DISTRICT OF COLUMBIA COURT OF APPEALS

No. 24-CV-0573

D.C. METROPOLITAN POLICE DEPARTMENT,

Appellant,

v.

D.C. PUBLIC EMPLOYEE RELATIONS BOARD, *et al.*,

Appellees.

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

BRIEF OF INTERVENOR FRATERNAL ORDER OF POLICE/METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Court of Appeals Rule 26.1, Intervenor the Fraternal Order of Police, Metropolitan Police Department Labor Committee submits the following Corporate Disclosure Statement:

The Fraternal Order of Police, Metropolitan Police Department Labor Committee is a labor organization with no parent corporation, and no publicly held corporation owns 10% or more of stock in the Fraternal Order of Police, Metropolitan Police Department Labor Committee.

Respectfully submitted,

/s/ Daniel J. McCartin

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

∗ Authorities upon which we chiefly rely are marked with asterisks.

ADMINISTRATIVE DECISIONS

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This appeal is from the District of Columbia Superior Court's Order denying the Appellant, the Metropolitan Police Department's ("Department" or "MPD"), Petition for Review of Agency Decision and affirming the District of Columbia Public Employee Relations Board's ("PERB") Decision on Remand ("DOR"). Thus, the MPD's appeal is from a final order.

ISSUE PRESENTED

Whether PERB's Decision on Remand, upholding the Arbitrator's Award on the proper remedy, was rationally indefensible as a matter of law or not grounded in substantial evidence.

STATEMENT OF THE CASE

On January 14, 2011, the Department terminated Officer Michael Thomas. Joint Appendix ("JA") at 972-977. The Fraternal Order of Police/Metropolitan Police Department Labor Committee, D.C. Police Union ("D.C. Police Union") appealed the termination through arbitration, contending, in part, that termination was not an appropriate penalty for Officer Thomas. JA 994-1040. On November 1, 2017, Arbitrator Malcolm Pritzker issued an Opinion and Award ("Award") sustaining the charges but finding that the Department's penalty of termination was not within tolerable limits of reasonableness. JA 19-28. As a result, Arbitrator Pritzker reduced the penalty to a forty-five (45) day suspension. JA 28.

On November 27, 2017, the MPD filed an Arbitration Review Request with PERB contending that Arbitrator Pritzker's decision to reverse Officer Thomas' termination and impose a 45-day suspension was contrary to law and public policy, and setting forth limited arguments in support of that contention. *See* JA 1-18. On May 17, 2018, PERB issued a Decision and Order denying the MPD's Arbitration Review Request. JA 1155-1160. On December 3, 2018, the MPD filed a Petition for Review of Agency Decision with the Superior Court. JA 1161-1179. On October 23, 2019, the Superior Court denied the MPD's Petition and affirmed PERB's Decision and Order. JA 1283-1294. The MPD then filed an appeal to this Court on November 21, 2019.

On September 15, 2022, this Court issued an opinion affirming PERB's decision in part and otherwise remanding the matter back to PERB to further explain its rulings and to address the MPD's arguments in more detail. *See D.C. Metro. Police Dep't v. D.C. Pub. Emp. Rels. Bd*., 282 A.3d 598, 602-605 (D.C. 2022) ("*Thomas I*").

On March 16, 2023, PERB issued the DOR, wherein it specifically addressed the MPD's remaining specific arguments in light of the general principles articulated in *Thomas I*, exactly as this Court had ordered. JA 1161-70. The MPD subsequently submitted another Petition for Review of Agency Decision

to the Superior Court. *See* JA 1173-1216. The Superior Court affirmed PERB's DOR in its entirety. *See* JA 1311-26. The MPD now appeals again to this Court.

STATEMENT OF FACTS

A. Underlying Events

The underlying events for the MPD's disciplinary proceeding against Officer Michael Thomas ("Officer Thomas") occurred in the early morning hours of September 13, 2009, and are summarized in the Arbitration Award (the "Award") that has now been twice upheld by PERB. *See* JA 19-20. As an initial matter, the MPD's lengthy Statement of Facts goes far beyond the factual findings rendered by the Arbitrator and is replete with irrelevant and misleading statements that are nothing more than a transparent, *post hoc* attempt to revise the Arbitrator's findings and to cast Officer Thomas in the most negative light possible to attempt to persuade this Court to ignore the irrefutable conclusion that PERB's detailed DOR is unquestionably in compliance with the law.

Properly limited to the factual findings rendered by the parties' mutually-selected Arbitrator, the facts pertinent to the instant appeal are as follows. On September 13, 2009, Officer Thomas was involved in an off-duty incident at his then-girlfriend's private residence in Hyattsville, Maryland. JA 776. In the early morning, while Officer Thomas was watching television and his girlfriend, Officer Hope Mathis, was asleep, Officer Thomas's car alarm went off. JA 777. Officer

Thomas looked outside the window and observed an individual, later identified as Julio Lemus, standing next to his vehicle. JA 778.

In an attempt to scare Mr. Lemus to run away, Officer Thomas identified himself as a police officer and commanded Mr. Lemus to leave. JA 703. At the time of the incident, Mr. Lemus was heavily intoxicated, and instead of retreating after Officer Thomas's multiple requests, Mr. Lemus approached Officer Thomas. JA 779-784, 950. While walking towards Officer Thomas, Mr. Lemus began to ask, "Is that how you're going, son?" and put his left hand behind his left leg. JA 785. Officer Thomas responded by bringing his service weapon to the tuck position. JA 785. Mr. Lemus continued to state multiple times, "That's how you're going, son?" while shaking his head. JA 786-787. As Mr. Lemus advanced towards Officer Thomas, Mr. Lemus reached his hand towards his hip. JA 787. Acting in self-defense to a perceived threat, Officer Thomas discharged his service weapon twice. JA 787-789. Shortly after the shooting, the Hyattsville City Police Department responded to the scene and investigated the non-fatal shooting of Mr. Lemus. JA 132-133. The State's Attorney for Prince George's County, Maryland, declined to prosecute Officer Thomas for the incident. JA 229.

On October 19, 2009, the Metropolitan Police Academy's Firearms Training Branch concluded that Officer Thomas's firearm tactics on the morning of

September 13, 2009 were consistent with the tactics taught by the Firearms Training Unit. JA 189-190. The Firearms Training Unit concluded, as follows:

> Officer Thomas was faced with a suspect who repeatedly refused to comply with his demands; despite the fact that he was displaying his badge and voiced that he was a police officer. Officer Thomas attempted to gain the advantage cover by taking a position next to the vehicle and only fired when he perceived that the suspect was possibly armed and reaching into his pocket while advancing.

JA 190. Subsequently, Detective James King conducted an independent use of service weapon investigation and concluded that Officer Thomas's use of his service weapon was justified. JA 114-128. Detective King submitted his investigation report to Lieutenant Guy Middleton who wrote a cover memorandum disagreeing with Detective King's report. JA 207-209. On January 12, 2010, the MPD Use of Force Review Board, in a split-decision, concluded that Officer Thomas's use of force was not justified. JA 192-194, 856-857.

On January 15, 2010, the Department served Officer Thomas with a Notice of Proposed Adverse Action ("NPAA") that set forth two charges. JA 49-53. Officer Thomas elected to have the matter heard before a three-member Adverse Action Panel ("Panel"), which occurred on October 5, 2010 and November 30, 2010. JA 301-929. The Panel found Officer Thomas guilty of both charges and recommended termination of his employment with the Department. JA 964.

The Final Notice of Adverse Action ("FNAA") was delivered to Officer Thomas's residence on January 15, 2010. JA 972-975. The FNAA found Officer

Thomas guilty of both charges and recommended termination. JA 973. Pursuant to the Department's *Trial Board Handbook*, the Panel was required to apply the factors set forth in *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 5 M.S.P.R. 280 (1981) (the "*Douglas* factors") in determining the appropriate penalty for Officer Thomas. The Panel's analysis of the *Douglas* factors mirrored those found in the NPAA, with minor formatting alterations. JA 50-52, 952-954.

