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

In the Matter of:)	
)	
District of Columbia)	
Metropolitan Police Department)	PERB Case No. 19-A-08
)	
Petitioner)	
)	Opinion No. 1724
v.)	
)	
Fraternal Order of Police/)	
Metropolitan Police Department)	
Labor Committee)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On June 6, 2019, the District of Columbia Metropolitan Police Department (MPD) filed this Arbitration Review Request (Request) of an arbitration award (Award) that sustained the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP).¹ The Arbitrator found that MPD failed to timely commence an adverse action against Officer Jose Mendoza (Grievant) within ninety (90) days of when MPD knew or should have known of the Grievant’s alleged misconduct in violation of D.C. Official Code § 5-1031(a). MPD asserts that the Award, on its face, is contrary to law and public policy, and requests the Board to set aside the Award and remand the matter to the Arbitrator.

In accordance with D.C. Official Code § 1-605.02(6), the Board is permitted to modify, set aside, or remand an arbitration award in three narrow circumstances: (1) if the 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.²

¹ Request at 2.

² D.C. Official Code § 1-605.02(6).

Having reviewed the Arbitrator's conclusions, the pleadings of the Parties and applicable law, the Board concludes that the Award is not, on its face, contrary to law and public policy. For the reasons stated herein, the Board denies MPD's request.

II. Background and Arbitrator's Award

On January 12, 2015, MPD issued a Notice of Proposed Adverse Action (proposed suspension notice) to the Grievant, proposing a 30-day suspension based on an incident in which the Grievant failed to pay the fare aboard an Amtrak train.³ On March 19, 2015, MPD issued a Final Notice suspending the Grievant for thirty (30) days.⁴ Although the Grievant stated that he would accept the suspension, on March 30, 2015, he sent the Chief of Police a letter asking her to consider a shorter suspension. On April 24, 2015, the Chief of Police declined to reduce the suspension, and remanded the case for reconsideration of the appropriate penalty to be imposed.⁵

On May 15, 2015, the Grievant received a new notice of proposed adverse action (proposed termination notice), which included the same specifications and charges as the suspension notice, but increased the penalty to termination.⁶ Thereafter, an MPD Hearing Panel recommended sustaining all charges against the Grievant and that termination was the appropriate penalty. On November 10, 2015, Acting Director Lennie Moore, the deciding official, accepted the Panel's recommendations, and issued the Grievant a Final Notice of Adverse Action, terminating him effective January 15, 2016.⁷

FOP appealed Grievant's termination to the Chief of Police, asserting that the proposed termination notice exceeded the 90-day requirement set forth in D.C. Official Code § 5-1031.⁸ MPD denied the Grievant's appeal, and FOP filed for arbitration.

The Arbitrator considered two issues: (1) whether MPD violated the 90-day time limit for taking corrective action, as set forth in D.C. Official Code § 5-1031; and (2) whether MPD had just cause to terminate the Grievant, and if not, what was the appropriate remedy?⁹ The Arbitrator determined that MPD violated the 90-day rule and reversed the Grievant's discipline.¹⁰

The Arbitrator concluded that the proposed termination notice was untimely. In considering the issue, the Arbitrator determined that the 90-day rule and the D.C. Municipal Regulation (DCMR) governing the proposed termination notice were enacted to "end the uncertainty inherent in the investigation process."¹¹

³ Award at 8.

⁴ Award at 9.

⁵ Award at 9.

⁶ Award at 10.

⁷ Award at 10.

⁸ Award at 10.

⁹ Award at 2.

¹⁰ Award at 28-29.

¹¹ Award at 18.

MPD argued that a criminal investigation tolled the 90-day time period for proposing the termination. The Arbitrator found that MPD failed to provide sufficient evidence of a criminal investigation, and concluded that there was no criminal investigation that would toll the time period for proposing an adverse action.

The Arbitrator further determined that, even if a criminal investigation occurred as MPD asserted, the proposed termination notice was untimely.¹² The Arbitrator found that MPD had exceeded the 90-day rule when eighty-five (85) days had passed between the date MPD asserted the criminal investigation concluded and the date MPD proposed Grievant's suspension, and fifteen (15) days had elapsed between the Chief of Police's remand and the issuance of the termination notice.

