

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

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

| | | |
|---------------------------------|---|-----------------------|
| In the Matter of: |) | |
| |) | |
| |) | |
| Metropolitan Police Department, |) | PERB Case No. 16-A-12 |
| Petitioner, |) | |
| |) | Opinion No. 1639 |
| v. |) | |
| |) | |
| Fraternal Order of Police/ |) | |
| Metropolitan Police Department |) | |
| Labor Committee |) | |
| (on behalf of Jose Mendoza), |) | |
| |) | |
| Respondent. |) | |
| |) | |

DECISION AND ORDER

I. Introduction

On July 5, 2016, the District of Columbia Metropolitan Police Department (“MPD” or “Petitioner”) filed an Arbitration Review Request (“Request”) of an award that sustained the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Respondent”) on behalf of Officer Jose Mendoza (“Officer Mendoza”). The Arbitrator determined that MPD failed to commence an adverse action against Officer Mendoza within 90 days of when it knew or should of known of his alleged misconduct, a violation section 5-1031(a) of the D.C. Official Code (also referred to as the “90-day rule”). The issue before the Board is whether the Award on its face is contrary to law and public policy.

The Board is authorized to modify or set aside an arbitration award in three narrow circumstances: (1) if the arbitrator was without, or exceeded his or her jurisdiction; (2) if the award on its face is contrary to law and public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.¹

The Board has reviewed the Arbitrator’s conclusions, the pleadings of the parties and applicable law, and concludes that the Award on its face is not contrary to law and public policy. For the reasons stated herein, Petitioner’s request is denied.

¹ D.C. Official Code § 1-605.02(6)

II. Statement of the Case

On July 30, 2011, Louis Ramirez (Mr. Ramirez) filed a police report with the Fairfax County Police Department (“FCPD”) accusing MPD Officer Jose Mendoza of theft.² At the time of the incident, Mr. Ramirez and Officer Mendoza had been friends for about two years and had a disagreement about the possible theft of money and other missing items.³

In response to the police report, FCPD Detective Harrington spoke with both Officer Mendoza and Mr. Ramirez. When speaking with Detective Harrington, Mr. Ramirez reported that he received all of his property back from Officer Mendoza and no longer wished to prosecute. The following day, August 1, 2011, Mr. Ramirez met Detective Harrington at the FCPS station and retracted his statement accusing Officer Mendoza of theft. FCPD decided that no criminal charges would be filed in Virginia.⁴

On July 30, 2011, FCPD contacted MPD and informed it that Officer Mendoza had been involved in the incident. MPD sent a member of Internal Affairs to visit Mr. Ramirez to investigate the allegations against Officer Mendoza. As a result, on July 30, 2011, Officer Mendoza’s police powers were revoked and he was placed in a non-contact duty status.⁵ An investigation was conducted by MPD into Officer Mendoza’s conduct in this case; however, MPD did not institute a criminal investigation. Officer Mendoza was subsequently served a Notice of Proposed Adverse Action and charged with “Conduct unbecoming an Officer” and a 30-day suspension was proposed.⁶

III. Arbitrator’s Award

The threshold issue determined by the Arbitrator was whether MPD violated the 90-day rule. MPD claimed that Officer Mendoza was served with the Notice of Proposed Adverse Action within the 90 days required by section 5-1031.

The Arbitrator ruled that MPD had actual knowledge of the acts or occurrences constituting the alleged cause on July 30, 2011, the date FCPD notified MPD of Mr. Ramirez’s claims against Officer Mendoza. The Arbitrator went on to state that in order to argue that the 90-day rule was tolled because of a criminal investigation, MPD needed to notify and consult with the United States Attorneys Office (“USAO”) no later than the next business day after it became aware of Office Mendoza’s acts.⁷ MPD determined by July 30, 2011 that Officer Mendoza may have committed a criminal act, and failed to produce any evidence that it ever consulted with the USAO or instituted a criminal investigation of Officer Mendoza.⁸ Based on this lack of evidence, the Arbitrator ruled that MPD was not entitled to argue that the 90-day rule

² Award at 5.

³ Award at 4.

⁴ Award at 7.

⁵ Award at 7.

⁶ Award at 7-8.

⁷ Award at 9 (citing Gen. Order 120.23 at p. 5).

⁸ Award at 9.

was tolled for any reason pertaining to any criminal aspects of the underlying events.⁹ Therefore, the Arbitrator found that MPD violated the 90-day rule. As a result of this finding, the Arbitrator found it unnecessary to make any further findings with respect to the other issues.¹⁰

The Arbitrator stated that, if the 90-day deadline could not be tolled as a result of a criminal investigation, the deadline to serve Officer Mendoza with a Notice of Proposed Adverse Action was December 8, 2011. The Arbitrator looked to exhibits presented at arbitration and determined that Officer Mendoza was served with a Notice of Proposed Adverse Action on December 9, 2011.¹¹ The Arbitrator found that MPD plainly violated the 90-day rule by not serving the Notice of Proposed Adverse Action on or before December 8, 2011.¹² Accordingly, the Arbitrator concluded that, under section 5-1031, MPD could not commence, proceed with or impose the proposed discipline against Officer Mendoza as a matter of law.

