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

)	
In the Matter of:)	
)	
Metropolitan Police Department)	
)	PERB Case No. 19-A-06
Petitioner)	
)	Opinion No. 1716
v.)	
)	
Fraternal Order of Police/ Metropolitan)	
Police Department Labor Committee)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Introduction

On March 20, 2019,¹ the District of Columbia Metropolitan Police Department (MPD) filed this Arbitration Review Request (Request) pursuant to the Comprehensive Merit Personnel Act (CMPA), section 1-605.02(6) of the D.C. Official Code. MPD seeks review of an arbitration award (Award) issued on February 27, 2019, granting the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP). The Award rescinded the termination of Charles Sims (Grievant). MPD seeks review of the Award claiming it is contrary to law and public policy.

Pursuant to the CMPA, the Board is permitted to modify, set aside, or remand a grievance arbitration award if: (1) the arbitrator was without or exceeded his or her jurisdiction; (2) the award on its face is contrary to law and public policy; or (3) the award was procured by fraud, collusion, or other similar unlawful means.² 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.

¹ The parties consented to three extensions of time between March 20, 2019, and May 22, 2019. The record for review was completed on June 7, 2019.

² D.C. Official Code § 1-605.02(6).

II. Statement of the Case

The Grievant successfully appealed his April 2006 termination through the grievance-arbitration process.³ MPD appealed the arbitration award to PERB. The Board issued a Decision and Order denying MPD's request for review in May 2013.⁴ The Decision and Order was not challenged in Superior Court, and the Grievant began the reinstatement process to return to his position as a police officer.⁵

MPD required the Grievant to report all arrests as a part of the background investigation for his reinstatement. On October 12, 2013, the Grievant self-reported⁶ four arrests: (1) August 30, 1997; (2) March 11, 2007; (3) April 11, 2007; and (4) June 25, 2007.⁷ After MPD completed its background investigation, MPD directed the Grievant to report to the police academy for reinstatement on April 21, 2014.⁸ When the Grievant appeared at the police academy for reinstatement, the Grievant reported an additional arrest that occurred on February 21, 2014.⁹ On April 21, 2014, MPD created an incident summary sheet and began to investigate whether the Grievant had engaged in misconduct while separated from the MPD.¹⁰

On August 21, 2014, MPD served the Grievant with a Notice of Proposed Adverse Action (NPAA) that charged the Grievant with conduct prejudicial to the reputation and good order of the police force.¹¹ The disciplinary charge specified that the Grievant was no longer qualified to be a police officer because of the five arrests.¹² On November 18, 2014, an MPD Adverse Action Panel (Panel) held a hearing.¹³ The Panel found the Grievant guilty of the disciplinary charge and recommended termination.¹⁴ On December 31, 2014, the Grievant was served with the Notice of Final Adverse Action (NFAA). On January 13, 2015, the Grievant appealed the NFAA to the Chief of Police.¹⁵ On February 4, 2015, the Chief of Police denied the appeal, and the FOP subsequently demanded arbitration.¹⁶

III. Arbitration Award

The parties presented three issues to the Arbitrator: (1) whether MPD violated D.C. Code § 5-1031 (90-Day Rule)¹⁷ when instituting discipline; (2) whether the evidence presented by

³ Request Support Memo at 2.

⁴ *MPD v. FOP/MPD Labor Committee ex rel. Sims*, 60 D.C. Reg. 9201, Slip Op. 1390, PERB Case No. 12-A-07 (2013).

⁵ Request Support Memo at 2.

⁶ Request Support Memo at 2.

⁷ Request Support Memo at 2.

⁸ Request Support Memo at 4.

⁹ Request Support Memo at 4.

¹⁰ Request Support Memo at 5.

¹¹ Pet. Ex.1 part 1, pg. 1-7.

¹² Pet. Ex.1 part 1, pg. 1-7.

¹³ Pet. Ex.1 part 14, pg. 5.

