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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. 17-A-01
)	
v.)	Opinion No. 1615
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Introduction

On November 07, 2016, the District of Columbia Metropolitan Police Department (“MPD” or “Petitioner”) filed an Arbitration Review Request (“Request”) in this matter, seeking review of the arbitration award (“Award”) that sustained the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”). The Arbitrator determined that MPD failed to commence an adverse action against Officer Hiram Rosario (“Officer Rosario”) 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. The Board has reviewed the Arbitrator’s conclusions, the pleadings of the parties and applicable law, and concludes that the Award on its face is not contrary to law and public policy. Therefore, Petitioner’s Request is denied.

II. Statement of the Case

The charges against Officer Rosario involve two separate incidents of alleged misconduct. One incident occurred on July 13, 2004, and the second incident occurred in May of 2004, and was revealed during an investigation of the July 13th event.

On April 15, 2005, MPD served Officer Rosario with a Notice of Proposed Adverse Action. On June 30, 2005, an Adverse Action Hearing was held before a three-member panel of the MPD. The Panel rendered a recommendation that MPD put Officer Rosario on notice that

his conduct was unacceptable for a Master Patrol Officer and further recommended that MPD remove him from the Master Patrol Officer Program.

On September 7, 2005, Officer Rosario received a Final Notice of Adverse Action from Assistant Chief Cockett who determined that the appropriate penalty was termination.¹ FOP appealed this decision to Chief of Police Charles Ramsey, emphasizing that MPD was in violation of the 90-day rule.² Chief Ramsey granted the appeal in part setting aside Officer Rosario's termination and instead imposed a penalty of removal from the Master Patrol Officer Program.³ On October 20, 2005, FOP demanded arbitration on behalf of Officer Rosario.⁴

III. Arbitrator's Award

The Panel proposed adverse action against Officer Rosario based on charges for events which occurred in May of 2004 and on July 13, 2004. All but one charge relating to the May incidents were dismissed.⁵ MPD argued at arbitration that the 90-day rule should not apply because the incident occurred in May 2004, well before September 30, 2004, when the statute establishing the 90-day rule became effective.⁶

The Arbitrator ruled that MPD failed to show that the 90-day rule was not applicable.⁷ The Arbitrator looked to four prior cases which dismissed adverse actions for misconduct because they were in violation of the 90-day rule. All four of these cases related to misconduct that had arisen prior to the September 30, 2004 effective date of the 90-day rule.⁸ The Arbitrator found that these four decisions were consistent with *Finch v. District of Columbia*,⁹ a case in which the Court held that the 90-day rule should be applied retroactively for events constituting cause that arose prior to September 30, 2004, provided that an appropriate grace period was given.¹⁰ The *Finch* case did not specify an appropriate length of time for the grace period but did observe that a reasonable grace period would echo the 90-day period mandated in the statute.¹¹

Applying this reasoning to the current case, the Arbitrator found that the evidence established that MPD violated the 90-day rule. The event constituting cause occurred in May of 2004 and MPD first learned of this event during the EEO investigation on July 16, 2004.¹² Officer Rosario was served with the Notice of Proposed Adverse Action on April 15, 2005,

¹ Award at 3.

² *Id.* at 4.

³ *Id.* at 5.

⁴ *Id.*

⁵ *Id.* at 19.

⁶ *Id.*

⁷ *Id.* at 20.

⁸ *Id.*

⁹ 894 A.2d 419 (D.C. 2006).

¹⁰ Award at 20.

¹¹ *Id.* at 20-21.

¹² *Id.* at 21.

about nine months after MPD had knowledge of the event.¹³ Using the approach from *Finch*, the Arbitrator found that by serving Officer Rosario with the Notice of Proposed Adverse Action approximately 133 business days after the date 90-day rule became effective, MPD violated the rule.¹⁴

The Arbitrator further found that MPD failed to meet its burden of establishing either its claim that the violation of the 90-day rule was *de minimis* or its claim that Officer Rosario was not prejudiced by the violation.¹⁵ According to the Arbitrator MPD provided no cogent explanation for why the violation should be characterized as *de minimis*. The Arbitrator once again looked to four previous arbitration decisions which dismissed charges against grievants based on MPD's violation of the 90-day rule. In these previous four cases, the Arbitrators found that MPD knew of the alleged misconduct prior to September 30, 2004, when the 90-day rule took effect, but failed to serve the Notice of Proposed Adverse Action within the 90-day grace period. MPD has made no attempt to distinguish this case from the four previous arbitration decisions.¹⁶ The Arbitrator found that Officer Rosario was prejudiced by the delay because he was not interviewed until March of 2005, ten months after the alleged incident took place.¹⁷ Since Officer Worthington was unable to recall the date in May of 2004 and unable to recall the identity of the ride-along citizen, the Arbitrator found that Officer Rosario's ability to mount a meaningful defense, including providing an alibi or locating a material witness, was compromised by the delay.¹⁸

