No. 24-CV-0573

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS
DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,

APPELLANT,

V.

DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD;
FRATERNAL ORDER OF POLICE/METROPOLITAN POLICE
DEPARTMENT LABOR COMITTEE,

APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
(Case No. 2023-CAB-002461)
The Honorable Shana Frost Matini Presiding

BRIEF OF APPELLEE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD

FOR WEBSTER & FREDRICKSON, PLLC

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March 23, 2025

* Geoffrey H. Simpson is expected to argue this matter.

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RULE 28(a)(2) CERTIFICATE

The undersigned, counsel of record for Appellee District of Columbia Public Employee Relations Board, certifies that the following listed parties appeared below before the Superior Court of the District of Columbia:

Appellant: District of Columbia Metropolitan Police Department

Appellant's Counsel: Brian L. Schwalb, Caroline S. Van Zile, Ashwin P. Phatak, Carl J. Schifferle, and Stacey L. Anderson of the District of Columbia Office of the Attorney General

Appellee: District of Columbia Public Employee Relations Board

Appellee's Counsel: Geoffrey H. Simpson of Webster & Fredrickson, PLLC

Intervenor: Fraternal Order of Police/Metropolitan Police Department Labor Committee

Intervenor's Counsel: Daniel J. McCartin and Benjamin J. Campbell of Conti Fenn LLC

Respectfully submitted,

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the decision of the Public Employee Relations Board ("PERB") on remand finding that an arbitration award was not "on its face contrary to law and public policy" within the meaning of D.C. Code § 1-605.02(6) was clearly erroneous or not grounded in substantial evidence.

STATEMENT OF THE CASE

This matter comes before the Court following the September 15, 2022 remand from this Court in *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 282 A.3d 598 (D.C. 2022) (*Thomas I*). In those proceedings, the parties outlined the underlying facts and procedural history to that point. (*Id.* at 600-02; Appellee PERB's Br. *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 19-CV-1115 at 1-6 (Mar. 21, 2021). PERB adopts and incorporates its recitation of the facts as stated by the Court and its prior submission and briefly restates the events below.

As recounted by Arbitrator Malcolm Pritzker, whose factfinding is controlling, the District of Columbia Metropolitan Police Department ("MPD") sought to terminate Officer Michael Thomas for an incident wherein Officer Thomas shot Julio Lemus in an early-morning incident

outside of his home. (JA 19.) Following the incident, State's Attorney for Prince George's County, Maryland, investigated what happened and declined to prosecute Officer Thomas for the incident. (JA 20.) MPD's investigative arms came to mixed conclusions as to whether Officer Thomas's use of force was justified. (JA 20.) The initial investigator found it was justified; but the investigator's superior determined it was not. (JA 20.) The "Use of Force Board in a split decision" agreed Officer Thomas' "use of his service pistol was not justified." (JA at 20.)

Alluding to, but not relying on, the *Douglas* factors (*see* JA 1166-67), Arbitrator Pritzker evaluated 1) whether the evidence supported MPD's charges that Officer Thomas had engaged in reckless endangerment and Officer Thomas failed to obey orders and 2) "[w]hether termination is an appropriate remedy." (JA 19, 21.) Exercising the discretion granted to his by the parties, Arbitrator Pritzker determined that Officer Thomas was guilty of the charges against him, but that a 45-day suspension was the appropriate remedy. (JA 19-28.)

In so ruling, Arbitrator Pritzker carefully reviewed the evidence, most importantly on whether the proposed discipline of termination was consistent with comparable cases. (JA 27.) In Arbitrator Pritzker's bargained-for view, the circumstances of Officer Thomas' misconduct were

sufficiently close to those in another case—that of Officer Ford—such that similar discipline was warranted. (JA 27.)

As outlined in *Thomas I*, PERB found the Award ordering reinstatement of Officer Thomas did not contravene law and public policy and otherwise PERB found no grounds to set aside the Award. 282 A.3d at 602. The Superior Court upheld PERB. *Id.*

The Court upheld the portion of PERB's Decision and Order that rejecting the MPD's argument that the Arbitrator was required to defer to the MPD in selecting a penalty. *See Thomas I*, 282 A.3d at 602-05. The Court remanded the case back to PERB to render a more detailed decision regarding the MPD's remaining arguments:

> We conclude that a remand to PERB is necessary with respect to MPD's other arguments that the arbitrator's award was on its face contrary to law. PERB did not specifically address those arguments, instead simply stating without further explanation that "mere disagreement with the Arbitrator's interpretation does not make an award contrary to law and public policy." On remand, PERB should address MPD's specific arguments in light of the general principles noted above. . . .
>
> We do not view PERB as having adequately explained its decision not to set aside the arbitral award as against public policy. After emphasizing that the authority to set aside arbitral awards on that basis is narrow, PERB simply stated without explanation that MPD had not offered a clear violation of public policy. A remand to PERB is therefore necessary on this issue as well.

> For the foregoing reasons, the judgment of the Superior Court is vacated and the case is remanded for the Superior Court to remand the case to PERB for further proceedings.

Id. at 605-606.