On January 28, 2011, Officer Thomas appealed the Panel's decision to then-Chief of Police Cathy Lanier. Officer Thomas argued that the Panel's findings were not supported by the evidence and that termination was not an appropriate penalty. JA 978-992. In support of the argument that the penalty was inappropriate, Officer Thomas provided a case of comparable discipline, in which Officer Edward Ford was involved in an off-duty, lethal shooting that was found to be unjustified by the Use of Force Review Board, resulting in a 45-day suspension. JA 987-991. Chief Lanier denied the appeal on February 16, 2011. JA 957-959.

B. <u>The Arbitrator Orders Reinstatement</u>

The matter then proceeded to arbitration pursuant to the parties' Collective Bargaining Agreement ("CBA"). The parties submitted the following two issues to the arbitrator: (1) Whether the evidence presented by MPD was sufficient to support the alleged charges; and (2) Whether termination was an appropriate remedy. JA 19. Arbitrator Pritzker found that the Department's evidence was

sufficient to support the charges against Officer Thomas. JA 24. However, after reviewing the record, examples of comparable discipline, and the relevant *Douglas* factors, Arbitrator Pritzker found that the Department's penalty of termination was not warranted. *See* JA 24-27.

Arbitrator Pritzker highlighted the fact that "[s]everal of the Douglas factors are routinely considered by arbitrators in determining whether, if guilt is proven, the degree of discipline selected by the employer is appropriate." JA 25. Arbitrator Pritzker reviewed the Panel's *Douglas* factors analysis and found that the Panel failed to "reach conclusions on Douglas Factors [6], 10 and 12 within 'tolerable limits of reasonableness.'" JA 27.

Arbitrator Pritzker further stated that "Arbitrators give great weight when deciding whether a discharge is for just cause to . . . 'consistency of the penalty imposed upon other employees for the same or similar offenses.'" JA 27. In reviewing the Panel's analysis of *Douglas* factor six, Arbitrator Pritzker noted that the Panel's conclusion "cited no other disciplinary decisions" and proceeded to examine the facts and circumstances of the comparable discipline cases submitted into the record. JA 27. Arbitrator Pritzker found enough similarity between Officer Thomas's case and the case of Officer Ford, which involved a "shooting and killing of someone who attacked [Officer Ford] after he identified himself as a Police Officer." *Id.*

After considering the consistency of the penalty, Arbitrator Pritzker considered other relevant *Douglas* factors, as follows:

> 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's rehabilitation in satisfaction of Factor number 10.

Id. Consistent with *Douglas*, after finding that the Panel failed to weigh the relevant *Douglas* factors 6, 10, and 12, Arbitrator Pritzker found that the penalty of termination was not within the "tolerable limits of reasonableness" and determined that a reasonable penalty was instead a forty-five (45) day suspension. JA 27-28. In doing so, Arbitrator Pritzker imposed a penalty similar to the penalty imposed in the comparable discipline case of Officer Ford. JA 28.

C. PERB Affirms the Award Because it is Not "On Its Face Contrary to Law and Public Policy"

On November 27, 2017, the Department filed an Arbitration Review Request with PERB. JA 1-18. The Department contended that the Award was contrary to law and public policy because Arbitrator Pritzker did not apply the correct standard in applying the *Douglas* factors. The Department also argued that reinstating Officer Thomas violated the public policy requiring officers to "preserve the peace, protect life, and uphold the law." JA 13-17. As described

further below, the MPD did not raise many of the arguments in its Arbitration Review Request that have been raised in this appeal. On May 17, 2018, PERB issued a Decision and Order denying the Department's Arbitration Review Request in its entirety. JA 1155-1160.

D. The Superior Court Upholds PERB's Initial Decision

On June 18, 2018, the Department submitted a Petition for Review of Agency Decision to the Superior Court. On October 23, 2019, the Honorable John M. Campbell issued an Order denying the MPD's Petition for Review of Agency Decision in its entirety and affirmed PERB's initial decision. *See* JA 1286-97.

E. The Court of Appeals Upholds PERB's Initial Decision in Part and Remands the Matter to PERB for Clarification

The MPD then appealed the D.C. Superior Court's decision to this Court, asserting various arguments presented to PERB. After providing guidance concerning the appropriate standard of review, this Court upheld the portion of PERB's Decision that rejected 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 602-605. With respect to the MPD's other arguments presented to PERB, this Court remanded the case back to PERB to render a more detailed decision regarding the MPD's remaining arguments. *See id.* at 605-606. Specifically, this Court stated as follows:

> 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.

F. PERB Issues the DOR that Specifically and Sufficiently Analyzes and Rejects the MPD's Remaining Arguments

On March 16, 2023, PERB issued the DOR, wherein it specifically "address[ed] MPD's [remaining] specific arguments in light of the general principles" articulated in *Thomas I*, exactly as this Court had ordered. *Thomas I*, 282 A.3d at 605.

With respect to the MPD's argument that the Arbitrator's application of the *Ford* case was on its face contrary to law, PERB first articulated the MPD's argument in detail. *See* JA 1165. PERB then set forth the applicable law

governing review of arbitral decisions, including citations to numerous legal authorities and applied that law to the Arbitrator's decision, stating as follows:

> By submitting a matter to arbitration, the parties agree to be bound by the arbitrator's decision which necessarily includes the arbitrator's interpretation of the contract and related rules and/or regulations as well as his evidentiary findings and conclusions upon which the decision is based. The arbitrator has discretion over the weight and significance of evidence. A dispute over the exercise of that discretion does not state a statutory basis for modifying or setting aside the award. It is not enough for the party to raise supposed deficiencies in the arbitrator's legal reasoning. To 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.
>
> MPD does not present any applicable law violated by the Arbitrator's consideration of the penalty in *Ford* when determining the Grievant's penalty. The essence of MPD's argument is its disagreement with the Arbitrator's interpretation of *Ford*, upon which the Arbitrator based his findings and conclusion. MPD merely requests that the Board adopt its interpretation and chosen penalty over that of the Arbitrator's. Therefore, the Board finds that MPD has not demonstrated that the Arbitrator's determination of penalty or reasoning was premised upon a misinterpretation of law apparent on the face of the Award.

Id. (internal footnote citations omitted). Thus, PERB ruled that the Arbitrator's determination that *Ford* was comparable was a factual determination that could not be disturbed and, in any event, the MPD had failed to provide any law that required the Arbitrator to interpret *Ford* in a different manner. *See id.*

With respect to the MPD's contention that the Arbitrator imposed an improper burden of proof on the MPD as to *Douglas* Factor No. 6, PERB rejected the MPD's argument as follows:

> 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.

Id. (internal footnote citations omitted).

Finally, PERB devoted multiple pages to addressing and rejecting the MPD's argument that reinstating Officer Thomas for the conduct at issue would be contrary to the public policy espoused by the MPD. *See* JA 1167-69. Duly noting the authorities and arguments raised by the MPD and the D.C. Police Union, as

well as this Court's explicit formulation of the MPD's public-policy argument in this case, PERB held as follows:

> The Board's scope of review is particularly narrow concerning the public policy exception. A petitioner must demonstrate that the arbitration award "compels" the violation of a "well defined and dominant" public policy that is ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." The issue is not whether the employee's misconduct violated public policy but rather whether enforcing the arbitral award would do so. The D.C. Court of Appeals has noted that courts across the country have been divided in their consideration of whether arbitral awards reversing termination violate established public policy.
>
> 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.
>
> MPD has not demonstrated that the Award compels the violation of public policy. Neither MPD's cited regulation nor its Department's General Orders support a public policy that precludes the Grievant's reinstatement. Nor has MPD provided support for its assertion that the Award's 45-day suspension penalty would erode public trust and confidence in MPD.
>
> MPD's argument that the reinstatement Award violates public policy is based wholly on the severity of the Grievant's conduct. MPD does not assert that it has removed other police officers for similar offenses. As FOP notes, MPD reinstated the terminated officer in *Ford*, a case

> in which the Arbitrator found the officer's misconduct similar to that of the Grievant. The Arbitrator further noted that there was a good chance of the Grievant's rehabilitation in this case. Finally, the Arbitrator's reversal of the Grievant's termination was conditioned upon the imposition of a 45-day suspension. Based on the facts of the case, the Board finds that MPD has not demonstrated that the reinstatement Award is contrary to public policy.

