

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 publication. 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:)	
)	
Johnny Jones)	
)	PERB Case No. 21-A-03
Petitioner)	
)	Opinion No. 1777
v.)	
)	
District of Columbia)	
Metropolitan Police Department)	
)	
Respondent)	
_____)	

DECISION AND ORDER

I. Statement of the Case

On November 3, 2020, Johnny Jones (Petitioner) filed an Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA)¹ seeking review of an arbitration award (Award) dated October 19, 2020. The Award affirmed the penalty of termination which the District of Columbia Metropolitan Police Department (MPD) imposed on him. The Petitioner seeks review of the Award on the ground that it is contrary to law and public policy.² MPD filed an Opposition, asking the Board to deny the Petitioner’s Request.

Upon consideration of the Arbitrator’s conclusions, applicable law, and the record presented by the parties, the Board concludes that the Award is not contrary to law and public policy. Therefore, the Board denies the Petitioner’s Arbitration Review Request.

II. Arbitration Award

A. Background

The Petitioner in this matter is an MPD Officer whom MPD proposed to terminate for (1) providing a false statement to an Internal Affairs Division (IAD) Agent, (2) making lewd and inappropriate comments and sexual advances toward a citizen while on duty, and (3) using his

¹ D.C. Official Code § 1-605.02(6).
² Request at 2.

authority to acquire a citizen's telephone number and thereafter making unwarranted and unwanted calls and text messages to that citizen.³

On May 14, 2014, the Petitioner encountered a citizen sitting in a parked car near 14th Street and Rhode Island Avenue.⁴ According to the citizen, the Petitioner pulled up behind her in his police cruiser with his emergency lights activated.⁵ The citizen claimed that she rolled down her window and the Petitioner informed her that she was illegally parked.⁶ According to the citizen, the Petitioner then said he smelled a strong odor of marijuana emanating from her vehicle and asked for her driver's license.⁷ Two additional MPD vehicles pulled up to the scene and the citizen exited her vehicle to allow the police to search the car.⁸ The officers performed a routine search of the car and found marijuana residue, which the citizen attributed to her boyfriend.⁹ Allegedly, the Petitioner drew the citizen aside while the other officers were searching the car and made inappropriate sexual advances toward her.¹⁰ The citizen claimed that the Petitioner asked for her telephone number and that she provided it to him, after which he informed her that he would come to her house that night.¹¹ The citizen asserted that she only gave him her phone number to terminate the encounter and have proof to use when lodging a complaint.¹² She stated that she tried to get the Petitioner's badge number but was only able to get his first and middle initials and his last name before the interaction ended.¹³

The citizen's aunt, an MPD Officer, made a complaint against the Petitioner less than an hour after his encounter with her niece.¹⁴ Later that day, the Petitioner called and texted the citizen, allegedly to follow-up and gather information surrounding the marijuana residue in her car.¹⁵ She did not respond.¹⁶ That night, a female MPD Sergeant called the telephone number provided by the citizen's aunt and posed as the citizen.¹⁷ According to the Sergeant, the Petitioner made overtly sexual comments to her over the phone.¹⁸ The Petitioner denies this allegation.¹⁹ An IAD Agent interviewed the Petitioner as part of an IAD investigation. The Petitioner told the IAD Agent that the citizen was being flirtatious with him during their encounter and that *she* was the one who

³ Award at 4,7-8,19.

⁴ Award at 8-9.

⁵ Award at 9.

⁶ Award at 9.

⁷ Award at 9.

⁸ Award at 9.

⁹ Award at 10.

¹⁰ Award at 10.

¹¹ Award at 10.

¹² Award at 10.

¹³ Award at 10.

¹⁴ Award at 11.

¹⁵ Award at 11-12.

¹⁶ Award at 10.

¹⁷ Award at 12.

¹⁸ Award at 12.

¹⁹ Award at 12.

asked *him* for his phone number.²⁰ He admitted initiating multiple unreciprocated phone calls and texts to the citizen but denied saying anything sexual to her in person or over the phone.²¹

This matter was referred to the U.S. Attorney's Office (USAO) for criminal prosecutorial review on May 20, 2014.²² The USAO declined to prosecute this case on April 7, 2015.²³ The Petitioner received the Notice of Proposed Adverse Action on the August 12, 2015, which was 92 business days after his encounter with the citizen (excluding the period of time when the case was with the USAO).²⁴ He requested an Adverse Action Hearing (AAH).²⁵ The first day of the hearing was March 15, 2016 and the second was April 5, 2016.²⁶ The IAD Agent who had conducted the investigation of the Petitioner had retired by the time the hearing commenced and did not appear to testify.²⁷ The female citizen did not appear to testify either, as she was not comfortable being in the same room as the Petitioner.²⁸ The Panel found the Petitioner guilty of conduct unbecoming an Officer and conduct prejudicial to MPD's reputation. The Panel recommended the Petitioner's termination.²⁹

On July 2, 2016, MPD issued a Final Notice of Adverse Action to the Petitioner.³⁰ He appealed the decision to the Chief of Police, who denied the appeal.³¹ The Union then invoked arbitration.³² The parties agreed to a record review before the Arbitrator.³³ FOP submitted its' initial arbitration brief on or about July 23, 2019 and MPD submitted its' reply brief on or about September 30, 2019.³⁴

B. Arbitrator's Findings

The Arbitrator considered three issues:

1. Whether MPD violated the Petitioner's right to Due Process by forcing the hearing to proceed without the Investigating Agent or the citizen?
2. Whether MPD violated the 90-day rule as set forth under D.C. Official Code § 5-1031 with respect to instituting the Proposed Adverse Action against the Petitioner?

