GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matters of:	
Metropolitan Police Department,	
Petitioner,	
and	PERB Cases No. 92-A-06, 92-A-07 and 92-A-09 Opinion No. 325
Fraternal Order of Police, Metropolitan Police Department Labor Committee (on behalf of Officers Timothy Craggette, Thurston C. Genies and Timothy Toland)	
Respondent.	

DECISION AND ORDER

On May 28, 1992, the District of Columbia Metropolitan Police Department (MPD) filed an Arbitration Review Request with the Public Employee Relations Board (Board) in PERB Case No. 92-A-06. MPD requested that the Board review an arbitration award (Award) that decided a grievance filed by the Fraternal Order of Police, MPD Labor Committee (FOP) on behalf of Officer Timothy Craggette, the Grievant. MPD asserts in its Request that the Award is contrary to law and public policy. FOP filed an Opposition to Petitioner's Arbitration Review Request on June 12, 1992, arguing that MPD has failed to establish that the Award violates any applicable law or public policy. The Award addresses the arbitrability and merits of a grievance contesting MPD's authority to terminate the Grievant. The Award also addresses the applicability of a ruling in a prior arbitration case (hereinafter referred to as the Bernard Award) holding that the provisions of D.C. Code Sec. 1-617.1(b-1)(1) were mandatory and required MPD to initiate an adverse action within 45 workdays of the date it should have known of the grievant's misconduct. In ruling that MPD did not comply with this statutory provision, the arbitrator in the Bernard Award rescinded the grievant's suspension and ordered his reinstatement.

In PERB Case No. 92-A-06, the Arbitrator held that, with respect to the issues of arbitrability, as provided under Article 19 D of the parties' collective bargaining agreement, the FOP did not forfeit its right to file a grievance on behalf of Officer Craggette by pursuing first an unfair labor practice complaint in PERB Case No. 91-U-18. The Arbitrator in the Craggette Award further ruled that Article 19 E of the collective bargaining agreement did not render the filing of FOP's grievance untimely. With respect to the merits, the Arbitrator concluded that MPD failed to (1) meet the 45-day time period for initiating termination proceedings against the Grievant; (2) show that the Bernard Award did not apply to adverse actions consisting of terminations or (3) establish that D.C. Code Sec. 1-617.1 does not impose a mandatory limitation on MPD's authority to initiate adverse action. (Award at 19.) In so concluding, the Arbitrator sustained FOP's grievance, reinstated the Grievant, and ruled that the Grievant be made whole for any lost work time or benefits.

While MPD's Request in PERB Case No. 92-A-06 was pending before the Board, MPD filed two additional Arbitration Review Requests --PERB Cases No. 92-A-07, on behalf of Officer Thurston C. Genies, and 92-A-09 on behalf of Officer Timothy Toland-- on July 27 and August 13, 1992, respectively. Timely Oppositions were filed by FOP in both cases. MPD asserts that the statutory grounds and reasons for review in these two cases present issues identical to its Request in PERB Case No. 92-A-06. In this regard, MPD requests that the three cases be consolidated for review.

Upon review of the issues presented by these Requests, we conclude that our rulings in PERB Case No. 92-A-06 are controlling and dispositive of the issues presented by PERB Cases No. 92-A-07 and 92-A-09. Therefore, the Board hereby consolidates these proceedings and, for the reasons set forth below, denies MPD's requests for review in all three cases.

The issue before the Board is whether or not the Arbitrator's determination with respect to the issues of arbitrability and D.C. Code Sec. (1-617.1(b-1)(1) present the asserted statutory basis for our review. Under the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Sec. 1-605.2 (6), the Board is authorized to "[c]onsider appeals from arbitration awards pursuant to grievance procedures: Provided, however, that such awards may be reviewed only if... the award on its face is contrary to law and public policy... ." The Board has considered the Craggette Award, the pleadings of the parties, and applicable law and concludes for the reasons below that the grounds presented in MPD's request for review of the Award do not present

any statutory basis for review. Therefore, we lack the authority to grant the requested relief.