On remand, PERB provided the detailed explanation of its decision as required by the Court. (JA 1161-70.) Concerning the arguments that the Arbitrator's reliance on the Ford case violates the law, PERB explained:

1) disputes over the weight or significance of evidence is not grounds to set aside an Award under the CMPA; 2) that the Arbitrator broke no law in considering the penalty applied in the Ford case; 3) there is nothing in the law that mandated the Arbitrator come to a different result; and 4) that MPD's disagreement with the Arbitrator's interpretation of the Ford case is not the sort of disagreement which contravenes a law "on its face."

(JA 1165)

PERB then considered whether the Arbitrator imposed an improper burden on MPD to establish the consistency of the penalty element, and rejected that argument as well: PERB was required to defer to the Arbitrator's interpretation of an external law and that a review of the *Douglas* factors amounted to an exercise of the Arbitrator's equitable power (JA 1166); where the MPD Hearing Panel made a determination on the consistency of the penalty factor, but did so in the absence of evidence, the

Arbitrator was making a factual determination that the Hearing Panel's determination was improper based on his equitable power to review the Hearing Panel's determination (JA 1166).

Finally, PERB considered carefully, and rejected MPD's argument that reinstatement of Officer Thomas would violate broader public policies against employing officers who had engaged in serious misconduct. In so doing, PERB reviewed the cases cited by MPD for that proposition and explained:

1) "The issue is not whether the employee's misconduct would violate public policy but rather whether enforcing the arbitral award would do so" (JA 1168); 2) In the absence of an explicit law violated by the reinstatement, PERB may look to several factors: "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.)

PERB viewed MPD's contention that termination was required as predicated on the severity of the misconduct. (JA at 1168-69.) Yet, MPD did

not present evidence that other were removed for similar offenses—because FOP had presented at least one case where an officer engaged in comparable conduct, and because Arbitrator Pritzker found that there was a good chance of rehabilitation, PERB concluded that MPD had not met its high burden to show the Award was contrary to public policy. (JA at 1168-69.)

MPD petitioned the Superior Court for review of PERB's decision. The Superior Court affirmed PERB's decision. Finding PERB articulated its reasons adequately, the Superior Court found none of MPD's arguments attacking the Award persuasive. (JA 1311-26.)

STANDARD OF REVIEW

The District of Columbia Court of Appeals reviews an appeal of a PERB decision as if the appeal initially had been heard by this Court rather than by the Superior Court and applies the same standard of review. *FOP/Dep't of Corr. Labor Comm. v. District of Columbia Public Employee Relations Bd.*, 973 A.2d 174, 176 (D.C. 2011) (*citing Gibson v. District of Columbia Public Employee Relations Bd.*, 785 A.2d 1238, 1241 (D.C. 2001)).

Under D.C. Code § 1-617.13 (b) (2001), PERB's factual findings "shall be conclusive if supported by substantial evidence in the record considered as a whole." As the Court articulated in *Thomas I*, "Recognizing agency expertise, we accord great weight to any reasonable construction of an

ambiguous statute by the agency charged with its administration.'" 282 A.3d 598, 603 (*quoting Johnson v. D.C. Dep't of Emp. Servs.*, 111 A.3d 9, 11 (D.C. 2015) (brackets, ellipses, and internal quotation marks omitted). The Court "'will sustain the agency's interpretation even if a [party] advances another reasonable interpretation of the statute or if we might have been persuaded by the alternate interpretation had we been construing the statute in the first instance.'" *Id.* (internal quotation marks omitted).

Concerning PERB's own review of arbitration awards, PERB is confined by the explicit language of the Comprehensive Merit Personnel Act, D.C. Code § 1-605.02(6). Accordingly, PERB "'has only limited authority to overturn an arbitral award.'" *Thomas I*, 282 A.3d at 603 (quoting *D.C. Pub. Emp. Rels. Bd. v. Fraternal Ord. of Police/Metro. Police Dep't Lab. Comm.*, 987 A.2d 1205, 1208 (D.C. 2010) (internal quotation marks omitted). The deference to PERB afforded by the CMPA, the Superior Court Rules of Civil Procedure, and the Court of Appeals is grounded on PERB's status as an expert agency specifically tasked with interpreting and applying the CMPA. *See Hawkins v. Hall*, 537 A.2d 571, 575 (D.C. 1988) (PERB has "special competence" to handle questions arising under the CMPA). Because PERB has the "express statutory responsibility" to decide standards of conduct complaints, it is error for a reviewing Court to disturb a PERB decision unless

the PERB decision is clearly erroneous. *District of Columbia Public Employee Relations Bd. v. Washington Teachers' Union*, 556 A.2d 206, 210 (D.C. 1989) (reversing Superior Court because the Superior Court applied the wrong standard of review).

SUMMARY OF ARGUMENT

This case comes to the Court a second time following a remand to the PERB from the District of Columbia Court of Appeals. *District of Columbia Metropolitan Police Dep't v. District of Columbia Public Employee Relations Bd.*, 282 A.3d 598 (D.C. 2022). The dispute originated when Arbitrator Malcolm Pritzker ordered that Michael Thomas, an MPD Officer, be reinstated with a lengthy suspension following an off-duty incident wherein Officer Thomas shot an individual Thomas believed was breaking into his car. PERB determined that under the narrow review afforded to it under the Comprehensive Merit Personnel Act ("CMPA"), it had no authority to set aside the Award. In its initial decision and order, PERB held that the Award was not on its face contrary to law and public policy. The Court of Appeals remanded the case to ask that PERB more fully address the arguments made by MPD. *Thomas I*, 282 A.3d at 602. PERB did just that. PERB fully addressed all of the arguments before it. Its decision, based on its expert interpretation of the CMPA, is reasonable.