²⁰ Award at 12.

²¹ Award at 12-13.

²² Petitioner's Arbitration Brief at 12.

²³ Petitioner's Arbitration Brief at 12.

²⁴ Petitioner's Arbitration Brief at 12.

²⁵ Opposition at 8.

²⁶ Opposition at 8.

²⁷ Opposition at 8.

²⁸ Opposition at 8.

²⁹ Opposition at 8.

³⁰ Opposition at 8.

³¹ Opposition at 8.

³² Opposition at 8-9.

³³ Opposition at 4.

³⁴ Opposition at 4.

3. Whether the evidence MPD presented was sufficient to support charges against the Petitioner for conduct unbecoming to an Officer and conduct prejudicial to MPD's reputation?³⁵

The Due Process issue and evidentiary issue are closely tied together. The Arbitrator concluded that the absence of the investigating IAD Agent and the citizen before the Panel did not rise to the level of a deprivation of Due Process.³⁶ He found that there was sufficient reliable hearsay and non-hearsay evidence in the record to prevent him from concluding that the Panel's decision was "so lacking in support that it was fundamentally unfair."³⁷ A preponderance of the evidence is required to sustain a finding of guilt. Here, the Arbitrator concluded that the evidentiary standard was met because a reasonable person could look at the evidence and conclude that the Petitioner was guilty of conduct unbecoming an Officer and conduct prejudicial to MPD's reputation.³⁸ The Arbitrator concluded that the Panel plausibly determined that the Petitioner's claim that his actions were intended to deter crime was not credible.³⁹

The Arbitrator also found that MPD's failure to institute an adverse action against the Petitioner before the expiration of the 90 business days prescribed by law did not warrant a dismissal of the adverse action.⁴⁰ He reasoned that, because D.C. Official Code § 5-1031 (the 90-day rule) does not indicate a penalty for its violation, it is directory, as opposed to mandatory.⁴¹ Therefore, the Arbitrator applied the balancing test set out in *JBG Properties, Inc. v. District of Columbia Office of Human Rights* to the case at hand and found that the 2-day delay was *de minimis* and did not cause any potential or actual prejudice to the Petitioner.⁴² He found that MPD has an interest in bringing adverse action charges against officers who have committed misconduct of this nature, an interest which outweighs any *de minimis* prejudice possibly suffered by the Petitioner.⁴³

The Arbitrator reviewed the Panel's *Douglas* Factors analysis and determined that it was reasonable.⁴⁴ He therefore agreed with the Panel that termination was the appropriate penalty and issued an award affirming the Petitioner's termination and dismissing the grievance.⁴⁵

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in three narrow circumstances: (1) if an arbitrator was

³⁵ Award at 5.

³⁶ Award at 15.

³⁷ Award at 18 (quoting *Singletary v. Reilly*, 452 F.3d 868, 873 (D.C. Cir. 2006)).

³⁸ Award at 21.

³⁹ Award at 21-22.

⁴⁰ Award at 19-20.

⁴¹ Award at 19.

⁴² Award at 19-20 (citing *JBG Properties, Inc. v. District of Columbia Office of Human Rights*, 364 A.2d 1183 (1976)).

⁴³ Award at 20.

⁴⁴ Award at 22-25 (citing *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981)).

⁴⁵ Award at 27.

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.⁴⁶

The Petitioner requests review⁴⁷ on the grounds that the Award is contrary to law and public policy because it (1) violated the Petitioner's Due Process rights, (2) violated the 90-day rule, causing harmful error, and (3) was not supported by substantial evidence.⁴⁸ In its Opposition, MPD argues that the Award is not contrary to law and public policy because (1) MPD's actions did not violate the Petitioner's right to Due Process, (2) MPD's violation of the 90-day rule was *de minimis* and did not constitute harmful error, and (3) MPD's charges against the Petitioner were supported by substantial evidence.⁴⁹

The Petitioner bears the burden of demonstrating that the Award itself violates established law or compels an explicit violation of "well defined public policy grounded in law and or legal precedent."⁵⁰ The D.C. Court of Appeals has reasoned that "[a]bsent a clear violation of law[,] one evident on the face of the arbitrator's award, the [Board] lacks authority to substitute its judgment for the arbitrator's."⁵¹ Overturning an arbitration award due to law and public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to the arbitrator's interpretation of the contract.⁵² "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy.'"⁵³

The Petitioner's allegation that his Due Process rights were violated and his allegation that the Award was not supported by substantial evidence are closely connected. The Petitioner claims his Due Process rights were violated when his counsel was not afforded the opportunity to cross-examine several key witnesses.⁵⁴ He maintains that there was "no reasonable explanation" for the IAD Agent's and the citizen's failure to testify.⁵⁵ However, the Arbitrator found that the IAD Agent was retired by the time the Hearing commenced and found that the citizen declined to appear at the hearing based on her initial encounter with the Petitioner.⁵⁶ Moreover, MPD repeatedly attempted to serve those two individuals with subpoenas and, because it did not succeed, they were

⁴⁶ D.C. Official Code § 1-605.02(6).

