Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Metropolitan Police Department	)	PERB Case No. 18-A-05
Petitioner	)	Opinion No. 1678
v.	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	
Respondent	)	

DECISION AND ORDER

I. Introduction

On December 6, 2017, the Metropolitan Police Department ("Department"), 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, seeking review of an Arbitrator's Opinion and Award ("Award"). The Department claims that the Award is, on its face, contrary to law and public policy.[1] The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Union") filed an Opposition to the Request, asserting that the Department has failed to state any grounds upon which the Board may modify or set aside the Award and that the Request should be dismissed.[2]

In accordance with the CMPA, the Board is permitted to modify or set aside 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.[3] Having reviewed the Arbitrator's conclusions, the pleadings of the parties and applicable law, the Board concludes

[1] Request at 2.
[2] Opposition at 2.
[3] D.C. Official Code § 1-605.02(6).

that the Award on its face is not contrary to law and public policy. Therefore, the Board denies the Department's Request.

II. Statement of the Case

On March 28, 2010, Officer Paul Lopez ("Grievant") was arrested for solicitation of prostitution. Superior Court granted the Grievant's request to complete a diversion program as a resolution of the criminal matter. On May 19, 2010, Grievant returned to court with proof that he completed the program and the court dismissed the criminal case against him.[4]

On May 27, 2010, an internal affairs officer learned that Grievant's driver's license had been suspended in 2009 and that the suspension was in effect at the time of his arrest.[5] On June 21, 2010, the D.C. Attorney General charged the Grievant with operating a vehicle after license suspension.[6] On September 23, 2010, Grievant was issued a notice of proposed adverse action with two charges. Charge No. 1 referred to the Grievant's March 28, 2010 arrest for solicitation of prostitution. Charge No. 2 referred to the traffic case for operating a vehicle on a suspended license.[7]

On May 17, 2011, an Adverse Action Panel found the Grievant guilty of all charges. The Panel recommended termination for Charge No. 1 and a thirty day suspension for Charge No. 2.[8] A Final Notice of Adverse Action was issued to the Grievant which stated that he should be removed from the Department, effective August 19, 2011.[9] The Union then initiated arbitration proceedings on behalf of the Grievant.

III. Arbitrator's Award

The Department seeks review of the Award based on the Arbitrator's decision with regard to one issue – whether the Department violated section 5-1031 of the D.C. Official Code ("the 90-day rule").[10] Section 5-1031(a) requires that the proposed adverse action should have been issued within 90 days of the date the Department had notice of the conduct giving rise to Charge No.1. The Arbitrator states that the 90-day period began to run on March 28 or 29, the date of the incident or the date the Grievant was charged, respectively.[11]

Section 5-1031(b) states that if the act constituting cause is the subject of a criminal investigation, then the 90-day period shall be tolled until the conclusion of the investigation. Section 5-1031(b) does not specify how the conclusion of any investigation is determined. The Department argued that the court's dismissal of the criminal charge on May 19, 2010, concluded

[4] Award at 2.
[5] Award at 2.
[6] Award at 3.
[7] Award at 3.
[8] Award at 4.
[9] Award at 1.
[10] Request at 13.
[11] Award at 7.

the investigation. The Union argued that the investigation concluded with the filing of the criminal charge on March 29, 2010.

The Arbitrator looked to an opinion and award by Arbitrator Kaplan. In that case, the arbitrator found that the investigation predated the date the criminal charges were filed.[12] Arbitrator Kaplan relied on *District of Columbia v. D.C. Office of Employee Appeals and Robert L. Jordan*[13] (hereafter "*Jordan*") which stated that the conclusion of a criminal investigation must involve action taken by an entity with prosecutorial authority and that action by the prosecutorial authority includes the review of evidence and the decision to charge an individual with a crime, or decide that charges should not be filed.[14] Arbitrator Kaplan's decision was appealed to the Board as contrary to law and public policy in *Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Duane Fowler)*[15] (hereafter "*Fowler*"). The Board concluded in *Fowler* that although *Jordan* was not persuasive authority with respect to section 5-1031(b), Arbitrator Kaplan did not act contrary to law and public policy.[16]

In this case, the Arbitrator states that it is not unreasonable to infer that the investigation was completed when the criminal charge was issued, on March 29, 2010.[17] According to the Arbitrator there is no basis in the record to make a factual determination that the investigation continued beyond that date.[18] Based on this finding, the Arbitrator concluded that Charge No.1 was issued more than 90 days after the Department became aware of Grievant's misconduct. The Arbitrator dismissed Charge No. 1 as untimely.[19]

The Arbitrator reversed the termination and ordered Grievant to be reinstated, in addition to ordering the Department to issue back pay and benefits that would have accrued to Grievant had he not been terminated.