MPD cannot demonstrate that PERB decision, grounded in the CMPA and decades of labor law, is clearly erroneous. The central question posed to the Arbitrator was: Was termination the appropriate penalty for the officer's misconduct? That is exactly the question Arbitrator Pritzker resolved. He found that termination was not appropriate. Arbitrator Pritzker found that in a comparable case MPD gave a 45-day suspension to an MPD officer who had killed a member of the public. The Arbitrator's reliance on that precedent and application of other mitigating factors was not so far out of bounds that implementing the Award would violate law and public policy. PERB reasonably found the answer is no based on its interpretation of the CMPA and the case law interpreting it. That decision is well grounded in both the statute and fundamental principles attached to arbitration which limit review of such Awards. Reinstating an officer who engaged in conduct of this sort does not affirmatively violate any law or public policy. PERB respectfully requests that its decision be affirmed.

ARGUMENT

I. Substantial Evidence Supports PERB's Conclusion that the Arbitrator was Not Bound by *Douglas*

For a generation, PERB has interpreted the CMPA's grant of power to PERB to review arbitration awards as extremely narrow. (PERB Br., *Metropolitan Police Dep't. v. PERB*, 19-CV-1115, (Mar. 21, 2021), filed by

Geoffrey H. Simpson on behalf of PERB, at 10-11. This interpretation of the CMPA is borne of and shaped by the background and purpose of the CMPA, and how labor law has developed, and the underlying legal precepts that govern the review of arbitration awards. *See id.*, *see also* FOP Br., Feb. 7, 2025, at 17-21.

MPD calls for an alteration of the legal landscape, the sort of which requires statutory change. *See* MPD Br. at 22-29 (advocating for a *de novo* review of PERB's statutory interpretation of arbitration awards). The Court should disregard this argument entirely. The Court's articulation of the standard of review in this matter recognizes the great weight afforded PERB in its construction of the CMPA. *Thomas I*, 282 A.3d at 603. This decision is binding on this appeal as law of the case. The controlling law, repeatedly affirmed by this Court, gives PERB's decision deference—any argument otherwise should be disregarded *in toto* for the reasons outlined by the Intervenor. FOP Br. at 17-21

PERB's interpretation of the CMPA in turn gives arbitrators a wide berth to make decisions—to make factual determination, contractual interpretations, and legal judgments—without interference by reviewing bodies except in rare circumstances. That interpretation rests in a sound interpretation of statutory text and wide-ranging precedent.

As this Court summarized in *Thomas I*, this Court's "prior cases establish three principles that provide guidance as to the meaning of the words "on its face contrary to law"":

1) First, an arbitral award will not be set aside as "on its face contrary to law" simply because PERB or this court might reach a different conclusion as to a legal issue decided by the arbitrator. *E.g.* , *D.C. Metro. Police Dep't v. D.C. Pub. Emp. Rels. Bd.*, 901 A.2d 784, 789 (D.C. 2006). That is because, by agreeing to arbitrate, "the parties bargained for the arbitrator's interpretation" of the law, not that of PERB or the court. *Id.*

2) Second, an arbitral award can be set aside if a "clear violation of law" is "evident on the face of the arbitrator's award." *Id.* (internal quotation marks omitted); *see Fraternal Ord. of Police*, 973 A.2d at 178 ("[T]he statutory reference to an award that on its face is contrary to law and public policy may include an award that was premised on a misinterpretation of law by the arbitrator that was apparent on its face.") (internal quotation marks omitted).

3) Third, an award will be viewed as on its face 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."

Thomas I, 282 A.3d at 604. These principles are rooted in the strong background presumption that labor arbitration awards generally may not be disturbed in order to secure finality and certainty.

On remand, PERB applied this framework when it fully addressed MPD's arguments. First, PERB concluded that Arbitrator Pritzker applied his equitable power to review MPD's application of the *Douglas* factors:

> The Board must defer to an arbitrator's rational interpretation of external law when the arbitrator is construing the parties' contract. An arbitrator's review of MPD's *Douglas* factor analysis constitutes an exercise of his equitable powers arising out of the parties' collective bargaining agreement.
>
> Here, in his assessment of the Panel's *Douglas* factor analysis, the Arbitrator found that the Panel did not reach a conclusion on Douglas factor 6 that was within "tolerable limits of reasonableness." The Arbitrator determined the Panel cited no other disciplinary decisions in reaching its conclusion that the penalty of termination is "…consistent with the penalty given to employees for like or similar conduct." The Arbitrator found that the Panel considered the *Douglas* factors but noted that, "consideration without proof, when proof is required or when the facts are in conflict with the conclusion is not in compliance with all of the Douglas factors that are 'pertinent.'"
>
> MPD alleges that the Arbitrator "improperly inferred" that MPD had a burden of proof to show that the Panel's penalty of termination was consistent with the penalty imposed against other members for similar misconduct. Based on the evidence presented before him, the Arbitrator had jurisdiction to determine that the Panel misapplied the *Douglas* factors and that the penalty of discharge was improper. The 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. Therefore, the Board finds that MPD has not met its burden to show that the Arbitrator's review of the Panel's *Douglas* factor analysis was premised upon a misinterpretation of law apparent on the face of the Award.

