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

In the Matter of:	)	
	)	
Metropolitan Police Department	)	PERB Case No. 09-U-48(R)
	)	
Complainant	)	Opinion No. 1535
	)	
v.	)	<b>Decision and Order on Remand</b>
	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	
	)	
Respondent	)	

**DECISION AND ORDER ON REMAND**

**I. Statement of the Case**

On September 12, 2014, the D.C. Superior Court granted the Fraternal Order of Police/Metropolitan Police Department Labor Committee's ("FOP") Petition for Agency Review of the Board's Decision and Order, Opinion No. 1224, and ordered that Opinion No. 1224 be vacated.<sup>1</sup> Consistent with the Superior Court's Order, Opinion No. 1224 is vacated, and MPD's complaint is dismissed with prejudice.

**II. Discussion**

In Opinion No. 1224, the Board found that a complaint filed by the Metropolitan Police Department against FOP was timely and that FOP committed an unfair labor practice.<sup>2</sup> The allegation in the complaint was that FOP improperly invoked arbitration in a matter that was not covered by the parties' collective bargaining agreement and refused to withdraw its request for arbitration.<sup>3</sup> The complaint was filed 146 days after the alleged unfair labor practice occurred,

<sup>1</sup> *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Public Employee Relations Board*, Case No. 2011 CA 009830 P(MPA)(September 12, 2014).

<sup>2</sup> *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 1224, PERB Case No. 09-U-48 (2014).

<sup>3</sup> *MPD v. FOP*, Slip Op. No. 1224 at 8.

but the Board found that the complaint was timely filed, in accordance with Board Rule 520.4, because FOP's failure to withdraw its arbitration request constituted a continuing violation that occurred repeatedly, thus extending the timeline for filing the complaint.<sup>4</sup>

The Superior Court found that the Board improperly applied the continuing violation doctrine. The Superior Court stated, "Although the Court of Appeals has not addressed the 'continuing violation' doctrine in the context of unfair labor practices, numerous federal courts have limited the doctrine in this context as well, noting that such violations are limited to those 'whose character as a violation did not become clear until [they] w[ere] repeated during the limitations period, typically because it is only [the] cumulative impact...that reveals [their] illegality.'"<sup>5</sup> Specifically, the Superior Court observed, "[T]he Court in *AKM* noted that the 'mere failure to right a wrong...cannot be a continuing wrong which tolls the statute of limitations,' for if it were, 'the exception would obliterate the rule.'"<sup>6</sup>

The Superior Court found for the following reasons that the Board erred in its application of the continuing violation doctrine:

First, the FOP's alleged unfair labor practice in this case – the filing of an arbitration request – was a single discrete act, not "prolonged or repeated conduct," or "continuous and repetitious wrongs." Second, FOP's refusal to withdraw that single arbitration request did not convert a single violation into a continuing one. Rather, FOP's "mere failure to right a wrong" (here, by not withdrawing its arbitration request) "cannot be a continuing wrong which tolls the statute of limitations" because if it were, the exception would obliterate the rule."<sup>7</sup>

Therefore, the Superior Court reversed the Board's determination that the time period for MPD's filing of the unfair labor practice complaint was tolled by a continuing violation.

The Superior Court further discussed that "PERB Rule 520.4 functions as a statute of limitations on unfair labor practice complaints and provides that such complaints must be filed 'not later than 120 days after the date on which the alleged violations occurred.'"<sup>8</sup> The Superior Court observed that the Court of Appeals has found that this time limit is "mandatory and jurisdictional."<sup>9</sup> The Superior Court, however, noted that the Court of Appeals has questioned whether the time period for filing is jurisdictional, or if the time period for filing "can be waived if not timely asserted" as a "claim-processing rule."<sup>10</sup>

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

<sup>5</sup> Order at 5, citing *AKM LLC, d/b/a Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 757 (D.C. Cir. 1977).

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

<sup>7</sup> Order at 5.

<sup>8</sup> Order at 3, quoting Board Rule 520.4.

<sup>9</sup> Order at 3.

<sup>10</sup> *Id.* (citing *Neill v. D.C. Pub. Employee Relations Bd.*, 9 A.3d 229, 233 n.5 (D.C. 2014)).

The Superior Court concluded that MPD's complaint was not tolled by the continuing violation doctrine, and that FOP had timely objected to the timeliness of MPD's complaint.<sup>11</sup> Therefore, the Superior Court remanded the matter to the Board for dismissal of MPD's complaint.

### **III. Conclusion**

Consistent with the D.C. Superior Court's Order, the Board vacates its Decision and Order in Opinion No. 1224. MPD's Complaint is dismissed with prejudice.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The Board's Decision and Order in Opinion No. 1224 is vacated.
2. MPD's Unfair Labor Practice Complaint is dismissed with prejudice.
3. 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, Member Ann Hoffman, Member Keith Washington, and Member Yvonne Dixon.

Washington, D.C.

August 20, 2015

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<sup>11</sup> Order at 6.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 09-U-48(R), Opinion No. 1535, was served on the following parties on this the 24<sup>th</sup> day of August, 2015.

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