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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-05
)	
v.)	Opinion No. 1600
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee (on behalf of)	
Edward Bush),)	
Respondent.)	
)	

DECISION AND ORDER

I. Introduction

On December 28, 2015, Petitioner the District of Columbia Metropolitan Police Department (“MPD”) filed this Arbitration Review Request (“Request”), pursuant to D.C. Official Code § 1-605.02(6). MPD seeks review of the Arbitration Award (“Award”) that overturned MPD’s termination of Officer Edward Bush (“Officer Bush”).¹ The arbitrator determined that MPD failed to commence an adverse action against Officer Bush 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.²

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

¹ MPD filed an initial Arbitration Review Request on December 28, 2015, along with a Motion to Extend Time to Submit a Statement of the Reasons for Appealing the Award, requesting an extension of time, through and including January 11, 2016. On January 11, 2016, MPD filed a Statement of Reasons for Appealing the Arbitration Award. On January 15, 2016 FOP filed a Consent to the Motion for an Enlargement of Time and moved for an enlargement of time until February 3, 2016 in order to file its opposition to MPD’s Arbitration Review Request. On January 22, 2016, FOP’s Motion for Extension of Time was granted.

² See D.C. Code § 1-605.02(6) (2014).

II. Statement of the Case

Officer Bush joined MPD in February of 2006.³ Before joining MPD, Officer Bush served in the U.S. Army for approximately twenty-one (21) years before retiring.⁴ His application to MPD included an August 15, 2005 Personal History Statement (“PHS”) as part of his application for employment to the MPD.⁵ The PHS included questions concerning his medical condition. In his response to the medical questions he indicated that while he was allergic to mold, he never had any medical problems and he did not anticipate the possibility of ever filing a claim with the Department of Veterans Affairs (“VA”) for any physical or mental disability.⁶ On October 27, 2005, Officer Bush began his out-processing from active service with the Army. As part of that process he appointed the Veterans of Foreign Wars (“VFW”) to represent him in order to assure he received all the benefits to which he was entitled. To Officer Bush’s knowledge, no medical claim was made at that time.⁷ He officially retired from active military duty on January 31, 2006 and joined MPD as an officer on February 6, 2006.⁸

On May 11, 2006, the VA issued a “Rating Decision” based on a disability claim filed on Officer Bush’s behalf on October 27, 2005. The VA determined that several medical conditions, including asthma, lumbar strain and left shoulder tendinitis, were related to Officer Bush’s military service.⁹

In early 2009, Officer Bush requested MPD adjust his annual leave entitlement to reflect his military service.¹⁰ MPD informed Officer Bush that his military service could not be credited unless he was a disabled veteran.¹¹ On March 27, 2009, Officer Bush submitted a Request for Reconsideration to MPD and attached with his request various documents in support of his position that he was a disabled veteran, including the May 11, 2006 Rating Decision from the VA.¹² On April 21, 2009 Assistant Chief of the Professional Development Bureau, Winston Robinson, issued a memorandum requesting an internal investigation into Officer Bush’s failure to disclose his disability claim to the MPD at the time of his application.¹³

On August 24, 2009, Officer Bush was served with a “Notice of Proposed Adverse Action” to terminate his employment for the following reasons:

Charge No. 1:	Violation of General Order 120.21, Attachment A, Part A-17, which states, “Fraud in securing appointment, or falsification of official records or reports.”
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³ Award at 4.

⁴ *Id.* at 2.

⁵ *Id.* at 3.

⁶ *Id.*

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² *Id.*

¹³ *Id.* at 7.

- Specification No. 1: In that, on June 11, 2009, during your Internal Affairs interview, you stated you did not file a disability claim with the Department of Veterans Affairs, knowing that to be untrue. Your original claim for disability was received by the Department of Veterans Affairs on October 27, 2005, and you learned of your disability award on May 11, 2006.
- Specification No. 2: In that on August 15, 2005, you indicated in the Metropolitan Police Department (MPD) Personal History Booklet, that you did not have any past or present shoulder problems, when you in fact had shoulder problems in the past. You indicated such, knowing it to be untrue.
- Specification No. 3: In that on August 15, 2005, you indicated in the Metropolitan Police Department (MPD) Personal History Booklet, that you did not have any past or present ankle problems, when you in fact had a sprained ankle in the past. You indicated such, knowing it to be untrue.¹⁴

