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

In the Matter of:)	
)	
Metropolitan Police Department,)	
)	
Petitioner,)	PERB Case No. 16-A-18
)	Opinion No. 1603
v.)	
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee (on behalf of)	
Clinton Turner),)	
Respondent.)	

DECISION AND ORDER

I. Introduction

On August 16, 2016, the District of Columbia Metropolitan Police Department (“MPD”) filed an Arbitration Review Request (“Request”) in this matter, seeking review of the arbitration award (“Award”) that sustained the grievance filed by the Fraternal Order of Police/ Metropolitan Police Department Labor Committee (“FOP”). The arbitrator determined that MPD failed to commence an adverse action against Officer Clinton Turner (“Officer Turner”) within 90 days of when it knew or should have known of alleged misconduct, a violation of D.C. Official Code § 5-1031(a) (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.¹

For the reasons stated herein, Petitioner’s Request is denied.

II. Statement of the Case

On January 20, 2011, Officer Turner and fellow MPD officer, Lewond Fogle, conducted a check on a business in Northeast Washington, D.C. During this visit, a physical altercation occurred between Officer Turner and Daniel Fox, a store employee, which resulted in the arrest of Mr. Fox.² The incident was recorded on the store security camera, however the video contains no audio. Sergeant Robert McGee was called to the scene where Officers Turner and Fogle provided him with a description of the events leading up to Fox’s arrest. Sergeant McGee

¹ See D.C. Official Code § 1-605.02(6).

² Award at 2.

determined that Fox would be charged with Disorderly Conduct- Loud and Boisterous, and Assault on a Police Officer.³ Sergeant McGee then called the watch commander, Lt. Mark Hodge, to the location. When Lt. Hodge arrived he interviewed Sgt. McGee as well as store employees who were present during the altercation. The employees told Lt. Hodge that they were not in fear of Mr. Fox, nor did they request police intervention. Moreover, none of the employees stated that Mr. Fox was causing a disturbance. Based on this information and after a review of the video footage, Lt. Hodge concluded that the officers did not have probable cause to arrest Mr. Fox.⁴

That same day, January 20, 2011, Lt. Hodge prepared a "Preliminary Report Form – Misconduct, Duty Status or Unusual Incidents" ("the Report") declaring "Serious Misconduct – False Arrest."⁵ Lt. Hodge recited his understanding of the facts surrounding the arrest and his assessment that there was no probable cause to arrest Mr. Fox.⁶ At Hodge's direction, Mr. Fox was released with no charges being filed. That same day, Lt. Hodge also advised Officer Turner that there were possible criminal implications and suggested he contact a union representative.⁷

The Report also stated that Sgt. McGee had notified the Internal Affairs Division (IAD) and an IAD agent, Det. John Hendrick about the incident.⁸ Det. Hendrick notified the United States Attorney's Office (USAO) of the incident by email on January 21, 2011. On February 3, 2011, Det. Hendrick submitted a preliminary investigative package to the USAO.⁹ The USAO presented the matter to a grand jury on July 27, 2011. The grand jury returned an indictment and a bench trial was held before Judge Robert Morin of the D.C. Superior Court.¹⁰ Officer Turner was found guilty of simple assault on October 15, 2013.¹¹

Det. Hendricks then completed his investigative report in early January of 2014 and submitted his "Final Investigative Report Regarding Allegation of Excessive Force" to the Use of Force Review Board.¹² On February 4, 2014, the Use of Force Review Board issued Findings and Recommendations concluding that the use of force by Officer Turner should be classified as "not Justified, Not within Departmental Policy."¹³

A Notice of Proposed Adverse Action was issued to Officer Turner on February 24, 2014 setting forth two charges:

Charge No. 1:	Violation of General Order 120.21, Attachment A, Part A-7, which provides, "Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense,
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³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 3.

or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of *nolo contendere*, or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report, or have reported their involvement to their commanding officers.

Specification No. 1: In that, on January 20, 2011, while on duty, you did assault Mr. Daniel Fox. You were subsequently placed under arrest for Simple Assault.

