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

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In the Matter of:	)	
	)	
District of Columbia Metropolitan Police	)	
Department,	)	
	)	PERB Case No. 16-A-01
Petitioner,	)	
	)	Opinion No. 1590
and	)	
	)	
Fraternal Order of Police/	)	
Metropolitan Police Department Labor	)	
Committee (on behalf of Christopher N. Johnson),	)	
	)	
Respondent.	)	
	)	

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**DECISION AND ORDER**

**I. Introduction**

On November 19, 2015, the District of Columbia Metropolitan Police Department (“MPD”) 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”).<sup>1</sup> The Union’s grievance protests the 10-day suspension of Officer Christopher N. Johnson (“Grievant” or “Officer Johnson”). The arbitrator determined that MPD violated D.C. Official Code § 5-1031(a) (also referred to as the “90-day rule”) by failing to commence an adverse action against the Grievant within ninety days after the date that MPD knew or should have known of the act allegedly constituting cause.<sup>2</sup>

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<sup>1</sup> MDP filed an initial Arbitration Review Request on November 19, 2015, along with a Motion to Extend Time to File Arbitration Review Request, requesting that review of the Award be extended one day until November 20, 2015. On November 20, 2015, MPD filed an Amended Arbitration Review Request. On November 25, 2015, FOP filed an Opposition to the Motion to Extend Time to File an Arbitration Review Request. On December 9, 2015, MPD’s Motion for Extension of Time was granted.

<sup>2</sup> The 90-day rule requires MPD to commence an adverse action against an employee within ninety business days after the date that MPD knew or should have known of the act or occurrence allegedly constituting cause. D.C. Code § 5-1031(a) (2014).

Further, the Arbitrator found that the violation was not *de minimis* or otherwise excused. The issue before the Board is whether the Award on its face is contrary to law and public policy.<sup>3</sup>

For the reasons stated herein, Petitioner's Request is denied.

## II. Statement of the Case

Officer Johnson was assigned to the MPD's Third District as a Property Officer.<sup>4</sup> On July 13, 2008, a Private Citizen ("PC") was arrested.<sup>5</sup> When arrested, PC was carrying cash.<sup>6</sup> PC's cash was confiscated and recorded in Third District's Property Book.<sup>7</sup> On October 7, 2008, approximately 90 days after PC's money was confiscated, Officer Johnson entered the details of PC's property, including his cash, into PEICS.<sup>8</sup> However, the property was not recorded on the Property Intake Sheet or transported out of the Third District. On May 8, 2009, PC sought to retrieve his money from Third District.<sup>9</sup> PC's money could not be located and was never found.<sup>10</sup> The Grievant was the last person to handle PC's money.<sup>11</sup>

On May 15, 2009, Desk Sergeant Janet Gross e-mailed Third District Manager David Jackson, informing him that the Grievant had processed PC's money and input data concerning the money; however, the money was not recorded on the Property Intake Sheet.<sup>12</sup> At this time, MPD management officials knew of the potential misconduct of the Grievant regarding PC's missing money.<sup>13</sup>

On May 27, 2009, Third District Manager Jackson filed a Preliminary Report Form, advising the Chief of Police that PC's money was missing.<sup>14</sup> Shortly thereafter, Internal Affairs Division ("IAD") Agent James V. McGuire was assigned to conduct an investigation into Grievant's alleged misconduct.<sup>15</sup>

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<sup>3</sup> See D.C. Code § 1-605.02(6) (2014).

<sup>4</sup> Award at 10.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The Third District's practice regarding prisoners' money was to place it into a secure drop box. If the cash was not retrieved by the prisoner within 30 days, then a property clerk would transport the cash to the property office, where it would be placed in a secure locker. Thereafter, if the prisoner did not pick up the cash within 60 days, the property clerk was required to input the property data description into the Property Evidence Inventory Control System ("PEICS") and ultimately, record the property data description on a form known as the Property Intake Sheet. Subsequently, the property would be transported to a central storage facility. *Id.* at 10-11.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 11-12.

<sup>14</sup> *Id.* at 12.

<sup>15</sup> General Order 120.23, in pertinent part, provides: "MPD shall notify and consult with the USAO immediately, in no case later than the next day, following the receipt or discovery of any allegations of criminal misconduct..."

