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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. 09-A-14(R)
and)	Opinion No. 1491
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
Respondent)	

DECISION AND ORDER ON REMAND

I. Statement of the Case

This matter comes before the Public Employee Relations Board on remand from the Superior Court of the District of Columbia, pursuant to its Order remanding the decision of the Board in *Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.* (on behalf of Officer Darrell Best).¹

In *MPD v. FOP/Labor Committee*, the Board upheld an award by Arbitrator Gregory Murad, in which he overturned the grievant's thirty-day suspension on a finding that the Metropolitan Police Department (MPD) violated D.C. Official Code § 5-1031(a) (colloquially known as the "90-day rule"). Thereafter, MPD filed a petition for review with the Superior Court. The court found D.C. Official Code § 5-1031(a) directory, and subsequently remanded this case for further evaluation of the balancing test established in *JBG Properties, Inc. v. D.C. Office of Human Rights*, 364 A.2d 1183 (D.C. 1976), to determine whether the one-day delay by MPD to propose discipline to the grievant was a *de minimis* violation.

¹ 59 D.C. Reg. 12689, Slip Op. No. 1325, PERB Case No. 09-A-14 (2012).

As the Board does not have a sufficient factual record before it, the Board remands to the Arbitrator to analyze the balancing test articulated in *JBG Properties*.

II. Background

The Arbitrator determined that MPD violated D.C. Official Code § 5-1031(a) when it failed to propose discipline of the grievant within ninety (90) days of when it knew or should have known of the underlying cause of the discipline.² As a remedy, the Arbitrator overturned the grievant's thirty-day suspension.³ In so doing, the Arbitrator rejected MPD's argument that the Arbitrator had miscalculated the tolling period of the ninety-day notice period.⁴ *Id.*

MPD filed an arbitration review request, asserting that the Arbitrator's award was contrary to law and public policy. The Board in *MPD v. FOP/Labor Committee* upheld the Arbitrator's award.⁵ In the Board's view, the Arbitrator correctly calculated the tolling period of subsection (b) of D.C. Official Code § 5-1031 that limited the application of the 90-day rule found in subsection (a), and that the Arbitrator's calculation was not contrary to law or public policy.⁶

MPD appealed to the Superior Court, arguing that the Board's Decision and Order was contrary to law and public policy. MPD raised the argument that D.C. Official Code § 5-1031 was directory and not mandatory, and therefore, the Board erred in upholding the Arbitrator's award when he overturned the grievant's suspension based on MPD's one-day delay in proposing discipline of the grievant.⁷ In addition, MPD argued that the Board erred in upholding the Arbitrator's calculation of the tolling period found in subsection (b) of D.C. Official Code § 5-1031. The Superior Court affirmed the Board's Decision and Order upholding the Arbitrator's calculation of the tolling timeframe for the notice period in D.C. Official Code § 5-1031.⁸ As a result, it was determined that MPD proposed discipline against the grievant ninety-one days after MPD knew or should have known of the act or occurrence allegedly constituting cause.⁹

Further, on review, the Superior Court determined that subsection (a) of D.C. Official Code § 5-1031 was directory, and not mandatory.¹⁰ The court remanded to the Board to "address the current legal precedent set forth in *Brown v. Public Employee Relations Board* concerning *de minimis* violations of statutory time limits in its analysis of public policy."¹¹ In

² *MPD v. FOP/Labor Committee*, Slip Op. No. 1325.

³ *Id.* (Award at 15).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *MPD v. Public Employee Relations Board*, No. 2012 CA 007805, at 6 (D.C. Super Ct. July 17, 2014).

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ The D.C. Superior Court previously upheld the Board's determination that the repealed version of D.C. Official 5-1031(a) was mandatory and not directory. *Metro. Police Dep't v. Public Employee Relations Bd.*, No. 92-29 (D.C. Super Ct. Aug. 9, 1993).

¹¹ *MPD v. Public Employee Relations Board*, No. 2012 CA 007805, at 9.

particular, the court ordered the Board to consider whether or not a one-day delay was a *de minimis* violation.¹²

III. Analysis and Conclusions

Consistent with the Superior Court's Order, the Board analyzes the public policy considerations of the directory nature of D.C. Official Code § 5-1031.