Specification No. 2: In that on October 15, 2013, you were found guilty of Simple Assault in Criminal Case 2013 CMD 008679 by District of Columbia Superior Court Judge Robert Morin. You were later sentenced by the Judge Morin to 180 days incarceration, execution of the sentence suspended, and two years supervised probation. You were also ordered to pay restitution in the amount of \$1,200.00 and \$50.00 to the Victims Crime Fund.

Charge No. 2: Violation of General Order 120.21, Part VIII, Attachment A-16, which states, "Failure to obey orders or directives issued by the Chief of Police." This misconduct is further specified in General Order RAR-901-07 (Use of Force), Part V, B. Part 1, (a, b, c, d) Part 3 and Part 4, which states in part. "In determining what level of force to use, it is important to consider the seriousness of the crime, the level of threat or resistance presented by the suspect, the imminence of danger, and the suspect's mental capacity. Only the minimum level of force needed to obtain control that the objectively reasonable officer would use in light of the circumstances shall be used. All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present should, if possible, defuse the situation through advice, warning and verbal persuasion. In the event that a situation escalates beyond the effective use of verbal diffusion techniques, members are authorized to employ Department approved compliance techniques and Department-issued defensive weapons.

Specification No. 1: In that, on January 20, 2011, while on duty and conducting a business check at the Downtown Locker Room, located at 3960 Minnesota Avenue, Northeast, Washington, D.C., you utilized force arresting Mr. Daniel Fox. Subsequently, the use of Force Review Board found that your use of force during the incident was not justified and not within Departmental policy.

On July 4, 2014 an Adverse Action Panel issued a decision, finding that D.C. Official Code § 5-1031(a) required an adverse action to be commenced within 90 days of the date MPD knew of the act constituting cause and MPD failed to meet this requirement.¹⁴ The panel included the nine days between January 20, 2011 and February 3, 2011 and then the 88 days between the October 15, 2013 guilty finding and the February 24, 2014 issuance of the proposed adverse action as part of the 90-day period.¹⁵ According to this panel, MPD was in violation of the 90-day rule. The panel further found Officer Turner not guilty of Charge 1, specification 1 but guilty of specification 2 based on a preponderance of the evidence.¹⁶ The panel further specified that guilty was not the appropriate term but that the court had made such a finding and therefore the specification was "true."¹⁷ The panel found Officer Turner not guilty of Charge 2 and overall recommended that Officer Turner receive no punishment and be returned to duty.¹⁸

Inspector Eldridge, the acting Director of the Human Resource Management Division at MPD, remanded the case to an alternate panel finding the original panel decision to have significant deficiencies, including a mistaken application of the 90-day rule.¹⁹

On August 27, 2014, an Amended Notice of Proposed Adverse Action was served on Officer Turner. The amended notice set forth a third charge in addition to those stated in the February 24, 2014 notice:

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-25, which provides, "Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to discipline and performance of the force."

Specification No. 1: In that, on October 15, 2013, during your trial in the matter of case 2013-CMD-8679, the Honorable Robert Morin, Associate Judge, Superior Court of the District of Columbia, announced in his findings that the testimony you provided was not credible and it was not supported by any objective evidence. As a result, the United States Attorney's Office reported that it will no longer sponsor your testimony based on the adverse credibility findings made by Judge Morin.²⁰

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 4-5.

²⁰ *Id.* at 6.

On October 29, 2014, an alternate Adverse Action Panel was convened to review evidence related to all three charges. The panel found Officer Turner guilty of all charges and recommended that he be terminated from the MPD.²¹

On December 2, 2014, Director of the Human Resources Management Division issued Officer Turner a Final Notice of Adverse Action with a termination date of February 6, 2015.²² Officer Turner appealed the decision to the Chief of Police asserting a violation of the 90-day rule. The Chief of Police denied the appeal.²³ The Union demanded arbitration on January 30, 2015.²⁴

III. Arbitrator's Award

The Arbitrator addressed four issues; however MPD requests review of the Award only with respect to the issue of the 90-day rule.²⁵