JA 1168-69 (internal footnote citations omitted).

G. <u>The Superior Court Again Upholds PERB's Decision.</u>

The MPD subsequently submitted another Petition for Review of Agency Decision to the Superior Court. *See* JA 1173-1216. The Superior Court affirmed PERB's DOR in its entirety. *See* JA 1311-26. The Superior Court ruled that on remand, PERB had sufficiently explained and articulated its reasoning for denying the MPD's Petition, as required by this Court. JA 1317-19.

The Superior Court next addressed and rejected the MPD's arguments directly challenging the Arbitrator's Award. As an initial matter, the Superior Court properly noted that it was reviewing PERB's DOR and, as such, that its review was limited to whether the DOR was supported by substantial evidence or clearly erroneous as a matter of law. JA 1316 n. 2. The Superior Court then turned to the MPD's arguments: (1) that the Arbitrator was held the MPD to an incorrect burden of under *Douglas*; (2) that the Arbitrator improperly relied on the *Ford* disciplinary matter in the record and (3) that the Award is on its face contrary to public policy. *See* JA 1320-26. The Superior Court concluded that none of the

MPD's arguments provided a basis, under the appropriate standard of review, to overturn the DOR. *Id.* The Superior Court also rejected several new arguments raised by the MPD that the Superior Court properly determined had been waived because they had not been previously raised before PERB. JA 1322, 1325 n. 3.

SUMMARY OF ARGUMENT

This Court owes deference to PERB's interpretation of whether the Award is "on its face contrary to law and public policy" within the meaning of D.C. Code § 1-605.02(6). As such, this Court cannot overturn PERB's decision unless it determines that the decision is not supported by substantial evidence and is rationally indefensible.

PERB's DOR is not rationally indefensible. PERB reasonably concluded, with citation to the record and to legal precedent, that Officer Thomas' reinstatement does not violate the MPD's asserted public policy. PERB also reasonably concluded that the Award is not on its face contrary to law, as the MPD failed to identify any law that mandated the Arbitrator to reach a different result. As a result, PERB's DOR upholding the Award was not rationally indefensible and should be affirmed by the Court.

The MPD has also raised numerous new arguments and asserted various authorities that were never argued by the MPD to PERB. All of those arguments have been waived and must be disregarded by this Court. The Court's analysis

must, as its deferential standard of review requires, be limited to the arguments presented by the parties to PERB and the reasoning and authorities relied upon by PERB. In any event, the MPD's waived arguments do not warrant reversal of PERB's DOR.

STANDARD OF REVIEW

This Court has already concisely and correctly articulated the appropriate standard of review applicable to this matter. *See Thomas I*, 282 A.3d at 603. This Court reviews PERB's DOR as if it had been appealed directly to this Court. *See id.* PERB's decisions are entitled to the same deference as other administrative agencies. *Id.* Generally, with respect to such deference, "we accord great weight to any reasonable construction of an ambiguous statute by the agency charged with its administration." *Id.* (quoting *Johnson v. D.C. Dep't of Emp. Servs.*, 111 A.3d 9, 11 (D.C. 2015)). Consistent with that principle, this 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 alternative interpretation had been construing the statute in the first instance." *Id.* (quoting *Johnson*, 111 A.3d at 11).

"PERB 'has only limited authority to overturn an arbitral award.'" *Id.* (quoting *D.C. Pub. Emp. Rels. Bd. v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 987 A.2d 1205, 1208 (D.C. 2010)). Specifically, PERB may

only set aside an arbitral award if the award "on its face is contrary to law and public policy." *Id.* (citing D.C. Code § 1-605.02(6)). Therefore, this Court must "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." *Id.* Unless PERB's interpretation and application of its limited review is "rationally indefensible," this Court must uphold PERB's decision. *D.C. Metro. Police Dep't v. D.C. Pub. Emp. Rels. Bd.*, 144 A.3d 14, 16-17 (D.C. 2016); *Am. Fed'n of State, Cnty., & Mun. Emps., Dist. Council 20, Local 2087, AFL-CIO v. Univ. of D.C.*, 166 A.3d 967, 972 (D.C. 2017).

ARGUMENT

A. The Award is Consistent with Public Policy and PERB's Decision is Supported by Substantial Evidence and Not Rationally Indefensible.

1. This Court Does Not Have *De Novo* Review of the MPD's Public Policy Argument and Cannot Independently Rule that the Arbitrator's Award is Contrary to Public Policy.

In a stunning disregard for well-settled law and this Court's own holdings in this proceeding, the MPD asserts that "[w]hether an arbitration award violates public policy is a legal question this Court reviews de novo" "without deference to PERB," and that this Court may independently determine that the Award violates public policy. MPD Br. 22-23, 26-29. In so arguing, the MPD seeks a sea change in the review of arbitration awards of public-employee disputes in the District of Columbia that would upend decades of this Court's jurisprudence and essentially

nullify PERB's exclusive jurisdiction, ***required by statute for over half a century***, to review arbitration decisions on narrow grounds. *See D.C. Dep't of Corr. v. Teamsters Union Local No. 246*, 554 A.2d 319, 322-23 (D.C. 1989); *see also* D.C. Gov't Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139, § 501, 25 D.C. Reg. 5740 (Mar. 3, 1979).

Notwithstanding the lack of any legal support for the MPD's extraordinary proposition, as discussed below, this Court must consider the practical and, ironically, policy implications of adopting the MPD's proffered *de novo* standard. The MPD asks this Court to disregard PERB's statutory authority and to instead become the sole arbiter over all questions of public policy. Abolishing the deference owed to PERB, as the MPD seeks, would result in parties inundating this Court with appeals seeking to overturn valid, bargained-for arbitral awards based on any number of supposed public policies, simply because this Court will have the power to give any party *de novo* review of such public policy arguments. Adopting the MPD's arguments would also destroy the longstanding stability and efficiency that bargained-for arbitration serves in the District of Columbia and across the country and would result in substantially all arbitration awards being appealed to this Court on *de novo* reviews of public policy. *See D.C. Pub. Emp. Rels. Bd.*, 987 A.2d at 1209 (stating that there is a "well defined and dominant policy favoring arbitration of a dispute where the parties have chosen that course,"

and that "[j]ust as Congress [has] declared a national policy favoring arbitration, so has the District of Columbia."); *see also Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (2nd Cir. 1998) ("the goals of arbitration [are] expeditious resolution of disputes and the avoidance of protracted and expensive litigation").

Moreover, and as discussed above, this Court has already articulated the correct standard of review in this matter. *Thomas I*, 282 A.3d at 603. Specifically, this Court held: (1) that PERB is entitled to the same deference accorded to any other administrative agency with respect to its interpretation of the CMPA; (2) that this case involves such an interpretation of the CMPA; and (3) that, as such, this Court will "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." *Id.* Thus, ordinary principles of administrative review apply, including the well-settled rule that this Court "will not disturb the agency's decision if it flows rationally from the facts which are supported by substantial evidence in the record." *Oubre v. D.C. Dep't of Employment Servs.*, 630 A.2d 699, 702 (D.C. 1993); *see also Thomas I*, 282 A.3d at 603. This Court's rulings in *Thomas I* as to the appropriate standard of review are the law of this case and, as such, cannot be revisited. *See In re Baby Boy C.*, 630 A.2d 670, 678 (D.C. 1993). Indeed, were this Court empowered to decide the public policy question *de novo* and/or without deference to PERB, then

this Court's remand to PERB in *Thomas I* would have been completely unnecessary. Therefore, this Court must confine its analysis to the proper standard of review already articulated in *Thomas I*.

