Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Elgie Morton),	
Petitioner,	PERB Case No. 07-A-03
and	
	Opinion No. 900
District of Columbia Metropolitan Police Department,	**Motion for Reconsideration**
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On April 17, 2007, the Fraternal Order of Police/District of Columbia Metropolitan Police Department Labor Committee ("FOP" or "Union") filed a Motion for Reconsideration ("Motion") in the above-referenced matter. FOP is requesting that the Board reverse the Executive Director's dismissal of FOP's Arbitration Review Request. The District of Columbia Metropolitan Police Department ("MPD") opposes FOP's Motion.

The issue before the Board is whether the Executive Director erred when he dismissed FOP's Arbitration Review Request because it was not timely filed.

II. Discussion

Elgie Morton ("Elgie Morton" or "Grievant") served as a police officer with MPD since 1990. On September 16, 2005, the Grievant was terminated based on charges of conduct unbecoming of an officer and the commission of a criminal offense. "The charges stem from an altercation in which the Grievant allegedly struck a fellow officer, causing injury." (Award at

pgs. 1-2) The Grievant appealed the termination to the Chief of Police. The Chief of Police denied the appeal and FOP invoked arbitration on behalf of the Grievant.

Arbitrator Elliot Shaller was presented with the following issues: "(1) whether [MPD] violated Article 12, Section 7 of the [parties' collective bargaining agreement] by virtue of an alleged failure of the Chief of Police to respond to the Grievant's appeal of his discharge within 15 days, and if so, whether the penalty should be rescinded on that basis; (2) [w]hether there [was] substantial evidence in the administrative record to support the charges against the Grievant; and (3) whether the penalty of discharge was for cause and otherwise consistent with the CBA and applicable laws, rules and regulations." (Award at pgs. 2-3) In an Arbitration Award ("Award") issued on January 3, 2007, Arbitrator Shaller found that MPD "did not violate Article 12, Section 7 of the CBA in that the Chief of Police's decision on the Grievant's appeal was left at his last known address within 15 days of the filing of the appeal; there [was] substantial evidence in the record to support the charges against the Grievant; and that the Grievant was discharged for cause and consistent with the requirements of the CBA." (Award at p. 3) Therefore, the Arbitrator denied the grievance.

On March 6, 2007, FOP filed an Arbitration Review Request seeking review of the January 3, 2007 Award that sustained the termination of bargaining unit member Elgie Morton, on the grounds that the arbitrator was without authority and the award was contrary to law and public policy. (See Request at p. 2) The Board's Executive Director determined that the Arbitration Review Request was not timely filed and on March 16, 2007, administratively dismissed the Request. FOP filed the instant Motion requesting that the Board reverse the Executive Director's decision dismissing FOP's Arbitration Review Request.

In support of its position, FOP asserts the following:

> The January 3, 2007 Arbitration Award was not served by mail, by facsimile, or by any other means generally accepted to satisfy the requirement for service upon a party in an administrative proceeding. The award was sent by e-mail only, to former FOP/MPD Labor Committee counsel and to Pamela Smith, Esq., counsel for the Metropolitan Police Department. A hard copy was never mailed or sent by facsimile. No service of any kind was made upon the Petitioner.
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> Undersigned Counsel took over as General Counsel to the FOP/MPD Labor Committee on October 1, 2006, and literally hundreds of files were transferred to undersigned counsel's office from former counsel. A procedure was established with the former General Counsel whereby any FOP/MPD Labor Committee case related decisions, pleadings or any other documents received at his