An Adverse Action Panel was convened on October 15, 2009 to consider the Charge and Specifications alleged in the Notice of Proposed Adverse Action. The majority of the Panel recommended that Officer Bush be given a 30-day suspension from the MPD. On December 24, 2009, Diana Haines-Walton, Director of Human Resources Management Division, issued a Final Notice of Adverse Action requiring Officer Bush be removed from the MPD effective February 5, 2010.¹⁵ Director Haines-Walton imposed the penalty of termination, proposed in the Notice of Proposed Adverse Action, rather than the 30-day suspension recommended by the Adverse Action Panel.

The Fraternal Order of Police/Metropolitan Police Department (“FOP”) subsequently filed a grievance on his behalf and sought arbitration.¹⁶

III. Arbitrator’s Award

Based on a review of the evidence before him, the Arbitrator sustained FOP’s grievance, finding that MPD failed to commence an adverse action against Officer Bush within 90 days of when MPD knew or should have known of the act allegedly constituting cause as required by the 90-day rule.¹⁷ In this regard, on March 27, 2009, Officer Bush submitted his Rating Decision and other documents to MPD to support his disabled veteran claim for additional annual leave.¹⁸ The Arbitrator noted that Officer Bush’s March 27, 2009 Request for Reconsideration was sent “thru” Assistant Chief Robinson making it reasonable to conclude that Assistant Chief Robinson

¹⁴ Award at 8.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 13.

¹⁷ D.C. Official Code § 5-1031(a)

¹⁸ Award at 16.

knew or should have known of Officer Bush's disability claim at that time, or at least five business days after March 27, 2009.¹⁹

The Arbitrator also found that MPD could not impose a higher level of discipline than what was recommended by the Panel, based on the meaning of the relevant regulations. Director Haines-Walton had no authority to increase the Panel's penalty.²⁰

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.²¹

IV. Discussion

Under D.C. Official Code § 1-605.02(6), the Board is authorized to modify or set aside an arbitration award 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.²²

MPD argues that the Arbitrator's decision was contrary to law and public policy because it commenced the adverse action against Officer Bush within 90 days after it knew or should have known of the matters constituting the alleged misconduct in accordance with D.C. Official Code § 5-1031(a).²³ According to MPD, there is no evidence in the record that shows Assistant Chief Robinson received the Request for Reconsideration on March 27, 2009, or even five business days after that date. MPD further states, that it is unreasonable to assume that Assistant Chief Robinson knew or should have known of the misconduct immediately after receiving the Request for Reconsideration.²⁴ MPD argues that the record supports April 21, 2009 as the start of the 90-day period, when Assistant Chief Robinson issued a memorandum requesting an internal investigation into Officer Bush's failure to disclose certain medical information.²⁵ If the calculation of the 90-day period began on April 21, 2009 then MPD would have been within the required time period when it served Officer Bush with the Notice of Proposed Adverse Action on August 24, 2009.

In response, FOP argues that the request is a mere disagreement with the Arbitrator's findings, which is an insufficient basis for concluding that an Arbitration Award is contrary to law or public policy.²⁶ FOP states that "MPD's argument demonstrates a fundamental misunderstanding of D.C. Code § 5-1031 and its calculation" because MPD incorrectly

¹⁹ The Arbitrator stated that March 27, 2009, or at least 5 days afterward is the start date of the 90-day period. MPD claimed that not every official who reviewed Officer Bush's request should have been able to immediately identify the discrepancy between his MPD application and his disability claim. The Arbitrator stated that it is reasonable to conclude that Assistant Chief Robinson, who authorized the request for an investigation of Officer Bush, should have known of Officer Bush's disability claim when he submitted his Request for Reconsideration or at least five days afterward.

²⁰ *Id.* at 21.

²¹ Request at 13.

²² *University of the District of Columbia v. PERB*, 2012 CA 8393 P(MPA) (2014).

²³ Request at 7

²⁴ *Id.* at 8.