Furthermore, this Court has previously rejected the argument made by the MPD in this matter. *See D.C. Dep't of Corr.*, 554 A.2d at 322-23. Specifically, this Court ruled as follows:

> We are dealing with the CMPA, a statute enacted in 1979 by the District of Columbia Council to supplant the federal laws which had previously governed personnel relations between the District and its employees. In addition to adopting "a comprehensive merit system of personnel management for the government of the District of Columbia," D.C. Code § 1–601.1 (1987), the Council created the PERB, authorized it to select arbitrators who would resolve collective bargaining disputes in the first instance, *id.* § 1–605.2(4), and granted it "exclusive" jurisdiction to review any arbitrator's award that, *inter alia*, "on its face is contrary to law and public policy. . . ." *Id.* § 1–605.2(6).6. **Given the PERB's statutory authority, the Department nevertheless asks us to conduct a de novo review and overturn the award on "public policy" grounds. We decline to do so** for two reasons. First, long-established principles of administrative law require us to defer to the PERB's interpretation of the CMPA unless it is unreasonable or contrary to the statute's plain meaning. Second, the only public policy involved here is the policy established by the Council and found in the CMPA itself, specifically in the list of twenty-one types of "cause" in section 1–617.1(d). In the face of this specific statutory language and its legislative history, we cannot apply some free-floating notion of "policy" as the Department urges; to do so would impermissibly intrude into the domain of the legislature.

Id. (emphasis added; internal footnotes omitted). This Court should again reject the MPD's request for *de novo* review of the Award.

None of the cases cited by the MPD warrant a different conclusion. Each such case involved arbitral awards that were appealed in the first instance to the courts, not to an expert governmental agency like PERB, as in this matter. *See, e.g.*, *Burr Rd. Operating Co. II, LLC v. New England Health Care Emps. Union, Dist. 1199*, 114 A.3d 144, 152 (Conn. 2015) ("*Burr*") (review of *trial court's* initial decision confirming arbitration award); *Bureau of Special Investigations v. Coalition of Pub. Safety*, 722 N.E. 441, 443-44 (Mass. 2000) ("*BSI*") (same)[1]; *Fairman v. District of Columbia*, 934 A.2d 438, 441-42 (D.C. 2007) (review of *trial court's* initial decision vacating arbitration award); *Cnty. of De Witt v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 699 N.E.2d 163, 165 (Ill. App. 1998) (same). This is the precise nuance that this Court recognized in *Thomas I.* Additionally, the MPD's citation to certain cases arising under a prior version of the Uniform Arbitration Act, *see* MPD Br. 27, is misplaced, as the MPD conspicuously fails to mention that this Court has explicitly refused to apply a *de novo* standard of review under the current version of the Uniform Arbitration Act. *See A1 Team USA Holdings, LLC v. Bingham McCutchen LLP*, 998 A.2d 320, 323-24 (D.C. 2010). In any event, such private arbitration awards rendered

[1] The Massachusetts Supreme Court in *BSI* explicitly declined to apply a pure *de novo* standard of review. *See BSI*, 722 N.E.2d at 443 ("According to BSI, we should review the arbitrator's decision de novo. **We no not agree**.") (emphasis added).

pursuant to the Uniform Arbitration Act are appealed directly to the courts and, therefore, have no relevance to the standard of review for awards that are required to be appealed first to PERB, as is the case here.

2. The DOR is Supported by Substantial Evidence and is Not Rationally Indefensible.

Applying the proper standard of review, the MPD's public policy argument must be rejected. The MPD argues that the Award's reinstatement of Officer Thomas is contrary to an allegedly well-defined and dominant public policy against criminal use of deadly force. MPD Br. 36-42. There is no basis for determining that PERB's rejection of the "extremely narrow" public policy exception was rationally indefensible. It is well-established that the public policy exception is "*extremely narrow*" and "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." *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986) (emphasis in original). This Court has adopted the "extremely narrow" standard for applying the public policy exception. *Thomas I*, 282 A.3d at 606 (citing *D.C. Metro. Police Dep't v. D.C. Pub. Emp. Rels. Bd.*, 901 A.2d 784, 789-90 (D.C. 2006)); *see also D.C. Pub. Emp. Rels. Bd.*, 987 A.2d at 1208 ("[W]e have emphasized that a public policy alleged to be contravened must be well defined and dominant, and as to be ascertained by reference to laws and legal precedents and not from general

consideration of supposed public interest.") (internal quotation marks and citations omitted). Indeed, this Court has rejected the MPD's attempt to overturn an arbitration award based upon the "strong public interest in insuring the competence and honesty of public employees, especially armed police officers." *D.C. Metro. Police Dep't*, 901 A.2d at 789.

However, the mere existence of a well-defined and dominant public policy is not the end of the analysis. The public policy question "is not whether the employee's misconduct violated public policy but rather whether enforcing the arbitral award would do so." *Thomas I*, 282 A.3d at 606 (citing *E. Associated Coal Corp. v. UMW, Dist. 17*, 531 U.S. 57, 62-63 (2000)). Thus, in this particular case, the issue is whether reinstating Officer Thomas would violate the alleged public policy "against the unjustified use of deadly force." With this proper framework in mind, the MPD's arguments fails.

First and foremost, PERB's decision on this point is supported by substantial evidence and not rationally indefensible. PERB correctly framed the issue, as explicitly directed by this Court, as whether reinstating Officer Thomas would violate the MPD's alleged public policy. *See* JA 1167. In turn, PERB agreed with this Court's recognition that "courts across the country have been **divided** in their consideration of whether arbitral awards reversing termination violate established public policy." JA 1168 (emphasis added). Significantly, PERB has previously

found that where there are differing authorities on an issue presented to PERB for resolution, an arbitrator's award *cannot* be said to be "on its face" contrary to law and public policy. *See D.C. Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, PERB Case No. 19-A-08, Op. No. 1724 at pg. 6 (Aug. 15, 2019).

While PERB also correctly noted that the MPD had failed to provide any legal authority that precluded Officer Thomas' reinstatement, PERB did not end its analysis there. *See* JA 1168-69. Rather, PERB agreed with the MPD that "[i]n the absence of such explicit law, determining whether an arbitral award violates public policy is a fact-specific inquiry." JA 1168 (citing *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1443 (3rd Cir. 1992)). With respect to that fact-specific inquiry, PERB noted that the MPD's sole factual contention raised in the Arbitration Review Request was "the severity of the Grievant's conduct." JA 1169. Contrary to the MPD's contention, PERB did not ignore the alleged severity of the underlying conduct. *See* MPD Br. 41. Rather, PERB found that other relevant factors weighed against the "extremely narrow" public policy exception, including the following: (1) MPD failed to provide evidentiary support for the notion that reinstating Officer Thomas "would erode public trust and confidence in MPD"; (2) the MPD had previously reinstated the officer in *Ford*, which was a case the Arbitrator found to be comparable to the

instant conduct—a factual finding that PERB was without jurisdiction to ignore; (3) the Arbitrator found that Officer Thomas could be rehabilitated as an officer; and (4) the Arbitrator did not refuse to impose a penalty at all, but instead imposed a 45-day suspension. JA 1169.

The MPD does not dispute PERB's use of a fact-specific inquiry or the laws on which PERB relies. *See* MPD Br. 40-43. Instead, the MPD largely disputes PERB's articulation of the facts as applied within that framework. *See id.* However, PERB was legally obligated to defer to the Arbitrator's factual findings. *See D.C. Dep't of Recreation & Parks v. Am. Fed'n of Gov't Emps., Local 2741, AFL-CIO*, PERB Case No. 99-A-01, Op. No. 579 at pg. 2 (Jan. 28, 1999); *see also United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38, (1987). Thus, PERB appropriately articulated what the Arbitrator had already factually determined and applied those facts to the relevant legal framework. As such, the MPD's arguments are simply disagreements with PERB's analysis and a request that this Court reach a different result. This is not the Court's role in reviewing PERB's DOR, as this Court must uphold the DOR even if it were to have rendered a different decision itself. *See Johnson*, 111 A.3d at 11. Therefore, PERB's decision on this point is supported by substantial evidence and is not rationally indefensible.