¹⁴ Pet. Ex.1 part 14, pg. 19.

¹⁵ Request Support Memo at 5.

¹⁶ Request Support Memo at 5.

¹⁷ D.C. Official Code § 5-1031 (2004), also known as the 90-Day Rule, in relevant part, requires that "no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays,

MPD was sufficient to support the charge against the Grievant; and (3) whether termination was the appropriate penalty.¹⁸ The Arbitrator conducted a review of the record and made a factual determination that MPD violated the 90-Day Rule when instituting discipline and therefore did not address the second or third issue.

The Arbitrator found that the facts were not in dispute and that the sole disciplinary charge against the Grievant was based upon his prior arrests.¹⁹ The Arbitrator found that except for the February 21, 2014 arrest, MPD had knowledge of the four other arrests on October 11, 2013, when the Grievant self-reported the arrest during the reinstatement process.²⁰

FOP argued that MPD waited too long to discipline the Grievant when it served the NPAA.²¹ MPD argued that the discipline was timely because the proper date to begin calculating the 90-Day Rule was April 21, 2014, when it received notice of the arrest and created an incident summary report.²²

The Arbitrator rejected MPD's argument and found that MPD unreasonably delayed its compliance with the initial arbitration award confirmed by PERB.²³ The Arbitrator held that PERB's order became binding on June 27, 2013, which was the final day to appeal to the Superior Court and MPD did not appeal the Board's decision.²⁴ As of that date, MPD was "on the clock" for the purposes of the 90-Day Rule after becoming aware of alleged misconduct.²⁵ The Arbitrator concluded that MPD violated the 90-Day Rule when it failed to serve the Grievant with the NPAA despite having notice of the prior arrests for more than 90 days.²⁶

IV. Position of the Parties

A. MPD's Position

MPD argues that the Award is contrary to law and public policy, because the Arbitrator misinterpreted the 90-Day Rule. MPD argues that public policy cannot require the reinstatement of an officer based on the erroneous interpretation of the 90-Day Rule.²⁷ MPD contends that the single charge was supported by five arrests, which occurred between August 30, 1997, and February 21, 2014.²⁸ MPD asserts that the record clearly establishes that MPD was notified of

Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause."

¹⁸ Award at 3.

¹⁹ Award at 6.

²⁰ Award at 6.

²¹ Award at 9.

²² Award at 9.

²³ Award at 9.

²⁴ Award at 10.

²⁵ Award at 11.

²⁶ Award at 11.

²⁷ Request Support Memo at 8.

²⁸ Request Support Memo at 7.

the February 21, 2014 arrest on April 21, 2014.²⁹ Therefore, MPD argues, that MPD timely served the NPAA on the Grievant eight-seven (87) days later, on August 21, 2014.³⁰

B. FOP's Position

FOP argues that the Arbitrator's findings and conclusions are not contrary to law and public policy. FOP argues that the Arbitrator properly found that the Grievant was a "reinstatee" and not an applicant for the police department.³¹ FOP argues that the Arbitrator properly held that MPD cannot benefit from its own delay in completing the reinstatement process.³² FOP points to the record, which shows that the required background investigation of the Grievant was completed on February 25, 2014, and yet the report did not indicate the February 21, 2014 arrest.³³ FOP contends that the Arbitrator properly found that an arrest is a matter of public record and should have been discovered by MPD during the background investigation.³⁴ FOP argues that the Award conforms to the 90-Day Rule since the four arrests are not in dispute and because MPD should have known about the February 21, 2014 arrest. FOP argues that MPD merely disagrees with the Arbitrator's decision.³⁵

V. Discussion

The law and public policy exception is "extremely narrow."³⁶ The narrow scope limits potentially intrusive judicial reviews under the guise of public policy.³⁷ MPD 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."³⁸ The violation must be so significant that law and public policy mandate a different result.³⁹

The 90-Day Rule states:

(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause. D.C. Official Code § 5-1031 (2004).