In order to determine whether MPD violated the 90-day rule, the Arbitrator looked to several separate timelines related to when the 90-day rule began and when the time limit was tolled under D.C. Official Code § 5-1031(b). Regarding Charges 1 and 2, the Arbitrator stated that the 90-day rule period began on January 20, 2011, and ended on February 23, 2014, the date the charges were issued.²⁶ A great deal of the intervening time was the subject of a criminal investigation. There are 88 days between October 15, 2013, when the court found Officer Turner guilty of simple assault, and February 24, 2014, the issuance of the Notice of Proposed Adverse Action.²⁷ The nine days between January 20, 2011, the date of the arrest, and February 3, 2011, the date of the referral to the USAO, are the dates in dispute. MPD claims these nine days should be considered part of the criminal investigation and therefore not part of the 90-day period.²⁸ If those nine days are included in the 90-day period, there would be a total of 97 days making MPD's charges untimely.

The Arbitrator concluded that if MPD sought to exclude the nine days immediately following the incident because Officer Turner was the "subject of a criminal investigation" it had the burden of establishing that fact on the record. According to the Arbitrator, MPD did not meet this burden.²⁹ During the nine days in dispute, Officer Turner was advised that criminal charges may be filed against him; the MPD Internal Affairs Division was also notified of the

²¹ *Id.*

²² *Id.*

²³ *Id.* at 7.

²⁴ *Id.*

²⁵ The four issues reviewed by the Arbitrator were (1) Whether the Department violated the 90-day Rule as set forth under D.C. Code § 5-1031, (2) whether the Acting Director of the MPD Human Resources Management Division, Inspector Michael Eldridge, had the authority to (a) remand DRB No. 105-14 to a new Adverse Action Panel and (b) remand DRB No. 105-14 without instruction, when Inspector Eldridge was also the proposing official for the discipline that was issued in this case, (3) whether the evidence presented by the Department was sufficient to support the charge and (4) whether termination is an appropriate penalty.

²⁶ Award at 19-20.

²⁷ *Id.* at 20.

²⁸ *Id.*

²⁹ *Id.* at 22.

incident, who then notified the USAO.³⁰ The Arbitrator concluded that there was no explanation of MPD procedures to support the link between those actions and the beginning of a criminal investigation and absent such a finding, the record does not rationally lead to a conclusion that the nine days were excluded from the 90-day limit pursuant to D.C. Official Code § 5-1031(b).³¹ The Arbitrator concluded that Charges 1 and 2 were not timely.³²

MPD has filed this Arbitration Review Request seeking to have the Arbitrator's Award reversed on the grounds that it is contrary to law and public policy.³³

IV. Discussion

Under D.C. Official Code § 1-605.02(6), the Board is authorized to modify or set aside an arbitration in only three limited circumstances: (1) if an 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.³⁴

MPD states that the Arbitrator's decision was contrary to law and public policy because in accordance with D.C. Official Code § 5-1031(a), MPD commenced the adverse action against Officer Turner within 90 days after it knew or should have known of the matters constituting the alleged misconduct.³⁵ According to D.C. Official Code § 5-1031(b) a criminal investigation into an act or occurrence constituting cause results in the 90-day period being tolled until the conclusion of the investigation.³⁶ The time period at issue is the nine-day period between January 20, 2011, the date of the arrest, and February 3, 2011, the date the report of the incident was presented to the USAO.³⁷ According to MPD, the record of evidence clearly shows that the nine-day period was related to the criminal investigation because it was during this period that Lt. Hodge advised Officer Turner that his actions could have criminal consequences. It was also during this time period when Det. Hendrick of the Internal Affairs Division was notified of the incident, assigned the case for an investigation. Det. Hendrick also notified the USAO by email during this nine day period.³⁸ MPD also states that all doubt about the nine day period is resolved by an August 2, 2011 letter from the USAO to Officer Turner stating that MPD and the USAO have been conducting an investigation relating to violations of the criminal code by Officer Turner.³⁹ MPD claims this letter unquestionably includes the nine-day period at issue as part of the criminal investigation.⁴⁰ The letter, dated August 2, 2011, states, in part:

The Metropolitan Police Department, in conjunction with the United States Attorney's Office for the District of Columbia, have

³⁰ *Id.* at 2.