On September 1, 2009, IAD Commander Christopher M. LoJacano sent Agent McGuire's preliminary investigative report to the U.S. Attorney's Office ("USAO") for prosecutorial consideration as a criminal investigation.<sup>16</sup> On September 9, 2009, the USAO declined prosecution and referred Officer Johnson's case to MPD.<sup>17</sup>

Thereafter, Agent McGuire continued his administrative investigation, submitting his final Investigative Report with Findings and Recommendations on December 11, 2009.<sup>18</sup> McGuire recommended sustaining the allegation of neglect of duty against Officer Johnson based on the loss of PC's money.<sup>19</sup>

MPD commenced disciplinary action against Officer Johnson on January 19, 2010, with a Notice of Proposed Adverse Action ("Notice") for a 10-day suspension.<sup>20</sup> On February 19, 2010, Officer Johnson appealed the Notice to Diana Haines-Walton, Director, Human Resources Management Division.<sup>21</sup> On March 29, 2010, Haines-Walton issued a Final Notice of Adverse Action ("Final Notice") denying Officer Johnson's appeal and suspending him for 10 business days.<sup>22</sup> On April 12, 2010, FOP submitted, on Grievant's behalf, a Final Grievance Appeal ("Grievance") to the Chief of Police. On May 3, 2010, the Chief denied the Grievance and imposed a 10-day suspension, but held 5 days in abeyance.<sup>23</sup> On May 24, 2010, FOP demanded arbitration.<sup>24</sup>

### **III. Arbitrator's Award**

The Arbitrator, based on a review of the evidence before him, sustained FOP's grievance, finding that MPD failed to commence an adverse action against the Grievant within ninety days after the date that MPD knew or should have known of the act allegedly constituting cause as required by the D.C. Code.

The Arbitrator found that May 15, 2009 was the start date of the calculation of the 90-day rule. On that date, Desk Sergeant Janet Gross e-mailed Third District Manager David Jackson, notifying him that the money was missing.<sup>25</sup> The Arbitrator then found that the period between May 15, 2009 and September 9, 2009, the date that the USAO declined prosecution, counted towards the calculation of the 90-day rule. He acknowledged that if the period from May 15, 2009 to September 9, 2009—80 business days—was a period of criminal investigation, then the

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<sup>16</sup> Award at 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Award at 22.

time for initiating discipline may be tolled.<sup>26</sup> However, the Arbitrator concluded that MPD was not conducting a criminal investigation.<sup>27</sup> The Arbitrator noted that MPD's General Order 120.23 requires that MPD notify and consult with the USAO "immediately, in no case later than the next day following the receipt or discovery of any allegations of criminal misconduct..."<sup>28</sup> In the current matter, this would have required referral to the USAO by May 16, 2009. Instead, MPD delayed making the referral until September 1, 2009.

The Arbitrator calculated that the total time from the act or occurrence allegedly constituting cause for the discipline and Johnson's receipt of the Notice of Proposed Adverse Action on January 19, 2010, was 163 business days. Based on this calculation, the Arbitrator found that MPD violated D.C. Code § 5-1031(a) when it disciplined the Grievant with a 10-day suspension more than 90 days after the act for which he was disciplined.

Applying the *de minimis* balancing test articulated in *JBG Properties*,<sup>29</sup> the Arbitrator determined that MPD's violation of the 90-day rule was not *de minimis* or otherwise excused<sup>30</sup> and the appropriate remedy for the violation was to rescind the Grievant's discipline.<sup>31</sup> Accordingly, the Arbitrator did not address the merits of the decision to suspend.

MPD has filed this Arbitration Review Request seeking to have the Arbitrator's Award reversed on the grounds that it is contrary to law and public policy.<sup>32</sup>

#### IV. Discussion

The Board's authority to review an arbitration award is extremely narrow.<sup>33</sup> In accordance with D.C. Official Code § 1-605.02(6), the Board is authorized to modify or set aside an arbitration award in only three limited 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.<sup>34</sup> The U.S. Court of Appeals, District of Columbia Circuit, observed that "the Supreme Court has

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<sup>26</sup> Award at 23. (Citations omitted). Since the Arbitrator determined that the investigation was administrative, 75 business days count towards the calculation of the 90-day rule, with only the five days of that period during the USAO's consideration of criminal prosecution tolled.

<sup>27</sup> Additionally, the Arbitrator determined that MPD failed to produce evidence that it conducted a criminal investigation.

<sup>28</sup> *Id.* at 23.

<sup>29</sup> 364 A.2d 1183 (D.C. 1976). 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. *Id.* at 1186-1187.

<sup>30</sup> Award at 26-27.

<sup>31</sup> Award at 28.

<sup>32</sup> Request at 7-10.

<sup>33</sup> See *Fraternal Order of Police v. D.C. Pub. Emp. Relations Bd.*, 973 A.2d 174, 177 (D.C. 2009) (stating that "The PERB itself has limited authority to overturn an arbitration award").