(JA 1166 (internal footnote citations omitted).)

This squarely addressed the questions of whether (1) the Arbitrator applied the wrong burden of proof and (2) whether the Arbitrator "erred by setting aside MPD's selected sanction without finding either that MPD failed

to weigh the relevant factors or that the proposed sanction fell outside the limits of reasonableness." *Thomas I*, 202 A.3d at 604.

PERB's decision is reasonable. FOP and MPD, through their collective bargaining agreement, set up a system for the review of disciplinary actions separate and apart from the system used for the review of disciplinary actions by the Office of Employee Appeals. As PERB explained, Arbitrator Pritzker exercised his equitable judgment in ascertaining the correct discipline for Officer Thomas.

The CMPA explicitly sanctions this separate system of self-government: "Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by a labor organization." D.C. Code § 1-616.52. Issues concerning whether there was cause for termination are squarely within the arbitrator's purview and are not governed by the laws or processes which adhere to the OEA's review of discipline.

By submitting this matter to arbitration, the parties committed themselves to a system governed by the collective bargaining agreement, the issues submitted to the Arbitrator, and the Arbitrator's interpretation

thereof. The parties bargained precisely for the arbitrator's determination of how to resolve these issues.

PERB concluded the Arbitrator's *Douglas* analysis did not contravene the law because he exercised the equitable power granted to him by the parties versus being strictly constrained to applying the *Douglas* factors under the same standards as might the MSPB. (JA 1166-67.) As PERB outlines in more detail below, arbitral review is a statutorily distinct process from Office of Employee Appeals ("OEA") review, rendering OEA and MSPB decisions nonbinding and courts routinely hold as much; that Arbitrator Pritzker neither relied solely upon *Douglas* nor ignored any express provisions of the law or decision. *See infra*; Appellee PERB's Br. *supra*, 19-CV-1115 at 15-25. Put another way, it was up to the Arbitrator to evaluate the Hearing Panel's determinations. *Douglas* serves as important guidance for that determination but is not controlling. PERB's decision so concluding is consistent with the guidance outlined by this Court as to the meaning of "on its face contrary to law and public policy." *Thomas I*, 282 A.3d at 604.

Substantial evidence supports PERB's conclusion that the Arbitrator was exercising equitable power. The Arbitrator himself stated that the analysis applicable to determining the appropriate penalty often includes comparison to other cases even without applying *Douglas*. (JA 25, 27.) The

Arbitrator neither relied solely on *Douglas* for authority to decide the issue nor did he ignore any express provisions in *Douglas* when issuing his award. Instead, Arbitrator Pritzker observed that several of the *Douglas* factors "are routinely considered by arbitrators in determining whether . . . the degree of discipline selected by the employer is appropriate." (JA 25 (*citing* Elkouri and Elkouri, "How Arbitration Works" ABA Fifth Ed. 1952).) The Arbitrator further explained that subsequent books on discipline "also discuss the factors considered by arbitrators in determining the appropriateness of degrees of discipline" including "the grievant's past record, the years of employment, the knowledge of rules, lax enforcement of rules, and unequal or discriminatory treatment." (JA 25.) Arbitrator Pritzker continued, "even without the *Douglas* Factors, Arbitrators give great weight when deciding whether a discharge is for just cause to, in the words of *Douglas* Factor 7, "consistency of the penalty with those imposed upon other employees for the same or similar offences." (JA 27.)

If there is any doubt as to whether the Arbitrator relied on *Douglas* alone for deciding whether termination was appropriate, any ambiguity in the award must be interpreted in such a way to uphold the award: because arbitrators generally are not legally required to write decisions that explain the outcome in their awards, Courts hold that so long as the "record discloses

a permissible route to the stated conclusion" the award will be affirmed. *Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union, AFL-CIO*, 578 F. Supp. 2d 160, 163 (D.D.C. 2008) (*citing Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 532 (D.C. Cir. 1989); *Chicago Typographical Union No. 16 v. Chicago Sun-times, Inc.*, 935 F.2d 1501, 1506 (7th Cir. 1991).)

PERB's rejection of MPD's argument that it was held to the wrong burden of proof is also reasonable for the same reasons. Intervenor FOP ably explains why MPD's argument that some alteration of the burden of proof and there is no need to duplicate that discussion. FOP Br. 37-44. PERB pauses to add only that MPD advocates for the wrong mode of analysis. Where the parties have asked an arbitrator to determine the appropriate remedies and where *Douglas* is guidance and not controlling, there are no bases to set aside the award even if a reviewing body would have applied the guidance differently or arrived at a different result. That means questions surrounding the order or quantum of proof necessary to conclude if termination is the appropriate remedy are reserved for the Arbitrator, as PERB explained. (JA 1165, *see* Appellee PERB Br., 19-CV-1115 at 26.)