In *Brown v. Public Employee Relations Board*, the D.C. Court of Appeals analyzed the statutory language that decisions made by the Board "shall be rendered within a reasonable period of time, and in no event later than 120 days after the matter is submitted or referred to it for a decision."¹³ The court stated, "[W]hen a statute says that an agency 'shall' make a decision within a set period of time, that limit is generally considered 'directory rather than mandatory.'"¹⁴ The court found that where no sanctions exist the statute has a "rebuttable presumption that the time limitation is intended to be merely directory."¹⁵ The court further stated, "[T]he presumption that a statutory time limitation is directory may be overcome after considering the 'nature of the act to be performed' and the 'phraseology of the statute' to see whether it should 'be considered a limitation of the power of the [public] officer.'"¹⁶ The Superior Court determined that D.C. Official Code § 5-1031(a) was directory, not mandatory, based on its determination that section 5-1031 did not contain any sanctions for exceeding the ninety-day time limit.¹⁷

After a statute's time limit is determined to be directory, a balancing test is applied "to determine whether the agency's delay caused sufficient prejudice to appellant to outweigh the normally prevailing interest in allowing the agency to act after the expiration of the time limit."¹⁸ The purpose of the public policy behind allowing *de minimis* violations of directory statutes is to prevent public and/or private interests from suffering because of a failure to act promptly by public officials.¹⁹ To determine whether or not a violation was *de minimis*, *JBG Properties* established a balancing test to weigh (1) the potential and actual prejudice to the losing party, and (2) public and private interests in allowing the agency to proceed after the time limit.²⁰

The Board has considered this balancing test before:

[I]n accordance with the policy of the CMPA, "[a]n Agency that has failed to comply with its [directory] regulations must show that its failure to do so did not prejudice the employee", we add that this showing is the

¹² *Id.*

¹³ 19 A.3d 351, 355 (D.C. 2011).

¹⁴ *Brown*, 19 A.3d at 355.

¹⁵ *Id.* at 356.

¹⁶ *Id.*

¹⁷ *MPD*, No. 2012 CA 007805, at 8.

¹⁸ *Brown*, 19 A.3d at 357 (citing *Vann v. D.C. Bd. of Funeral Directors*, 441 A.2d 246 (D.C. 1982)).

¹⁹ *Vann*, 441 A.2d at 248.

²⁰ *JBG Properties*, 364 A.2d at 1187.

agency's ultimate burden of persuasion to "demonstrate, [i.e., prove,] that its delay did not substantially prejudice the complaining party."²¹

Notwithstanding the directory nature of the statute or rule, relief is still available to an aggrieved party if after applying a balancing test a finding is made of prejudice to the party caused by the agency's delay.²²

The Board notes that its role in reviewing arbitration awards pursuant to D.C. Official Code § 1-605.02(6) is not *de novo*. The Board's review is restricted to a narrow scope as set forth therein. 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.²³ Thus, if the Board's statutory criteria for review warrants that additional issues of fact be considered, such issues are properly remanded for further proceedings before an arbitrator.

The issue before the Board on remand – whether MPD's delay prejudiced the grievant in such a manner that it outweighs the prevailing interest in allowing the agency to act after the expiration of the time limit – was not addressed nor raised by the parties during arbitration, and consequently, not discussed by the Arbitrator. Further, the arbitration award and the Board's underlying Decision and Order do not contain an adequate record of the potential and actual prejudice to the grievant nor the public interests in allowing the agency to proceed after the time limit. The Board declines to speculate as to what potential or actual prejudice to the grievant occurred, nor the public interests of the agency to proceed after the time limit. As the test rests upon a factual finding, the Board remands to the Arbitrator to apply the test articulated in *JBG Properties*. As mentioned above, under the balancing test, the agency bears the burden of demonstrating that the delay did not substantially prejudice the complaining party.²⁴

IV. Decision

The Arbitrator relied upon D.C. Official Code § 5-1031 in his determination that the grievant's thirty-day suspension was inappropriate.²⁵ Consistent with the Superior Court's opinion in *MPD v. Public Employee Relations Board*, the Board finds that the arbitration award is contrary to law and public policy, because D.C. Official Code § 5-1031 is directory, and a violation of the time frame described in the statute should be analyzed under the *JBG Properties* balancing test. The Board orders the Arbitrator to consider whether MPD's actions were a *de minimis* violation of the statutory time limits. If the Arbitrator determines that the Agency has met its burden that the violation was *de minimis*, then the Arbitrator should proceed to a decision on the grievance's merits.

²¹ *Int'l Brotherhood of Teamsters, Local 1714 v. Dep't of Corrections*, 41 D.C. Reg. 1510, Slip Op. No. 296, PERB Case No. 87-A-11 (1994).

²² *Teamsters, Local 1714*, Slip Op. No. 296.

²³ See *American Federation of State, County and Municipal Employees, District Council 20, Local 2743, AFL-CIO v. District of Columbia Department of Consumer and Regulatory Affairs*, 38 D.C. Reg 5076, Slip Op. No. 281, PERB Case No. 90-A-12 (1991).

²⁴ *Vann*, 441 A.2d at 248.

²⁵ *MPD v. FOP/Labor Committee*, Slip Op. No. 1325. (Award at 15).

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is granted.
2. The Order in Opinion No. 1325 is vacated.
3. The matter is remanded to the Arbitrator with instructions to the balancing test established in *JBG Properties*.
4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

September 25, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order for PERB Case No. 09-A-14(R) was transmitted to the following parties on this the 30th day of September, 2014.

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