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

In the Matter of:)	
)	
District of Columbia Metropolitan Police)	
Department,)	
)	
Petitioner,)	
)	PERB Case No. 9-A-14
and)	
)	Opinion No. 1325
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee,)	
(on behalf of Officer Darrell Best),)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case:

On December 23, 2009, the District of Columbia Metropolitan Police Department (“MPD”, “Department” or Respondent”) filed an Arbitration Review Request (“Request”) in the above captioned matter. MPD seeks review of an arbitration award (“Award”) that sustained the Fraternal Order of Police/Metropolitan Police Department Labor Committee’s (“Union” or “FOP”) grievance filed on behalf of Officer Darrell Best (“Grievant” or “Officer Best”) with MPD.¹ The Arbitrator ruled that MPD violated the collective bargaining agreement (“CBA” or “the Agreement”) between the Union and MPD.

The issue before the Board is whether “the award on its face is contrary to law and public policy.” D.C. Code § 1-605.02(6) (2001 ed).

¹ The Union’s grievance concerned the thirty (30) day suspension of Officer Best’s employment.

II. Discussion:

The matter before the Board arises from a grievance filed on behalf of Officer Best challenging the Department's imposition of a thirty (30) day suspension for Officer Best's misconduct related to the reporting of hours worked in outside employment. The facts concerning the asserted violation, as found by the Arbitrator, are as follows:

On August 1, 2006, Sergeant Michael Coligan of the Office of Professional Responsibility, Quality Assurance Unit made a site visit to the Credit Union to conduct a site inspection relative to his responsibilities as Outside Employment Monitor for the Agency. After reviewing the Grievant's work record, Sergeant Coligan determined that Grievant had worked 32 hours of outside employment in a seven day period in violation of Department Orders. The Investigation also showed irregularities that Credit Union time cards and the Agency time and attendance records had Grievant working hours at the Credit Union the same hours he was working at the Agency on certain dates. Sergeant Coligan notified Captain Keith L. Williams on August 3, 2006. The matter was referred to the Internal Affairs Division ("IAD") for investigation on August 4, 2006.

IAD Sergeant Garrett conducted the investigation. She determined that Grievant had worked a total of fifty-two (52) hours while on the clock with the Agency. She found that he fraudulently received \$1,997.32 from the Agency.

On August 8, 2006, Lieutenant Robinson, Grievant's supervisor during the period 2006-2007, concluded an investigation as to whether Grievant had worked more than 32 hours in a workweek in violation of an Agency Order. Lieutenant Robinson had directed Grievant to provide a time card from the Credit Union. The time card that Grievant submitted showed hours worked at the Credit Union. It did not include hours that Grievant had worked on February 4, 6 and 7, 2006, which Grievant had [applied correction fluid to].

Grievant was recommended for adverse action and cited for the following:

Charge No. 1: Violation of General Order 120.21, Attachment 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 violations of any law of the of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia." This conduct is further prohibited by General Order 201.26, Part I-B-22, which provides: "Members shall conduct their private and professional lives in such a manner as to avoid bringing discredit upon themselves or the department." This misconduct is defined as Cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that, beginning January 6, through June 24, 2006, you worked (intermittently) authorized employment in conjunction with your official on-duty hours for a total of fifty-two (52) hours.

Charge No. 2: Violation of General Order 120.21, Attachment A, Part A-6 which reads, in part: "Willfully and knowing making an untrue statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer..." This misconduct is further prohibited by General Order 201.26, Part I-A-30, which reads: "When questioned by superior officers in connection with matters relating to the official business of the police department, subordinate members shall respond [] truthfully. Additionally, during the course of an investigation, all members shall respond truthfully to questions by an agent or official of the Office of Internal Affairs. This misconduct is defined as Cause in Section 1603 of the D.C. Personnel Manual."

Specification No. 1: In that, you provided an altered timecard to Lieutenant Michelle Robinson. Specifically, the time card that you provided was altered to represent that you had not worked authorized outside employment on February 4, 6 & 7, 2006, when in fact you did work. The time card that you provided was intended for use in an investigation.

The Agency proposed a thirty (30) day suspension related to the above stated charges and specifications. The Agency denied all internal appeals. Grievant served the suspension. On April 30, 2009, an arbitration hearing was held.

(Award at pgs. 1-3).