Drilling down further, the crux of MPD's argument appears to be that it should not have been required to present any comparative discipline evidence until Officer Thomas established disparate treatment, as suggested

in some OEA and MSPB decisions. MPD's attempted comparison between arbitration and OEA or MSPB, however, processes fails as a matter of logic and law.

MPD's argument first fails because it is entirely dependent on viewing *Douglas* and analog OEA cases as controlling law. They are not. D.C. Code § 1-616.52(d); D.C. Code § l-606.02(b) ("Any performance rating, grievance, adverse action or reduction-in-force review, which has been included within a collective bargaining agreement" is not subject to OEA processes). And the Superior Court has repeatedly and correctly held that the OEA's standard of review of an agency decision is inapposite in the context of arbitration. Indeed, this issue has been brought before the Superior Court repeatedly and the Superior Court—to the undersigned's research—has never found that OEA standards bound arbitrators. *See District of Columbia Metro. Police Dep't v. Pub. Emp. Relations Bd.*, 2017 CA 007997 P(MPA), *6 (D.C. Super. Ct. Oct. 4, 2018) (Rigsby, J.)(arbitrator reviewed an Adverse Action Panel decision and found the Panel's analysis with respect to the consistency of the penalty and efficacy of alternate sanction Douglas factors wanting; "[t]he Arbitrator considered the Panel's *Douglas* analysis and provided additional analysis and evidence of other factors relevant to determining the appropriate sanction," the Arbitrator "appropriately complied with

applicable law."); *District of Columbia Metro. Police Dep't v. District of Columbia Public Employee Relations Bd.*, Case No. 2014 CA 007679 P(MPA) (D.C. Super Ct. 2015) (Ross, J.). *District of Columbia Metropolitan Police Dept. v. District of Columbia Public Employee Relations Bd.*, 2010 CA 005945 P(MPA) (D.C. Super. Ct., Feb. 15, 2012) (standard applicable to OEA is inapposite in the context of arbitration); *District of Columbia Metropolitan Police Dept. v. District of Columbia Public Employee Relations Bd.*, Case No. 2005 CA 4642 P(MPA) (D.C. Super. Ct. June 12, 2006) (rejecting MPD's argument that a reviewing body is precluded from substituting its judgment regarding a penalty for an agency because of the OEA standard); *District of Columbia Metropolitan Police Dept. v. District of Columbia Public Employee Relations Bd.*, Case No. 2006 CA 3712 (D.C. Super. Ct. May 25, 2007) (affirming PERB decision that a "case involve[d] a review of an employer's decision by OEA, an administrative agency, not by an arbitrator" and was therefore distinguishable).

It fails as a matter of logic because a claimant does not start an MSPB or OEA appeal with the full record necessary to challenge an adverse action as MPD seems to believe was required of Officer Thomas. Under both the OEA and MSPB's rules, parties are entitled to discovery to make out their claims. *See* 6-B DCMR §§ 620.1, *et seq.*; 5 C.F.R. §§ 1201.71-75. An employee

challenging an adverse action would have the opportunity to gather evidence, develop legal theories, and then contest the action based on such information obtained. The MSPB and OEA then, applying the rules and standards applicable in those forums, make a decision based on the record evidence submitted.

When the MSPB says that the employee must establish disparate treatment because differential treatment is evaluated, it is not saying as MPD seems to contend, that the employee needed to be armed with all the evidence before receiving a notice of termination. *See Boucher v. U.S. Postal Service*, 2012 M.S.P.B. 126, 118 M.S.P.R. 640 (2012). Rather, the employee presents evidence *to the MSPB* that there is differential treatment and the employer then is required to explain why such differential treatment occurred. *Id.*

It was MPD, through its Hearing Panel that claimed that the consistency of the penalty factor helped justify termination. (JA 20, 953.) It did so without making any actual comparison to other matters--as the Arbitrator stated, it was an assertion without evidence. (JA 27.) FOP, challenging the Hearing Panel's determination, alerted MPD to the Ford case in a letter to Chief Cathy Lanier. (JA 988-89.) MPD then had the opportunity to address the comparison either by Chief Lanier remanding or in

arbitration. Yet, MPD simply argued to the Arbitrator that Ford's conduct was not as severe as Thomas' without making any additional case. (JA 1056-57)

If a parallel were to be drawn at all, FOP established differential treatment by citation to the Ford matter in its letter to Captain Cathy Lanier seeking review of the Hearing Panel determination (JA 988-99), which amounted to providing a comparator case establishing that termination was not the appropriate penalty (JA 26 (Arbitrator acknowledging acceptance of three cases into the record)). Once the record had been supplemented with a comparator case, it was up to MPD to successfully distinguish Ford or marshal other evidence in its favor. (JA 1056-57, 1165.) MPD failed to do so to the factfinder's satisfaction. MPD simply lost the argument with the union as to whether it provided sufficient evidence on the consistency of the penalty factor and whether the circumstances in Ford were close enough to draw a meaningful comparison. That is not the product of any additional burden placed on MPD but a product of Arbitrator Pritzker's bargained-for factfinding.

