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

)	
In the Matter of:)	
)	
Metropolitan Police Department)	
)	PERB Case No. 18-A-16
Petitioner)	
)	Opinion No. 1708
v.)	
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Background

On April 6, 2018, the Board issued a Decision and Order in PERB Case No. 18-A-02 (“Slip Opinion No. 1662”). The Board found that the Arbitrator acted contrary to law and public policy by allowing the Metropolitan Police Department (“Department”) to increase the Adverse Action Panel’s recommended penalty.¹ The Board reversed and remanded the Award to the Arbitrator. The Arbitrator issued an Opinion and Award on Remand (“Remand Award”) consistent with the decision of the Board. On August 12, 2018, the Department filed this arbitration review request (“Request”) pursuant to the Comprehensive Merit Personnel Act (“CMPA”), D.C. Official Code § 1-605.02(6), seeking review of the Remand Award. The Department claims that the Remand Award is, on its face, contrary to law and public policy. The Fraternal Order of Police (“Union”) filed a timely Opposition to the Request. Having reviewed the Arbitrator’s conclusions, the pleadings of the parties and applicable law, the Board concludes that the Remand Award is not, on its face, contrary to law and public policy. Therefore, the Board denies the Department’s request.

II. Arbitrator’s Award

The Remand Award stated in full:

¹ *FOP/MPD Labor Comm.(on behalf of Kevin Whaley) v. MPD*, 65 D.C. Reg. 6435, Slip Op. No. 1662 at 5-6, PERB Case No. 18-A-02 (2018).

Pursuant to the Decision and Order of the Government of the District of Columbia, Public Employee Relations Board, dated March 23, 2018, remanding the arbitration for issuance of an Award consistent with the Board's Decision and Order, the following Award is issued.

AWARD

The Findings of Fact and Conclusions of Law and Recommendations of the Adverse Action Panel are confirmed and the penalty recommended by the Panel shall be imposed.²

III. Position of the Parties

A. Timeliness

The Department acknowledges that this appeal was filed past the twenty-one (21) day deadline required for an Arbitration Review Request.³ Although the Request is late, the Department argues that equitable tolling of the deadline applies in this case because the Board's rules are claim processing and there was good cause to justify the delay.⁴ The Department was not aware of the Remand Award at the time it was issued because it did not appear in the counsel's email inbox.⁵ Counsel only became aware of the Remand Award when a follow-up email was sent to the Arbitrator on July 22, 2018.⁶ The delay does not prejudice the other party and is devoid of bad faith.⁷ The Department requests the Board toll the deadline until July 22, 2018, when the Department actually received the Remand Award.⁸

The Union argues that the Request is untimely and should be dismissed.⁹ Regardless of whether Rule 538.1 is a claim processing rule, there still must be good cause in order for the 21-day deadline to be relaxed or waived. Despite the Department's claim that the delay has not prejudiced the Union, the four-month long delay has unnecessarily prolonged litigation for the grievant and if excused will result in longer delays rendering PERB Rule 538.1 meaningless.¹⁰

B. Remand Award

The Department claims that the Remand Award is contrary to law and public policy because a court must uphold an arbitrator's decision which draws its essence from the collective bargaining agreement.¹¹ Even if the Arbitrator has misinterpreted the relevant law in his determination of whether the collective bargaining agreement was violated, the parties are bound

² Request at 14.

³ Request at 3.

⁴ Request at 3.

⁵ Request at 5.

⁶ Request at 5.

⁷ Request at 5.

⁸ Request at 5.

⁹ Opposition at 10.

¹⁰ Opposition at 11.

¹¹ Request at 14.

by the arbitrator's interpretation.¹² According to the Department, the Arbitrator's initial award drew its essence from the parties' collective bargaining agreement.¹³ The conception of the Remand Award is contrary to the law and public policy that as long as the arbitrator's decision draws its essence from the collective bargaining agreement, it must stand.¹⁴

The Union first argues that the Request should be dismissed because it is actually a motion for reconsideration. The Board's Decision and Order did not require the arbitrator to make any additional factual findings or legal conclusions. The Department referred to the analysis in Slip Opinion No. 1662 to explain the Arbitrator's Remand Award. There is no dispute that the Department received Slip Opinion No. 1662 on April 6, 2018. A motion for reconsideration of a Board decision must be filed within 14 days.¹⁵ The Union argues that since this Request is in essence a motion for reconsideration and it was filed well after 14 days of receiving the Board's decision in Slip Opinion No. 1662 it is untimely.¹⁶

Finally, the Union argues that the Remand Award did not, on its face, violate law or public policy.¹⁷ The Board correctly determined that the Arbitrator's Award was directly at odds with the legal and regulatory framework that controls adverse actions cited by the Arbitrator.¹⁸ Limitations set forth in the District of Columbia Municipal Regulations ("DCMR") control what the Department can and cannot do after it receives a recommendation from the Panel. According to the Union, the Board correctly found that there was a well-defined public policy underlying the statutory framework of DCMR 6-A § 1001.5 and 6-B DCMR § 1623.2.¹⁹

IV. Discussion

The Board's authority to review an arbitration award is narrow. The Board is permitted to modify or set aside an arbitration award "only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means."²⁰ For the Board to find the Remand 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.²¹

A. Timeliness

Despite the Department's untimely filing of this Request, Board Rule 520.4 is waived and the Request may move forward. The Board stated in *Jenkins v. Department of Corrections*²²

¹² Request at 16.