³¹ *Id.* at 22.

³² *Id.*

³³ Request at 10.

³⁴ *University of the District of Columbia v. PERB*, 2012 CA 8393 P(MPA) (2014).

³⁵ Request at 10.

³⁶ *Id.*

³⁷ *Id.* at 11.

³⁸ *Id.* at 12.

³⁹ *Id.*

⁴⁰ *Id.* at 13.

been conducting an investigation which shows that you may have committed violations of the criminal code, to include Assault, in violation of D.C. Code § 22-401, et seq., and/or Deprivation of Rights Under Color of Law, in violation of Title 18, United States Code § 242. These violations stem from your contact with a complainant Daniel Fox at the Downtown Locker Room located at 3960 Minnesota Avenue, NE, while on duty on January 20, 2011.⁴¹

Based on these issues, MPD claims the record supports including the nine days as part of a criminal investigation. FOP states that the nine day period was not part of the criminal investigation and therefore MPD violated the 90-day rule because the adverse action did not commence until ninety seven days after the MPD knew or should have known of the January 20, 2011 incident. FOP claims that MPD has failed to provide any legal reasoning in support of its position and has simply rehashed the points in dispute from the record which were ultimately determined by the Arbitrator.⁴²

The Board has long held that it will not overturn an Arbitrator's findings on the basis of a mere disagreement with the Arbitrator's determination.⁴³ By submitting a matter to arbitration, parties are bound by the arbitrator's interpretation of the CBA, related rules and regulations, and evidentiary and factual findings. In order for the Board to find that the Arbitrator's Award was, on its face, contrary to law and public policy, the petitioner has the burden to show the applicable law and public policy that mandates a different result.⁴⁴ In this case, the Arbitrator has determined that the nine day period was not part of the criminal investigation and MPD has failed to point to any specific law or public policy violated by the Award. MPD merely disagrees with the Arbitrator's determination of when the criminal investigation started. Accordingly, the Board finds that MPD's request is merely a disagreement with the Arbitrator's evidentiary findings and conclusions.

Finally, MPD argues that the issue regarding the 90-Day Rule is a question of law and as such the Arbitrator would not have been bound by any prior determination of the issue but instead would have reviewed the issue *de novo*.⁴⁵ MPD states that since there was no evidentiary hearing, the Arbitrator failed to make an independent determination regarding the 90-day rule and this is an error and contrary to law and public policy.⁴⁶ The Arbitrator's decision was based on a record including an MPD investigative report, the determination of the Use of Force Board, two trial board hearing transcripts and decision, the remand orders and intervening interlocutory appeals by the Union and decisions on these appeals by MPD.⁴⁷ MPD disagrees with the

⁴¹ *Id.* at 12-13

⁴² Response at 4.

⁴³ *Fraternal Order of Police/Metro. Police Dep't Labor Comms. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 9798, Slip Op. No. 1271, PERB Case No. 10-A-20 (2012).

⁴⁴ See *Fraternal Order of Police v. D.C. Pub. Emp. Relations Bd.*, 2015 CA 006517 P(MPA) at p. 8.

⁴⁵ Request at 13.

⁴⁶ *Id.* at 14.

⁴⁷ Award at 19.

Arbitrator's evidentiary conclusions and the Board has held that a mere disagreement with the Arbitrator's interpretation is no basis for vacating an Award.⁴⁸

V. Conclusion

The Board finds that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. Thus, 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 with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

- 1. The arbitration review request is hereby denied.**
- 2. Pursuant to Board Rule 559. 1, this Decision and Order is final upon issuance.**

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, and Members Ann Hoffman, and Douglas Warshof. Members Barbara Somson and Yvonne Dixon were not present.

November 22, 2016

Washington, D.C.

⁴⁸ See *D.C. Dep't of Health v. AFGE, Local 2725, AFL-CIO*, 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).

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This is to certify that the Decision and Order in PERB Case No. 16-A-18, Op. No. 1603 was sent by File and ServeXpress to the following parties on the the 29th day of December, 2016.

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