The next concern identified by the Court is closely interrelated with the previous ones: MPD contends the Arbitrator did not find either that MPD failed to weigh the relevant factors or that the proposed sanction fell outside

the limits of reasonableness. As PERB held, the Arbitrator did make such a finding and weigh such evidence. (JA 1166.) In fact, the Arbitrator rejected the Hearing Panel's analysis on *Douglas* factors 6 (consistency of the penalty), 10 (potential for rehabilitation) and 12 (no other sanction could suffice) and explained his reasoning for those conclusions. (JA 27.) Those were the "pertinent" *Douglas* factors for which MPD did not have support. (JA 27; *see also* JA 1166. PERB reasonably applied the "on its face contrary to law and public policy standard" as outlined in its prior decisions and as stated in *Thomas I*.

Lastly, the premise of MPD's argument boils down to its contention that the Ford case is not close enough to draw a meaningful comparison and that MPD itself was not required to offer evidence of comparative discipline. As described above, PERB explained that MPD agreed to the Arbitrator's factual determinations as to whether the Ford case is sufficiently close. (JA 1165.) PERB is bound to accept the factual findings of the Arbitrator. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (*quoting United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 39 (1987)). As the Supreme Court held "Courts are not authorized to review an arbitrator's decision on the merits despite allegations that the decision rests on factual errors." *Id*. The Supreme Court has gone so far as to explain,

"When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's improvident, even silly, factfinding does not provide a basis for a reviewing court to refuse to enforce the award." *Id.* A dispute over the weight of evidence, even where a party believes the Arbitrator was "silly," is not grounds for reversal.

There was nothing silly about Arbitrator Pritzker's fact finding. He rejected FOP's proffered comparison to misconduct in two of three instances FOP had presented. (JA 26-27.) The Ford matter included the following description of events:

> When Sergeant Colin Hall arrived on the scene, he asked the off-duty duty officer to come out of the alley. You were that off-duty officer in the alley. You were pursuing Mr. Ignatius Brown, the person suspected of stealing your property. You were directed by Sergeant Hall to let the investigators handle the theft of your property. Sergeant Parson specifically advised you that the investigators would handle the case. Sergeant Parson further directed you not to pursue Mr. Brown again, especially attired in garments that would not allow you to be easily identified as a police officer. . . .
>
> [W]hile off duty, again you saw Mr. Ignatius Brown. Again you took matters into your own hands and approached Mr. Brown. A brief verbal confrontation ensued . . . . Mr. Brown told you that he was not going back to jail and . . . started swinging and kicking towards you. You attempted to keep Mr. Brown away . . . . You then then drew your service weapon and held it in both hands. When Mr. Brown lunged forward, you discharged one (1) round from your departmental issued Glock-17 service pistol, striking Mr. Brown . . . . [T]he Use of Force Review Board found that you used your department issued service weapon unjustifiabl[y]

> when you shot Mr. Ignatius Brown, killing him, on February 22, 2006. Your actions were in violation of the above General Orders.

(JA 988-89 (emphasis added).) MPD seeks to sanitize what Ford had done by emphasizing that the man Ford shot had lunged at Officer Ford. But the record shows that Ford disobeyed orders, took the law into his own hands, instigated a hostile incident, and shot and killed a man. (JA 988-89.) MPD penalized Ford with a 45-day suspension. (JA 26-27.)

So, which is worse? Ford took a man's life. But we see that Ford's victim had lunged at him—but did so after Ford disobeyed orders and initiated the confrontation. Thomas did not kill anyone. But we do not see that Lemus attacked Thomas in the same way. The underlying events are not identical, but the Ford case is sufficiently close that an arbitrator can reasonably rely on it as guidance for ascertaining the consistency of the penalty in deciding what the appropriate penalty for Thomas was. Another factfinder might have found that termination was warranted in both cases. Still another might find Ford's conduct more severe. A third might agree that Thomas' was worse than Ford's. But MPD itself had determined that an off-duty officer who instigates a confrontation resulting in a shooting does not necessarily require that such an officer be fired. And MPD never offered countervailing examples supporting that such conduct did warrant termination.

Where MPD complains that PERB does not address its argument as to the distinctions between Ford and Thomas, it seeks to impose a role for PERB and for this Court that is not theirs to fill. PERB explained plainly that the analysis of factual similarities between Ford and Thomas are squarely in the realm of the Arbitrator. PERB's role is not to ascertain the correctness of the Arbitrator's decision, only to determine if it broke the law. Given that MPD had, on its own accord, determined that a 45-day suspension was appropriate for Ford, Arbitrator Pritzker's determination that Thomas ought to have a 45-day suspension too is not so far out of bounds that it itself violates the law. *Compare Thomas I*, 282 A.3d at 605 (decision can be so disproportionate as to violate the law). The person who was bargained for here to make this factual call is the Arbitrator, and PERB reasonably declined to re-visit the factual determinations under well-established standards.

Under a reasonable interpretation of the CMPA, its own longstanding precedent, decisions by the Court of Appeals, PERB concluded that the Arbitrator is the fact finder. Substantial evidence supports PERB's conclusion that the comparison between Thomas and Ford is a factual question left for the Arbitrator's determination. This conclusion is not clearly erroneous.