Notwithstanding the fact that the MPD's mere disagreement with PERB's analysis is insufficient to reverse the DOR, the MPD has also improperly introduced evidence that was never submitted by the MPD to the Arbitrator or to PERB. Specifically, the MPD now cites four (4) cases for the proposition that the MPD has previously terminated officers for similar conduct. *See* MPD Br. 41 n. 2. None of those cases were introduced into evidence or cited by the MPD at any point prior to the instant appeal. *See generally* JA. Arguments not raised before PERB or the Arbitrator are waived. *See, e.g.*, *In re: D.C. Pub. Schools*, PERB Case No. 13-A-09, Op. No. 1422 at pg. 4 (Sep. 26, 2013) ("An argument may not be raised for the first time in an arbitration review request."); *D.C. Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, PERB Case No. 16-A-19, Op. No. 1606 at pg. 5 (Dec. 15, 2016); *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, PERB Case No. 16-A-12, Op. No. 1639 at pg. 5 (Aug. 17, 2017). PERB's decision cannot be overturned for reasons that were never presented to PERB for consideration. Therefore, the MPD's *post hoc* reliance on such cases should be disregarded.

The MPD further contends that there is a public policy against police officers' use of excessive force and/or an unconstitutional seizure of a person. MPD Br. 30. The MPD also contends that such public policy is reflected in D.C. Code § 5-123.02, which states that "[a]ny officer who uses unnecessary and

wanton severity in arresting or imprisoning any person shall be deemed guilty of assault and battery, and, upon conviction, punished therefor." *Id.* Critically, however, Officer Thomas was not charged by the MPD with using unnecessary and excessive force, or with violating Mr. Lemus' constitutional rights or the provisions of D.C. Code § 5-123.02. Indeed, Officer Thomas did not arrest or imprison anyone in the exercise of any police powers, as he was off-duty at the time of the incident. Significantly, the Maryland State's Attorney declined to prosecute Officer Thomas for any crimes based on the incident. JA 229.

Relatedly, the MPD also cites a D.C. regulation concerning "Use of Firearms and other weapons" for the proposition that "[s]hooting at another is a crime except when proven to be done as authorized by law." MPD Br. 30 (citing 6A DCMR § 207.10). Again, the State's Attorney for Prince George's County, Maryland, declined to prosecute Officer Thomas based on the incident. JA 229. Moreover, the Metropolitan Police Academy's Firearms Training Branch concluded that Officer Thomas' firearm tactics were consistent with the tactics taught by the Firearms Training Unit. JA 189-190. Further, MPD Detective King conducted an independent use of service weapon investigation and concluded that Officer Thomas' use of his service weapon was justified. JA 114-128. While the MPD's Use of Force Review Board later determined that Officer Thomas's use of force was not justified, the Board's decision was split and two (2) members of the

Board, who were management-level commanders, dissented and concluded that Officer Thomas' use of force was justified. *See* JA 192-194, 856-857. Thus, substantial evidence supports PERB's conclusion that Officer Thomas' reinstatement is not contrary to any public policy against unjustified use of force. Moreover, none of the foregoing authorities cited by the MPD preclude or even concern an officer's reinstatement as a police officer. Thus, none of those authorities demonstrate that Officer Thomas' *reinstatement* is on its face contrary to public policy.

The cases from outside jurisdictions cited by the MPD, and that as such do not concern the District of Columbia's public policies, do not aid its cause. For example, the Department cites *In re Bukowski*, 50 N.Y.S.3d. 588 (N.Y. App. Div. 2017), in which the officer at issue not only engaged in unjustified use of force but also concealed his conduct and consistently lied about his misconduct. *See id.* at 593. The Supreme Court Appellate Division of New York did not vacate the arbitrator's award solely because reinstating the officer violated the public policy against unjustified use of force. Instead, the court found that public policy precluded enforcement of the award because of the prohibition against the use of unjustified force combined with the officer's intentional lying about his actions and failure to acknowledge his misconduct. *Id.* at 594. Notably, the *Bukowski* Court held:

> In reaching this result, we take no position as to the penalty that ultimately should be imposed; the appropriate penalty, which should be both effective and sufficiently address the public policy considerations previously discussed, is a matter for the arbitrator to resolve pursuant to the terms of the collective bargaining agreement.

Id. In this matter, there is no evidence in the record to suggest that Officer Thomas was uncooperative or dishonest in the investigation or proceedings, and the MPD did not charge him as such. Accordingly, *Bukowski* does not support the MPD's argument that the arbitration award in this case violated public policy.

The Department also cites *City of Boston v. Boston Police Patrolmen's Ass'n*, 824 N.E.2d 855 (Mass. 2005), in which the Supreme Judicial Court of Massachusetts overturned a one-year suspension of a Boston police officer in which the officer had engaged in "egregious," "outrageous," "felonious misconduct" towards two civilians. *City of Boston*, 824 N.E.2d at 857. The officer involved was verbally abusive towards two civilians, had to be physically restrained by other officers from assaulting the civilians, made false accusations of criminal charges against the civilians, and then lied about the incident during the department's internal investigation and the subsequent arbitration. *Id.* at 858-859. The public policy at issue in *City of Boston* was "that police officers be truthful and obey the law in the performance of their official duties." *Id*. at 864. Unlike *City of Boston*, there is no evidence that Officer Thomas was untruthful or failed to obey the law in the performance of his official duties. The public policy consideration

addressed in *City of Boston* "that police officers be truthful" thus has no bearing on this matter.

The MPD also cites *City of Springfield, Ill. (Police Dep't) v. Springfield Police Benev. & Protective Ass'n*, 593 N.E.2d 1056 (1992), in which the Appellate Court of Illinois did not find an arbitrator's award violated public policy when a police officer used excessive force on multiple occasions. On appeal, the Appellate Court of Illinois acknowledged that "the use of excessive force by a law enforcement officer is against public policy." *Id.* at 1060. However, the court found the public policy issue was not clearly intertwined with the arbitrator's decision because the record indicated that the arbitrator's award was based on particular facts relating to the employee's conduct. *See id.*

Similar to the arbitrator in the *City of Springfield, Ill.*, Arbitrator Pritzker's Award was based on the facts relating to this specific case and the Panel's inadequate penalty determination. After considering the facts and circumstances of Officer Thomas's use of force, Arbitrator Pritzker found that the Panel failed to consider alternative penalties and Officer Thomas's potential for rehabilitation. *See* JA 27. Accordingly, Arbitrator Pritzker found that termination was not an appropriate remedy and imposed a reasonable suspension.

3. The MPD's Waived Arguments are Substantively Meritless.

The MPD asserts various arguments and relies on certain authorities that were not raised in its Arbitration Review Request and have thus been waived. Specifically, the MPD raises the following completely novel issues: (1) that the Court should consider "four principle factors" articulated in the out-of-jurisdiction case of *Burr Rd. Operating Co. II, LLC v. New England Health Care Emps. Union, Dist. 1199*, 114 A.3d 144 (Conn. 2015) ("*Burr*"); (2) citing D.C. Code §§ 5-107.01, 22-402, 22-404, and 6-B DCMR § 873.11 for the proposition that Officer Thomas' conduct would otherwise render him ineligible for the MPD; (3) that a "reoccurrence of Thomas's misconduct plainly would expose the District to substantial liability"; and (4) that Officer Thomas is "incorrigible" and that "it [is] likely that Thomas will re-offend[.]" MPD Br. 30-34, 37-39. *None* of these points in support of the MPD's public policy argument were raised by the MPD in its Arbitration Review Request. *See* R. 13-17. Nor were they even raised by the MPD when it first appealed to this Court. *See* Brief for Appellant in *Thomas I* (dated Sept. 3, 2020) at 44-50.

It is well-settled that arguments not presented to an agency are waived on appeal from that agency's decision. *See Sims v. District of Columbia*, 933 A.2d 305, 309 (D.C. 2007) ("It is a principle of long standing that '[a]dminstrative and judicial efficiency require all claims be first raised at the agency level to allow

appropriate development and administrative response before judicial review.'") (citation omitted); *Hisler v. D.C. Dep't of Employment Servs.*, 950 A.2d 738, 744 (D.C. 2008). Indeed, this Court has stated in this very proceeding that **"[w]e decline to consider information and argument that were not presented to PERB**." *Thomas I*, 282 A.3d at 605 (emphasis added). Therefore, all of the foregoing arguments made, and authorities relied upon, by the MPD for the first time in this appeal should be deemed waived.