¹³ Request at 15.

¹⁴ Request at 16.

¹⁵ Opposition at 12.

¹⁶ Opposition at 12.

¹⁷ Opposition at 12.

¹⁸ Opposition at 13.

¹⁹ Opposition at 14.

²⁰ D.C. Official Code § 1-605.02(6)

²¹ See *Fraternal Order of Police v. D.C. Pub. Emp. Relations Bd.*, 2015 CA 006517 P(MPA) at p.8.

²² 65 D.C. Reg. 4046, Slip Op. No. 1652, PERB Case No. 15-U-31 (2018).

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.”²³ The 21-day deadline is found in Rule 520.4. It is not in the CMPA or in any other statute. It is a claim-processing rule. The Board may relax the deadline to allow a case to proceed despite untimely filing if there is good cause as to why it should not be dismissed. Although the Remand Award was emailed to the representatives on April 12, 2018, the Department did not receive the Remand Award until July 22, 2018 due to a technical error.²⁴ The 21-day deadline begins to run after service of the award. Because the Remand Award was not properly served on the Department until July 22, 2018, Rule 520.4 is waived, and the Request will be treated as timely.

B. The Remand Award

The Remand Award is not contrary to law and public policy. In Slip Opinion No. 1662, the Board found that there was a misinterpretation of law by the Arbitrator on the face of the Award. The Arbitrator acted contrary to the plain meaning of 6-A DCMR section 1001.5, 6-B DCMR section 1623.2, and the Board’s precedent as established by *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on Behalf of Dunkins)*.²⁵ As a result, the Award was remanded to the Arbitrator to issue an award consistent with the decision.²⁶ The Arbitrator then issued the Remand Award which stated that the penalty imposed by the panel shall be imposed. Rather than meet its burden of proof regarding the Remand Award, the Department’s Request responds to the Board’s decision in Slip Opinion No. 1662 and argues why the Arbitrator’s initial Award was not contrary to law and public policy. As stated earlier, for the Board to find the Remand 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.²⁷ At no point does the Department show the applicable law and public policy that was violated by the Arbitrator’s Remand Award.

The Department’s argument that the Arbitrator’s initial Award draws its essence from the collective bargaining agreement does not override the Board’s determination that it is contrary to law and public policy. The Board has stated that just as it defers to the arbitrator’s interpretation of the contract “the Board must also defer to the arbitrator’s interpretation of external law incorporated into the contract.”²⁸ This deference exists because, through the parties’ collective bargaining agreement, the arbitrator has the sole authority to interpret the contract and the arbitrator maintains this authority even when contract interpretation requires the arbitrator to

²³ *Id.* at 10.

²⁴ In a companion case, PERB Case No. 18-U-33, an exhibit shows that the Department’s Director, Mark Viehmeyer, was cc’ed in a July 2, 2018, email detailing the Arbitrator’s decision in the Remand Award. Since this Arbitration Review Request was filed by the Attorney General’s Office and we have no exhibits showing when the Attorney General’s Office received the Remand Award, we are accepting the date provided by the Complainant.

²⁵ 60 D.C. Reg. 566, Slip Op. No. 1344, PERB Case No. 12-A-06 (2013).

²⁶ *FOP/MPD Labor Comm. v. MPD*, 65 D.C. Reg. 6435, Slip Op. No. 1662, PERB Case No. 18-A-02 (2018).

²⁷ See *FOP v. D.C. Pub. Emp. Relations Bd.*, 2015 CA 006517 P(MPA) at p.8.

²⁸ *FOP/Dep’t of Corr. Labor Comm. (on behalf of Lee) and D.C. Dep’t of Corr.*, 59 D.C. Reg. 10952, Slip Op. No. 1324 at 5, PERB Case No. 10-A-16 (2010).

interpret law that is incorporated by reference.²⁹ The Board has previously stated that, when the collective bargaining agreement is not at issue, the arbitrator's sole authority to interpret the collective bargaining agreement cannot be extended to the law.³⁰ In this case, the Department is not claiming that an interpretation of 6-A DCMR section 1001.5 and 6-B DCMR section 1623.2 is required to clarify the collective bargaining agreement. In their briefs, the parties discuss the law alone and do not refer to any specific portion of their collective bargaining agreement. Therefore the Arbitrator's sole authority to interpret the collective bargaining agreement does not extend to encompass the pertinent law in this case.

V. Conclusion

The Board rejects the Department's arguments and finds no grounds to modify, set aside, or remand the Remand Award. Accordingly, the Department's Arbitration Review Request is denied and the matter is dismissed in its entirety with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is hereby denied.
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 Ann Hoffman, Mary Anne Gibbons, Barbara Somson, and Douglas Warshof.

April 18, 2019

Washington, D.C.

²⁹ *Electrolux Home Prods. v. United Auto., Aerospace, & Agric. Implement Workers*, 416 F.3d 848, 853 (8th Cir. 2005) (citing *Am. Postal Workers Union v. U.S. Postal Serv.*, 789 F.2d 1, 6 (D.C. 1986)).

³⁰ *MPD v. FOP/MPD Labor Comm.*, 64 D.C. Reg. 10115, Slip Op. No. 1635 at 7, PERB Case No. 17-A-06 (2017).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-16, Op. No. 1708 was sent by File and ServeXpress to the following parties on this the 22nd day of April, 2019.

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