⁴⁷ Although the Agency is typically the party which files an Arbitration Review Request in cases such as this one, the Collective Bargaining Agreement governing MPD and FOP states that either MPD or the aggrieved employee may do so.

⁴⁸ Request at 2-3.

⁴⁹ Opposition at 10-16.

⁵⁰ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

⁵¹ *Fraternal Order of Police/Dep't of Corr. Labor Comm. v. District of Columbia Pub. Emp. Relations Bd.*, 973 A.2d 174, 177 (D.C.2009)

⁵² *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019) (citing *Am. Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986), accord *MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 8, PERB Case No. 09-A-05 (2014); *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. No. 925 at 11-12, PERB Case No. 08-A-01 (2012)).

⁵³ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

⁵⁴ Opposition at 14.

⁵⁵ Request at 7.

⁵⁶ Award at 13.

not obligated to appear at the disciplinary hearing.⁵⁷ The record before the Arbitrator included two recorded interviews with the citizen by two separate MPD investigators.⁵⁸ The Arbitrator noted that the Petitioner was impeached on cross-examination at the trial board and the Petitioner admitted that his conduct in seeking the citizen's phone number was "unprofessional."⁵⁹ Additionally, the Petitioner claims that MPD provided insufficient evidence to support the charges of conduct unbecoming to an Officer and conduct prejudicial to MPD's reputation.⁶⁰ However, the Arbitrator determined that the hearsay evidence presented was sufficiently reliable that, when combined with the other evidence available, it supported the Panel's guilty findings.⁶¹ "The Board 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."⁶² Therefore, the Board does not find grounds to overturn the Award based on the Petitioner's Due Process rights and sufficiency of evidence arguments.

According to the Petitioner, MPD violated the 90-day rule by initiating his disciplinary proceeding two days late, causing harmful error.⁶³ MPD argues that that the Arbitrator was correct in concluding that its 2-day delay in proposing the Petitioner's termination was a *de minimis* violation of D.C. Official Code § 5-1031 and did not cause the Petitioner any actual or potential prejudice.⁶⁴ This disagreement hinges on the Arbitrator's finding that the 90-day rule is directory, as opposed to mandatory. The Board has held that "an Award is not contrary to law and public policy, on its face, whether an arbitrator determines that the 90-day rule is directory or mandatory" as the D.C. Superior Court has issued opinions supporting both interpretations of the rule and the D.C. Court of Appeals has not made a final determination on the issue.⁶⁵ Therefore, the Arbitrator in this matter had the right to interpret the 90-day rule as directory. Having done so, he appropriately used the *JBG Properties* test to determine that MPD's interest in bringing adverse action charges against officers who harm the reputation and functioning of the Department outweighs the prejudice which the Petitioner claims.⁶⁶ Though the Petitioner repeatedly claims that he has been prejudiced by the 2-day delay, he never explains *how*. Therefore, he has failed to demonstrate that the 2-day delay warrants dismissal of the adverse action.

For the aforementioned reasons, the Petitioner's Request is denied.

⁵⁷ Opposition at 13-14.

⁵⁸ Award at 11.

⁵⁹ Award at 21,24.

⁶⁰ Request at 13-14.

⁶¹ Award at 15-18.

⁶² *D.C. Water and Sewer Authority v. AFGE Local 2091*, 62 DCR 2888, Slip Op. No. 1502 at 4, PERB Case No. 15-A-01 (2014).

⁶³ Request at 2,5-6.

⁶⁴ Opposition at 10-11.

⁶⁵ *MPD v. FOP/MPD Labor Comm.*, Slip Op. No.1707_ at 5, PERB Case No. 21-A-02 (2021) (citing *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 15816, Slip Op. No. 1724 at 6, PERB Case No. 19-A-08 (2019)).

⁶⁶ Award at 19-20.

IV. Conclusion

The Board rejects the Petitioner's arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, the Petitioner'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 is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

March 18, 2021

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 21-A-03, Op. No. 1777 was sent by File & ServeXpress to the following parties on this the 24th day of March 2021.

Johnny M. Jones
13946 King George Way
Upper Marlboro, MD 20772

Rahsaan J. Dickerson, Esq.
D.C. Office of the Attorney General
400 6th Street NW
Washington, D.C. 20001

/s/ Elizabeth Slover
Public Employee Relations Board