

comply with Slip Opinion 789. On November 21, 2011, the MPD filed a Motion for Reconsideration ("Motion") pursuant to PERB Rule 559.2.¹

The MPD's Motion is before the Board for disposition.

II. Discussion

A. Background

In the original Grievance from which this case arises, five members of the MPD, Pablo Figueroa, Brian Murphy, Donald Yates, John Brennan and Curtis Sloan alleged that they were "assigned" to the positions of Detective Sergeant without the stipend of \$595.00 per annum allegedly required by D.C. Code Sec. 543-02(c). On December 12, 2003, they filed a group grievance against the MPD with the Chief of Police. The Chief denied the Grievance on December 29, 2003. On April 23, 2004, a hearing was conducted. On May 23, 2004, the parties filed post hearing briefs. Ultimately, arbitration was invoked. On July 9, 2004, the Arbitrator issued the Arbitration Award.

The MPD subsequently filed a Request seeking review of the Award which upheld the timeliness of the FOP's underlying group grievance and awarded the five grievants the status of Detective Sergeant pursuant to D.C. Code §5-543.02(c) and back pay of \$595.00 retroactive to the date that each grievant was assigned to the position of Detective Sergeant. The Award applied to all similarly situated employees as described in the grievance.

On September 30, 2005, PERB issued its Decision and Order denying MPD's request for review. (See PERB Case No. 04-A-18). Following PERB's denial of the Request, MPD did not invoke its right to file a petition for review in District of Columbia Superior Court. Further, MPD failed to comply with the terms of the Arbitration Award.

On April 21, 2006, FOP filed a Motion to Confirm the Arbitration decision in D.C. Superior Court in order to enforce the Arbitration award. The Motion was confirmed by Judge Terrell. MPD appealed the confirmation to the D.C. Court of Appeals which set aside Judge Terrell's Order confirming the Arbitration award. The Court ruled, in part, that the FOP needed to exhaust its remedies with PERB before proceeding to Superior Court. (See District of Columbia Court of Appeals No. 08-CV-1590, June 25, 2010.)

On January 12, 2011, FOP filed a Petition for Enforcement of Order with PERB; on January 31, 2011, MPD filed an Opposition to Petition for Enforcement of Order.

¹ The Board's Decision and Order shall not become final if any party files a motion for reconsideration within ten (10) days after issuance of the decision, or if the Board reopens the case on its own motion within ten (10) days after issuance of the decision, unless the order specifies otherwise

In the MPD's Opposition to Petition for Enforcement, it relied on the doctrine of Laches² (See Opposition to Petition for Enforcement, p.3) and two previous PERB decisions: Slip Opinion No. 162 and Slip Opinion No. 191.

In Slip Opinion No. 789, the Board found that MPD's Request for Review did not meet the requirements for reversing the Arbitrator's Award. MPD had the burden to specify applicable law and definite public policy that mandated that the Arbitrator reach a different result.³ The Board found that the MPD failed to do so. The Board disagreed with the MPD that the Arbitrator's Award was contrary to law and public policy when it concluded that the grievants did, in fact, timely file. (See Decision and Order at p.4). The Board found that the Arbitrator correctly identified the occurrence giving rise to the grievance as the discovery by Sgt. Figueroa of the relevant statute (See D.C. Code §5-543.02 (c)) and, thus, the MPD's violation. The Board also agreed with the Arbitrator that the issue of pay is a continuing one. Therefore, the Board did not agree with the MPD that the grievance must be tied to the 10-day grievance-filing period of Article 19 of the Collective Bargaining Agreement. Further the Board did not find that the back pay award to the grievants was an improper modification of the CBA and therefore contrary to law and public policy. The Board did not conclude that Article 19 constituted an express restriction on the Arbitrator's authority, thus the Board found that the Arbitrator acted within his authority. (See Slip Op. 789 at p.3.)

On January 12, 2011, the FOP filed a Petition for Enforcement with the Board. FOP contended that MPD had failed to comply with Slip Op. No. 789. Specifically, FOP asserted that despite the Board's denial of MPD's Request, MPD did not provide the grievants with their back pay as required by the Award. FOP requested that the Board enforce Slip Op. No. 789 and compel MPD to comply with the terms of the Arbitrator's Award.