The Arbitrator determined that the issues before him were: (1) Did the Department Violate the Provisions of the "Police and Firefighters Disciplinary Action Procedures Act of 2004," D.C. Code Sections 5-1031 (a) and (b) by initiating disciplinary action against Grievant?; and (2) Whether there is cause for the Grievant's 30 day suspension?"

(Award at p. 3).

At arbitration, MPD related the facts of the case, asserting:

that Sergeant Coligan, after reviewing Grievant's work records at the Credit Union determined that Grievant had worked in excess of 32 hours of outside employment within a seven (7) day workweek in violation of Agency Orders. The time cards revealed that between January 6, 2006 and June 24, 2006, Grievant worked fifty-two (52) hours of authorized outside employment with the Credit Union while on duty and being paid by the Agency.

Sergeant Coligan reported the matter to his superiors and on August 2, 2006, the case was referred to the Internal Affairs Division (IAD) for investigation as a criminal matter-Time and Attendance Fraud. IAD Sergeant Denise Garrett conducted the investigation and determined that Grievant had worked intermittently a total of fifty (52) hours of outside employment while on the clock with the Agency. The Agency contends he fraudulently received \$ 1,997.32 from the Department.

On September 8, 2006, according to the Agency the case was referred to the United States Attorney's Office and prosecution was declined that same day. After receiving notice that the United States Attorney's Office would not consider criminal prosecution on September 8, 2006, the Department commenced an administrative investigation. When the Administrative investigation was concluded, Grievant was charged with "Conduct Unbecoming," and "Willfully and Knowingly Making an Untrue Statement", as described above. The Notice of Proposed Adverse Action was served on him on January 18, 2007.

(Award at pgs. 3-4).

In addition, MPD claimed that it complied with the Fire and Disciplinary Action Procedure Act of 2004, D.C. Official Code Section 5-1031(a), commonly referred to as the 90 day rule, which precludes the Agency from commencing adverse action under certain circumstances. MPD cited the 90 day rules as providing, in pertinent part, that:

No corrective or adverse action against any sworn or civilian employee of.. the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays or legal holidays, after the date that the... Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

(Award at p. 7).

In addition, MPD called attention to sub-section (b), providing that:

If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney, or the Office of the Attorney General, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

Based on the foregoing provisions, MPD argued that it had complied with the 90 day rule because the "90 day clock" commenced on August 1, 2006, and paused on August 3, 2006, when the Department began its criminal investigation. (See Award at p. 7). After the matter was presented to, and declined by, the U.S. Attorney's Office for prosecution, MPD contends the "90 day clock resumed. (See Award at p. 8). As a result, MPD claimed that notice of adverse action was commenced within 90-days after it became aware of the incident at issue. (See Award at p. 8).²

MPD also argued that the Grievant's actions warranted a thirty-day suspension. Specifically, MPD maintained that the penalty was consistent with "the guidelines set forth in General Order 120.21, Disciplinary Procedures and Processes[, where: (1) a] first offense of "Conduct Unbecoming" calls for a suspension of 3 days to removal[; and (2) a] first offense of "Untruthful Statements" calls for a suspension for 15 days to removal." (Award at p. 9).

Arbitrator Murad observed that the Union's position asserted that August 1, 2006, should be treated as the initiating date (*i.e.* when MPD knew or should have known of Grievant's alleged misconduct). The Union argued that MPD "exceeded the 90-day allowable commencement date for advancing adverse action where there was no referral for criminal review until September 8, 2006 . . ."

² MPD claimed that two (2) days passed after it became aware of the Grievant's misconduct (*i.e.* August 1 to August 3, 2006); and 88 days passed between September 8, 2006, and January 18, 2007; for a total of 90 days.

when the matter was referred to the U.S. Attorney's Office. (Award at p. 10). The Union concurred with MPD, that 88 business days had accrued between September 8, 2006, and January 18, 2007. (See Award at p. 10). Consequently, the Union contended: (1) the period of August 1, 2006, to September 8, 2006, equaled twenty-three (23) days; and (2) the period of September 8, 2006, to January 18, 2007, amounted to 88 days; that (3) the notice of adverse action against the Grievant was commenced "a total of one hundred eleven days" after MPD became aware of the alleged misconduct at issue. Moreover, the Union asserted that it believed MPD actually became first aware of the Grievant's alleged misconduct in April of 2006, when it observed irregularities in the Grievant's time sheets. (See Award at p. 11). Therefore, an additional seventy-eight (78) days should be added to the time period at issue. (See Award at p. 11). However, the Union postulated that where the misconduct allegedly commenced on August 1, 2006, using MPD's own time-frame, a criminal investigation could not have been conducted until August 4, 2006, and, therefore, "the Agency had missed the 90 day period by one day." (Award at p. 12).