The Arbitrator rescinded the 30-day suspension and ordered MPD to reimburse Officer Mendoza all lost back pay with interest.¹³

IV. Discussion

The Board is authorized to modify or set aside an arbitration award in three narrow circumstances: (1) if the arbitrator was without, or exceeded his or her jurisdiction; (2) if the award on its face is contrary to law and public policy; or (3) if the award was procured by fraud, collusion or other similar and unlawful means.¹⁴

MPD argues that the Arbitrator's decision violated law and public policy. The Arbitrator stated in the Award that MPD agreed that December 8, 2011, was the 90th business day for the matter. The Arbitrator cited Joint Exhibit 5 and 6 as supporting evidence that Officer Mendoza was not served until December 9, 2011, and concluded that MPD violated the 90-day rule. According to MPD, the Arbitrator incorrectly cited the record in determining the date of service.¹⁵ MPD believes that Joint Exhibit 5 demonstrates conclusively that Officer Mendoza was served on December 8, 2011 meaning there was no violation of the 90-day rule.¹⁶

MPD further argues that even if there was a violation of the 90-day rule, it was *de minimis* and did not preclude the agency from taking adverse action against Officer Mendoza.¹⁷ MPD argues that consistent with the Superior Court's opinion in *MPD v. Public Employee Relations Board*,¹⁸ PERB has determined that the 90-day rule is directory, not mandatory. When

⁹ Award at 9.

¹⁰ Award at 10.

¹¹ Award at 9.

¹² Award at 9.

¹³ Award at 10.

¹⁴ D.C. Official Code § 1-605.02(6)

¹⁵ Request at 7.

¹⁶ Request at 7.

¹⁷ Request at 8.

¹⁸ 2012 CA 007805 (D.C. Super. Ct. July 17, 2014).

a statute is directory, the balancing test set forth in *JBG Properties, Inc. v. D.C. Office of Human Rights*¹⁹ must be applied.²⁰ Applying the *JBG Properties* balancing test, MPD argues that any purported violation of the 90-day rule by the agency would be *de minimis*. According to MPD, Officer Mendoza did not sustain any prejudice as a result of the alleged one-day violation.²¹ The record establishes that Officer Mendoza was able to fully avail himself of the agency's appeal process and formulate a robust case for the arbitration hearing in 2016.²²

Finally, MPD argues that the Arbitrator's award of pre-judgment and post-judgment interest exceeded his authority and violated law and public policy. MPD cites to the parties' collective bargaining agreement which states that the arbitrator shall not have the power to add to, subtract from, or modify the parties' collective bargaining agreement.²³ MPD further states that Article 46 of the collective bargaining agreement states that the employer shall issue back pay checks within 60 days from the date of final determination. If MPD fails to issue a check within 60 days then an arbitrator may, if appropriate, order interest.²⁴ MPD argues that the parties anticipated back pay as part of an award and specifically stated the arbitrator's role in awarding interest through Article 46. Finally, MPD argues that an interest award exceeding 4% violates section 28-3302(b) of the D.C. Official Code which limits interest rates on judgments against the District to no more than 4% per annum.²⁵ In this case, the Arbitrator awarded 10% post-judgment interest, which according to MPD is a violation of section 28-3302(b).

FOP argues that the MPD's contentions are mere disagreements with the Arbitrator's findings and conclusions and that the decision did not violate law or public policy. FOP argues that it would be improper for the Board to consider the *de minimis* issue when the Arbitrator never had the opportunity to rule on it because MPD never raised it with the Arbitrator.²⁶ FOP further argues that the 90-day requirement is akin to a statute of limitations and that Officer Mendoza was seriously prejudiced by the one day delay.²⁷ Officer Mendoza's defense was entirely dependent upon the statements of Luis Ramirez who retracted his accusations the very next day. Finally, FOP argues that the interest award was within the Arbitrator's discretion.

The issue before the Board is whether the arbitrator acted contrary to law and public policy. MPD's argument that the Arbitrator incorrectly cited the record in determining the 90-day deadline, does not meet the requirement for the Board to overrule the Award. The Arbitrator looked to all the evidence and made a determination that service was effected on December 9, 2011. The Board has long held that it does not act as a finder of fact nor does it substitute its judgment for that of the arbitrator on credibility determinations and the weight attributed to evidence.²⁸ By submitting a matter to arbitration, parties are bound by the Arbitrator's

¹⁹ 364 A.2d 1183 (D.C. 1976).

²⁰ Request at 8.

²¹ Request at 9.

²² Request at 9.

²³ Request at 12.

²⁴ Request at 12.

²⁵ Request at 13.

²⁶ Opposition at 6.

²⁷ Opposition at 7.

²⁸ *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 61 D.C. Reg. 11295, Slip Op. No. 1491 at 4, PERB Case No. 09-A-14(R) (2014); *See also AFSCME, District Council 20, Local 2743, AFL-*

evidentiary and factual findings.²⁹ The 90-day rule deadline is a factual determination that was resolved by the Arbitrator.

