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

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In the Matter of:)	
)	
Fraternal Order of Police/ Metropolitan Police)	
Department Labor Committee,)	
)	PERB Case No. 24-A-06
Petitioner)	
)	Opinion No. 1881
v.)	
)	
District of Columbia Metropolitan Police)	
Department)	
)	
Respondent)	
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DECISION AND ORDER

I. Statement of the Case

On February 27, 2024, the Fraternal Order of Police/ Metropolitan Police Department Labor Committee (FOP) filed an arbitration review request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), seeking review of a supplemental arbitration award (Supplemental Award) dated February 9, 2024. The Supplemental Award sustained three additional charges and five specifications against a terminated MPD officer (Grievant) and found termination of the Grievant’s employment to be the appropriate penalty. FOP seeks review on the grounds that the Supplemental Award is contrary to law and public policy. The Metropolitan Police Department (MPD) filed an Opposition, asking the Board to deny FOP’s request.

Upon consideration of the Arbitrator’s conclusions, applicable law, and the record presented by the parties, the Request is denied for the reasons stated herein.

II. Arbitration Award

A. Background

On March 2, 2020, the Grievant was arrested in Maryland and charged with burglary, trespass, and firearm possession.¹ On April 29, 2020, the Maryland State's Attorney's office made an initial plea offer to the Grievant.² On November 20, 2020, MPD served the Grievant with a Notice of Proposed Adverse Action (NPAA) based on the Grievant's criminal charges.³ An MPD Adverse Action Panel found the Grievant guilty of all but two charges and specifications.⁴ Subsequently, MPD issued a Final Notice of Adverse Action informing the Grievant of his termination, effective July 29, 2021.⁵ Thereafter, FOP invoked arbitration on behalf of the Grievant.⁶

The Arbitrator determined that the dispositive issue was whether MPD issued its NPAA in a timely manner, in accordance with D.C. Official Code § 5-1031(a-1) (the "90-day rule"). The 90-day rule required MPD to commence adverse action within 90 business days of the time that MPD knew or should have known of the misconduct at issue.⁷ When the misconduct is the subject of a criminal investigation, the 90-day period was tolled "until the conclusion of the investigation."⁸ The Arbitrator found that the criminal investigation concluded when the Maryland State's Attorney's Office made an initial plea offer to the Grievant on April 29, 2020.⁹ Therefore, the Arbitrator found that MPD untimely issued its NPAA, more than 90 days after the conclusion of the criminal investigation.¹⁰ Based on this determination, the Arbitrator dismissed the charges against the Grievant and reversed the Grievant's termination.¹¹

On September 21, 2022, MPD filed an arbitration review request (Request) with the Board, challenging the Arbitrator's decision to reverse the Grievant's termination as contrary to law and

¹ Award at 7. The Grievant was charged with the following offenses: (1) Burglary 2nd Degree; (2) Conspiracy to Commit Burglary 2nd Degree; (3) Three counts of Burglary 4th Degree; (4) Three counts of Conspiracy to Commit Burglary 4th Degree; (5) Theft; (6) Conspiracy to Commit Theft; (7) Malicious Destruction of Property; (8) Conspiracy to Commit Malicious Destruction of Property; (9) Trespassing; (10) Conspiracy to Trespass; (11) Firearm Use in Commission of a Felony; and (12) Handgun Wearing or Carrying Under the Influence of Alcohol.

² Award at 8.

³ Award at 9-11.

⁴ Award at 15.

⁵ Award at 15.

⁶ Award at 18.

⁷ D.C. Official Code § 5-1031(a-1) (repealed 2023).

⁸ D.C. Official Code § 5-1031(b).

⁹ Award at 35.

¹⁰ Award at 35.

¹¹ Award at 34, 43 (The Arbitrator found that MPD complied with the statutory 90-day timeline for Charge 1, Specification No. 4 (carrying a handgun while intoxicated and driving a vehicle while impaired by alcohol), and Charge 2, Specification No. 1 (making an untruthful statement to MPD Internal Affairs Division). Award at 35-36. The Arbitrator sustained both timely charges against the Grievant and ordered the Grievant's 45-calendar day suspension as a mitigated penalty for the two sustained charges. Award at 39-40, 42, 43)).

public policy.¹² The Board denied MPD's Request.¹³ MPD appealed the Board's decision to the Superior Court of the District of Columbia.