> office by mail or facsimile would be promptly forwarded to undersigned counsel's office. This system has been very effective in the transitioning of active cases from former counsel to current counsel
>
> In the instant case, undersigned counsel learned of the January 3, 2007 Arbitration Award on March 1, 2007 after routinely reviewing the file, observing that the last brief had been submitted in November 2006, and contacting former assistant counsel Kelly Burchell, Esq. by telephone about the matter who subsequently reported that he had received the award by electronic mail on January 3, 2007. Although Mr. Burchell had forwarded the e-mail to this office and the undersigned, undersigned counsel did not receive the e-mail. Undersigned counsel thereupon requested that Mr. Burchell print a hard copy of the Arbitration Award and forward it to undersigned counsel. Undersigned counsel thereafter filed the Arbitration Review Request within five days of his receipt of the hard copy.
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> The Petitioner submits that the Arbitrator failed to serve the Arbitration Award by any legally sufficient method of service so as to establish jurisdiction requiring the Petitioner to earlier file its Arbitration Review Request. The Petitioner submits that service by a specific, designated method is a jurisdictional prerequisite for filing an Arbitration Review Request with the Board.
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> On March 1, 2007, upon learning of the Arbitration Award, Petitioner filed its Arbitration Review Request within five days of the receipt of the Arbitration Award, notwithstanding the absence of proper service. Accordingly, because the Petitioner was never properly served, its Arbitration Review Request is timely. (Motion at pgs. 1-3, footnotes omitted.)

For the reasons noted above, FOP requests that the "March 16, 2007 decision of the Executive Director dismissing the Arbitration Review Request be reconsidered and set aside, and that the Arbitration Review Request be accepted for filing." (Request at p. 3.)

MPD opposes FOP's Motion on the grounds that: (1) FOP's Arbitration Review Request was untimely and (2) FOP has failed to establish a statutory basis for the Board's reversal ot the Executive Director's decision.

Board Rules 538.1, 501.4 and 501.5 provide in relevant part as follows:

> **538.1 - Filing**
> A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board **not later than twenty (20) days after service of the award . . . .** (Emphasis added.)
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> **501.4 - Computation - Mail Service**
> Whenever a period of time is **measured from the service of a pleading and service is by mail, five (5) days shall be added to the prescribed period.** (Emphasis added.)
>
> **501.5 - Computation - Weekends and Holidays**
> In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included. . . .**Whenever the prescribed time period is eleven (11) days or more, [Saturdays, Sundays and District of Columbia Holidays] shall be included in the computation.** (Emphasis added.)

In the present case, FOP acknowledges that both its former counsel and MPD's counsel received the award via electronic mail on January 3, 2007. (See Request at p. 1) However, FOP claims "that the Arbitrator failed to serve the Arbitration Award by any legally sufficient method of service so as to establish jurisdiction requiring the Petitioner to earlier file its Arbitration Review Request." (Motion at p. 3) Specifically, FOP argues that Board Rules do not provide for electronic transmitted awards as meeting the Board's requirement for service. (See Motion at p. 1) As a result, FOP contends that the January 3, 2007 service date is not what triggers the twenty day requirement of Board Rule 538. Rather, FOP claims that since its current counsel did not receive a hard copy of the Award until March 1, 2007, that service date (March 1, 2007) is the operative factor that triggers the computation of the twenty day filing requirement noted in Board Rule 538.1. Also, FOP contends that no service of any kind was made upon the Union. In light of the above, FOP asserts that their March 6, 2007, filing was timely.

We recently considered a Petitioner's claim that Board Rules do not provide for electronic transmitted arbitration awards as meeting the Board's requirement for service. In American Federation of State, County and Municipal Employees, Local 2401 (on behalf of Albert Jones) and Office of the Attorney General, Slip Op. No. 856, PERB Case No. 07-A-01 (2006), we stated the following:

> Board Rule 501.16 provides in pertinent part that "[s]ervice of pleadings shall be complete on personal delivery . . .depositing the document in the United States mail or by facsimile." Also, Board Rule 599 defines pleadings as "Complaint[s], petitioner[s], appeal[s], request[s] for review or resolution[s], motion[s],