The Arbitrator, having determined that MPD violated the 90-day rule, then considered whether the 90-day rule is directory or mandatory. The Arbitrator compared conflicting case law on the matter. The Arbitrator concluded that the 90-day rule is mandatory, but considered MPD's argument that it was directory and applied the *JBG Properties, Inc. v. D.C. Office of Human Rights* balancing test.¹³ The Arbitrator considered the Parties' arguments and evidence, and found that, even if the 90-day rule was directory, MPD failed to meet its burden under the balancing test that the delay did not substantially prejudice the Grievant.¹⁴ Therefore, the Arbitrator concluded that, even if the 90-day rule was directory, MPD would still be liable for the violation.

Finally the Arbitrator considered whether FOP waived its right to raise a violation of the 90-day rule with respect to the proposed suspension notice. MPD argued that the 90-day rule is directory and FOP could not assert a violation at arbitration because FOP was required to raise the issue at the administrative stage. The Arbitrator concluded that the 90-day rule is mandatory and jurisdictional and thus FOP had the right to raise the issue at arbitration, even if it had failed to raise the issue previously.¹⁵

Notwithstanding his determination that the 90-day rule is mandatory and jurisdictional, the Arbitrator nevertheless considered MPD's argument that the 90-day rule is directory, and still found that FOP did not waive its right to raise the issue, because FOP had raised the issue in its appeal of the proposed termination notice to the Chief of Police.¹⁶ The Arbitrator found that MPD was on notice that FOP might raise an argument concerning tolling, and concluded that FOP's argument had not been waived.¹⁷

The Arbitrator sustained the grievance, because "MPD violated the 90-day time limit for taking corrective action as set forth in D.C. Code § 5-1031."¹⁸ As a remedy, the Arbitrator

¹² Award 17.

¹³ Award 23-24.

¹⁴ Award at 24.

¹⁵ Award at 25.

¹⁶ Award at 25.

¹⁷ Award at 26.

¹⁸ Award at 28. The Arbitrator noted that "MPD had just cause to terminate the Grievant."

ordered MPD to reinstate the Grievant to his former position, subject to meeting all applicable fitness for duty requirements. The Arbitrator also ordered MPD to make Grievant whole for any loss in pay or benefits, such amount to be offset by any interim earnings, and for the Grievant's personnel file to reflect rescission of his termination.

III. Discussion

In its Request, MPD argues that the Award is contrary to law and public policy, on the grounds that (1) the Arbitrator misapplied the provision of the 90-day rule related to tolling for a criminal investigation; (2) the remand period for the proposed termination notice should not have been included in the calculation of the 90-day period for commencing an adverse action; and (3) the Arbitrator improperly determined that the 90-day rule is mandatory. FOP filed an opposition to the MPD's arbitration review request, asserting that MPD's arguments are a mere disagreement with the Arbitrator's findings and conclusions.

In the absence of a clear violation on the face of the award, the Board may not modify or set aside an award as contrary to law and public policy.¹⁹ MPD has the burden to demonstrate that the award itself violates established law or compels an explicit violation of a "well-defined public policy grounded in law or legal precedent."²⁰

A. Tolling because of the Criminal Investigation

The Board finds that the Arbitrator's determination of whether a criminal investigation in this case tolled the 90-day rule was a factual determination. In its Request, MPD asserts that the Arbitrator misapplied the tolling provision of the 90-day rule by conducting an improper inquiry into the substance of the investigation.²¹ MPD argues that it provided evidence of the beginning of the criminal investigation, as well as the end of the investigation, which the Arbitrator was bound to accept.²²

Before the Arbitrator, MPD argued that an investigation began on July 2, 2014, the day it became aware of the incident, and ended on September 8, 2014, the day MPD received the United States Attorney's Office (USAO) letter from the US Attorney's Office stating that it declined to prosecute the Grievant. However, the Arbitrator stated that the July 2, 2014 Incident Summary Sheet provided by MPD listed the incident as "officer misconduct" and the allegations as "abuse of authority."²³ The Arbitrator found that these entries could indicate commencement of an administrative investigation. They did not on their face prove the commencement of a criminal investigation.²⁴ Further, the Arbitrator noted that MPD did not provide evidence to the Hearing Panel regarding when the investigation began. For all of these reasons, the Arbitrator

¹⁹ *FOP/Dep't of Corr. Labor Comm. v. PERB*, 973 A.2d 174, 177 (D.C. 2009).

²⁰ *American Postal Workers Union, AFL-CIO V. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986).

²¹ Request at 10-11.

²² Request at 10-11.

