Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Metropolitan Police Department	)	PERB Case No. 16-A-18(R)
Petitioner	)	Opinion No. 1806
v.	)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Clinton Turner)	)	
Respondent	)	

DECISION AND ORDER ON REMAND

I. Statement of the Case

PERB Case No. 16-A-18 comes before the Public Employee Relations Board (Board) on remand from the D.C. Court of Appeals and the D.C. Superior Court.[1] This matter has been remanded to the Board to decide whether the Arbitrator's "factual findings determined as a matter of law that [the Grievant's] conduct was the subject of a criminal investigation beginning on the day of the incident at issue."[2] For the reasons stated herein, the Metropolitan Police Department's (MPD) arbitration review request is granted and the matter is remanded to the Arbitrator for further findings.

II. Background

A. Arbitrator's Factual Findings

[1] *See MPD v. FOP/MPD Labor Comm. (on behalf of Clinton Turner)*, 64 D.C. Reg. 2005, Slip Op. No. 1603, PERB Case No. 16-A-18 (2017), *rev'd* 2016 CA 9253P(MPA) (D.C. Super. Ct. February 9, 2018); *rev'd* 18-CV-228, Mem. Op. and J. (D.C. Oct. 29, 2020).
[2] *FOP/MPD Labor Comm.*, Mem. Op. and J. at 6.

On January 20, 2011, the Grievant, an MPD officer, was involved in a physical altercation while conducting a check on a business.[3] The Grievant and another officer subsequently arrested an employee of the business for disorderly conduct.[4] Based on conversations with other employees of the business and surveillance footage, MPD concluded that the Grievant and his colleague lacked probable cause to arrest the employee.[5] On the day of the incident (January 20, 2011), one of the Grievant's superiors prepared a preliminary report on the Grievant's "Serious Misconduct" and "False Arrest," warning the Grievant that his actions could have criminal implications.[6] On January 21, 2011, an Internal Affairs Division (IAD) officer informed the United States Attorney's Office (USAO), via email, of the incident and indicated that an investigatory package would follow.[7] MPD sent a preliminary investigatory package to the USAO on February 3, 2011.[8]

On July 27, 2011, the USAO presented the Grievant's matter to a grand jury.[9] The grand jury returned an indictment, and the case went before the D.C. Superior Court.[10] On October 15, 2013, the Grievant was found guilty of simple assault.[11] In January 2014, the IAD officer completed his final investigative report and submitted it to the Use of Force Review Board.[12] On February 4, 2014, the Use of Force Review Board concluded that the Grievant's use of force should be classified as "not Justified, Not within Departmental Policy."[13]

On February 24, 2014, MPD issued a Notice of Proposed Adverse Action to the Grievant, proposing termination for his criminal conviction (assault) and his failure to obey MPD orders and directives.[14] On July 4, 2014, an Adverse Action Panel issued a decision finding that MPD had failed to meet the requirements of the ninety-day rule.[15] In reaching this conclusion, the Panel "included the nine days between January 20, 2011 and February 3, 2011, as well as the 88 days between the October 15, 2013 guilty finding and the February 24, 2014 issuance of the proposed adverse action as part of the 90-day period."[16]

MPD remanded the case to an alternate Adverse Action Panel.[17] On October 29, 2014, the alternate Panel found the Grievant guilty of all previous charges, as well as an additional

[3] Award at 2.
[4] Award at 2.
[5] Award at 2.
[6] Award at 2.
[7] Award at 2.
[8] Award at 2.
[9] Award at 2.
[10] Award at 2.
[11] Award at 2.
[12] Award at 2.
[13] Award at 3.
[14] *MPD*, Slip Op. No. 1603 at 2-3.
[15] Award at 4 (citing D.C. Official Code § 5-1031(a) (requiring MPD to commence adverse action against employees no more than ninety business days after MPD had notice of act or occurrence allegedly constituting cause)).
[16] Award at 4.
[17] Award at 6.

prejudicial conduct charge.[18] On December 2, 2014, a Final Notice of Adverse Action was issued to the Grievant with a termination date of February 6, 2015.[19] The Grievant appealed his termination to the Chief of Police, who denied the appeal.[20]

On January 30, 2015, FOP demanded arbitration.[21] The Arbitrator determined that MPD violated D.C. Official Code § 5-1031(a) ("ninety-day rule") when it failed to propose discipline of the Grievant within ninety (90) days of when MPD knew or should have known of the underlying cause of the discipline.[22] As a remedy, the Arbitrator overturned the Grievant's termination and remanded the issue to the parties to attempt to reach an agreement regarding the appropriate penalty.