The argument that the violation was *de minimis* does not show that the Arbitrator acted contrary to law and public policy. Although the Superior Court determined that section 5-1031(a) is directory, not mandatory, the Board has previously held that an argument may not be raised for the first time in an arbitration review request.³⁰ The Board has exclusive jurisdiction over appeals from grievance-arbitration awards, but it does not have original jurisdiction over such matters.³¹ During Arbitration, MPD argued that the Notice of Proposed Adverse Action was served within the 90-day limit and the Arbitrator made a finding on this issue. MPD did not argue that if it violated the 90-day rule then the violation was *de minimis* and the Arbitrator made no finding regarding this matter. MPD brings the issue of a *de minimis* violation of the 90-day rule for the first time in this Arbitration Review Request. As a result, MPD has waived its argument that the Arbitrator's decision is contrary to law and public policy based on a *de minimis* violation of the 90-day rule.

On the issue of interest awarded by the Arbitrator, the Board has held that an arbitrator does not exceed his or her authority by exercising equitable power to formulate a remedy unless the collective bargaining agreement expressly restricts his or her equitable power.³² A collective bargaining agreement's prohibition against awards that add to, subtract from, or modify the collective bargaining agreement does not expressly limit the arbitrator's equitable power.³³ For the Board to overturn an arbitrator's award as in excess of the arbitrator's authority, MPD must show that the collective bargaining agreement expressly limits an arbitrator's equitable power. MPD's interpretation of Article 46 of the collective bargaining agreement also does not provide the Board with an express limitation on the arbitrator's equitable power. Instead, MPD asks the Board to accept its interpretation of the collective bargaining agreement over that of the Arbitrator. The Board has repeatedly held that it will not overturn an arbitration award based simply upon the petitioning party's disagreement with the arbitrator's findings.³⁴ Lastly, the Board has also held that section 28-3302(b) of the D.C. Official Code does not apply to arbitration awards of interest since an arbitrator's power to render awards is authorized by

CIO v. D.C. Dep't of Consumer and Regulatory Affairs, 38 D.C. Reg. 5076, Slip Op. No. 281, PERB Case No. 90-A-12 (1991).

²⁹ See *D.C. Dep't of Health v. AFGE, Local 2725, AFL-CIO*, 60 D.C. Reg. 7198, Slip Op. No. 1383, PERB Case No. 13-A-01 (2013); See also *D.C. Metro. Police Dep't v. Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comm.*, 59 D.C. Reg. 11329, Slip Op. No. 1295, PERB Case No. 09-A-11 (2012).

³⁰ *D.C. Metro. Police Dep't, v. Fraternal Order of Police/Metro. Police Dep't Labor Comms*, 64 D.C. Reg. 2021, Op No. 1606, PERB Case No. 16-A-19 2017). See also, *District of Columbia Housing Authority v. AFGE, Local 2725*, 62 DC Reg. 2893, Op. No. 1503, PERB Case 14-A-07 (2015).

³¹ *D.C. Metro. Police Dep't, v. Fraternal Order of Police/Metro. Police Dep't Labor Comms*, 64 D.C. Reg. 2021, Op No. 1606, PERB Case No. 16-A-19 2017).

³² See *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 59 D.C. Reg. 6787, Slip Op. No. 1133 at p. 8, PERB Case No. 09-A-12 (2011); *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

³³ *Metro. Police Dep't v. Fraternal Order of Police/ Metro. Police Dep't Labor Comm.*, 59 D.C. Reg. 6787, Slip Op. No. 1133 at 8, PERB Case No. 09-A-12 (2011).

³⁴ *Fraternal Order of Police/Dep't of Corr. Labor Comm. v. Dep't of Corr.*, 59 D.C. Reg. 9798, Slip Op. No. 1271 at p. 6, PERB Case No. 10-A-20 (2012).

contract and not by law, as prescribed by section 28-3302(b).³⁵ Therefore, MPD's disagreement with the Arbitrator's Award of interest does not present a statutory ground for review.

V. Conclusion

The Board rejects MPD's arguments and finds no cause to set aside or modify the Arbitrator's Award. Accordingly, MPD's request is denied and the matter is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
2. Pursuant to Board Rule 559, this Decision and Order shall become final thirty (30) days after issuance unless a party files a motion for reconsideration or the Board reopens the case within fourteen (14) days after issuance of the Decision and Order.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Members Douglas Warshof, Barbara Somson and Mary Anne Gibbons.

August 17, 2017

Washington, D.C.

³⁵ *UDC and UDC, Faculty Ass'n*, 41 D.C. Reg. 2738, Slip Op. 317 at 3, PERB Case No. 92-A-02 (1992) (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960)).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-A-12, Op. No. 1639 is being transmitted to the following parties on this the 25th day of August 2017.

Mark Viehmeyer, Esq.
Metropolitan Police Department
300 Indiana Avenue, NW
Room 4126
Washington, D.C. 20001

Marc L. Wilhite, Esq.
Pressler & Senftle, PC
1431 K Street, NW
12th Floor
Washington, DC 20005

/s/ Sheryl Harrington
PERB