IV. Discussion

A. Timeliness of a Request for Review

The Union argues that the Department's request for review of the Award is untimely.[20] Pursuant to Board Rule 538.1, a request for review of an arbitration decision must be filed with the Board no later than twenty-one (21) days after service of the award. The Union relies on previous Board decisions that stated: "Board rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or

[12] Award at 8. *See Arbitration Opinion and Award* in FMCS Case No. 16-53471-A at p.16 (Arbitrator Roger P. Kaplan) (March 17, 2017).
[13] 883 A.2d 124 (D.C. 2004).
[14] Award at 8.
[15] 64 D.C. Reg. 10115, Slip Op. No. 1635, PERB Case No. 17-A-06 (2017).
[16] *Id*. at 12.
[17] Award at 9-10.
[18] Award at 10.
[19] Award at 10.
[20] Opposition at 8.

exception for extending the deadline for initiating an action."[21] The Board has stated that the 21-day period for filing a review of an arbitration award begins to run the day after the event. In addition, 5 more days must be added for service by mail. The Union concludes that the last day to file the arbitration review request was on Monday, December 4, 2017.[22] The Department did not file the Request until December 6, 2017. The Union argues that the Request is untimely and it must be dismissed.

The Department attributes the two-day delay in filing on its miscalculation of the time period within which to file the Request.[23] The Department received the Award on November 16, 2017, with no certificate of service. Since the Award was mailed from Arlington, Virginia, the Department assumed that the Award was mailed no earlier than November 13, 2017. Five additional days are added to the date of service when service is by mail.[24] The Department concluded that the Request would be due on December 11, 2017.[25] Upon further investigation, the Department found that the envelope was post-marked November 6, 2017.[26]

The Board stated in *Jenkins v. Department of Corrections*[27] that "we overrule our prior holdings that filing deadlines established by the Board's rules are mandatory and jurisdictional. Those rules are claim-processing rules and the deadlines they set are waivable."[28] The 21-day deadline is not in the CMPA, nor is it in any other statute; it is in Rule 538.1, a rule adopted by the Board. This is a claim processing rule. The Court of Appeals has found, and the Board has agreed, that deadlines set by claim processing rules may be relaxed or waived.[29] The Board may relax the deadline to allow a case to proceed despite untimely service if there is good cause as to why it should not be dismissed. The two-day delay in filing was the result of a miscalculation and the lack of a certificate of service; it did not prejudice either party. The Board finds the Department's untimely filing in this case does not require dismissal.

B. 90-Day Rule

The Department argues that the Arbitrator acted contrary to law and public policy. The Arbitrator did not cite any binding precedent for the decision and only relied on one arbitration decision, Arbitrator Kaplan's award, to conclude that the Department violated the 90-day rule.[30] The Department's evidence that a criminal investigation was ongoing was the simple fact that the criminal case pending in D.C. Superior Court had not concluded.[31] The Department looks to *Jordan*, where the Court of Appeals addressed a previous statute similar to section 5-1031(b). In that case, the Court of Appeals stated that the conclusion of a criminal investigation "must

[21] Opposition at 8.
[22] Opposition at 9.
[23] Request at 3.
[24] PERB Rule 501.4.
[25] Request at 3.
[26] Request at 3.
[27] 65 D.C. Reg. 4046, Slip Op. No. 1652, PERB Case No. 15-U-31 (2018).
[28] *Id*. at 10.
[29] *Id.* at 11(*citing Neill v. D.C. Pub. Emp. Relations Bd.*, 93 A.3d 229, 238 (D.C. 2014)).
[30] Request at 14.
[31] Request at 14.

involve action taken by an entity with prosecutorial authority – that is, the authority to review evidence, and to either charge an individual with commission of a criminal offense, or decide that charges should not be filed."[32] Contrary to Arbitrator Kaplan's analysis, the court did not mean that the U.S. Attorney's office concludes a criminal investigation when it decides to charge an individual with the commission of a criminal offense. As the Board has acknowledged, the court in *Jordan* was explaining what is meant by "prosecutorial authority" and that only an entity with prosecutorial authority could take an action that would conclude a criminal investigation.[33]