B. Prior Cases

In Opinion No. 1603, the Board reviewed MPD's Arbitration Review Request (Request), in which MPD requested that the Board overturn the Award on the grounds that the Award violated law and public policy. Specifically, MPD argued that the Arbitrator's conclusion that MPD violated the ninety-day rule contravened D.C. Official Code § 5-1031(b), which states that "a criminal investigation into an act or occurrence constituting cause results in the '90-day period...[being] tolled until the conclusion of the investigation.'"[23] Before the Board, MPD argued that the statutory start of the tolling period began on January 20, 2011, when the criminal investigation began.[24] As a result, MPD asserted that, even accepting the Arbitrator's factual findings as true, only eighty-eight (88) days had elapsed between the conclusion of the investigation and the service of the Notice of Proposed Adverse Action, meaning the discipline was timely.[25] The Board denied MPD's Request, finding that "MPD merely disagree[d] with the Arbitrator's determination of when the criminal investigation started."[26]

MPD appealed the Board's decision to the Superior Court. The Superior Court reversed the Board, finding that MPD had not violated the ninety-day rule and affirming the Grievant's termination.[27] FOP appealed the case to the Court of Appeals. Contrary to the Board's conclusion, the Court of Appeals found MPD's argument was based on more than mere disagreement with the Arbitrator's evidentiary findings and conclusions.[28] The court determined that "MPD clearly argued to PERB that, even accepting the arbitrator's factual determinations, those factual determinations established as a matter of law that [the Grievant's] conduct was the subject of a criminal investigation beginning on the day of the incident at issue," which tolled the

[18] Award at 6.
[19] Award at 6.
[20] Award at 7.
[21] Award at 7.
[22] Award at 28-29.
[23] Request at 10 (quoting D.C. Official Code § 5-1031(b)).
[24] Request at 11.
[25] Request at 11.
[26] *MPD*, Slip Op. No. 1603 at 7.
[27] *MPD v. PERB*, 2016 CA 9253P(MPA) (D.C. Super. Ct. February 9, 2018).
[28] *FOP/MPD Labor Comm.*, Mem. Op. and J. at 6.

ninety-day period for MPD to commence the Grievant's adverse action.[29] Finding that PERB failed to address MPD's argument, the Court of Appeals vacated the judgment of the Superior Court and remanded the matter to the Superior Court to remand to the Board for further proceedings.[30] The matter is now before the Board.

III. Discussion

The issue before the Board is whether the Arbitrator's "factual findings determined as a matter of law that [the Grievant's] conduct was the subject of a criminal investigation beginning on the day of the incident at issue."[31] Although the Court of Appeals declined to define "subject of a criminal investigation," the Court of Appeals found relevant the court's recent decision in *Butler v. Metropolitan Police Department*,[32] as well as the Board's holding in *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*.[33]

In *Butler*, the Court of Appeals was asked to consider when a criminal investigation is deemed to have started for purposes of tolling the ninety-day rule.[34] The court noted that "[s]ection 5-1031(b) does not define the key phrase 'subject of a criminal investigation'…[and the court's] cases have not shed much light on the meaning of that phrase in the context of the beginning of a criminal investigation."[35] The court broadly stated that a criminal investigation "is a comprehensive effort to clarify or better understand circumstances surrounding an incident or series of incidents."[36] However, the court concluded that the statute was ambiguous and ultimately left the interpretation of "subject of a criminal investigation" to the Office of Employee Appeals (OEA), remanding the case to the Superior Court to remand to OEA.[37] The court declined to construe the statutory provisions before the agency charged with administering the provisions had construed them.[38] The court stated that the question of when a criminal investigation begins might turn on factual issues, "including…at what precise point [the Grievant's supervisor] determined that the matter had 'criminal overtones.'"[39]

In *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Opinion No. 1702, the Board disagreed with the arbitrator's

[29] *Id*.
[30] *Id*. at 8.
[31] *Id*. at 6.
[32] 240 A.3d 829 (D.C. 2020).
[33] 66 D.C. Reg. 6056, Slip Op. No. 1702, PERB Case No. 18-A-17 (2019).
[34] *Butler*, 240 A.3d at 836. In *Butler*, MPD argued that tolling begins "as soon as MPD (a) is aware of potentially criminal conduct and (b) has taken at least one concrete step to look into that conduct." *Id*. The employee appealing termination argued that "in addition someone in MPD would have to subjectively view the investigation as potentially criminal rather than merely civil or disciplinary." *Id*.
[35] *Id*. (quoting D.C. Official Code § 5-1031(b)).
[36] *Id*. (quoting *D.C. Fire & Med. Servs. Dep't v. D.C. Off. of Emp. Appeals*, 986 A.2d 419, 425 (D.C. 2010)).
[37] *See Id*. at 836-37.
[38] *See Id*. at 836 (citing *Brown v. District of Columbia Dep't of Emp't Servs.*, 83 A.3d 739, 751-52 (D.C. 2014)).
[39] *Id*. at 838. In Butler, the IAD investigator testified at an evidentiary hearing before an administrative judge that she determined the Grievant's conduct had "criminal overtones." *Id*. at 833.

