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**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:	)	
	)	
The District of Columbia Metropolitan Police Department,	)	
	)	
Petitioner,	)	PERB Case No. 20-A-07
	)	
v.	)	Opinion No. 1756
	)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,	)	
	)	
Respondent.	)	

**DECISION AND ORDER**

**I. Statement of Case**

On July 15, 2020, the District of Columbia Metropolitan Police Department (MPD) filed this Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-605.02(6). MPD seeks review of an Arbitration Award (Award) issued on June 15, 2020, which granted, in part, the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP). MPD seeks review of the Award, asserting that the Award is contrary to law and public policy. On July 28, 2020, the FOP filed an Opposition to the Request and sought dismissal of the case.

Upon consideration of the record and the parties' filings, MPD's Request is dismissed for the reasons stated herein.

**II. Discussion**

Under the CMPA, the Board is permitted to modify, set aside, or remand a grievance arbitration award if: (1) the arbitrator was without or exceeded his or her jurisdiction; (2) the award on its face is contrary to law and public policy; or (3) the award was procured by fraud, collusion, or other similar unlawful means.<sup>1</sup> In its Request, MPD argues that the Award is contrary to law

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<sup>1</sup> D.C. Official Code § 1-605.02(6).

and public policy.<sup>2</sup> MPD preemptively asserts that its Request should not be dismissed on timeliness grounds for two reasons: (1) MPD argues that the Board's filing deadline is a claim-processing rule and, therefore, a *de minimis* delay is not prejudicial to the FOP,<sup>3</sup> and (2) MPD argues that the arbitrator has jurisdiction over the remedial portion of the Award<sup>4</sup> and, therefore, a review of the Award's merits is not ripe for appeal.<sup>5</sup> FOP opposes MPD's Request on substantive and procedural grounds. In particular, FOP argues that PERB's filing deadline is jurisdictional and asserts the defense of untimeliness in arguing that MPD's filing should be dismissed.<sup>6</sup>

Board Rule 538.1 states that an Arbitration Review Request must be filed no later than twenty-one (21) days after service of the award. MPD does not dispute that its Request was filed two days beyond the Board's 21-day filing deadline.<sup>7</sup>

Jurisdictional rules limit the cases properly before the Board, regardless of whether the parties invoke the rule.<sup>8</sup> The Board discussed the difference between claim-processing rules and jurisdictional rules in *Jenkins v. Department of Corrections*.<sup>9</sup> There the Board found that "a deadline is not jurisdictional . . . unless it is found in a statute, and the legislature has clearly stated that the deadline is to have jurisdictional consequences."<sup>10</sup> The Board held that its filing deadlines are waivable claim-processing rules.<sup>11</sup>

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<sup>2</sup> Request at 3.

<sup>3</sup> Request at n.1.

<sup>4</sup> On June 15, 2020, the Arbitrator issued the Award and served it upon the parties via first-class mail. In the Award, the Arbitrator retained jurisdiction for sixty (60) days for the purpose of determining whether additional remedies of interest and attorney fees were warranted. The Arbitrator requested briefs from the parties on the remedial issues. On June 23, 2020, FOP submitted its brief and petition for attorney fees. On July 7, 2020, MPD submitted its brief in opposition to the petition. As of the date of the filing of the Request, the Arbitrator has not issued an award on the issues of interest and attorney fees.

<sup>5</sup> MPD's argument that the Award is not ripe for appeal is unpersuasive. The Board has previously held that, when arbitration proceedings result in two awards addressing distinct issues, timeliness of an appeal is measured from the service of the award containing the issue appealed. *UDC v. AFSCME, Local 2087*, 46 D.C. Reg. 4833, Slip Op. No. 473 at 2, PERB Case No. 96-A-06 (1999) (holding that each award is final when rendered with respect to the issues therein).

<sup>6</sup> Opposition at 8-9.

<sup>7</sup> Board Rule 538.1 allows a party to request review of an arbitration award no later than twenty-one (21) days after the service of the award. Furthermore, Board Rule 538.1 augments the time to request review no later than five (5) days when service is made by U.S. mail. The twenty-first day after June 15, 2020 was Monday, July 6, 2020. After applying an additional five days under Board Rule 538.1, the Request was due on Saturday, July 11, 2020. Board Rule 501.5 moves the filing deadline to the next business day when a filing is due on a Saturday, Sunday, or District of Columbia Holiday. Here, the Request was due on Monday, July 13, 2020. MPD filed its Request on Wednesday, July 15, 2020.