Furthermore, this Court's standard of review demands that such waiver be enforced. As this Court has already recognized, this appeal narrowly concerns whether PERB's limited review of the Arbitrator's Award, to which this Court owes deference, is rationally indefensible. PERB was not presented with, and therefore did not address, the novel arguments raised by the MPD. *See* JA 1167-69. This Court cannot declare the DOR rationally indefensible for reasons never presented to PERB for consideration. Therefore, this Court should disregard the MPD's novel arguments identified above, and should instead limit its review of the DOR to the arguments and authorities presented by the MPD in its Arbitration Review Request and the reasons articulated by PERB in the DOR.

To the extent that this Court considers the MPD's reliance on *Burr* and its arguments made thereto, they do not support the MPD's contention that the Award is on its face contrary to public policy. As an initial matter, the framework

articulated in *Burr* is inappropriate, as the Supreme Court of Connecticut applied that framework in the context of *de novo* review of an arbitrator's award. *See Burr*, 114 A.3d at 153. As discussed above, this Court does not apply a *de novo* review in this matter. Thus, this Court's independent review of the factors set forth in *Burr* would inherently infringe upon the deference owed to PERB's DOR.

The MPD argues that Officer Thomas's reinstatement is contrary to 6-B DCMR § 873.11(a), which prohibits the initial employment of officers who have engaged in a felony, asserting that Officer Thomas engaged in conduct that constituted a felony assault. MPD Br. 31-32. Such regulation says nothing about discipline of employees after hiring. Indeed, PERB has recently rejected the MPD's argument that an arbitration award was contrary to an eligibility requirement set forth in 6-B DCMR § 873, stating that it solely applied to pre-employment applicants. *See Metro. Police Dep't of D.C. v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, PERB Case No. 24-A-08, Op. No. 1872 at 8 n. 79 (May 16, 2024). Additionally, although the Arbitrator found Officer Thomas guilty of administrative disciplinary charges, the State's Attorney for Prince George's County, Maryland, declined to prosecute Officer Thomas for any crimes. JA 229. Thus, the incident at issue did not involve a felony.

The MPD next argues that D.C. Code § 5-107.01(f)(1), enacted through the Comprehensive Policing and Justice Reform Amendment Act of 2022 ("CPJRA"),

"reflects a strong policy against employing officers who have engaged in serious misconduct and [ ] the unlawful use of deadly force." MPD Br. 33. As with the aforementioned regulation, D.C. Code § 5-107.01(f)(1) concerns pre-employment eligibility of officers and is therefore, inapposite. Additionally, it is inappropriate for the Court to declare the Award as on its face contrary to a public policy purportedly reflected in a law that was not in existence at either the time of the Award or PERB's initial decision. *See, e.g., Lopata v. Coyne*, 735 A.2d 931, 938 (D.C. 1999) (analyzing only whether an arbitration award was contrary to a public policy set forth in the version of a law in effect at the time of the award).

The MPD next argues that "[a] reoccurrence of Thomas's misconduct plainly would expose the District to substantial liability." MPD Br. 33. Relatedly, the MPD also argues that there is a "substantial risk" that Officer Thomas will re-offend. *Id.* at 37-38. These arguments are baseless and improperly speculative. First, there is no evidence whatsoever that Officer Thomas will "re-offend." *See generally* JA. Indeed, ***fifteen (15) years have passed since the incident*** and there is no evidence whatsoever that Officer Thomas has repeated the off-duty conduct. The MPD does not cite *any* evidence in support of the "substantial risk" it claims is created by the Award. *See* MPD Br. 38-39. Rather, the MPD cites its own subjective and speculative contention that there are no mitigating circumstances. *See id.* To the contrary, Arbitrator Pritzker stated that there were avenues available

that would assist in Officer Thomas' rehabilitation. *See* JA 27. Contrary to the MPD's contention, and as Officer Thomas argued during arbitration, there were several mitigating circumstances. *See* JA 1037-38.

The MPD then argues the negative, stating that "the arbitrator did not find an insubstantial risk that Thomas would re-offend." *Id.* at 38. This statement is simply false. Nowhere in the Award is there any statement or suggestion by the Arbitrator regarding **any risk** that Officer Thomas would re-offend. *See* JA 19-28. This is unsurprising, given that the MPD **never** argued to either the Arbitrator or to PERB that it believed there was any risk that Officer Thomas would re-offend. *See* JA 1-17, 1041-58. The MPD is simply taking the Arbitrator's silence to mean whatever is most advantageous to its appeal. The MPD's flagrant distortion of the record in its desperate attempt to end Officer Thomas' chosen career, is reflective of the baselessness of its argument.

Second, any reoccurrence would not subject the District to liability. The conduct at issue occurred when Officer Thomas was off-duty, out of uniform, and acting purely within his capacity as a private citizen. Critically, in a case nearly identical to the instant matter, this Court ruled that a Maryland municipality was not liable where one of its police officers shot and killed a civilian while off-duty during a private dispute that occurred in the District of Columbia. *See Phelan v. City of Mount Rainier*, 805 A.2d 930, 937-40 (D.C. 2002).

Similarly, the MPD's contention that reinstating Officer Thomas would "erode public trust and confidence" in the MPD is unsupported. *See* MPD Br. 35. As PERB correctly noted, the MPD has not provided any evidence that Officer Thomas' reinstatement would impact public trust. Rather, the MPD merely cites to out-of-District caselaw for general statements concerning the relationship between police behavior and the public's trust in policing. *See* MPD Br. 34-35. Such statements are precisely the type of "general suppositions" that cannot support a well-defined and dominant public policy

Lastly, the MPD argues that the egregiousness of the conduct at issue demonstrates that reinstating Officer Thomas would be contrary to public policy. MPD Br. 36-37. While off-duty, Officer Thomas discharged his weapon based on the belief that Mr. Lemus posed an imminent threat to Officer Thomas. As discussed above, numerous MPD officials have determined that Officer Thomas' actions were consistent with MPD standards, policies, and training. Additionally, there is no evidence, or even an allegation, that Officer Thomas acted maliciously. Moreover, Arbitrator Pritzker explicitly recognized the importance of consistency in disciplinary penalties imposed against different employees for similar offenses. *See* JA 27. Guided by that well-settled policy, Arbitrator Pritzker concluded that termination of Officer Thomas would not serve that policy. *See id.*

B. PERB's Decision that the Arbitration Award is Not on its Face Contrary to Law is Supported by Substantial Evidence and Not Rationally Indefensible.

With respect to the MPD's contention that the Arbitrator's Award is contrary to law, the MPD once again applies an incorrect standard of review by asserting that this Court can "independently set aside [the Award] as contrary to law." MPD Br. 43. As discussed above, the MPD's asserted standard is incorrect. This Court must instead determine whether PERB's decision is supported by substantial evidence and not rationally indefensible as a matter of law—and only upon consideration of the information and arguments actually presented to PERB.

1. The MPD's Arguments Concerning "Disparate Treatment" are Procedurally Deficient and Substantively Meritless.

The MPD argues that the Arbitrator's consideration of *Douglas* Factor No. 6, concerning consistency of the penalty with that imposed on other employees for similar conduct, is on its face contrary to law. *See* MPD Br. 44. Specifically, the MPD argues that Arbitrator Pritzker could not consider whether the proposed termination was inconsistent unless Officer Thomas first proved "disparate treatment." *Id.* at 44-45 (citing, *e.g.*, *Boucher v. U.S. Postal Serv.*, 2012 M.S.P.B. 126, 118 M.S.P.R. 640 (2012)). As an initial matter, the MPD's "disparate treatment" argument has been waived. PERB has repeatedly held that issues not raised before the arbitrator are waived and cannot serve as a basis to reverse an arbitration decision. *See, e.g.*, *In re: D.C. Pub. Schools*, PERB Case No. 13-A-09,

Opinion No. 1422 at pg. 4 (Sep. 26, 2013) ("An argument may not be raised for the first time in an arbitration review request."). In its arbitration brief submitted to Arbitrator Pritzker, the MPD did not argue that Officer Thomas was required to prove "disparate treatment" before the Arbitrator could consider whether there were comparable cases reflecting a lesser penalty. *See* JA 1056-57. Thus, the MPD was precluded from raising that argument for the first time in its Arbitration Review Request. For this reason alone, such argument cannot serve as a basis to vacate the Award and, in turn, cannot serve as a basis to reverse PERB's DOR.