²⁹ Request Support Memo at 7.

³⁰ Request Support Memo at 7.

³¹ Opposition at 16.

³² Opposition at 17.

³³ Opposition at 17.

³⁴ Opposition at 18.

³⁵ Opposition at 18.

³⁶ *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986).
Accord MPD v. FOP/MPD Labor Comm. ex rel. Pair, 61 D.C. Reg. 11609, Slip Op. 1487 at 8, PERB Case No. 9-A-05 (2014); *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. 925 at 11-12, PERB Case No. 08-A-01 (2012).

³⁷ *American Postal Workers* at 8.

³⁸ *Id.*

³⁹ *Id.*

Here, the Arbitrator found that the facts are undisputed. The Arbitrator found that, on October 11, 2013, MPD had notice of four arrests. The untimeliness of these four arrests is not in dispute. The fifth arrest occurred on February 21, 2014. The Arbitrator found all the arrests were matters of public record that would be discovered during the routine background investigation for “reinstates.”⁴⁰ The Arbitrator found MPD failed to complete the reinstatement process it began on October 11, 2013, until April 21, 2014, and then did not serve the NPAA until August 21, 2014.⁴¹ The Arbitrator examined the facts and found an undue delay. The Arbitrator therefor concluded that the single charge, which was constructed to include all five arrests, violated the 90-Day Rule and must be dismissed.⁴² The Arbitrator has the authority to resolve issues of fact including determinations regarding the credibility, significance, and weight of the evidence.⁴³ By agreeing to submit a grievance 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.”⁴⁴

In this case, MPD did not challenge whether the issue of the interpreting the 90-Day Rule was properly before the Arbitrator. The Arbitrator determined when the 90-day period began. The Arbitrator determined that MPD should have known about the fifth arrest as a part of its background investigation, and that MPD served the NPAA on the Grievant after the 90-day period expired.

MPD had the burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at a different result.”⁴⁵ The Board finds MPD’s arguments unpersuasive. Therefore, the Board declines MPD’s request to substitute the Board’s judgment in place of the bargained-for decision of the Arbitrator.⁴⁶

VI. Conclusion

The Board rejects MPD’s arguments and finds no cause to modify, set aside, or remand the Arbitrator’s Award. Accordingly, MPD’s request is denied.

⁴⁰ Award at 9.

⁴¹ Award at 9.

⁴² Award at 10.

⁴³ *DCDHCD v. AFGE Local 2725 AFL-CIO*, 45 D.C. Reg. 326, Slip Op. 527 at 2, PERB Case No. 97-A-03(1998). *AFSCME District Council 20 AFL-CIO v. D.C. General Hospital*, 37 D.C. Reg. 6172, Slip Op. 253, PERB Case No. 90-A-04 (1990).

⁴⁴ *FOP v. Dept. of Corrections* 59 D.C. Reg. 9798, Slip Op. 1271 at 2, PERB Case No. 10-A-20 (2012). See *MPD v. FOP/MPD Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633 at p. 3, PERB Case No. 00-A-04 (2000); *MPD v. FOP/MPD Labor Comm. ex rel. Fisher*, 51 D.C. Reg. 4173, Slip Op. 738, PERB Case No. 02-A-07 (2004).

⁴⁵ *MPD and FOP/MPD Labor Committee*, 47 D.C. Reg. 717, Slip Op. 633 at p. 2, PERB Case No. 00-A-04 (2000).

⁴⁶ *MPD v. FOP/MPD Labor Committee ex rel. Best*, 59 D.C. Reg. 12689, Slip Op. 1325 at 8, PERB Case No. 9-A-14 (2010).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department 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, Members Douglas Warshof, and Mary Anne Gibbons.

Washington, D.C.
July 18, 2019

Certificate of Service

This is to certify that the attached Decision and Order in PERB Case No. 19-A-06, Slip Op.1716, was sent by File and ServeXpress to the following parties on this the 25th day of July 2019.

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