While the appeal was pending before the Superior Court, the Council of the District of Columbia (Council) enacted the Comprehensive Policing and Justice Reform Amendment Act of 2022 (Reform Act), effective April 21, 2023.¹⁴ The Reform Act repealed the 90-day rule, as it applied to MPD officers.¹⁵ The Reform Act expressly applies "retroactively to any matter pending, before any court or adjudicatory body" as of its effective date.¹⁶

On September 5, 2023, the Superior Court remanded the case back to the Board "for consideration of the Comprehensive Policing and Justice Reform Amendment Act of 2022 in the context of the Comprehensive Merit Personnel Act and the termination of [the Grievant]."¹⁷ On October 19, 2023, the Board granted MPD's Request and found the Arbitrator's Award to be contrary to law and public policy, in light of the Reform Act's repeal of D.C. Official Code § 5-1031(a-1) and the Superior Court's order.¹⁸ The Board vacated its prior decision in Opinion No. 1826 and remanded the Award back to the Arbitrator for further proceedings in accordance with its decision.¹⁹

The Arbitrator issued a Supplemental Award on February 9, 2024. On remand, the Arbitrator determined that the issues presented for decision were (1) whether the charges and specifications dismissed in the 2022 Award, based on the application of the 90-day Rule, are supported by substantial evidence; and (2) whether termination of the Grievant's employment is an appropriate penalty.²⁰

The Arbitrator determined that the Grievant did not contest the evidentiary bases supporting Charge No. 1, Specification Nos. 1 and 4; Charge No. 3, Specification No. 1; and Charge No. 6, Specification No. 1.²¹ Therefore, the Arbitrator determined these Charges and Specifications to be sustained.²² The Arbitrator noted that the MPD Adverse Panel found the Grievant not guilty of Charge No. 5, Specification Nos. 1 and 3.²³ The Arbitrator found that no basis was shown to set aside these findings.²⁴ The Arbitrator further found that there was sufficient

¹² *MPD v. FOP/MPD Labor Comm. (Baccus)*, 70 D.C. Reg. 132, Slip Op. No. 1826, PERB Case No. 22-A-09 (2022).

¹³ *Id.*

¹⁴ D.C. Law 24-345, 70 D.C. Reg. 953 (2023).

¹⁵ D.C. Law 24-345.

¹⁶ Reform Act §§ 117(a), 301(b).

¹⁷ *Dist. of Columbia Metro. Police Dep't.*, No. 2023 CAB 000300 P(MPA), (D.C. Super. Ct. Sept. 5, 2023).

¹⁸ *MPD v. FOP/MPD Labor Comm. (Baccus)*, 70 D.C. Reg., Slip Op. No. 1848 at 3, PERB Case No. 22-A-09 (2023).

¹⁹ *Id.*

²⁰ Supplemental Award at 2.

²¹ Supplemental Award at 5.

²² Supplemental Award at 5.

²³ Supplemental Award at 5-6.

²⁴ Supplemental Award at 6.

evidence to sustain the following charges against the Grievant: Charge No. 1, Specification Nos. 2 and 3; Charge No. 4, Specification Nos. 1 and 2; and Charge No. 5, Specification No. 2.²⁵

The Arbitrator noted that in the 2022 Award, based on the limited number of Charges and Specifications that were timely under the application of the 90-day Rule, the Arbitrator found the appropriate penalty for the proven violations of Charge No. 1, Specification No. 4; and Charge No. 2, Specification No. 1 was a 45-day calendar day disciplinary suspension.²⁶ On remand, in light of the repeal of the 90-day Rule, the Arbitrator sustained the following additional Charges and Specifications: Charge No. 1, Specification Nos. 1, 2, 3 and 4; Charge No. 3, Specification No. 1; Charge No. 4, Specification Nos. 1 and 2; Charge No. 5, Specification No. 2; and Charge No. 6, Specification No. 1.²⁷

In light of the sustained Charges, the parties' respective arguments and the *Douglas* factors, the Arbitrator found that the Grievant's termination was the appropriate penalty in this case.²⁸

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 only three narrow 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.²⁹ FOP requests review on the grounds that the Award is contrary to law and public policy.³⁰

In the Request, FOP argues that the Supplemental Award is contrary to H.R. 5798, 118th Congress 1st Session (Sept. 28, 2023), a bipartisan Bill that includes a provision that would repeal the Reform Act's repeal of the 90-day Rule and reinstate the 90-day Rule retroactively.³¹ FOP argues that H.R. 5798 "is swiftly moving through the legislative process" and "will imminently reinstate the 90-day rule as if it had never been repealed, rendering the Supplemental Award on its face contrary to federal law."³²

FOP further argues that "[a]lthough the Court of Appeals determined that the Reform Act's retroactivity provision is technically enforceable, the retroactivity provision is not enforceable in the instant matter, as it has created manifest injustice to [the Grievant]."³³ FOP notes that the Court of Appeals has held that manifest injustice is measured by three factors: "(1) the nature and identity

²⁵ Supplemental Award at 5.

