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

In the Matter of:)	
)	
District of Columbia)	
Metropolitan Police Department,)	PERB Case No. 16-A-19
Petitioner,)	
)	Opinion No. 1606
v.)	
)	
Fraternal Order of Police/)	
Metropolitan Police Department)	
Labor Committee,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Introduction

On August 16, 2016, the District of Columbia Metropolitan Police Department (“MPD”) filed an Arbitration Review Request (“Request”) in this matter, seeking review of the arbitration award (“Award”) that sustained a grievance filed by the Fraternal Order of Police/ Metropolitan Police Department Labor Committee (“FOP”). The Arbitrator determined that MPD violated D.C. Official Code § 5-1031(a), also referred to as the “90-day rule,” by failing to commence an adverse action against the Grievant within ninety days after the date that MPD knew or should have known of the act allegedly constituting cause.¹ The issue before the Board is whether the Award on its face is contrary to law and public policy.²

II. Statement of the Case

Officer Daxzaneous Banks (“Officer Banks” or “Grievant”) was called to testify in the matter of *United States v. Tyrone Knight*, 2007-CF2-7702, as the sole witness to a drug transaction. The case was originally set for trial at D.C. Superior Court on March 12, 2008, but then continued to March 20, 2008.³ On March 13, 2008, Officer Banks checked himself into court and listed *United States v. Tyrone Knight* as the reason for his appearance.⁴ On the following day, Sergeant Rene Davis (“Sgt. Davis”) of the Court Liaison Division interviewed

¹ D.C. Official Code § 5-1031(a) (from 16-a-01, op. 1590)

² D.C. Official Code § 1-605.02(6)

³ Request at 3.

⁴ *Id.*

Officer Banks, his supervisors as well as various Assistant United States Attorneys (AUSAs) and confirmed that Officer Banks had checked himself into court on a day when he was not supposed to be there.⁵ On April 22, 2008, AUSA Kent, who had spoken previously with Sgt. Davis, confirmed again that Officer Banks was not supposed to be checked in for court on March 13th.⁶ AUSA Lisa Baskerville-Greene reported in her April 23, 2008 statement that, as a result of the United States Attorney's Office ("USAO") not being able to account for the PD 140 (court attendance record), calling Officer Banks as a witness would now require certain disclosures to the Defense Attorney and/or the Court as his veracity was in doubt. AUSA Greene reported that as a result of this problem, the charges in *United States v. Tyrone Knight* were dismissed.⁷ A statement was made by Wendy Hardy, a Court Liaison Case Worker, on April 23, 2008 which referred to an IS number.⁸ According to the Union, an IS number is an indication of MPD's belief that some type of misconduct may have taken place.⁹ MPD does not dispute the fact that Ms. Hardy's statement recites on its face that the statement was being taken as part of an investigation.¹⁰ On May 6, 2008, the USAO issued a decline-to-prosecute letter.¹¹ There is no evidence in the record that MPD ever made a criminal referral to the USAO in this matter.

Officer Banks was served with a Notice of Proposed Adverse Action ("Notice") on September 9, 2008 proposing his removal from MPD.¹² The Notice charged Officer Banks with the following four charges and specifications:

Charge No. 1: Violation of General Order 120.21, Table of Offenses and Penalties Part A, #7, which reads, in part, "...or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report, or have reported their involvement to their commanding officers."

Specification No. 1: In that, on March 13, 2008, you submitted a PD 140 to Court Liaison Division checking yourself into court for 8 hours and 34 minutes on a continued trial that had not been scheduled for that day. Upon checking out of court, you submitted the PD 140, for which you were compensated for 8 hours and 34 minutes. Moreover, the AUSA who handled the case confirms that he did not sign your PD 140.

⁵ Award at 8.

⁶ *Id.* at 9.

⁷ *Id.*

⁸ *Id.* at 10.

⁹ *Id.*

¹⁰ *Id.* at 11.

¹¹ *Id.* at 10.

¹² *Id.* at 7

- Charge No. 2: Violation of General Order 120.21, Attachment A, Part A-12, which reads: “Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee’s or the agency’s ability to perform effectively, or violation of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia.”
- Specification No. 1: In that on March 13, 2008, you checked yourself into court for 8 hours and 34 minutes on a continued trial that was not scheduled for that day. You had prior knowledge that the matter was continued to March 20, 2008.
- Charge No. 3: Violation of General Order Series 120.21, Table of Offenses and Penalties Part A, #8, which states in part, “Inefficiency as evidenced by repeated and well-founded complaints from superior officers, or others, concerning the performance of police duty, or the neglect of duty.”
- Specification No. 1: AUSA Greene reported in her April 23, 2008 statement that, as a result of the USAO not being able to account for the PD 140 that you submitted on March 13, 2008, serious veracity issues on your part were raised. Calling you as a witness would now require certain disclosure to the Defense Attorney and/or the Court. AUSA Greene reported that as a result of these issues, the USA dismissed the charges in the United States v. Tyrone Knight.
- Charge No. 4: Violation of General Order Series [120.21], Table of Offenses and Penalties, Part A (17), which states, “Fraud in securing appointment, or falsification of official records or reports.”
- Specification No. 1: In that on seven (7) occasions between July 2 – November 13, 2007; and three (3) occasions between January 15- March 13, 2007, you falsified signatures of several AUSAs on you PD 140s during the above mentioned time frames. Furthermore, all AUSAs denied signing your PD 140s for the dates listed. You affixed these signatures knowing them to be improper and fraudulent.¹³

An Adverse Action Panel (“the Panel”) found Officer Banks guilty of Charge Nos. 1-3 and not guilty of Charge No. 4.¹⁴ The Panel recommended Officer Banks be removed from his

¹³ *Id.* 6-7

¹⁴ *Id.* at 7

position at MPD. Officer Banks was served with a Final Notice of Adverse Action on May 7, 2009. Officer Banks and FOP brought a demand for arbitration to challenge his removal.¹⁵

III. Arbitrator's Award

During Arbitration, FOP asserted that the Notice of Proposed Adverse Action, served on September 9, 2008, was ninety-six days after April 23, 2008. The Union argued that MPD failed to adhere to the 90-day rule and therefore the Panel's decision to remove Officer Banks from his position should be set aside and the charges dismissed.