IV. Discussion

MPD argues that the Arbitrator erred in finding that the 90-day rule was applicable.¹⁹ According to MPD, the Arbitrator misinterpreted the *Finch* decision by stating that the Court "left open the possibility that it could be persuaded in a particular case that the 90-day grace period should be extended, and this presumes that a showing that an extension should be granted will be made."²⁰ The *Finch* decision, according to MPD, shows that a grace period of more than 90 days could be warranted when disciplinary action was commenced more than 90 days after the statute took effect.²¹ MPD further argues that any violation of the 90-day rule would be *de minimis* and therefore not preclude MPD from taking adverse action against Officer Rosario.²² MPD states that the delay did not preclude Officer Rosario from defending himself at the Adverse Action Hearing and there is no evidence that Officer Rosario was unable to locate and/or present any witnesses or evidence material to his case.²³

¹³ *Id.*

¹⁴ *Id.* at 23.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 24.

¹⁸ *Id.*

¹⁹ Request at 8.

²⁰ *Id.*

²¹ *Id.* at 9

²² *Id.* at 11

²³ *Id.* at 12.

FOP argues that the Arbitrator's determination that MPD violated the 90-day rule is proper and valid and that MPD's challenge to the Award is a mere disagreement with the Arbitrator's findings.²⁴ FOP further states that although MPD argued that the 90-day period should not be retroactively applied, MPD never argued to the Arbitrator whether there should be a grace period or whether the grace period should be longer than 90 days.²⁵

The 90-day rule took effect on September 30, 2004.²⁶ Before this statute went into effect, the Board looked to its predecessor, D.C. Code § 1-617.1(b-1).²⁷ The previous statute provided that no corrective or adverse action shall be commenced more than 45 days after MPD knew or should have known of the act or occurrence allegedly constituting cause.²⁸ The implementation of the 90-day rule gave MPD double the amount of time to commence an adverse action compared to the previous rule.

Pursuant to D.C. Official Code § 1-605.2(6), the Board is authorized to consider appeals from arbitration awards pursuant to grievance procedures, provided such awards may be reviewed only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means. 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.³⁰ In order for the Board to find that the 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 The Arbitrator found that *Finch* did not specify an appropriate length of time for the grace period but did observe that a reasonable grace period would echo the 90-day period mandated in the statute. Using this approach, the Arbitrator found that MPD violated the 90-day rule by serving Officer Rosario with the Notice of Proposed Adverse Action approximately 133 business days after the statute became effective. This is the bargained-for interpretation of the statute and the Board may not modify or set aside the Award because MPD offers a different interpretation of *Finch*.³²

²⁴ Response at 6.

²⁵ *Id.* at 7

²⁶ Award at 19.

²⁷ See *Metro. Police Dep't v. Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comm. (on Behalf of Officers Timothy Craggette, Thurston C. Genies and Timothy Toland)*, 41 D.C. Reg. 6092, Slip Op. No. 325, PERB Case Nos. 92-A-06, 92-A-07, 92-A-09 (1992).

²⁸ *District of Columbia v. District of Columbia Office of Employee Appeals*, 883 A.2d 124 (D.C. 2005).

²⁹ *Fraternal Order of Police/D.C. 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. AFGE, Local 2725, AFL-CIO*, 60 D.C. Reg 7198, 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 *D.C. Metro. Police Dep't and FOP/MPD Labor Committee (re: Fred Johnson)*, PERB Case No. 09-A-02, Slip Op. 961, 59 D.C. Reg. 4936 (2012).

V. Conclusion

The Board rejects MPD's arguments and finds no cause to set aside or modify the Arbitrator's Award. Accordingly, MPD's request is denied and the matter is dismissed in its entirety.

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 the unanimous vote of Board Chairperson Charles Murphy and Members Ann Hoffman and Douglas Warshof.

March 23, 2017

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 17-A-01, Op. No. 1615 was sent by File and ServeXpress to the following parties on this the 4th day of April, 2017.

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