²⁶ Supplemental Award at 8.

²⁷ Supplemental Award at 8-9.

²⁸ Supplemental Award at 10.

²⁹ D.C. Official Code § 1-605.02(6).

³⁰ Slip Op. No. 1826 at 1.

³¹ Request at 7.

³² Request at 7.

³³ Request at 8.

of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change in law upon those rights.”³⁴ FOP notes that manifest injustice may be shown through one or more of these factors.³⁵ FOP argues that retroactivity would create manifest injustice under the circumstances of this case because: (1) MPD acted in a private capacity in this matter, and retroactivity would affect the individual rights of the two private parties vis a vis one another; (2) the first Award created and preserved property rights held by both FOP and the Grievant that have “matured,” and thus cannot be impaired without causing manifest injustice; and (3) the Reform Act’s retroactivity provision arbitrarily excused MPD from an already-violated obligation and thereby upended the relative positions and responsibilities of the parties, resulting in manifest injustice.³⁶

Finally, FOP argues that the Supplemental Award is contrary to the public policy against untimely imposition of employee discipline.³⁷

To set aside an award as contrary to law, the asserting party bears the burden to present applicable law that mandates that the arbitrator arrive at a different result.³⁸ Further, FOP has the burden to demonstrate that the award itself violates established law or compels an explicit violation of “well defined public policy grounded in law and or legal precedent.”³⁹ In the absence of explicit law, determining whether an arbitral award violates public policy is a fact-specific inquiry.⁴⁰

FOP’s assertion that there is federal law retroactively reimposing the 90-day Rule lacks merit. FOP references proposed legislation, H.R. 5798, that is only before the House of Representatives.⁴¹ As MPD notes in its Opposition, H.R. 5798 “has not been passed by that Chamber, much less also approved by the Senate and signed by the President to become a law.”⁴²

FOP’s argument that the Reform Act’s retroactivity provision would result in manifest injustice in this case is similarly unfounded. The D.C. Court of Appeals has held that enforcing the Reform Act’s retroactivity provision in cases like this does not create manifest injustice.⁴³

Finally, FOP’s public policy argument against the untimely imposition of employee discipline is grounded in the repealed 90-day Rule.⁴⁴ In the absence of explicit law, FOP has not

³⁴ Request at 8 (citing to *Scholtz P’ship v. D.C. Rental Accommodations Comm’n*, 427 A.2d 905, 914 (D.C. 1981)).

³⁵ Request at 8 (citing to *Scholtz P’ship*, 427 A.2d at 915-19).

³⁶ Request at 8-11. FOP notes that “[m]anifest injustice is measured by three factors: ‘the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change in law upon those rights

³⁷ Request at 11.

³⁸ *MPD and FOP/Metro. Police Dep’t Labor Committee*, 47 D.C. Reg. 717, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000).

³⁹ *MPD v. FOP/Metro. Police Dep’t Labor Committee*, 66 D.C. Reg. 6056, Slip Op. No. 1702 at 4, PERB Case No. 18-A-17 (2019).

⁴⁰ *MPD v. FOP/MPD Labor Comm.*, 70 D.C. Reg. 4123, Slip Op. No. 1833 at 8, PERB Case No. 18-A-04 (2023).

⁴¹ Opposition at 2.

⁴² Opposition at 2.

⁴³ *D.C. Metro. Police Dep’t v. D.C. Pub. Empl. Relations Bd.*, 301 A.3d 714, 720-723 (D.C. 2023).

⁴⁴ Request at 11-12.

shown that the Supplemental Award's remedy upholding the Grievant's termination in this case is contrary to a public policy.

FOP has not met its burden to show that the Supplemental Award is contrary to law or public policy. Therefore, the Board finds no cause to modify, set aside, or remand the Supplemental Award. FOP's Request is denied, and the matter is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is 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

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

July 18, 2024

Washington, D.C.

APPEAL RIGHTS

A final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.