II. PERB Reasonably Refused to Set Aside the Award As Contrary to Public Policy

The last grounds for remand was for PERB to further explain its reasoning that the Award did not violate the public policy associated with returning an officer who had engaged in serious misconduct to work. *Thomas* I, 282 A.3d at 606. The Court set forth the legal standard:

> The public-policy exception to the enforcement of arbitral awards is "*extremely narrow* ." *D.C. Metro. Police Dep't* , 901 A.2d at 789 (internal quotation marks omitted). The "public policy alleged to be contravened must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* (internal quotation marks omitted). The Supreme Court of the United States has explained that the issue is not whether the employee's misconduct violated public policy but rather whether enforcing the arbitral award would do so. *E. Associated Coal Corp. v. UMW, Dist. 17* , 531 U.S. 57, 62-63, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000).
>
> The Court continued:
>
> The Supreme Court also has stated, however, that "courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law." *Id.* at 63, 121 S.Ct. 462. It does not appear that either PERB or this court has expressly addressed the latter issue.

Id. The Court then outlined the dispute as follows:

> Rather, the dispute is over whether reinstating Officer Thomas would violate that public policy. Courts around the country have divided when confronting similar issues. *Compare, e.g.* , *City of Seattle, Seattle Police Dep't v. Seattle Police Officers' Guild* , 17 Wash.App.2d 21, 484 P.3d 485, 489-507 (Ct. App. 2021)

> (upholding trial-court order setting aside arbitral award as against public policy, where arbitrator reinstated officer who used excessive force by punching handcuffed suspect in face, breaking suspect's orbital bone), *and City of Des Plaines v. Metro. Alliance of Police, Chapter No. 240* , 391 Ill.Dec. 328, 30 N.E.3d 598, 600-610 (App. Ct. 2015) (upholding in part trial-court order setting aside arbitral award as against public policy, where arbitrator reinstated officer who used excessive force against arrestees; case remanded for arbitrator to further consider appropriate sanction), *with, e.g.* , *Town of South Windsor v. S. Windsor Police Union Loc. 1480* , 255 Conn. 800, 770 A.2d 14, 16-30 (2001) (reversing order setting aside arbitral award as contrary to public policy, where arbitrator reinstated officer who pointed gun at young men playing basketball without permission at gymnasium); *see generally* Tracy Bateman Farrell, *Vacating on Public Policy Grounds Arbitration Awards Reinstating Discharged Employees—State Cases* , 112 A.L.R.5th 263, § 18 (2003 & Cum. Supp.) (citing cases).

Addressing this issue in detail, PERB provided the grounds in which it may set aside an award on public policy grounds:

> An arbitral award reversing termination will violate established public policy that is embodied in explicit law precluding the employee's reinstatement. In the absence of such explicit law, determining whether an arbitral award violates public policy is a fact-specific inquiry. The Board may look to several factors to determine whether an arbitral award violates public policy, including 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.) To arrive that this statement of the law, PERB drew on cases from across the country in establishing this standard which marries the reasoning of other decisions, the Court's instructions and observations with this Court's precedent, PERB precedent, and PERB's expertise. (JA 1168.)

This standard is consistent with the broad sweep of decisions from across the country. Even in cases where sister courts have found that reinstatement of a public employee can violate public policy, those courts generally require something more than general opposition to employing an individual who had done something wrong.

Applying this standard here, the first question is, is there an explicit law forbidding enforcing the Award by reinstating the officer? There is also no law barring Thomas's return. MPD notes that there are (unsurprisingly) laws and rules which prohibit unlawful shootings by police officers. Yet, the Award did not order Officer Thomas to shoot anyone. 6-A DCMR § 207 and MPD's General Orders set standards do not require termination for those who engage in misconduct or otherwise explicitly forbid such officers from returning to work.

MPD now claims D.C. Code §§ 5-107.01, 22-402, 22-404, and 6-B DCMR § 873.11 require termination, but none do. On its face, 6-B DCMR § 873, applies to pre-employment applicants and says nothing about

discipline. The same is true of D.C. Code § 5-107.01(f)(1)—a law that post-dates the conduct here by a decade and was enacted well after the Arbitrator made his Award.

The next question is to analyze the factors in a fact-specific inquiry. The public policy must ordinarily be more than a simple reluctance to return an employee to work who had engaged in misconduct. For example, the Illinois court explicitly holds that looks at "the constant practice of the government officials when determining questions regarding public policy." *City of Aurora v. Ass'n of Prof'l Police Officers*, 2019 IL App (2d) 180375, ¶ 53, 429 Ill. Dec. 362, 373, 124 N.E.3d 558, 569 (quotation omitted).

The Court of Appeals cited *City of Seattle, Seattle Police Dep't v. Seattle Police Officers' Guild,* 484 P.3d 485, 489-507 ("*SPD*") as another example where a court set aside an arbitration award reinstating a police officer as violating public policy. At the center of *SPD* was the fact that the Seattle Police Department had entered into a consent decree with the Department of Justice because the Department had engaged in a pattern and practice of using excessive force. The public policy at issue stemmed from preventing such a pattern from taking hold. There is no such consent decree here of the sort which gave rise to the well-defined public policy identified by the Washington courts. The need for an enforcement mechanism to ensure no

pattern resurfaced pursuant to the Consent Decree gave rise to the public policy beyond the general public policy that officers ought not to engage in misconduct, even serious misconduct. *Id*.