The Department looks to section 22-721(3) of the D.C. Official Code to further define "criminal investigation." This section of the D.C. Official Code applies to Subchapter III of Chapter 7 of Subtitle I (Criminal Offenses) of Title 22 (Criminal Offense and Penalties). A criminal investigation is defined as "an investigation of a violation of any criminal statute in effect in the District of Columbia."[34] The same subchapter states that "criminal investigator" also includes a prosecuting attorney conducting or engaged in a criminal investigation. The Department argues that, if a criminal case is pending against an individual for the violation of any criminal statute in the District of Columbia, and the criminal investigator includes a prosecuting attorney, then a "criminal investigation" does not conclude until the dismissal of the case.[35] The Department concludes that the Arbitrator acted contrary to law and public policy when he found that the criminal investigation concluded before the dismissal of the criminal case.

The Union argues the Department's challenge is nothing more than a disagreement with the Arbitrator's findings.[36] There is nothing in section 5-1031(b), *Jordan*, or Arbitrator Kaplan's award which states that the 90-day period is tolled until the conclusion of the criminal case. The D.C. Official Code provides only that the 90-day rule shall be tolled until the conclusion of the criminal investigation. The Union argues that both the plain language of the statute and the case law are contrary to the Department's argument that the investigation against the Grievant did not end until his case was formally dismissed by D.C. Superior Court.[37] The Department failed to meet its burden of proving circumstances that tolled the statute of limitations.[38]

The issue before the Board is whether the Arbitrator acted contrary to law and public policy. Section 5-1031(b) establishes when the 90-day period is tolled:

> If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office

[32] *Jordan*, 883 A.2d 124 at 128.
[33] Request at 16.
[34] Request at 16.
[35] Request at 17.
[36] Opposition at 9.
[37] Opposition at 13.
[38] Opposition at 14.

> of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

The statute does not further explain how an investigation is concluded. The Board has previously stated that the *Jordan* court's interpretation of the predecessor to section 5-1031(b) is not persuasive because the court's decision governed a different statute than the one at issue.[39] The Board also said, in *Fowler*, that nothing in *Jordan* or the statute states that the period of limitation is tolled until the dismissal of the criminal case.[40]

It is insufficient to show that the Arbitrator misinterpreted the precise holding of a case governing a different statute. The Department must show that the Arbitrator misinterpreted the law.[41] The Board has stated that proof of a subsequent investigative activity might compel a conclusion that the criminal investigation did not conclude.[42] The Department does not present any additional proof that the investigation was ongoing. Instead, the Department states that its evidence that a criminal investigation was ongoing was the simple fact that the criminal case pending in D.C. Superior Court had not concluded.[43] Although the Department concedes that there are "virtually no cases that clarify the language in section 5-1031(b)," it states that the Arbitrator's refusal to accept its rival interpretation of the meaning of 5-1031(b) is contrary to law and public policy. In order for the Board to find 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.[44] The Department has failed to show that the Arbitrator's disposition of Charge No. 1 is contrary to law and public policy. This is the bargained-for interpretation of the statute and the Board may not modify or set aside the Award because the Department offers a different interpretation of section 5-1031(b).[45]

V. Conclusion

The Board rejects the Department's arguments and finds no cause to set aside or modify the Arbitrator's Award. Accordingly, the Department'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.

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[39] *See D.C. MPD v. FOP/MPD Labor Comm. (on behalf of Sims)*, 60 D.C. Reg. 9201, Slip Op. No. 1390 at 9, PERB Case No. 12-A-07 (2013).
[40] 64 D.C. Reg. 10115, Slip Op. No. 1635 at 10, PERB Case No. 17-A-06 (2017).
[41] *Id*. at 13.
[42] *Id*.
[43] Request at 14.
[44] See *Fraternal Order of Police v. D.C. Pub. Emp. Relations Bd.*, 2015 CA 006517 P(MPA) at p. 8.
[45] *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).

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 Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

Washington, D.C.

August 16, 2018

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-05, Op. No. 1678 was transmitted to the following parties on this the 22nd day of August, 2018.

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