Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee (on behalf of Michael Pokladnik)	)	PERB Case No. 18-A-03
Petitioner	)	Opinion No. 1663
v.	)	
Metropolitan Police Department	)	
Respondent	)	

DECISION AND ORDER

I. Introduction

On December 1, 2017, the Fraternal Order of Police/District of Columbia Metropolitan Police Department Labor Committee ("Union"), 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 an Arbitrator's Opinion and Award ("Award"). The Award directed the Metropolitan Police Department ("Department") to set aside the termination of Office Michael Pokladnik ("Grievant") and ordered an alternative sanction of a 15-day suspension.

In accordance with the CMPA, the Board is permitted to modify or set aside an arbitration award in three narrow circumstances: (1) if the 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.[1] The Union claims that the award is, on its face, contrary to law and public policy.[2] Having reviewed the Arbitrator's conclusions, the pleadings of the parties and applicable law, the Board concludes

[1] D.C. Official Code § 1-605.02(6).
[2] Memorandum in Support of Arbitration Review Request at 1.

that the award is not on its face contrary to law and public policy. Therefore, the Board denies the Union's Request.

II. Statement of the Case

The Grievant served as a Patrol Officer with the Department for approximately five years when, as a result of a knee problem, he was placed on limited duty status.[3] On October 9, 2009, the Grievant submitted to his supervisor a Clinic Data Record showing that he had been returned to full duty status. Nevertheless, between October 9, 2009 and May 30, 2010, the Grievant failed to take any initiative to have his police power restored and remained on limited duty detail.[4] On May 30, 2010, a superior officer questioned Grievant about his work limitations and when he had last been to the clinic. When the Grievant stated that he had not been to the clinic for about a year, the superior officer advised him to report there at once. On October 7, 2010, the Grievant received a Notice of Proposed Adverse Action for an alleged untruthful statement made by the Grievant to a superior officer regarding his duty status and failing to take the initiative to have his Police Power restored.[5] A three-member adverse action panel was convened at the Greivant's request. A Final Notice of Proposed Adverse Action was sent to the Grievant, notifying him that the Panel recommended his termination.[6] The Union appealed the termination to the Chief of Police. The appeal was denied and then the Union filed for arbitration.[7]

III. Arbitrator's Award

The Arbitrator determined three issues: (1) whether the Department violated section 5-1031 of the D.C. Official Code ("the 90-day rule"), (2) whether the evidence presented by the Department was sufficient to support the charges and (3) whether termination was an appropriate penalty.[8]

According to the Arbitrator, May 30, 2010, was the day the Department had notice of the act or occurrence allegedly constituting cause.[9] Using this date as the starting point, the deadline for the Department to issue the Notice of Proposed Adverse Action was October 6, 2010. The Grievant received the notice on October 7, 2010, which was 91 business days after the alleged violation. The Arbitrator looked to *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Best)*[10] which stated that the 90-day rule was directory not mandatory and directed the Board to analyze whether a one-day violation by the Department was a *de minimis* violation of the statute.[11] The Arbitrator concluded that this case was the most applicable prior award which had been tested by both the

[3] Award at 2.
[4] Award at 5.
[5] Award at 5.
[6] Award at 7.
[7] Award at 8.
[8] Award at 8.
[9] Award at 13.
[10] No. 2012 CA 007805 P (MPA), (D.C. Sup. Ct. July 17, 2014).
[11] Award at 15.

Board and D.C. Superior Court. Using this case as guidance, the Arbitrator found that while the Department did violate the 90-day rule by one day, it was a *de minimis* violation of the statute and the Grievant was not prejudiced.[12]

Regarding the final two issues, the Arbitrator found that the Panel's determination was based on substantial evidence in the record, however the penalty of termination was not justified.[13] The Arbitrator applied the balancing test established *in JBG Properties v. D.C. Office of Human Rights*[14] and found that the grievant should be suspended for fifteen (15) calendar days for his misconduct and then reinstated with full back pay and benefits.[15]

IV. Discussion

The Union argues that the award is contrary to law and public policy because the Department instituted the adverse action against the grievant after the deadline prescribed by the law had expired. The Union asserted that the Arbitrator relied entirely on *Best*, but this decision ignored prior case law from both the Court of Appeals and the Superior Court.[16] The Union further asserted that the plain language and the legislative history show that the 90-day rule is a mandatory statute[17] and the Arbitrator's opinion and award applying a *de minimis* standard to the mandatory 90-day rule is contrary to law and public policy.

The Union argues that the D.C. Council's intent that the 90-day rule would remain a mandatory statute was confirmed as recently as October 24, 2014, when the D.C. Council considered a bill that proposed repealing the rule. The Union looks to the Committee Report on Bill 20-810, which proposed repealing the rule. The Committee Report stated that under the 90-day rule the Department "is barred from later taking disciplinary action" and "discipline could not be enforced."[18] The Union argues that this language regarding the 90-day rule leads to the conclusion that it is mandatory, not directory.[19]

The Union further argues that the *JBG Properties*' balancing test is only applicable to statutes that are directory rather than mandatory.[20] Since it is clear that the 90-day rule is mandatory, the application of the balancing test by the Arbitrator is contrary to law and public policy.