As to the merits of the grievance, the Union argued that MPD had failed to establish any evidence of misconduct warranting a thirty (30) day suspension. (See Award at pgs. 12-13).

The Arbitrator acknowledged that "[t]he initial determination that must be made is whether the Agency complied with the requirements of D.C. Code Section 5-1031, the 90 day rule." (Award at p. 13). Based upon his findings, the Arbitrator concluded that:

[t]he Department's logic about ninety days passing between September 8, 2006, and January 18, 2008, and Grievant properly being served on the 90th day is flawed. The tolling of the statute under D.C. Code Section 5-1031(b) in the Arbitrator's opinion simply means that the running of time under the statute is stopped. See Black's Law Dictionary (9th ed.), page 1625. The time before the running was stopped is included in calculating the total 90 day period. . . . The Arbitrator finds that the Department knew or should have known about the act or occurrence constituting cause on August 1, 2006, when Sergeant Coligan discovered timesheets which revealed that, Grievant worked at the Credit Union during the same time that he was working on duty at the Department. According to the Department's General Order G.O. 120.23, the IAD is responsible for the investigation of this serious misconduct. IAD could not have made a determination before August 4, 2006, the date they received the Complaint of Grievant's irregularities as to whether the investigation was to be criminal because as of August 1, 2006, they had yet to receive the Complaint. The clock did not stop, therefore, on August 3, 2006. Three days having passed before the referral was made using the time period August 1, 2006, the Agency missed the 90 days required to commence discipline of the Grievant. This is calculated as follows: August 1, 2006 until August 4, is 3 days. The statute tolls from August 4, 2006 until September 8, 2006, when the U.S. Attorney issues its immediate declination of criminal time and attendance fraud.

There are eighty-eight (88) countable days between September 8 and January 18, 2007. The Grievant was served on January 18, 2007, one day too late on the ninety first (91) day.

Since the Department violated the provisions of D.C. Code Section 5-1031, there is no reason to discuss the merits of the case.

Article 4 of the CBA vests in the Department when exercised in accordance with applicable laws, rules and regulations the sole right to take disciplinary actions against an employee for cause. In the case at hand, the Department failed to follow the time limitations of a D.C. law. Disciplinary action was inappropriate.

The Grievant shall receive back pay for the thirty (30) day suspension and otherwise made whole for the suspension. All records of the suspension shall be removed from his personnel file. The Department is responsible for the Arbitrator's fees and expenses under Article 19, E.7 of the CBA.

(Award at pgs. 14-16).

MPD filed the instant review of the Award, contending that the award is contrary to law and public policy. (See Request at p. 2).

When a party files an arbitration review request, the Board's scope of review is extremely narrow.³ Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited 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." D.C. Code § 1-605.02(6) (2001 ed.).

³ In addition, Board Rule 538.3 - Basis For Appeal - provides:

In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:

- (a) The arbitrator was without authority or exceeded the jurisdiction granted;
- (b) The award on its face is contrary to law and public policy; or
- (c) The award was procured by fraud, collusion or other similar and unlawful means.

MPD asserts that Arbitrator Murad's determination that the 90-day clock was started prior to the U.S. Attorney's decision to decline prosecution of the Grievant on September 8, 2006, is contrary to law and public policy. In support of its argument, MPD contends that a decision by the District of Columbia Court of Appeals, *District of Columbia v. D.C. Office of Employee Appeals*, 883 A.2d 124 (D.C. 2005) (*Jordan*), provides a guide for the proper construction of a provision similar to D.C. Code § 5-1031. (See Request at p. 5). The provision at issue in *Jordan* concerned the Corrective Action Amendment Act of 1990 (D.C. Law 8-128), or 45-day rule. MPD claims that the 45-day rule was the "predecessor to the 90-day rule, imposing a 45-day (instead of 90-day) deadline for commencing disciplinary actions. The 45-day rule contained an exception that was virtually identical to the exception that exists for the 90-day rule:

In the event that the act or occurrence allegedly constituting cause is the subject of an ongoing criminal investigation, the 45-day limit . . . shall be tolled until the conclusion of the investigation."

