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

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In the Matter of: )  
Fraternal Order of Police/ )  
Metropolitan Police Department Labor )  
Committee, ) PERB Case No. 15-A-12  
Petitioner, ) Opinion No. 1595  
and )  
Metropolitan Police Department, )  
Respondent. )  
)

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**DECISION AND ORDER**

**I. Introduction**

Based on a remand from the D.C. Superior Court, the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”) filed this Arbitration Review Request (“Request”) seeking review of the arbitration award (“Award”) that found that while the Metropolitan Police Department (“MPD”) failed to commence an adverse action against Sergeant Best within 90 days of when it knew or should have known of his alleged misconduct, MPD’s failure to act was *de minimis*. The issue before the Board is whether the Award on its face is contrary to law and public policy.

For the reasons stated herein, FOP’s Request for Review is denied.

## II. Background

Sergeant Best was assigned to MPD's Domestic Violence Unit.<sup>1</sup> He also was approved for outside employment as a part-time security officer with Andrews Federal Credit Union ("AFCU").<sup>2</sup> On August 1, 2006, Sergeant Michael Coligan, an Outside Employment Monitor for MPD, visited AFCU to conduct a "site inspection."<sup>3</sup> Sergeant Coligan found that Sergeant Best had worked more than 32 hours in a week, a violation of General Order 201.17.<sup>4</sup> The inspection also revealed inconsistencies between Sergeant Best's MPD time records and his AFCU time cards.<sup>5</sup> The Internal Affairs Division ("IAD") initiated a criminal investigation which confirmed that Sergeant Best violated the General Order and had defrauded the District of almost \$2,000.00.<sup>6</sup> On September 8, 2006, MPD referred the case to the U.S. Attorney's Office (USAO). However, because the amount that Sergeant Best fraudulently received was modest, the USAO declined prosecution.<sup>7</sup>

Subsequently, Sergeant Best's Supervisor, Lieutenant Michelle Robinson, commenced an administrative investigation into the violation.<sup>8</sup> In response to Lieutenant Robinson's request to submit a timecard for a particular week, Sergeant Best produced a timecard on which certain dates had been whited out.<sup>9</sup> Lieutenant Robinson obtained a duplicate timecard that revealed additional inconsistencies.<sup>10</sup> On January 18, 2007, MPD served Sergeant Best a Notice of Adverse Action for "Conduct Unbecoming an Officer and Untruthful Statements."<sup>11</sup> The Notice of Adverse Action for a 30-day suspension was served on the Grievant on January 18, 2007.<sup>12</sup> A grievance was filed by the FOP and the case was advanced to arbitration.

In August 2009, the Arbitrator, Gregory Murad, determined that MPD violated D.C. Official Code § 5-1031 by one (1) day when it failed to initiate adverse action against Sergeant Best for the alleged misconduct within 90 days of when it knew or should have known of the conduct.<sup>13</sup> In light of the violation of the 90-day rule, the Arbitrator directed that the 30-day suspension be removed from his personnel file and that he be compensated for the time lost.<sup>14</sup> In December 2009, MPD filed an arbitration review request of that award and on August 30, 2012, the Board upheld the award.<sup>15</sup>

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<sup>1</sup> Award at 3.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; Request at 5 ("General Order 201.17 states that officers may work 32-hours of authorized outside employment per week...").

<sup>5</sup> Award at 3.

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

<sup>7</sup> *Id.*

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

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

<sup>10</sup> *Id.* at 3-4.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> Request Ex. 5 at 2.

<sup>13</sup> Award at 1.

<sup>14</sup> *Id.* at 1, 4.

<sup>15</sup> *Id.* at 1; See *MPD v. FOP/MPD Labor Comm.*, 59 D.C. Reg. 12689 (2012), Slip Op. 1325, PERB Case No. 09-A-14 (2012).

MPD then appealed to the D.C. Superior Court.<sup>16</sup> The Superior Court determined that the statute, D.C. Official Code § 5-1031, was directory and not mandatory and, therefore, the Board erred in upholding the Arbitrator's Award, and remanded the case to PERB.<sup>17</sup> The Superior Court directed the Board to apply the balancing test established in *JBG Properties* to determine whether the one-day delay by MPD to propose discipline to Sergeant Best was a *de minimis* violation.<sup>18</sup>

On remand, the Board sent the matter back to the Arbitrator and ordered him "...to consider whether MPD's actions were a *de minimis* violation of the statutory time limits. If the Arbitrator determines that the Agency has met its burden that the violation was *de minimis*, then the Arbitrator should proceed to a decision on the grievance's merits."<sup>19</sup> Thereafter, a second arbitration was held before Arbitrator Murad on April 15, 2015.<sup>20</sup>

A second hearing was held in the case and the Arbitrator determined, with respect to the specific issue remanded by the Court, that MPD's failure to commence an adverse action against Sergeant Best within 90 days after the date that MPD knew or should have known of the act allegedly constituting cause as required by the D.C. Official Code was *de minimis*.<sup>21</sup> Applying the balancing test in *JBG Properties*, he found that Sergeant Best was not prejudiced by MPD's failure to comply with the 90-day rule and "was not hurt in any way by the delay."<sup>22</sup> The Arbitrator also found that the public interest is "well-served in this matter" given that "[t]he public expects that police officers are to be held to a higher standard when it comes to any misconduct and should be beyond reproach."<sup>23</sup> Therefore, the Arbitrator concluded that MPD was not prohibited by the 90-day rule from proceeding with either of the charges set forth in the Notice of Proposed Adverse Action against Sergeant Best.<sup>24</sup>

The Arbitrator then addressed both charges against Office Best: "Conduct Unbecoming and Untruthful Statements". Based on the evidence, the Arbitrator found that MPD had not proven its charge of "Conduct Unbecoming" and set aside the 15-day suspension on that charge. As for the charge of "Untruthful Statements", the Arbitrator found that Sergeant Best willingly and knowingly provided misleading or inaccurate information to his superior.<sup>25</sup> Based on this finding, the Arbitrator upheld the 15-day suspension on that charge.<sup>26</sup>

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<sup>16</sup> Award at 1.