MPD requests review of the Craggette Award with respect to the Arbitrator's decision regarding both the arbitrability and the merits of the grievance.[1]/ Turning first to the issues concerning arbitrability, MPD disagrees with the Arbitrator's conclusion that, pursuant to his interpretation of Article 19 D of the parties' agreement[2]/, FOP did not forfeit its right to file for arbitration by electing first to pursue an unfair labor practice complaint before the Board. MPD further argues that the Arbitrator's decision "is contrary to the public policy expressed in D.C. Code Sec. 1-618.1" of "maintaining an effective and efficient collective bargaining process designed to bring finality to labor disputes in a timely manner." (Req. at 6.)[3]/

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[1]/ The Request in PERB Case No. 92-A-09 presents all three issues presented by PERB Case No. 92-A-06 concerning the arbitrability of the grievance as well as the arbitrator's decision on the merits, i.e., whether or not D.C. Code Sec. 1-617.1(b-1)(1) is mandatory. The Request in PERB Case No. 92-A-07, however, presents only the merit issue. In any event, MPD provides no additional arguments in these two related Requests but rather relies upon the arguments it made in PERB Case No. 92-A-06, which it incorporated by reference, to support its grounds for our review in PERB Case Nos. 92-A-07 and 92-A-09.

[2]/ Article 19 D, in relevant part, provides the following:

> The employees in the unit and the union shall follow the procedures set forth in the article with respect to any grievance they may have and should not follow any other cause of action to resolve grievances. If either breaches this provision, the right to invoke the provisions of this article as to the incident involved shall be forfeited.

[3]/ D.C. Code Sec. 1-618.1 provides in relevant part the following:

> (a) The District of Columbia government finds and declares that an effective collective bargaining process is in the general public

We have held that "[b]y agreeing to submit a matter to arbitration the parties also agree to be bound by the Arbitrator's decision which necessarily includes the Arbitrator's interpretation of the parties' agreement...as well as his evidentiary findings and conclusions upon which the decision is based. University of the District of Columbia Faculty Association/NEA and University of the District of Columbia, ____ DCR____, Slip Op. No. 320 at 2, PERB Case No. 92-A-04 (1992). This applies equally to the Arbitrator's jurisdictional authority to decide issues of arbitrability. See, University of the District of Columbia and American Federation of State, County and Municipal Employees, Council 20, Local 2087, 36 DCR 3344, Slip Op. No. 219, PERB Case No. 88-A-02 (1989). MPD's arguments in support of our review on this basis are essentially disagreements with the Arbitrator's interpretation of the parties' collective bargaining agreement, based upon his evidentiary findings and conclusions. With respect to MPD's contention that the Award is contrary to D.C. Code Sec. 1-618.1, we have held that mere assertions that an arbitration award contravenes some broad public policy does not meet our statutory criteria for review requiring that an award contravene, on its face, both law and public policy. District of Columbia Metropolitan Police Department and Fraternal Order of Police, MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282 at n.7, PERB Case No. 87-A-04 (1992).[4]/

MPD raises the same "public policy" arguments in support of its request that we review the Arbitrator's decision that FOP did not breach the time requirements set forth in Article 19 E of the parties' collective bargaining agreement. [5]/ For the reasons

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> interest and will improve the morale of public employees and the quality of service to the public.

[4]/ Moreover, submission of the parties' dispute over the proper interpretation of Article 19D to final and binding grievance arbitration appears to be in furtherance, not in contravention, of "maintaining an efficient collective bargaining process designed to bring finality to labor disputes in a timely manner" as prescribed by D.C. Code 1-618.1. (Emphasis added.)

[5]/ Article 19 E provides in relevant part the following:

> * * * *
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> 2. Within 15 days of the decision of the Chief of Police on an adverse action, the Union may advise the Chief in writ-

discussed above, the grounds asserted do not present a statutory basis for our review of this aspect of the Award.

We turn now to MPD's contention that the Award deciding the merits of the grievance is contrary to law and public policy. Underlying the Arbitrator's decision to sustain the grievance was his conclusion that MPD failed to establish that the Bernard Award did not apply equally to MPD's authority to initiate adverse actions concerning termination of employment. The arbitrator in the Bernard Award sustained an FOP grievance based on his conclusion that D.C. Code Sec. 1-617.1(b-1)(1), which provides the following, is mandatory:

> Except as provided in paragraph (2) of this subsection, no corrective or adverse action shall be commenced pursuant to this section more than 45 days, not including Saturdays, Sundays, or legal holidays, after the date that the agency knew or should have known of the act or occurrence allegedly constituting cause, as that term is defined in subsection (d) of this section.