That MPD was unable to identify comparable cases where it fired MPD officers for conduct like that engaged in by Officer Thomas (and in fact in the closest case in the record, Ford, reflected a practice akin to that ordered by the Arbitrator) tells the story that (1) there is no "constant practice" of firing similarly situated officers; and (2) the District MPD does not suffer from the same lack of enforcement mechanisms as SPD--the same public policy is not at stake. MPD now has identified four additional instances it states that MPD officers were fired for misconduct like that of Officer Thomas. As FOP notes, those cases were not cited in Arbitration or prior to this appeal, and reliance on them is waived. *Thomas I*, 282 A.3d at 605; *see also* FOP Br. at 26.

Otherwise, even egregious misconduct is usually not enough to make reinstatement of an employee who had engaged in misconduct, *vel non*, a violation of law and public policy. In *District of Columbia Dep't of Corrections v. Teamsters Union Local 246*, 554 A.2d 319 (D.C. 1989) a Department of Corrections ("DOC") Officer encountered an ex-inmate, tried to buy heroin, and then assaulted the ex-inmate with a hammer. *Id*.at 320.DOC terminated the Officer, but the arbitrator awarded reinstatement.

Id.DOC asked that this award not be enforced, but the Court of Appeals refused because to refuse would be to improperly apply "some free-floating notion of 'policy.'" *Id*. at 323. The conduct there was premeditated. Thomas' misconduct was not.

In *Town of South Windsor v. S. Windsor Police Union Loc. 1480*, 770 A.2d 14, 16-30 (Conn. 2001), identified by the Court of Appeals, the Connecticut court affirmed an arbitration award. It found no violation of public policy to reinstate an officer who had pointed a gun at youth and rejected many of the same arguments made by MPD here.

MPD has cited a host of additional cases seeking to establish its point that reinstating employees who had engaged in egregious misconduct can violate public policy, but all generally agree something more than misconduct is necessary to overturn an award, whether that is untruthfulness, *see In re Bukowski*, 50 N.Y.S.3d. 588 (N.Y. App. Div. 2017), *City of Boston v. Boston Police Patrolmen's Ass'n*,824 N.E.2d 855 (Mass.2005), or membership in a domestic terrorist organization, *State v. Henderson*, 762 N.W.2d 1 (Neb. 2009). Whether these factors would be enough under the narrow standard under District law remains to be seen—one expects membership in the KKK would preclude employment for other

specific grounds—but none of these cases reflect a well-defined and dominant public policy applicable in this case.

MPD now cites *Burr Rd. Operating Co. II, LLC v. New England Health Care Emps. Union, Dist.* 1199, 114 A.3d 144 (Conn. 2015) for the proposition that there are four principle factors to be considered. Yet, reliance on *Burr* is waived (*see* FOP Br. at 31-36), and *Burr* is not controlling. *Burr* is no more than another case among the span PERB considered in articulating the standard applicable in the District of Columbia—and it is among the least persuasive because it involved *de novo* review of an arbitration award by a Court unlike the system established by the CMPA.

Indeed, it is hard to square claims that the underlying conduct is so egregious as to require termination no matter what a bargained-for arbitrator determines with the past voluntary imposition of a 45-day suspension for when another officer killed someone while off-duty—this is not a case where the Arbitrator is just so wrong it violates the law or where MPD did not receive a fair hearing. The Arbitrator found a good chance of rehabilitation. (JA 1169.) And the Arbitrator imposed a stiff suspension nonetheless. (JA 1169.) Based on these factors, PERB found no violation of public policy by reinstating Officer Thomas.

MPD now also claims reinstatement would expose MPD to litigation risk due to the potential that Thomas' conduct would recur and that Officer Thomas would re-offend. This is directly contrary to the Arbitrator's factfinding where he found a substantial likelihood of rehabilitation (JA 26-27) and history as MPD offers no evidence whatsoever of any recurrence of conduct since 2011. This is a made-up concern that has no basis in the record or law. The same is true of MPD's contention that reinstatement would erode public trust. Yet, MPD offers no specific evidence for this claim and again resorts to general statements of public policy—and this concern was among the factors already considered by the bargained-for arbitrator in making the Award. (JA 26.)

Put simply, there is no law or public policy that *requires* termination for the misconduct in this case. The Arbitrator reviewed all of the facts (including a dispute over whether the officer's use of force was justified) next to the *Douglas* factors and just cause standards more broadly, and made a determination as to the appropriate remedy. PERB was required to accept those facts, no matter what efforts MPD undertakes to frame them differently. PERB's determination that enforcing the award here, where the Arbitrator reviewed the facts and the *Douglas* factors and cause standards generally to ascertain whether termination was appropriate, would not be

"on its face contrary to law and public policy" is consistent with controlling precedent.

CONCLUSION

For these reasons, the reasons stated by Intervenor FOP, and for any reason the Court may find, PERB respectfully requests the Court find that PERB reasonably concluded that there are no grounds to set aside or modify the arbitration award.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2025, a copy of the foregoing Brief of Appellee PERB was served by the Court's electronic filing system, to counsel of record.

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