But the arbitrator failed to make the findings *Douglas* demands before setting aside MPD's decision to fire Thomas. MPD Br. 46-48. It was not enough for him to conclude "that the Panel did not reach conclusions on Douglas [f]actors [6], 10 and 12 within tolerable limits of reasonableness." JA 27 (internal quotation marks omitted). Instead, he had to find that the *penalty of termination* was outside "tolerable limits of reasonableness" under the weight of all the relevant *Douglas* factors. *Douglas*, 5 M.S.P.R. at 306; *see* MPD Br. 46-48.

PERB again failed to address the correctness of the arbitrator's application of *Douglas*, concluding instead that this Court affirmed its earlier ruling on this issue. JA 1164; *see* PERB Br. 3-4; FOP Br. 45. But that is simply wrong. In *Thomas I*, MPD argued that under a specific term of the collective bargaining agreement (CBA) the arbitrator was bound to follow *Douglas* because the arbitrator's role was one of an "appellate tribunal" that owed deference to MPD. MPD Reply Br. 1-7, *Thomas I*, 282 A.3d 598 (No. 19-CV-1115). This Court rejected that argument—but only

that argument—because MPD had failed to "provide the [CBA] to PERB" and failed to "argue to PERB that the terms of the [CBA] required the arbitrator to defer to MPD's selected sanction." *Thomas I*, 282 A.3d at 604-05. The Court then concluded that "a remand to PERB [wa]s necessary with respect to MPD's other arguments that the arbitrator's award was on its face contrary to law." *Id.*

Whether the arbitrator had to defer to the penalty selected by MPD under the CBA is a different question than whether the arbitrator's award is contrary to law because he overlooked or misconstrued express provisions of external law which he purported to apply. Indeed, this Court remanded because "PERB did not specifically address" that latter question. *Id.* at 604-06. And it still has not.

FOP's assertion that the arbitrator "found that the *penalty of termination* was not within the 'tolerable limits of reasonableness,'" is simply wrong. FOP Br. 8 (emphasis added). The arbitrator made no such finding. *See* JA 27. Moreover, PERB's conclusion in its initial decision that MPD misplaced its reliance on *Stokes* does not answer the question. FOP Br. 45-46. That analysis says nothing about whether the arbitrator looked to external law and misapplied it. JA 1157-58.

For its part, PERB again turns to a post hoc merits analysis that appears nowhere in its decision, asserting that it found that the arbitrator did make the findings required by *Douglas*. PERB Br. 20-21. In any event, it is wrong on both counts. As MPD has shown, the arbitrator's analysis and findings fell short of what

Douglas requires, and PERB did not find otherwise. MPD Br. 46-48; JA 1164-65.

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

The arbitrator's imposition of a 45-day suspension was contrary to law for two reasons. *First*, it was irrational. MPD Br. 48-49. Under *Douglas* the arbitrator was to consider the individual facts and circumstances of the case when selecting a penalty. *Douglas*, 5 M.S.P.R. at 303. Instead of doing that, 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. This approach is patently contrary to *Douglas*; neither PERB nor FOP have said or shown otherwise. *See* FOP Br. 42-43, 47-48.

Instead, PERB and FOP have set up a straw man. They argue MPD is challenging the arbitrator's factual findings. PERB Br. 21-24; MPD Br. 25. Not so. MPD *does not dispute* the arbitrator's factual finding that Ford's misconduct is "as close to similar misconduct as is in evidence." JA 28. Of the three cases Thomas identified, Ford's case is factually the closest. But that finding is a far cry from a determination that Ford's and Thomas's cases were sufficiently similar to warrant the same penalty—a finding the arbitrator did not make. JA 1165. Similarly, FOP's contention that the arbitrator found Ford's misconduct to be "more egregious" and then "reasoned that if a similar-but-worse circumstance warranted only a suspension,

then such a suspension was equally appropriate" for Thomas is baseless. FOP Br. 48-49. The arbitrator found no such thing.

Second, the penalty—a mere 45-day suspension—is so disproportionate to the severity of Thomas's misconduct as to be contrary to law. This Court recognized 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. MPD has shown why this is such a case. MPD Br. 48-50. PERB's only answer is to give absolute deference to the arbitrator's choice of a penalty absent "applicable law that mandates that the arbitrator arrive at a different result." JA 1165; *see* PERB Br. 21-24. PERB thus appears to maintain its view that it will not otherwise set aside an arbitrator's selected penalty, no matter how insignificant the penalty or how egregious the misconduct. This approach again ignores what is settled and is flatly contrary to *Thomas I*.

CONCLUSION

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

Respectfully submitted,

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August 2025

CERTIFICATE OF SERVICE

I certify that on August 12, 2025, this reply brief was served through this Court's electronic filing system to:

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