(Request at p. 5, citations omitted).

MPD contends that in the *Jordan* case, MPD's proposed termination was challenged by alleging that the Department had violated the 45-day rule. (See Request at p. 5). The matter was referred to an administrative law judge at the District of Columbia Office of Employee Appeals ("OEA") for resolution. (See Request at p. 5). The OEA Judge agreed with *Jordan* that MPD violated the 45-day rule and ordered that *Jordan* be reinstated. (See Request at pgs. 4-6). "This decision was affirmed by the full board of OEA and [the] D.C. Superior Court. [However, t] he D.C. Court of Appeals reversed the determination and remanded the case to OEA for further proceedings. (Request at p. 6, citations omitted). MPD asserts that the D.C. Court of Appeals construction of the 45-day rule in the *Jordan* case implies that the "45-day clock" did not begin to run when the Department became aware of *Jordan*'s alleged misconduct, but at the conclusion of the criminal investigation. (See Request at p. 6). Consequently, MPD believes the Arbitrator's Award is contrary to law and public policy because it is not consistent with the Court of Appeals' ruling in *Jordan*.

In support of its argument, MPD provides the following rationale and application of the *Jordan* case:

As was the case in *Jordan*, the Department, through Sergeant Coligan became aware of Sergeant Best's allegedly fraudulent conduct. Sergeant Coligan is undisputedly a law enforcement officer, whose responsibilities include, *inter alia*, enforcing the criminal laws of the District of Columbia. Sergeant Coligan's law enforcement obligations are established in part by Title 6A of the District of Columbia Municipal Regulations (DCMR). Title 6A DCMR provides, in part:

§ 200.4 Members of the force shall be held to be always on duty

200.13 Members of the force shall familiarize themselves with the statutes, laws, and regulations in force in the District of Columbia, and failure to do so, or to take action respecting violations of those statutes, laws, and regulations coming to their attention or about which they have knowledge shall be deemed neglect of duty.

As Arbitrator Murad found, Sergeant Coligan learned on August 1, 2006, that Sergeant Best had been submitting timesheets to both the Department and his outside employer for the same dates and times. Award at 13-14. As with Jordan, such conduct clearly meets the criminal definition of fraud (D.C. Official Code § 22-3221) and is subject to criminal sanction. See D.C. Official Code § 22-3222. The fact that the U.S. Attorney ultimately decided not to prosecute the case is of no moment. As determined by Arbitrator Murad, the criminal nature of Sergeant Best's conduct was evident to Sergeant Coligan when he learned of it on August 1, 2004. Thus, under the Court of Appeals decision in Jordan (and contrary to Arbitrator Murad's decision), everything from that point until the declination of prosecution on September 8, 2006 is encompassed within the statutory exception to the 90-day rule at D.C. Official Code § 5-1031(b). Accordingly, the Department did not violate the 90-day rule in commencing adverse action against Sergeant Best 88 business days after receiving the declination of prosecution from the U.S. Attorney. [Consequently, MPD contends that] Arbitrator Murad's decision that the Department violated the 90-day rule should be overturned as contrary to law and public policy and the case should be remanded to Arbitrator Murad for a decision on the merits of the case.

(Request at pgs. 7-9).

The Union opposes MPD's request, arguing that the instant case "is different than that of *Jordan* and that Arbitrator Murad's Award is consistent with law and public policy." (Opposition at p. 5). The Union believes that "Arbitrator Murad was correct in not tolling the time between August 1, 2006, and August 4, 2006." (Opposition at p. 6). In addition, the Union states that the criminal prosecution of Officer Best was not declined until the Office of the United States Attorney rejected the matter on September 8, 2006. (See Opposition at p. 6). Further, the Union maintains that Best "was not served with the Notice of Adverse Action until January 18, 2007, 88-days later. This coupled with the three days where no determination had been reached on whether this would be handled criminally or not resulted in 91-days passing prior to the member being served." (Opposition at p. 6). Furthermore, the Union asserts that the *Jordan* case is inapplicable because the plain reading of D.C. Code § 5-1031 indicates "that

unless a criminal investigation has been initiated, then all time outside of that period should be counted towards the 90-days allowed for the agency to commence adverse action.” (Opposition at p. 8). Moreover, the Union states that the parties agreed through their CBA to grant the Arbitrator the power to interpret the provisions at issue. (See Opposition at pgs. 8-9).