<sup>8</sup> See *Smith v. United States*, 984 A.2d 196, 199 (D.C.2009).

<sup>9</sup> *Jenkins et al. v. DOC*, 65 D.C. Reg. 4046, Slip Op. No. 1652, PERB Case No. 15-U-31 (2018)..

<sup>10</sup> <sup>10</sup> *Id.* at 11. (citing *Mathis v. District of Columbia Housing Authority* 124 A.3d 1089, 1102 (2015) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

<sup>11</sup> *Jenkins et al. v. DOC*, 65 D.C. Reg. 4046, Slip Op. No. 1652 at 10, PERB Case No. 15-U-31 (2018)..

Rule 538.1 is a claim-processing rule.<sup>12</sup> In a recent D.C. Court of Appeals case,<sup>13</sup> the court determined that a claim-processing rule is subject to forfeiture or waiver and equitable tolling.<sup>14</sup> However the court held, “In general, where a [] claim-processing rule is “properly invoked [by a party] . . . [it] must be enforced[.]”<sup>15</sup> “[C]laim-processing rules . . . assure relief to a party properly raising them, but do not compel the same result if the party forfeits them.”<sup>16</sup>

In this case, through a footnote, MPD asserts that the Board should excuse it from the filing deadline because its two-day delay for filing its Request does not prejudice FOP.<sup>17</sup> MPD does not provide any further explanation for its delay or request equitable tolling. As noted above, FOP properly raised timeliness in its Opposition and there is no factual basis for a claim of waiver.<sup>18</sup> In light of the Court of Appeals’ decision,<sup>19</sup> the Board finds that MPD’s Request must be dismissed for untimeliness.

### **III. Conclusion**

The Board finds the Arbitration Review Request untimely. Accordingly, MPD’s Request is denied and the matter is dismissed in its entirety.

## **ORDER**

### **IT IS HEREBY ORDERED THAT:**

1. MPD’s Arbitration Review Request is hereby denied; and,
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

### **BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

August 20, 2020

Washington, D.C.

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<sup>12</sup> See *Jenkins et al. v. DOC*, 65 D.C. Reg. 4046, Slip Op. No. 1652 at 10, PERB Case No. 15-U-31 (2018).

<sup>13</sup> *Neill v. D.C. Pub. Employee Relations Bd.*, No. 18-CV-1253 (D.C. Aug. 6, 2020).

<sup>14</sup> *Neill v. D.C. Pub. Employee Relations Bd.*, No. 18-CV-1253, Slip Op. at 17 (D.C. Aug. 6, 2020) (The court did not determine whether the 120-day period under Rule 544.4 is jurisdictional. The court noted that PERB did not decide whether Rule 544.4 was jurisdictional in the decision being appealed and suggested that PERB should revisit and decide whether Rule 544.4 is jurisdictional in the first instance. Since the Board issued the decision at issue in *Neill* the Board has held that its filing deadlines are waivable claim-processing rules).

<sup>15</sup> *Neill v. D.C. Pub. Employee Relations Bd.*, No. 18-CV-1253, Slip Op. at 17-18 (D.C. Aug. 6, 2020) (citing *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017); *In re Na.H.*, 65 A.3d 111, 116 (D.C. 2013)).

<sup>16</sup> *Neill v. D.C. Pub. Employee Relations Bd.*, 93 A.3d 229, n. 5 (D.C. 2014) (citing *Smith v. United States*, 984 A.2d 196, 199 (D.C. 2009); *Eberhart v. United States*, 546 U.S. 12, 19, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)).

<sup>17</sup> Request at n.1.

<sup>18</sup> Opposition at 8.

<sup>19</sup> *Neill v. D.C. Pub. Employee Relations Bd.*, No. 18-CV-1253 (D.C. Aug. 6, 2020).

**CERTIFICATE OF SERVICE**

I hereby certify that the attached Decision and Order, Slip Op. 1756, in PERB Case No. 20-A-07 served electronically via File & ServeXpress to the following parties on this the day of August 31, 2020:

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