The arbitrator in the Bernard grievance-arbitration proceeding ruled that, as mandated by the above provision, MPD's failure to initiate an adverse action against the grievant within 45 days of the date that MPD knew of the grievant's misconduct barred MPD from ever bringing the action.

The basis of MPD's request for review of a similar ruling in the Craggette Award turns on its contention that D.C. Code Sec. 1-617.1 (b-1)(1) is not mandatory but rather directory in nature.[6]/ In this regard, MPD --while conceding that it

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> ing of its demand for arbitration and that the parties agree to meet at least once in a last attempt at conciliation.
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> 4. Submissions to arbitration shall be made within (10) days from any attempt at conciliation.

[6]/ A statutory provision which specifies a certain period of time within which an act is to be done, and is construed as "mandatory", forecloses the authority to act beyond the specified time period. See Black's Law Dictionary 547 (4th ed. rev. 1976).

initiated adverse action against the Grievant beyond the 45-day time period provided by Sec. 1-617.1(b-1)(1)-- contends that its authority to terminate the Grievant beyond that statutorily prescribed period was left intact since actual prejudice was not established. (See n. 4.) By finding that Sec. 1-617.1(b-1)(1) is mandatory and thereby created an automatic forfeiture of MPD's authority to terminate Grievant, the Award, MPD asserts, is contrary to law and public policy.

In support of this contention, MPD advances the same arguments in its Request that were presented to and rejected by the Arbitrator, and are premised upon MPD's assertion that "[t]here is no meaningful distinction between [D.C. Code Sec. 1-617.1(b-1)(1)] and [D.C. Code Sec. 1-617.3(a)(1)(D),] the statute [found directory] by the courts and PERB" in District of Columbia Department of Corrections v. Public Employee Relations Board, Civil Action No. 91 MPA 15; Teamsters Union Local No. 1714 v. Public Employee Relations Board, Civil Action No. 88 MPA 14; and District of Columbia v. Int'l. Bhd. of Teamsters, Local 1714, Civil Action No. 88 MPA 15 (Memorandum Opinion and Order granting Petition to Review) and Teamsters Local Union No. 1414 a/w Int'l. Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Department of Corrections, 38 DCR 5080, Slip Op. No. 284, PERB Case No. 87-A-11 (1991), respectively. [7]/ (Req. at 12.) Thus, MPD avers, the

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Cf., Teamsters Local Union No. 1714 a/w Int'l. Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO and D.C. Department of Corrections, 38 DCR 5080, Slip Op. No. 284, PERB Case No. 87-A-11 (1991); Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment, 490 A.2d 628, 635 (1985) and Thomas v. District of Columbia Department of Employment Services, 490 A.2d 1162, 1164 (1985). If the time period is construed as leaving intact the authority to act beyond the specified time period unless actual prejudice is established, it is deemed "directory." Id.

[7]/ In Slip Op. No. 284, the Board concluded in a Decision and Order on Remand from the D.C. Court of Appeals (Teamsters Local Union 1714 v. PERB, 579 A.2d 706 (1990)), that D.C. Code Sec. 1-617.3(a)(1)(D) was directory. D.C. Code Sec. 1-617.3(a)(1)(D) provides:

> Procedures and appeals.
>
> (a)(1) An individual in the Career and Education Services against whom an adverse action is recommended in accordance with this subchapter

"Bernard decision [finding D.C. Code Sec. 1-617.1(b-1)(1) directory] is not controlling and should not be used as the basis to overrule the applicable case law and to undermine the public interest." (Request at 18.)

We begin by making clear that arbitration decisions, to the extent they make rulings of law, are not controlling legal precedent with respect to the Board's statutory authority to review arbitration awards to determine whether or not such awards are, on their face, contrary to law and public policy. [8]/ Thus, while a basis for sustaining the grievance turned on the Arbitrator's conclusion that MPD "failed to show that ...Bernard did not equally apply to termination cases[,]" we do not, attribute similar precedential effect to the Bernard Award absent evidence of an agreement between the parties that the Bernard Award would apply to the instant grievance arbitration. (Award at 16.)