²³ Award at 27.

²⁴ Award at 27-28.

ruled that MPD failed to meet its burden of proof to establish the start and end dates of a criminal investigation.²⁵

MPD's arguments in its Request concerning tolling are mere disagreements with the factual determinations of the Arbitrator. A disagreement with an arbitrator's factual determinations is not a basis for overturning an award.²⁶ The Board has long held that it 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 afforded to evidence.²⁷ By submitting a matter to arbitration, the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings on which the decision is based.²⁸ The Board may not modify or set aside an award because MPD disagrees with the Arbitrator's evidentiary finding. MPD has failed to meet its burden that the Award is contrary to law and public policy.

B. Timeliness of the Proposed Termination Notice

The Arbitrator's calculation of lapsed time relative to the 90-day rule is not contrary to law and public policy. In its Request, MPD argues that the Arbitrator incorrectly determined that the 90 days included the fifteen days between when the Chief of Police remanded the proposed suspension notice and the issuance of the proposed termination notice.²⁹

The Arbitrator considered the language of the 90-day rule, which states in pertinent part:

Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.³⁰

The statute is silent as to the computations for the 90-day period in situations where the penalty is remanded.

In determining whether the remand period should be included in the computation of the 90 days, the Arbitrator considered 6B DCMR § 1618.2, which identifies the information that

²⁵ Award at 26.

²⁶ *FOP/Dep't of Corrections Labor Comm. v. D.C. Dep't of Corrections*, Slip Op. No. 1271, PERB Case No. 10-A-20, at p. 6 (May 12, 2012).

²⁷ *MPD v. FOP/Metro. Police Dep't Labor Comm.*, 61 D.C. Reg. 11295, Slip Op. No. 1491 at 4, PERB Case No. 09-A-14(R) (2014); *See also AFSCME, District Council 20, Local 2743, AFL-CIO v. D.C. Dep't of Consumer and Regulatory Affairs*, 38 D.C. Reg. 5076, Slip Op. No. 281, PERB Case No. 90-A-12 (1991).

²⁸ *MPD v. FOP/Metro. Police Dep't Labor Comm.*, 47 DC Reg. 7217, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000); *MPD and FOP/Metro. Police Dep't Labor Comm. (Grievance of Angela Fisher)*, 51 DC Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

²⁹ Request at 13.

³⁰ D.C. Official Code § 5-1031(a-1(1)).

must be included in a notice of proposed adverse action.³¹ He noted that the regulation does not state that the notice of the charges and specifications is more important than the notice of the penalty, and that the regulation lists all those elements as co-equal notice requirements.³² Based on this reasoning, the Arbitrator found that if changes to the charges or specifications affect the 90-day period, as MPD admitted, then so did a change to the penalty.³³ The Arbitrator found that the Grievant resumed a period of uncertainty as to what discipline would be imposed after the Chief of Police remanded the proposed suspension notice. The Arbitrator determined that the remand period must be included in the 90-day calculation.³⁴

As stated above, by submitting a matter to arbitration, parties are bound by the arbitrator's interpretation of the collective bargaining agreement, related rules and regulations, and evidentiary and factual findings. 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.

C. Mandatory v. Directory

The Board finds that the Arbitrator's conclusions regarding the 90-day rule are not contrary to law and public policy.

Addressing MPD's argument that the Arbitrator improperly found that the 90-day rule is mandatory,³⁵ the Board notes that since the *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Best)* decision, the Board has applied the Superior Court decision that the 90-day rule is directory, not mandatory.³⁶ Notwithstanding, the Board does not have original jurisdiction over the statute establishing the 90-day rule. The Superior Court has rendered conflicting opinions as to whether the 90-day rule is mandatory or directory.³⁷ Until the Court of Appeals has made a final determination on the issue, an award cannot be contrary to law and public policy, on its face, whether an arbitrator determines the 90-day rule is mandatory or directory. Therefore, the Board finds that the Award is not contrary to law and public policy.

MPD argues that the Arbitrator did not correctly apply the balancing test to the 90-day rule. Even though he determined that the 90-day rule is mandatory, the Arbitrator considered

³¹ Award at 18.

³² Award at 19.

³³ Award at 19.

³⁴ Award at 18.

³⁵ Award at 22. Based on the Board's interpretation of the 90-day rule in previous Decisions and Orders the Arbitrator concluded that the 90-day rule is mandatory.