Even if the Court considers the MPD's "disparate treatment" argument, PERB's analysis of this argument in the DOR is not rationally indefensible. PERB viewed the Arbitrator's analysis of *Douglas* Factor No. 6 as "an exercise of his equitable powers arising out of the parties' collective bargaining agreement," rather than a narrow application of the *Douglas* decision and its progeny. JA 1166. In turn, PERB determined 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). Thus, PERB viewed the Arbitrator's analysis of *Douglas* Factor No. 6 as an exercise of equitable authority and, as such, ruled that the MPD had failed to identify any law that limited such equitable authority to the burden-shifting analysis sought by the MPD. *See id.* This conclusion is not rationally

indefensible, as there are numerous prior decisions by PERB holding that an arbitrator's equitable authority includes the authority to independently assess the *Douglas* factors and independently determine an appropriate disciplinary penalty. *See, e.g.*, *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, PERB Case No. 21-A-04, Opinion No. 1780 at pg. 9 (Mar. 18, 2021); *D.C. Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, PERB Case No. 12-A-04, Opinion No. 1366 at pg. 5-7 (Feb. 21, 2013). Having rendered a decision well-within its own established precedent and relevant principles, PERB's rejection of the MPD's argument on this point is not rationally indefensible.

Faced with this reality, the MPD now argues that PERB's conclusion that the Arbitrator was exercising equitable powers is "foreclosed" by *Thomas I*. MPD Br. 46. This argument is misplaced. This Court stated it was "not at all clear" whether the Arbitrator was applying only *Douglas* or was instead exercising his broad equitable authority. *See Thomas I*, 282 A.3d at 605. In other words, this Court stated that it was not evident on the face of the Award whether the Arbitrator was applying *Douglas* without regard to his equitable authority. Critically, this statement demands affirming the DOR. By statute, PERB cannot overturn the Award unless it is "**on its face** [ ] contrary to law and public policy." *Thomas I*, 282 A.3d at 603 (citing D.C. Code § 1-605.02(6)) (emphasis added). This Court

determined that the Award does not "on its face" foreclose the conclusion reached by PERB that the Arbitrator was exercising his equitable powers. Therefore, the Award is not "on its face" contrary to the inapposite cases cited by the MPD.

The MPD's argument concerning "disparate treatment" and burden shifting is misplaced and does not render the Award on its face contrary to law. In support of this argument, the MPD relies upon Office of Employee Appeals ("OEA") and Merit Systems Protection Board ("MSPB") cases. *See* MPD Br. 44-45. Rather than a case that originated before the MSPB or OEA, however, the Award in this case was issued pursuant to a bargained-for arbitration proceeding under the parties' CBA. Pursuant to this bargained-for process, the parties presented Arbitrator Pritzker with the open-ended issue of "[w]hether termination is an appropriate remedy." JA 19.

As stated by PERB in the DOR, "[a]n arbitrator's review of MPD's *Douglas* factor analysis constitutes an exercise of his equitable powers arising out of the parties' collective bargaining agreement." JA 1166 (citations omitted). With respect to such equitable powers, the Supreme Court has held as follows:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. . . .
>
> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, **he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.**

> **There the need is for flexibility in meeting a variety of situations**. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. **He may of course look for guidance from many sources**, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596-597 (1960) ("*Enterprise Wheel*") (emphasis added); *see also D.C. Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, PERB Case No. 89-A-01, Opinion No. 218 at pg. 4 (Apr. 6, 1989) (citing with approval *Enterprise Wheel*). The Court of Appeals and PERB have likewise held that an arbitrator's remedial authority is virtually without limit unless specifically proscribed by the applicable collective bargaining agreement. *AFSCME*, 166 A.3d at 973-74; *D.C. Office of Prop. Mgmt. v. Am. Fed'n of Gov't Emps., Local 631*, PERB Case No. 02-A-06, Op. No. 707 at pg. 5 (Apr. 25, 2003). To be sure, this Court has specifically held that "nowhere" in the CBA between the D.C. Police Union and the MPD does it "purport to restrict an arbitrator's power to grant equitable relief." *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 277 A.3d 1272, 1278 n. 3 (D.C. 2022). The MPD also did not argue before PERB that the parties' CBA restricted the Arbitrator's remedial authority. *See* JA 7-13; *see also Thomas I*, 282 A.3d at 605.

Arbitrator Pritzker complied with these well-settled principles and used his informed judgment to properly and reasonably determine that termination was not an appropriate remedy. Arbitrator Pritzker reached a "fair solution" by imposing a 45-day suspension against of Officer Thomas after carefully reviewing the record, examples of comparable discipline, and relevant factors—under *Douglas* and as otherwise adhered to generally by arbitrators—for "guidance." Arbitrator Pritzker explained his analysis as follows in the Award:

> Several of the Douglas factors are routinely considered by arbitrators in determining whether, if guilt is proven, the degree of discipline selected by the employer is appropriate. . . . Subsequent books discussing [d]iscipline also discuss the factors considered by arbitrators in determining the appropriateness of degrees of discipline. For example, the grievant's past record, the years of employment, the knowledge of rules, [l]ax enforcement of rules, and unequal or discriminatory treatment. . . .
>
> As I pointed out on in [*sic*] page 7 of this opinion, **even without the Douglas Factors**, Arbitrators give great weight when deciding whether a discharge for just cause to . . . "consistency of the penalty with those imposed upon other employees for the same or similar offences."

JA 25, 27 (emphasis added). Arbitrator Pritzker noted that the Panel's conclusion on *Douglas* factor six "cited no other disciplinary decisions in reaching its conclusion that the penalty of termination is . . . 'consistent with the penalty given to other employees for like or similar misconduct.'" JA 27. Accordingly, Arbitrator Pritzker reviewed the cases of comparable discipline in evidence and found that a 45-day suspension was appropriate. Notably, Arbitrator Pritzker did

not hinge his decision entirely upon the issue of consistency of the penalty, but also found that the Panel's analysis of *Douglas* Factor Nos. 10 and 12 were deficient, explaining that sanctions less than termination, such as the 45-day suspension imposed, would sufficiently deter Officer Thomas and other employees from similar conduct. *See* JA 27. In short, Arbitrator Pritzker exercised his broad equitable authority, while using *Douglas* and other authorities as guidance, in addressing the precise issue submitted to him for resolution.

To be clear, the parties did not ask Arbitrator Pritzker to determine whether Officer Thomas was required to show disparate treatment during the adverse action hearing. Instead, by submitting the question of whether termination was an appropriate remedy to the arbitrator, the parties bargained for and agreed to be bound by Arbitrator Pritzker's decision on this question, which included his evidentiary findings and conclusions from the record submitted for review. *See D.C. Metro. Police Dep't*, 901 A.2d at 789. As a result, Arbitrator Pritzker's decision on this question is not on its face contrary to law.

The MPD's reliance on *Boucher v. U.S. Postal Service*, 2012 M.S.P.B. 126, 118 M.S.P.R. 640 (2012), is unavailing. Again, the parties did not request that the Arbitrator render a decision that strictly complied with MSPB jurisprudence. *See* JA 19. Therefore, the MPD's reliance on *Boucher* and other MSPB cases does not "mandate" a different result, as is required to conclude that an arbitration award is

on its face contrary to law. *See AFCME*, 166 A.3d at 972-73. Regardless, the holding in *Boucher* undermines the Department's argument because the MSPB held in *Boucher* that an agency-employer cannot justify its penalty by leaving the record unclear, stating as follows:

> Certainly, whether a deciding official knowingly treated similarly situated employees differently is a relevant consideration in determining whether a penalty is reasonable, but it is not the only relevant consideration. Further, whether this consideration justifies a difference in penalties depends upon the facts and circumstances, which can only be discerned on the basis of a fully-developed evidentiary record. An agency cannot, however, 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.