In view of the above, we are constrained to consider, notwithstanding the Bernard Award's conclusions of law, MPD's contention that D.C. Code Sec. 1-617.1(b-1)(1) is not mandatory in nature. MPD contends that "no meaningful distinction [exists] between the 45-day law [, i.e. D.C. Code Sec. 1-617.1(b-1)(1),] and the statute [, i.e., D.C. Code Sec. 1-617.3(a)(1)(D),] reviewed by the courts and PERB" in PERB Case No. 87-A-11. In that case, the Board concluded that "D.C. Code Sec. 1-617.3(a)(1)(D) d[id] not establish a mandatory rule." Id. at 5086 (See n. 5.) For the reasons discussed below, we find D.C. Code Sec. 1-617.1(b-1)(1) establishes a mandatory rule.

> is entitled to the reasons, in writing, and to the following:
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> * * *
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> (D) A written decision on the answer within forty-five (45) calendar days of the date the charges are preferred. (emphasis added)

Upon a Petition for Review of Opinion No. 284, the D.C. Court of Appeals, inter alia, affirmed the Board's ruling regarding its interpretation of this statutory provision.

[8]/ Contrary to the implied statements by the Arbitrator (Award at 18), the fact that an arbitration award has not been appealed does not enhance its precedential or controlling effect on subsequent arbitration awards with respect to its legal sufficiency, upon review, under this statutory criterion for review.

Foremost, MPD fails to take into consideration that D.C. Code Sec. 1-617.1(b-1)(1) fundamentally differs from D.C. Code Sec. 1-617.3(a)(1)(D) in that the former directly concerns the District's authority to initiate adverse or corrective action with respect to its employees. We specifically found, however, that "[n]othing contained in D.C. Code Sec. 1-617.3(a)(1)(D) [] is expressly directed to an agency's authority to take adverse action[.]" Id. at 4. The 45-day time period in Sec. 1-617.3(a)(1)(D) provides a prescribed time period in which employees are to receive a particular procedural entitlement, i.e., a written decision on an employee's answer to the charges, after the adverse or corrective action has been initiated by the agency. On the other hand, the 45-day time period in Sec. 1-617.1(b-1)(1), is specifically directed to the agency's authority to take adverse or corrective action.

This critical distinction, i.e., the authority to commence adverse action, we conclude, places Sec. 1-617.1(b-1)(1) in the same category of statutes that place time limits for initiating or appealing actions before administrative adjudicative agencies, e.g., the Board. The Board has ruled --and the D.C. Court of Appeals has affirmed-- that such statutes are "mandatory and jurisdictional, thus obviating any need for a showing of prejudice" when violated. See, District of Columbia Metropolitan Police Dept. and Fraternal Order of Police, MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282 at n.2, 87-A-04 (1992) quoting the D.C. Court of Appeals in Public Employee Relations Board v. D.C. Metropolitan Police Dept. No. 88-868 (June 25, 1991), Slip Op. at 2. See also, District of Columbia Metropolitan Police Dept. and Fraternal Order of Police/Metropolitan Police Dept. Labor Committee, 39 DCR 1931, Slip Op. 286 at 3, PERB Case No. 87-A-07 (1991). [9]/ Furthermore, as observed by the Arbitrator, the legislative history reflects an intent by the District Council to make the statutory amendment mandatory, unlike the scant legislative history available regarding D.C. Code Sec. 1-

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[9]/ Such an analogous treatment of D.C. Code Sec. 1-617.1 (b-1)(1) is further supported by the remarks of former Councilmember Betty Ann Kane in presenting Bill 8-369 (which became codified as D.C. Code Sec. 1-617.1(b-1)(1)) for final reading. She noted that "[t]he purpose of this legislation is to equalize the amount of time that an employee has to file an appeal of corrective action and the amount of time that the District government has to bring an adverse action or corrective action against an employee." (Emphasis added.) Council of the District of Columbia Report at 12, Final Reading and Final Vote on Proposed Bills, Corrective Action Amendment Act of 1990 (8-369) February 27, 1990.)

617.3(a)(1)(D). [10]/

MPD's argument that the statute should not be found mandatory because it lacked, as did Sec. 1-617.3(a)(1)(D), a

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[10]/ Reflected in the legislative history is an unsuccessful attempt by the Acting Deputy Director of the Office of Personnel to amend the statute to extend the time period from 45 to 60 days and to provide an exception to the time limitation to enable agencies to show that any delay was reasonable. Committee on Government Operations Report, Public Roundtable Hearing on Bill 8-369, January 4, 1990.