³⁶ See *FOP/Metro. Police Dep't Labor Comm. v. MPD*, 63 D.C. Reg. 14526, Slip Op. 1595, PERB Case No. 15-A-12 (2016); *MPD v. FOP/Metro. Police Dep't Labor Comm.*, 64 D.C. Reg. 10152, Slip Op. No. 1639, PERB Case No. 16-A-12 (2017); *MPD v. FOP/Metro. Police Dep't Labor Comm.*, 64 D.C. Reg. 2012, Slip Op. No. 1606, PERB Case No. 16-A-19 (2016).

³⁷ *MPD v. PERB*, Case No. 2012 CA 007805 P(MPA) (D.C. Sup. Ct. July 17, 2014); *FOP/MPD Labor Comm. v. PERB*, Case No. 2015 CA 0006517 P(MPA) (D.C. Sup. Ct. Sept. 13, 2016); *FOP/MPD Labor Comm. v. PERB and MPD*, Case No. 003948 P(MPA) (D.C. Sup. Ct. May 1, 2019).

MPD's actions under a directory statutory interpretation of the 90-day rule. The Arbitrator applied the balancing test set forth in *JBG Properties, Inc.*, and found that MPD failed to meet its burden of proof.³⁸ Specifically, before the Arbitrator MPD argued that in termination cases, a delay is not prejudicial, if it does not undermine the officer's defense and the officer kept his job during the delay period. The Arbitrator rejected this argument, finding that MPD's interpretation would effectively eliminate the 90-day notice requirement from most termination cases.³⁹ MPD also argued that the Grievant was not prejudiced by MPD's delay, because he was on notice that he would be served with a notice of adverse action 90-days after the USAO's declination letter. The Arbitrator rejected this argument, stating that putting the Grievant on notice that a notice would be delivered by a date past the 90-day requirement did not alleviate the prejudice caused by the additional period of uncertainty.⁴⁰ Finally, MPD argued that it needed to ensure that officers were not kept on the force due to a technicality. The Arbitrator rejected MPD's argument. The Arbitrator relied upon the D.C. Council Committee report, and found that the Chief of Police had made a similar argument before the D.C. Council Committee, and that "[t]he Committee acknowledged her [the Chief of Police's] concern but emphasized that the value in an expeditious and efficient process for investigating misconduct outweighed her public policy concern."⁴¹

The Arbitrator also differentiated the Grievant's case from the *Best* case's⁴² "paradigm of a *de minimus* delay," and found that, even accepting MPD's argument that a criminal investigation tolled the 90-day period by 10 days, that a 10-day delay was more than a ten-percent delay and more than *de minimus*.⁴³ Moreover, the Arbitrator noted that, as he did not find a criminal investigation had commenced, the resulting 50-day delay was even more egregious.⁴⁴ The Arbitrator found that MPD failed to meet its burden to demonstrate that the delay did not substantially prejudice the complaining party.

The Board has stated that this balancing test rests on a factual finding and the agency bears the burden of demonstrating that the delay did not substantially prejudice the complaining party.⁴⁵ Consequently, the Board finds that MPD merely disputes the Arbitrator's factual findings. The Board concludes that the Arbitrator's application of the balancing test is not contrary to law and public policy.

³⁸ *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Best)* 2012 CA 007805 (D.C. Super. Ct. July 17, 2014) (applying *JBG Properties* analysis as to whether the prejudice to a party caused by an agency's delay is outweighed by the interests of the other party or the public in allowing the agency to act after the statutory time period has elapsed).

³⁹ Award at 24.

⁴⁰ Award at 24.

⁴¹ Award at 25.

⁴² 2012 CA 007805 P(MPA), (D.C. Sup. Ct. July 17, 2014)

⁴³ Award at 25, fn. 3.

⁴⁴ Award at 25, fn. 3.

⁴⁵ *MPD v. FOP/Metro. Police Dep't Labor Comm.*, 61 D.C. Reg. 11295, Slip Op. No. 1491 at 3, PERB Case No. 09-A-14(R) (2014).

IV. Conclusion

The Board rejects the MPD's arguments and finds no grounds to modify, set aside, or remand the Award. Accordingly, MPD's Arbitration Review 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, 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 Board Members Ann Hoffman, Mary Anne Gibbons, and Douglas Warshof.

August 15, 2019

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 19-A-08, Op. No. 1724 was sent by File and ServeXpress to the following parties on this the 18th day of September, 2019.

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