Board Rules 560. 1 provides in relevant part as follows:

560.1 – Enforcement

If any party fails to comply with the Board's decision within the time period specified in Rule 559.1, the prevailing party may petition the Board to enforce the order.

In its Opposition to Petition for Enforcement, the MPD asserted the doctrine of Laches, citing PERB Case Nos. 162 and 191. In Slip Opinion No. 1216, the Board distinguished this case from Slip Opinion Nos. 162 and 191 in several ways. First, in both cases upon which MPD relied, the doctrine of Laches was asserted because the Complainants failed to file their Complaints in a timely manner. Complainant in Slip Opinion No. 162, Ms. Irene Wilkes, waited

² As cited in PERB Slip Opinion No. 162 citing *Black's Law Dictionary*, 4, Ed. Rev. (1968): "conduct of (a) party which has placed (the) other party in a situation where his rights will be imperiled and his defenses embarrassed..."

³ See *D.C. Housing Authority and American Federation of Government Employees*, Slip Op. No. 738 at 4, PERB Case No. 02-A-07 (1997).

approximately one year and 3 months from the date of the occurrence giving rise to the alleged violation before filing a Standards of Conduct complaint. The Complainant in Case No. 191, Mr. James Monroe, waited four years from the date of the triggering occurrence before filing a Standards of Conduct complaint. As the Board noted (See Slip Opinion No. 1216), the Complainants filed a grievance as soon as they learned of the relevant statute and the MPD's alleged violation. Thus, the grievance began a series of regular filings from that of the original grievance until the Petition for Enforcement.

On November 4, 2011, PERB issued Slip Opinion No. 1216 granting the FOP's Petition and ordering the MPD to comply with Slip Opinion No. 789 which denied MPD's request for review of the Arbitrator's Award.

B. Motion for Reconsideration

In its current Motion for Reconsideration, the MPD abandons the doctrine of Laches which it used to defend its alleged failure to comply with PERB Slip Opinion No. 789 and now asserts that it had, in fact, complied with the PERB Decision and Order. The Board finds that the use of the Laches doctrine was an implicit acknowledgement of the MPD's failure to comply with the Arbitration Award and Slip Opinion No. 789. The Complainants cannot have asserted that they were not obligated to comply with the Award and PERB Slip Opinion No. 789 and then, in response to an enforcement order, suddenly claim compliance.

The MPD includes in its present Motion an affidavit from Keely Williams, the payroll Operations Manager for the Public Safety and Justice Cluster, and printouts from what is identified as the Supplemental Research System indicating that certain individuals were issued back pay in 2007. (See Affidavit of Keely Williams in Motion for Reconsideration.)

The Board notes that the MPD raised this new issue and added to the factual record information that was not previously submitted in their filings with PERB, the District of Columbia Superior Court and the District of Columbia Court of Appeals. The Board has held that "we will not permit evidence presented for the first time in a motion for reconsideration to serve as a basis for reconsidering...when the [Complainant] failed to provide any evidence at the afforded time." *Mack, Simmons, Lee and Ott v. Fraternal Order of Police/Department of Corrections Labor Committee*, 45 DCR 1472, Slip Op. No. 521 at p. 3, PERB Case No. 97-S-01 (1988). The affidavit from Keely Williams and the attached printouts were not presented to PERB prior to the Board issuing Slip Opinion No. 1216 ordering the MPD to comply with PERB Slip Opinion No. 789 affirming the Arbitration Award. Consequently the Board finds that the affidavit and attachment may not serve as a basis for reconsideration of the Board's order.

Consistent with Board precedent, the standard for a motion for reconsideration is clear legal error. The MPD has not alleged, with any particularity, any such clear legal error on the part of PERB in Slip Opinion No. 1216. As a result, the Board concludes that the MPD has failed to assert any grounds for the Board to reverse the Board's prior decision. See *White v. District of Columbia Department of Corrections and FOP/ DOC Labor Committee*, 49 DCR 8973, Slip Op. No. 686, PERB Case No. 02-U-15 (2002).

The Board denies the MPD's Motion for Reconsideration and affirms the Board's previous decision and order.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The District of Columbia Metropolitan Police Department's Motion for Reconsideration is denied.
- (2) Pursuant to Board Rule 559.1, the Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.**

December 19, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 11-E-01 are being transmitted via Fax and U.S. Mail to the following parties on this the 21st day of December, 2011.

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