MPD claimed that the 90-day time limit began to run on May 6, 2008, the date when the USAO issued a decline-to-prosecute letter. This, according to MPD, would make the Notice of Proposed Adverse Action timely. MPD argued that on March 14, 2008 Sgt. Davis began calling the USAO and Officer Banks to try and resolve a discrepancy, but there was no determination of misconduct at this time.¹⁶ MPD also disputed April 23, 2008 as the start date because the 90-day rule should be tolled as a result of the criminal investigation. According to MPD the criminal investigation was intertwined with the administrative investigation, therefore the 90-day rule was tolled until the issuance of the declination letter on May 6, 2008.¹⁷

The Arbitrator concluded that MPD should have known of the act or occurrence constituting cause no later than April 23, 2008. According to the Arbitrator, on this date the record shows that MPD had taken statements as part of an administrative investigation of the allegations against Officer Banks.¹⁸ Furthermore, the Arbitrator determined that the act or occurrence allegedly constituting cause in the instant matter was not the subject of a criminal investigation. According to the Arbitrator, various AUSAs giving statements during an administrative investigation does not constitute a criminal investigation. Since there was no criminal investigation, the 90-day limit cannot be tolled.¹⁹ The decision to remove Officer Banks from his position was reversed by the Arbitrator on the grounds that MPD violated D.C. Official Code § 5-1031(a).

IV. Discussion

Under D.C. Official Code § 1-605.02(6), the Board is authorized 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.²⁰

FOP argues that MPD's Arbitration Review Request is untimely. Citing to a former version of PERB Rule 538.1, FOP states that a request for a review of an arbitration decision

¹⁵ *Id.*

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 12-13.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 19.

²⁰ *University of the District of Columbia v. PERB*, 2012 CA 8393 P(MPA) (2014).

must be filed with PERB no later than twenty (20) days after service of the award.²¹ Effective October 1, 2015, PERB Rule 538.1 states that a request for an arbitration review is due twenty-one (21) days after service of the award. PERB Rule 501.5 further states that in computing any period of time under PERB rules, the time begins to run the day after the event occurs. The Arbitration Award was issued on September 6, 2016; therefore twenty-one (21) days after the following day, September 7 would be September 28, 2016. MPD's arbitration review request is timely under PERB rules.

FOP further states that MPD is now making a new argument in its request for review that was not presented to the Arbitrator. According to FOP, MPD's request should be denied because new arguments cannot be raised for the first time on appeal.²² MPD argues that the Arbitrator's decision was contrary to law and public policy because the agency's five day violation of the 90 day rule would be *de minimis* at most.²³ MPD looks to *Metropolitan Police Department v. District of Columbia Public Employee Relations Board*²⁴ which states that D.C. Official Code § 5-1031(a) is directory not mandatory.²⁵ MPD argues that if the statute is directory, not mandatory, then an Arbitrator must use the balancing test set forth in *JBG Properties v. D.C. Office of Human Rights* to determine whether the violation is *de minimis*.²⁶

The issue before the Board is whether the arbitrator acted contrary to law and public policy. Although the Superior Court determined that D.C. Official Code § 5-1031(a) is directory, not mandatory, the Board has previously held that an argument may not be raised for the first time in an arbitration review request.²⁷ The Board has exclusive jurisdiction over appeals from grievance-arbitration awards, but it does not have original jurisdiction over such matters.²⁸ During Arbitration, MPD argued that the 90-day rule was tolled because of a criminal investigation and the Arbitrator ruled on this issue. MPD did not argue during arbitration that a 95 day violation is *de minimis* and the Arbitrator made no findings regarding that matter. MPD brings the issue of a *de minimis* violation of the 90-day rule for the first time in this Arbitration Review Request. As a result, MPD has waived its argument that the Arbitrator's decision is contrary to law and public policy based on a *de minimis* violation of the 90-day rule.

V. Conclusion

The Board rejects MPD's arguments and finds no cause to set aside or modify the Arbitrator's Award. Accordingly, MPD's request is denied and the matter is dismissed in its entirety.

²¹ Opposition at 4.

²² *Id.* at 6.

²³ Request at 10.

²⁴ 2012 CA 007805 P(MPA) (D.C. Super. Ct. July 17, 2014).

²⁵ Request at 10.

²⁶ *Id.*

²⁷ *District of Columbia Housing Authority v. AFGE, Local 2725*, 62 DC Reg. 2893, Op. No. 1503, PERB Case 14-A-07 (2015).

²⁸ *Id.*

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 Ann Hoffman, and Douglas Warshof. Members Barbara Somson and Yvonne Dixon were not present.

December 15, 2016

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-A-19, Op. No. 1606 was sent by File and ServeXpress to the following parties on this the 29th day of December, 2016.

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