conclusion that there was no "ongoing" criminal investigation between the IAD referral to the USAO and the USAO's declination to prosecute letter, based on the arbitrator's review of a series of emails between the IAD and USAO during a period of that time.[40] The Board stated, "[W]hen a matter is presented for consideration by way of a criminal investigation, the 90-day rule requires that the time for commencing disciplinary action is tolled until the outcome of that investigation."[41] The Board found that the arbitrator's interpretation of General Order 201.22 defining tolling during an ongoing criminal investigation conflicted with the statute.[42] The Board determined that the award was "unenforceable and contrary to law and public policy."[43]

In the present case, the Arbitrator noted that none of the testifying MPD officials pointed to a "specific action marking the beginning of a criminal investigation or any investigative activities during the January 21 and February 3 period."[44] The Arbitrator stated that MPD had failed to meet its burden of establishing that the Grievant was the "subject of a criminal investigation" during the nine days between the incident and the submission of the Preliminary Investigative Packet to the USAO.[45] The Arbitrator further concluded that there was no evidence in the record that "rationally lead to a conclusion that the nine days were excluded from the 90-day limit pursuant to Section 5-1031(b)."[46]

The statute states that "a criminal investigation into an act or occurrence constituting cause results in the '90-day period...[being] tolled until the conclusion of the investigation.'"[47] There is no precedent requiring a "specific action" to signal the beginning of a criminal investigation for the purposes of tolling the ninety-day rule pursuant to D.C. Official Code § 5-1031(b). The Court of Appeals has not defined a starting point for the criminal investigation phase, only loosely defining it as a "a comprehensive effort to clarify or better understand circumstances surrounding an incident or series of incidents"[48] The Board has also never specifically defined the starting point, holding only that "the involvement of the USAO demonstrates that the Grievant's conduct was the subject of a criminal investigation,"[49] but that the period of a criminal investigation may begin earlier, if IAD begins its own criminal investigation.[50]

The Arbitrator's factual findings show that the Grievant's superior officer prepared a document titled, "Preliminary Report Form - Misconduct, Duty Status or Unusual Incidents"

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[40] *MPD*, Slip Op. No. 1702 at 6.
[41] *Id*.
[42] *Id*.
[43] *Id*. (granting arbitration review request because arbitrator stopped tolling while conduct continued to be subject of USAO criminal investigation).
[44] Award at 20.
[45] Award at 22.
[46] Award at 22.
[47] D.C. Official Code § 5-1031(b).
[48] *Butler*, 240 A.3d at 836 (quoting *D.C. Fire & Med. Servs. Dep't v. D.C. Off. of Emp. Appeals*, 986 A.2d 419, 425 (D.C. 2010)).
[49] *MPD*, Slip Op. No. 1702 at 5.
[50] *See Id*. at 6 (citing *Brown v. District of Columbia Dep't of Emp't Servs.*, 83 A.3d 739, 751-52 (D.C. 2014)).

(Preliminary Report Form), and marked a box denoting "Serious Misconduct – False Arrest" on the same day as the incident (January 20, 2011).[51] The Arbitrator's factual findings also show that the Preliminary Report Form stated that the Grievant's superior officer had informed IAD of the incident on the day it occurred.[52] The Arbitrator's factual findings further indicate that the Grievant's superior officer informed the Grievant, on the day of the incident, "that there were possible criminal implications in the arrest."[53] The Arbitrator also found that MPD alerted USAO of the incident the next day (January 21, 2011), stating that "that once the investigative package was completed, …MPD would bring it to the USAO for review."[54] The Arbitrator's findings show that MPD submitted the "preliminary investigative packet for prosecutorial merit" (Preliminary Investigative Packet) to the Assistant U.S. Attorney at USAO on February 3, 2011.[55]

These facts demonstrate "a comprehensive effort to clarify or better understand circumstances surrounding [the] incident" that may have been criminal.[56] The Arbitrator's factual findings lead to the conclusion that MPD was conducting a criminal investigation from January 20, 2011, to February 3, 2011. Thus, based on the Arbitrator's determination of the factual evidence and as a matter of law, the criminal investigation into the Grievant's conduct tolled the ninety-day rule. Therefore, the Board finds that MPD has demonstrated that the Award is contrary to law and public policy.

IV. Conclusion

The Board vacates its previous decision in *MPD v. FOP/MPD Labor Committee (on behalf of Clinton Turner)* on the basis that the Arbitrator's Award is contrary to law and public policy. The Board remands this case to the Arbitrator for an award in accordance with this decision and for any further findings.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is granted.
2. Opinion No. 1603 is vacated.
3. This matter is remanded to the Arbitrator for further findings.
4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

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[51] Award at 2.
[52] Award at 2.
[53] Award at 2.
[54] Award at 2.
[55] Award at 2.
[56] *Butler*, 240 A.3d at 836 (quoting *D.C. Fire & Med. Servs. Dep't v. D.C. Off. of Emp. Appeals*, 986 A.2d 419, 425 (D.C. 2010)).

January 20, 2022

Washington, D.C.