Councilmember Nathanson, in providing testimony on what became the only exception to the statute, stated that in waiting for the conclusion of criminal investigations to decide whether to discipline, the Executive, the Police Department and the General Counsel wanted to relieve any concern that the "45 days would begin to count and the agency would lose its authority to take the adverse action." Council of the District of Columbia Report at 19, Final Reading and Final Vote on Proposed Bills, Corrective Action Amendment Act of 1990 (8-369), February 27, 1990. Ironically, in relaying MPD's position concerning the need for the exception, Councilmember Nathanson further stated that "the concern of the Police Department with the complexity of the kinds of investigations they sometimes get into, is that [without the exception] they will then lose their authority to take an adverse action against an employee" under proposed Bill 8-369. Id. at 32.

Councilmember Lightfoot, in expressing reservations on the one exception to Sec. 1-617.1 (b-1)(1), remarked: "the purpose of this particular Bill...is to put some certainty in the employees' lives as well, not to have an employee faced with some great uncertainty as to when they may be charged with an offense. And what we're trying to do here is balance the government's interest to discipline employees for wrongful conduct... with the rights of employees to have some certainty in the process for their allegations... . I'm concerned about your amendment because I think, in the way it's worded it may open this bill up to a point that actually defeats the purpose of the legislation so that the employee won't have any certainty and, therefore, the very purpose of the Bill will be defeated." Id. at 33-34. (Emphasis added.)

Finally, during this same proceeding, then Council Chairman Clarke stated that the 45-day time period "is a limit on time in which the government may act." Id. at 27. He went on to state that the "bill is designed to require that the city act within a specified amount of time. Id. (Emphasis added.)

statement regarding the consequences for failing to comply, is only one factor in determining whether a statute is mandatory or directory. Reliance on this factor as controlling to such a determination, represents the kind of "mechanistic approach" viewed unfavorably by the D.C. Court of Appeals in Teamsters Local Union 1714 et al. v. Public Employee Relations Board, 579 A.2d 706 at ____ (1990). Moreover, this factor establishes only a presumption that the statute may be directory. We find any such presumption associated with this statute's lack of expressed consequences or penalty for failing to comply with the time period therein is rebutted by the factors discussed above. Moreover, we find that in failing to comply with the statute, there is no less drastic remedy available that would serve the statute's objective than an automatic forfeiture of the agency's authority to act. (See n.9.) [11]/

We, therefore, conclude that D.C. Code Sec. 1-617.1(b-1)(1) is mandatory in nature and effect. [12]/ Consequently, with respect to all three Requests, by sustaining the grievances on this basis, the Awards are not on their face contrary to law and public policy. Accordingly, MPD has not shown a statutory basis for reviewing the Awards, and therefore its requests for Board review must be denied.

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[11]/ As noted by Councilmember Nathanson, "[t]he intent of this legislation is not to let the government sit forever on a potential action against an employee. And the idea is to have a time limit." Council of the District of Columbia Report at 31, Final Reading and Final Vote on Proposed Bill, "Corrective Action Amendment Act of 1990" (8-369) February 27, 1990.

[12]/ MPD raises an ancillary argument that notwithstanding the nature of D.C. Code Sec. 1-617.1(b-1)(1), the Award is contrary to law and public policy by extending the Bernard Award, concerning a suspension, to MPD's authority to terminate in the instant proceeding. As we discussed in the text, Bernard has no legal precedential effect with respect to its rulings of law concerning D.C. Code Sec. 1-617.1(b-1)(1). A review of the statute, however, reveals that it makes no distinction with respect to types of adverse or corrective action included under its coverage. Moreover, in view of our conclusion that the statute is mandatory in nature and in effect, we find no merit to or basis for MPD's arguments that including terminations within the statute's coverage renders the Award on its face contrary to law and public policy. We further note that the legislative history does not support this delimited application of D.C. Code Sec. 1-617.1(b-1)(1) advanced by MPD.

ORDER

IT IS HEREBY ORDERED THAT:

The Arbitration Review Requests in PERB Cases No. 92-A-06, 92-A-07 and 92-A-09 are consolidated.

The Arbitration Review Requests are denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

September 25, 1992

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 92-A-06, 92-A-07 and 92-A-09 was hand-delivered and/or mailed (U.S. Mail) to the following parties on the 25th day of September, 1992.

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