<sup>17</sup> *MPD v. PERB*, No. 2012 CA 007805 P. (MPA), at 6 (D.C. Sup. Ct. July 17, 2014).

<sup>18</sup> *Id.*; See *JBG Properties v. D.C. Office of Human Rights*, 364 A.2d 1183 at 1187 (D.C. 1976) (establishing a balancing test as follows: (1) whether there is potential for an actual existence of prejudice to the appellant and (2) the public and private interests in allowing the Office to pursue the investigation).

<sup>19</sup> Award at 2; See *MPD v. FOP/MPD Labor Comm.*, 61 D.C. Reg. 11295 (2014), Slip Op. 1491, PERB Case No. 09-A-14(R) (2014).

<sup>20</sup> Award at 2.

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

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

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

<sup>24</sup> The Arbitrator states that, "...based on the balancing test of *JBG Properties*, any violations of the 90 Day Rule were *de minimis*." (emphasis added). *Id.*

<sup>25</sup> *Id.* at 25.

<sup>26</sup> *Id.* at 26.

FOP filed this Arbitration Review Request, seeking to have the Award reviewed on the ground that it is contrary to law and public policy.<sup>27</sup> MPD opposed this request.

### III. Discussion

The Board has limited authority to review an arbitration award. In accordance with D.C. Official Code § 1-605.02(6), the Board is permitted 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>28</sup>

In its request, FOP argues that (1) the plain language of the 90-day rule is mandatory and not directory, and as set forth in *JBG Properties*, which is only applicable to directory statutes, does not apply to the 90-day rule;<sup>29</sup> (2) the 90-day rule is mandatory because the legislative history indicates that the rule was set to prevent investigatory abuses that occurred in the absence of a mandatory deadline;<sup>30</sup> and (3) the violation of the 90-day rule was not *de minimis* because the D.C. Superior Court implied that even a ten-day violation of the 90-day rule would not be *de minimis*.<sup>31</sup>

The Board finds that FOP's request is merely a dispute of the Arbitrator's evidentiary findings and conclusions. FOP's first two arguments that the 90-day rule is mandatory are simply a reiteration of its arguments presented to the Arbitrator and ignore the directives of the Superior Court and of the Board on remand in this case. As previously noted, the D.C. Superior Court and PERB determined that the 90-day rule is directory, not mandatory, and instructed the Arbitrator to apply this standard.<sup>32</sup> Accordingly, the Arbitrator's finding that the 90-day rule is directory is consistent with current Board precedent and the Superior Court's interpretation of the statute.

The Board also finds no merit to FOP's third objection made above. To support its contention that MPD's violation of the 90-day rule was not *de minimis*, FOP cites to the Superior Court decision in this matter where, according to FOP, the Superior Court implied that even a ten-day violation of the 90-day rule would not be *de minimis*.<sup>33</sup> However, the Superior Court made no such implication. In fact, the court stated in its decision that there "...is certainly a line at which a delay is no longer *de minimis*, however, it is not necessary for the Court to determine

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<sup>27</sup> Request at 11.

<sup>28</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).

<sup>29</sup> Request at 11.

<sup>30</sup> *Id.* at 15-16.

<sup>31</sup> *Id.* at 17.

<sup>32</sup> *MPD v. PERB*, No. 2012 CA 007805, at 6; *MPD v. FOP/MPD Comm.*, 61 D.C. Reg. 11295 (2014), Slip Op. 1491 at 5, PERB Case No. 9-A-14(R) (2014).

<sup>33</sup> The language in question from the Superior Court states, "The PERB contends "that a 'slight delay' of one day can easily become ten days, and ten days can become three years." Resp't Br. at 24. This slippery slope argument is hyperbolic and illogical; no party in this case is suggesting that a three-year delay, or even a ten-day delay, would constitute a *de minimis* violation." Request at 17.

that line in this matter.<sup>34</sup> The Board finds no support for FOP's reading of the Superior Court decision that implies that a ten-day delay is not *de minimis*.

FOP's Request constitutes only a disagreement with the Arbitrator's interpretation of the Superior Court's directive, the Board's Remand Order and the Arbitrator's application of the balancing test in *JBG Properties*. This disagreement is not a basis for the Board to overturn the Award. "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>35</sup> Therefore, the Board finds that FOP 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.

#### **IV. Conclusion**

The Board finds that FOP has not cited any specific law or public policy that was violated by the Arbitrator's Award. Thus, the Board rejects FOP's arguments and finds no cause to set aside or modify the Arbitrator's Award. Accordingly, FOP's 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 559.1, 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 Yvonne Dixon, Ann Hoffman, and Douglas Warshof.

September 22, 2016

Washington, D.C.

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<sup>34</sup> *MPD v. PERB*, No. 2012 CA 007805, at 7.

<sup>35</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).

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 15-A-12, Op. No. 1595 was sent by File and ServeXpress to the following parties on this the 30<sup>th</sup> day of September, 2016.

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