The Department argues that the Arbitrator's holding that the 90-day rule is directory is not contrary to law and public policy, and that the balancing test from *JBG Properties* was properly applied. According to the Department, the Superior Court has previously rejected an arbitration award in which an arbitrator overturned a grievant's suspension based on a one-day

[12] Award at 16.
[13] Award at 24.
[14] 364 A.2d 1183 at 1187 (D.C. 1976)
[15] Award at 25.
[16] Memorandum at 6.
[17] Memorandum at 4-5.
[18] Memorandum at 10.
[19] Memorandum at 10-11.
[20] Memorandum at 13.

delay by the Department. The Department argues that the Union's argument that the Arbitrator should have relied on other Superior Court cases amounts only to a disagreement about legal interpretation; not a clear violation of the law by the Arbitrator.[21] The Department, further states that the Arbitrator correctly applied the *JBG Properties*' balancing test to find that the one-day violation created no prejudice that impaired the fairness of the proceedings or the correctness of the action taken.[22]

The Union references the similarities between the 90-day rule and it's now repealed predecessor, the 45-day rule, as part of its argument why the 90-day rule should be mandatory. While it is true that in *Metropolitan Police Department v. Public Employee Relations Board*[23] the Superior Court upheld the Board's determination that the 45-day rule was mandatory, the Superior Court's decision in *Best* is more recent and interprets the 90-day rule rather than its predecessor. Since *Best*, the Board has consistently held that the 90-day rule is directory, not mandatory.[24] The Arbitrator has properly applied the Board's precedent to this case and the Union has not presented a clear violation of law on the face of the Award.

The Board has limited authority to overturn an arbitration award.[25] For the Board to find the Award contrary to law and public policy, the asserting party bears the burden to specify the "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result."[26] The 90-day rule states that no corrective or adverse action against a sworn member or civilian employee of the Department "shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause."[27] The Union does not dispute the Arbitrator's determination of when the 90 days began, but it does dispute the assertion that the 90-day rule is directory.

The Arbitrator relied on *Best* when issuing the award because the situation was very similar to the present case. When the Superior Court remanded that case back to the Board, it stated that, in *Brown v. Public Employee Relations Board*[28], the Court of Appeals found that, if a statute is directory, a court must use the balancing test set forth in *JBG Properties* to determine whether any prejudice to a party caused by agency delay is outweighed by the interests of another party or the public in allowing the agency to act after the statutory time period has

[21] Opposition at 9.
[22] Opposition at 10.
[23] *Metro. Police Dept. D.C. v. Pub. Employee Rel. Bd*., 92-29, 1993 WL 761156, (D.C. Super. Aug. 9, 1993)
[24] *See FOP/Metro. Police Dep't Labor Committee v. MPD,* 63 D.C. Reg. 14526, Slip Op. 1595, PERB Case No. 15-A-12 (2016); *MPD v. FOP/Metro. Police Dep't Labor Comm.*, 64 D.C. Reg. 10152, Slip Op. No. 1639, PERB Case No. 16-A-12 (2017); *MPD v. FOP/Metro. Police Dep't Labor Comm.*, 64 D.C. Reg. 2012, Slip Op. No. 1606, PERB Case No. 16-A-19 (2016).
[25] *FOP/Dep't of Corr. Labor Comm. v. D.C. Pub. Emp. Rels. Bd.*, 973 A.2d 174, 177 (D.C. 2009).
[26] *MPD and FOP/Metro. Police Dep't Labor Committee*, 47 D.C. Reg. 717, Slip Op. 633 at 2, PERB Case No. 00-A-04 (2000); *See also D.C. Pub. Sch. v. AFSCME., District Council 20*, 34 D.C. Reg. 3610, Slip Op. 156 at 6, PERB Case No. 86-A-05 (1987).
[27] D.C. Official Code § 5-1031(a).
[28] 19 A. 3d 351(D.C. 2011).

elapsed.[29] The Superior Court went on to state that there is no sanction in section 5-1031; therefore the 90-day rule is directory, not mandatory.[30]

V. Conclusion

Based on the foregoing, the Board finds that the Arbitrator's Award is not contrary to law and public policy. Accordingly, the Union'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 Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

April 26, 2018

Washington, D.C.

[29] *Metropolitan Police Department v. Public Employee Relations Board*, No. 2012 CA 007805 P (MPA), (D.C. Sup. Ct. July 17, 2014).
[30] *Id*.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-03, Op. No. 1663 was transmitted to the following parties on this the 4th day of May, 2018.

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