As stated above, the Board’s scope of review, particularly concerning the public policy exception, is extremely narrow. Furthermore, the U.S. Court of Appeals, District of Columbia Circuit, observed that “[i]n *W.R. Grace*, the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question “must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’ Obviously, the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of “public policy.”” *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F. 2d 1, 8 (D.C. Cir. 1986).⁴ A petitioner must demonstrate that the arbitration award “compels” the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify “applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must “not be led astray by our own (or anyone else’s) concept of ‘public policy’ no matter how tempting such a course might be in any particular factual setting.” *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A2d 319, 325 (D.C. 1989).

Furthermore, the public policy exception:

is not available for every party who manages to find some generally accepted principle which is transgressed by the award. Rather, the award must be so misconceived that it “compels the violation of law or conduct contrary to accepted public policy.”

Revere Copper and Brass Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83 (D.C. Cir. 1980), cert. denied, 446 U.S. 983 (1980) (citing *Union Employers Division of Printing Industry, Inc. v. Columbia Typographical Union No. 101*, 353 F.Supp. 1348, 1349 (D.D.C.1973)).

Even if an arbitrator’s award runs contrary to some generally recognized policy, it still does not justify applying the “public policy exception” unless the award is itself illegal or requires a party to act illegally. *District of Columbia Dept. of Corrections v. Teamsters Union Local No. 246*, 554 A.2d 319, 323 (D.C. 1989) (refusing to “apply some free-floating notion of ‘policy’”).

⁴ See *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 2176, 76 L. Ed. 2d 298 (1983).

The Board must also defer to the arbitrator's interpretation of external law incorporated into the contract:

When construction of the contract implicitly or directly requires an application of "external law," i.e., statutory or decisional law . . . , the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the "contract reader," his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties to the contract.

District of Columbia Metropolitan Police Department v. Public Employee Relations Board, 901 A.2d 784, 789 (D.C. App. 2006) (citation omitted).

Thus, the Board may not set aside the Award solely because the arbitrator may have made some legal error in reaching his conclusions. It is not enough for MPD to raise supposed deficiencies in the Arbitrator's legal reasoning. MPD bargained for Arbitrator Murad's interpretation of the CBA. Therefore, MPD must show that carrying out the Award would compel the violation of law and public policy. Arbitrator Murad ordered that MPD reinstate the Grievant. MPD has not shown that carrying out this Award would require the breach of any law and public policy. Even if the Arbitrator arrived at this result through arguably faulty logic or a misapplication of law, that is not enough for the Board to modify or set aside the Award. See D.C. Code § 1-605.02(6); *MPD v. D.C. PERB*, 901 A.2d at 789.

In the present case, Arbitrator Murad concluded that MPD was in violation of the D.C. Code § 5-1031, where he found that the Department knew or should have known about the act or occurrence constituting cause on August 1, 2006. Next, the Arbitrator determined that the IAD was responsible for the investigation of the whether Grievant's conduct constituted criminal and/or serious misconduct. He further found that IAD could not have made a determination before August 4, 2006, the date they received the Complaint of Grievant's irregularities as to whether the investigation was to be criminal. As a result, the Arbitrator concluded that the 90-day clock did not stop on August 3, 2006. Whereas, "[t]hree days [had] passed before the referral was made using the time period August 1, 2006, the Agency missed the 90 days required to commence discipline of the Grievant. This is calculated as follows: August 1, 2006 until August 4, is 3 days. The statute tolls from August 4, 2006 until September 8, 2006, when the U.S. Attorney issues its immediate declination of criminal time and attendance fraud. There are eighty-eight (88) countable days between September 8 and January 18, 2007. The Grievant was served on January 18, 2007, one day too late on the ninety first (91) day." (Award at p. 15).

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. We decline MPD's request that we substitute the Board's judgment for the Arbitrator's decision for which the parties bargained. MPD had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 D.C. Reg. 717, Slip Op No. 633 at p. 2, PERB Case