Boucher, 118 M.S.P.R. at 650. In this case, as Arbitrator Pritzker found, the Panel left the record unclear by failing to cite *any* other disciplinary decisions in support of termination and further failing to provide any "reasonable explanation of the reasons for the conclusion" that termination was an appropriate penalty. JA 27. Thus, even if considered, *Boucher* does not mandate a different result in this case.

2. The MPD's Strict Application of *Douglas* Has Already Been Correctly Rejected and Such Rejection Has Been Upheld by this Court.

The MPD contends that the Award does not comply with *Douglas* because Arbitrator Pritzker overturned Officer Thomas' termination without first determining that the MPD failed to conscientiously assess the *Douglas* factors and

that termination was not "within the tolerable limits of reasonableness." MPD Br. 48. This argument is procedurally and substantively meritless.

As an initial matter, and as PERB stated in the DOR, this Court has already upheld PERB's rejection of this argument. *See* JA 1164. Specifically, this Court ruled as follows:

> PERB addressed one aspect of MPD's argument in some detail, concluding 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 as long as that sanction was reasonable. MPD argues, however, that the collective bargaining agreement contains provisions that should be interpreted to require the arbitrator to defer to MPD's selected remedy as long as that remedy is reasonable. . . . Given the limited arguments and information presented to PERB, we agree that PERB's ruling on this point was reasonable.

Thomas I, 282 A.3d at 604-605. Nevertheless, the MPD contends that this Court "merely held that the arbitrator was not necessarily required to follow *Douglas* and 'defer' to MPD's penalty" and that this Court did not address the "tolerable limits of reasonableness" standard insisted upon by the MPD. MPD Br. 48. This is a gross mischaracterization of this Court's holding and a distortion of the record.

In its Arbitration Review Request, the MPD's arguments concerning deference and applying the "tolerable limits of reasonableness" standard were one and the same. *See* JA 11-12. PERB rejected those arguments in detail, as follows:

> The Department's arguments in favor of overturning the Award repeatedly rely on *Stokes v. District of Columbia* as the standard by which an Arbitration decision should be reviewed. As the Union

> states in its response, *Stokes* establishes the deferential standard by which the Office of Employee Appeals ("OEA") is to review penalties that agencies impose on employees. The Board has repeatedly held that *Stokes* is not the correct standard to apply to an arbitrator's review of agency decisions when the parties have agreed to submit the case to arbitration. The Board has previously affirmed an arbitrator's decision reducing a police officer's penalty from termination to a thirty-day suspension. The Superior Court of the District of Columbia went on to hold that the Board reasonably found that the Arbitrator was not bound by the standards that apply to OEA's review of agency decisions set forth in *Stokes*. As stated earlier, and in many previous PERB Decisions and Orders, the arbitrator's authority does not arise from *Stokes*, but from the parties' contractual agreement to submit the case to arbitration.

JA 1157-58.[2] Thus, in addressing deference, this Court was referring to PERB's rejection of the MPD's reliance on *Stokes* that otherwise requires decisionmakers to defer to an agency's penalty so long that it is within tolerable limits of reasonableness. Therefore, the MPD is simply reasserting an argument that has already been disposed of by this Court.

In any event, the MPD is simply wrong in stating that PERB "refused to consider the argument[.]" PERB explicitly addressed, considered, and rejected the MPD's argument that the Arbitrator was required to strictly adhere to the deferential standard set forth in *Stokes* and *Douglas*. *See* JA 1157-58. The MPD

[2] The MPD's citation to *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985) is the same as its present citation to *Douglas*, as the Court in *Stokes* was articulating the same "tolerable limits of reasonableness" standard set forth in *Douglas*. *See Stokes*, 502 A.2d at 1010-11.

has failed to demonstrate, or even argue, that PERB's decision on this point is rationally indefensible.

3. The Award is Not So Arbitrary and Capricious as to be Contrary to Law.

Seizing upon *dicta* in *Thomas I*, the MPD argues that the Award is "'so arbitrary and capricious' as to be contrary to law." MPD Br. 48-49 (quoting *Thomas I*, 282 A.3d at 605). In support of this argument, the MPD asserts that the Arbitrator's reasoning as to the penalty was "irrational" and that the 45-day suspension without pay was "so disproportionate to the severity of Thomas's misconduct as to be contrary to law." MPD Br. 49. The MPD's argument should be rejected on both procedural and substantive grounds.

As an initial matter, this argument has been waived, as it was never raised before PERB. *See* JA 1-17. Since PERB's interpretation of the statutory phrase "on its face contrary to law and public policy" is entitled to deference, PERB is entitled to decide in the first instance what level of arbitrariness and capriciousness, if any, satisfies the statutory meaning of "contrary to law."

Furthermore, the MPD's argument is substantively unfounded. Arbitrator Pritzker's Award is not "irrational." The Award was rendered after careful consideration of the record evidence and the parties' factual and legal arguments. *See generally* JA 19-28. Arbitrator Pritzker did not arbitrarily overturn the termination in favor of a 45-day suspension without pay, but instead based that

decision on several reasons that he explicitly articulated in his Award, including the following: (1) a 45-day suspension was the same penalty imposed upon Officer Ford in a case of comparable discipline, who, unlike Officer Thomas, shot and killed an individual; (2) penalties less than termination, such as a suspension, were sufficient to deter Officer Thomas and other employees from similar misconduct; and (3) there were resources available to the MPD that could assist in Officer Thomas' rehabilitation as an officer. JA 28. Although the MPD disagrees with the Arbitrator's comparison of *Ford* to Officer Thomas' circumstances, it cannot be said that Arbitrator Pritzker's analysis and application of *Ford* was irrational. To the contrary, Arbitrator Pritzker chose the 45-day suspension because it was the same penalty imposed in the *Ford* case. Moreover, the *Ford* case involved conduct that was objectively more egregious than the subject incident, as evidenced from the record evidence presented to Arbitrator Pritzker:

> 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). Rationally and logically, Arbitrator Pritzker reasoned that if similar-but-worse circumstances warranted only a suspension, then such a suspension was equally appropriate as applied to Officer Thomas. In other words, Arbitrator Pritzker did not dispense his own brand of industrial justice, but instead utilized record evidence as a guidepost for his Award.

For these same reasons, a 45-day suspension without pay is not "so disproportionate" from the conduct at issue as to be arbitrary. Again, a 45-day suspension was imposed by the MPD in the *Ford* case where an officer shot and killed someone. Thus, the disproportionality complained of by the MPD is of the MPD's own subjective making. Simply because the MPD does not believe the penalty is severe enough is not a basis to completely vacate the bargained-for Award, particularly where the penalty imposed by the Award and the reasoning for the Award was thoroughly articulated.

In sum, this case does not present the "extraordinary circumstances" cited by this Court. As indicated through this Court's hypothetical, such "extraordinary

circumstances" would require matters of much greater severity that include, at a minimum, affirmative malice. *See Thomas I*, 282 A.3d at 605. The Arbitrator determined that Officer Thomas made a mistake and that he would be punished for that mistake. There is nothing extraordinary in simply requiring that the punishment be severe, but less severe than the highest form of punishment.

CONCLUSION

Contrary to the law of the District, the MPD requests that this Court substitute its own judgment for that of PERB and to independently determine whether Officer Thomas should be terminated. In essence, the MPD begs this Court to become the parties' bargained-for arbitrator and to decide the question—*that the MPD agreed to submit to the Arbitrator*—of what the appropriate disciplinary penalty is in this matter. In considering the MPD's sweeping (and incorrect) public policy arguments, this Court should likewise consider the countervailing public policies—namely, that adopting the MPD's arguments would obliterate longstanding stability and efficiency that bargained-for arbitration serves in the District of Columbia and across the country. *See D.C. Pub. Emp. Rels. Bd.*, 987 A.2d at 1209. For all of the foregoing reasons, the D.C. Police Union respectfully requests that this Court affirm PERB's DOR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2025, a copy of the foregoing was served via the Court's electronic filing system to counsel for all parties of record.

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