²⁵ *Id.*

²⁶ Response at 6.

calculates the date from when it knew of the alleged misconduct rather than when it should have known.²⁷ FOP agrees with the Arbitrator that March 27, 2009, is the date that should begin the 90-day period.²⁸

The Board has long held that it will not overturn an Arbitrator's findings on the basis of a disagreement with the Arbitrator's determination.²⁹ 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. The Board has held that a mere disagreement with the Arbitrator's interpretation is no basis for vacating an Award.³⁰ 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.³¹ In this case, MPD has failed to point to any specific law or public policy violated by the Award. Accordingly, the Board finds that MPD's request is merely a disagreement with the Arbitrator's evidentiary findings and conclusions.

MPD further asserts that the Arbitrator's determination that Director Haines-Walton did not have the authority to increase the Panel's recommended penalty is contrary to law.³² MPD states that 6-B DCMR § 1613.2 refers to the penalty originally proposed in the Advance Written Notice of Proposed Discipline, not the penalty recommended by the hearing officer/adverse action panel.³³ MPD cites to *Hutchinson v. District of Columbia Office of Employee Appeals*³⁴ because the language of DPM § 1614.4 (1987) is identical in every pertinent respect to the language of its successor provision, 6B DCMR §1613.2.³⁵ *Hutchinson* dealt with the termination of an employee of the District of Columbia Fire Department subject to 6-B DCMR § 1613.2. The Court of Appeals, in *Hutchinson*, upheld OEA's interpretation that the deciding official may increase the penalty proposed by the proposing official.

The Board has previously held that §§1613.1 and 2 prohibit MPD from imposing a higher penalty than what the adverse action panel recommends.³⁶ In Slip Op. No. 1344, the Board upheld the arbitrator's findings, stating:

²⁷ *Id.* at 8.

²⁸ *Id.* at 9.

²⁹ *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).

³⁰ See *D.C. Dep't of Health v. AFGF, 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).

³¹ See *Fraternal Order of Police v. D.C. Pub. Emp. Relations Bd.*, 2015 CA 006517 P(MPA) at p. 8.

³² Request at 9.

³³ *Id.*

³⁴ 710 A.2d 227 (D.C. 1998).

³⁵ Request at 10.

³⁶ See *D.C. Metro. Police Dep't v. Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comm. (on Behalf of Jose Medina)*, Slip Op. No. 1516, PERB Case No. 14-A-12 (2015).

On the question raised by this case[...]: neither § 1001.5 nor the new regulations adopted pursuant to the CMPA permit the assistant chief to increase the recommended penalty. Section 1613 provides:

1613.1 The deciding official, after considering the employee's response in the report and recommendation of the hearing officer pursuant to section 1612, when applicable, shall issue a final decision.

1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty.

Thus, § 1613.2 precludes a deciding official from increasing the penalty recommended by a hearing officer by whatever name. If § 1613.2 did not preclude increasing the penalty, then § 1001.5 would supersede it and still preclude the assistant chief from increasing the penalty. [...] All of these regulations supersede a General Order of the MPD. *See District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998).

If a recommended penalty appears insufficient, the regulations give the assistant chief the option of remanding the case, but they do not give her the option of increasing the penalty on her own. Accordingly, the Award's reduction of the penalty imposed on the Grievant is consistent with the CMPA as well as the D.C. Municipal Regulations and is not contrary to law or public policy.³⁷

On August 4, 2016, the D.C. Court of Appeals affirmed the Board's findings in Slip Op. No. 1344.³⁸ Therefore, the Board finds that MPD has not demonstrated that the Award constitutes a violation of law or public policy that would compel setting aside the Arbitrator's Award.

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

³⁷ *MPD v. FOP*, *supra*, Slip Op. No. 1344 at ps. 5-6, PERB Case No. 12-A-05.

³⁸ *Dist. of Columbia Metro. Police Dept. v. Dist. of Columbia Pub. Employee Relations Bd.*, 144 A.3d 14, (D.C. 2016)

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 Yvonne Dixon, Ann Hoffman, and Douglas Warshof. Member Barbara Somson was not present.

October 20, 2016

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-A-05, Op. No. 1600 was sent by File and ServeXpress to the following parties on this the 31 day of October, 2016.

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