> exception[s], brief[s] and reponses to the foregoing. **In light of the above, we believe that Board Rule 501.16, concerns the service of a pleading filed with the Board and not to the service of an award issued by an arbitrator on parties that participated in the arbitration proceeding.** Even assuming arguendo that Board Rule 501.16 is applicable in this case, we have previously found that "[t]he Board's Rules exist to establish and provide notice of a uniform and consistent process for proceeding in matters properly within our jurisdiction. In this regard, we do not interpret our rules in such a manner as to allow form to be elevated over the substantive objective for which the rule was intended." *Citing District of Columbia General Hospital and Doctors' Council of the District of Columbia General Hospital, 46 DCR 8345, Slip Op. No. 493 at p. 3, PERB Case No. 96-A-08 (1996).* AFSCME's argument that although the parties agreed to accept issuance of Arbitrator Coburn's award via email, the parties did not stipulate that service of the award via electronic mail would be sufficient, is such an application of our Rules. While the Award transmitted to AFSCME on August 21, 2006, was not served by one of the methods of service noted in Board Rule 501.16, we find under these facts that the impact of this requirement is one of form rather than substance. . . In light of the above, we do not find AFSCME's argument to be persuasive. Slip Op. No. 856 at p.11. (Emphasis added.)

A review of the record reveals that at the arbitration hearing FOP was represented by Kelly Burchell and MPD was represented by Pamela Smith. On January 3, 2007Arbitrator Shaller transmitted the Award to Mr. Burchell and Ms. Smith via e-mail. Attached to the Award was a cover letter addressed to Mr. Burchell and Ms. Smith. Arbitrator Shaller's cover letter provided in pertinent part as follows:

> Attached is the Opinion and Award in the above matter as well as my invoice.
>
> If you have any difficulty opening either of these documents, **or for any reason would like me to send them to you via fax and or regular mail, please let me know** and I would be glad to do so.
>
> (See Exhibit No. 2 attached to MPD's Opposition, emphasis added.)

Also, FOP's current counsel (James Pressler) acknowledges that the Award was transmitted to the parties' attorneys of record by e-mail on January 3, 2007. In addition, Mr.

Pressler does not contend that the Award transmitted to the parties' by e-mail on January 3, 2007, differs in any way from the hard copy of the Award delivered to him on March 1, 2007 by Kelly Burchell (FOP's former counsel). Instead, Mr. Pressler argues that on October 1, 2006 he took over as general counsel for FOP and a procedure was established whereby any documents received via mail or facsimile by FOP's former counsel, were promptly transmitted to Mr. Pressler's office. Mr. Pressler suggests that he did not become aware of the January 3rd Award until March 1, 2007 because it was transmitted via e-mail and not by mail or facsimile. Therefore, Mr. Pressler asserts that the March 1st service date is the operative date for purposes of commencing the time that FOP had to file its Arbitration Review Request under Board Rule 538.1.

We find that Kelly Burchell was the counsel of record for FOP during the arbitration hearing. Furthermore, there is no dispute that the Award was transmitted to him by e-mail on January 3, 2007. Moreover, Mr. Burchell was given the option to receive a copy of the Award via fax or U.S Mail. It appears that Mr. Burchell did not exercise that option by requesting that the arbitrator provide FOP with a copy via fax or U.S. Mail. In light of the above, we do not find FOP's argument persuasive. Therefore, consistent with our holding in American Federation of State, County and Municipal Employees, Local 2401 (on behalf of Albert Jones) and Office of the Attorney General, *supra* and pursuant to Board Rule 538.1, FOP was required to file their Request within twenty days after the January 3, 2007 service date, or by January 23, 2007. FOP did not file their request until March 6, 2007. Thus, FOP's filing was forty two (42) days late. We find no reasonable basis for discounting FOP's receipt of the January 3, 2007 Award for purposes of commencing the time that FOP had to file its Arbitration Review Request under Board Rule 538.1. Therefore, we reject FOP's argument.

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. See, Hoggard v. Public Employee Public Employee Relations Board, 655 A.2d 320, 323 (DC 1995). The Board cannot extend the time for filing an Arbitration Review Request. We find that the Executive Director's decision was reasonable, supported by the record and consistent with Board precedent. As a result, we deny FOP's Motion.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Motion for Reconsideration, is denied.

2. 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.

June 14, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.07-A-03 was transmitted via Fax and U.S. Mail to the following parties on this the14th day of June 2007.

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