<sup>34</sup> *Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 62 D.C. Reg. 12587, Slip Op. 1531, PERB Case No. 15-A-10 (2015).

explained that, in order to provide a basis for an exception, the public policy question must be well defined and dominant,” and is to be ascertained “by reference to the law and legal precedents and not from general considerations of supposed public interest.”<sup>35</sup> The exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration under the guise of “public policy.”<sup>36</sup>

Citing PERB Rule 538.1, MPD contends that the Arbitrator’s Award should be reversed because the award on its face is contrary to law and public policy.<sup>37</sup> Specifically, MPD asserts that the Award “created an end run around the protections afforded law enforcement officers during investigatory questioning under *Garrity v. New Jersey*, 385 U.S. 493 (1967), and *Miranda v. Arizona*, 384 U.S. 436 (1966). MPD argues that the Award will result in the infringement of Constitutional protections:

That an investigation into possible criminal activity where an officer’s liberty is at stake can be transformed into a mere administrative investigation by the lack of a telephone call or e-mail has dire implications upon the constitutionally protected rights of the targeted officer against self-incrimination and coerced statements.

(Request at 8).

MPD cites to *Garrity v. New Jersey*, in which the United States Supreme Court held that an employee may be compelled to give statements under the threat of discipline or discharge, but such statements cannot be used in a criminal prosecution.<sup>38</sup> By operation of the Award, MPD asserts, “a criminal investigation is deemed an administrative investigation upon MPD’s failure to notify USAO by the next business day of the allegations of criminal misconduct as required under General Order 120.23.”<sup>39</sup> “As the investigation is administrative,” MPD continued, “*Garrity* does not apply and the officer can be ordered to provide a statement and the refusal to do so could subject the officer to discipline.”<sup>40</sup>

In response to MPD’s asserted basis for review, FOP argues that “the [Request] represents a mere disagreement with Arbitrator Vaughn’s findings.”<sup>41</sup> In addition, FOP asserts that “MPD ignores the numerous factual findings ... set forth by Arbitrator Vaughn in support of his conclusion that the MPD’s actions taken in its investigation in this matter constituted an

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<sup>35</sup> *D.C. Metro. Police Dep’t v. Fraternal Order of Police/ D.C Metro. Police Dep’t Labor Comm.*, 63 D.C. Reg. 4573, Slip Op. 1561, PERB Case No. 14-A-09 (2016) (citing *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

<sup>36</sup> *Id.*

<sup>37</sup> MPD does not make any contention that the Arbitrator was without or exceeded his authority, or that the Award was procured by fraud, collusion, or other similar and unlawful means.

<sup>38</sup> *Garrity v. N.J.*, 385 U.S. 493, 500 (1967) (holding that “the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.”)

<sup>39</sup> Request at 8-9.

<sup>40</sup> *Id.*

<sup>41</sup> Response at 11.

administrative investigation.”<sup>42</sup> Finally, FOP asserts that “MPD fails to establish that the Award will result in the infringement of any of the Constitutional protections afforded to police officers during investigatory questioning.”<sup>43</sup>

The Board finds that MPD’s request is merely a dispute of the Arbitrator’s evidentiary findings and conclusions. In *Garrity*, the Supreme Court recognized that, where an individual was given a choice “between the rock and the whirlpool,” by having to forego his right against self-incrimination in order to avoid forfeiting his job, the resulting statements would represent a “form of compulsion” in violation of the Fifth Amendment and therefore inadmissible at trial.<sup>44</sup> This case is very different from the circumstances before the court in *Garrity*. In light of the record before the Board, it cannot be said that the Grievant was compelled to provide an answer or even that MPD was conducting a criminal investigation. MPD’s Request constitutes only a disagreement with the Arbitrator’s evidentiary findings of the administrative investigation of the Grievant. “The Board will not second guess credibility determinations, nor will it overturn an arbitrator’s findings on the basis of a disagreement with the arbitrator’s determination.”<sup>45</sup> Accordingly, enforcement of the Arbitration Award does not compromise any of the public policies and protections allegedly threatened by the Award. Therefore, the Board finds that MPD has not demonstrated that the Award constitutes a violation of an explicit well defined public policy grounded in law or public policy that would compel and mandate setting aside the Arbitrator’s Award.

## V. Conclusion

The Board finds that MPD has not cited any specific law or public policy that was violated by the Arbitrator’s Award. Thus, 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 with prejudice.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 15.

<sup>44</sup> *Garrity*, 385 U.S. at 497-99.

<sup>45</sup> *Fraternal Order of Police/Metro. Police Dep’t Labor Comm. v. D.C. Metro. Police Dep’t*, 59 D.C. Reg. 9798, Slip Op. No. 1271, PERB Case No. 10-A-20 (2012). *See also Metro. Police Dep’t and Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 31 D.C. Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984); *FOP/DOC Labor Comm. v. Dep’t of Corrections*, 52 D.C. Reg. 2496, Slip Op. No. 722, PERB Case Nos. 01-U-21, 01-U-28, 01-U-32 (2005).

**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 unanimous vote of Board Chairperson Charles Murphy and Members Ann Hoffman, Douglas Warshof, and Barbara Somson.

August 12, 2016

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 16-A-01, Op. No. 1590 was sent by File and ServeXpress to the following parties on this the 22nd day of August, 2016.

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