

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
Metropolitan Police Department)	
Petitioner)	PERB Case No. 18-A-09
)	
v.)	Opinion No. 1684
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Introduction

On March 13, 2018, the Metropolitan Police Department (“Department”), filed this Arbitration Review Request (“Request”) pursuant to the Comprehensive Merit Personnel Act (“CMPA”), section 1-605.02(6) of the D.C. Official Code. The Department claims that the Arbitrator’s Opinion and Award (“Award”) is, on its face, contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) filed a timely Opposition to the Request.

In accordance with the CMPA, the Board is permitted to modify, set aside, or remand 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 Having reviewed the Arbitrator’s conclusions, the pleadings of the parties and applicable law, the Board concludes that the Award on its face is not contrary to law and public policy. Therefore, the Board denies the Department’s Request.

¹ D.C. Official Code § 1-605.02(6).

II. Statement of the Facts

In January of 2011, the Department's Internal Affairs Division and the Federal Bureau of Investigation began an investigation into the illegal purchase of stolen property by Department personnel.² The Grievant purchased property from a cooperating witness on two separate occasions. On March 8, 2011, the Grievant was arrested and charged with "Attempt Receiving Stolen Property" and his police powers were revoked.³ On December 21, 2011, the Grievant was found guilty after a bench trial in District of Columbia Superior Court.⁴

On April 12, 2012, the Department served the Grievant a Notice of Proposed Adverse Action and proposed a penalty of termination from the Department. An Adverse Action Panel found that the Grievant was guilty of the charges and specifications brought against him and recommended his termination from the Department. The Department's Director of Human Resources accepted the Panel's decision and terminated the Grievant effective November 2, 2012. The Grievant appealed the termination to the Chief of the Department. After the appeal was denied, the Union proceeded to arbitration.⁵

III. Arbitrator's Award

The Department seeks review of the Award based on the Arbitrator's decision regarding one issue – whether the Department violated the 90-day rule set forth in section 5-1031 of the D.C. Official Code ("the 90-day rule").⁶ The 90-day rule requires that the proposed adverse action be issued within 90 days of the date the Department had notice of the conduct giving rise to the act allegedly constituting cause.⁷ The Arbitrator found that the Department did not initiate the adverse action against the Grievant until more than a year after the date of his arrest.⁸

It was uncontested at arbitration that the Notice of Proposed Adverse Action was served on the Grievant on April 12, 2012. The Department argued that the Grievant was barred from raising the 90-day rule as a defense because he failed to raise this matter at an earlier time in the proceeding as required by Article 19, E, Section 5.2 of the collective bargaining agreement ("CBA").⁹ The Department also argued that even if the 90-day rule did apply, the Department did comply because the period was tolled until the completion of the criminal trial on December 21, 2011.¹⁰

The Arbitrator found that the Grievant did not waive his right to invoke the 90-day rule.¹¹ The Arbitrator relied on *Charles Sims*, FMCS Case No. 08-5712 (2012) (Simmelkjaer, Arb.)

² Award at 2.

³ Award at 2.

⁴ Award at 2.

⁵ Request at 7-8.

⁶ Request at 8.

⁷ D.C. Official Code § 5-1031(a).

⁸ Award at 10.

⁹ Award at 5.

¹⁰ Award at 5.

¹¹ Award at 5.

which concluded that the Union complied with the requirements of Article 19, E, Section 5.2 when it notified the Chief of Police in its appeal that it would rely on “any and all applicable laws, rules, regulations and provisions of the labor agreement.” The Arbitrator further found that there is substantial authority for the proposition that the 90-day rule is jurisdictional and cannot be waived.¹²

The Arbitrator further found that the 90-day rule was only tolled until the end of a criminal investigation. According to the Arbitrator, there was no evidence in the record indicating that the Department, the United States Attorney’s Office, the Office of the Attorney General, or the Office of Police Complaints was conducting any criminal investigations into the events after the date of the Grievant’s arrest. Therefore, the Arbitrator concluded that the 90-day period should not be extended because the criminal investigation into the receipt of stolen property was completed by March 8, 2011.¹³ The Department violated the 90-day rule because it did not serve the Notice of Proposed Adverse Action until April 12, 2012.

The Department argued that the Grievant was charged in the Notice of Proposed Adverse Action with “having been found guilty of ‘Attempt Receiving Stolen Property’” and it would not have known of this misconduct until the Grievant was found guilty on December 21, 2011. The Arbitrator found that General Order 120.21 clearly states that it is the act of misconduct which is the basis for an adverse action against an employee, not whether the employee has been convicted of a crime involving that act or misconduct.¹⁴

The Arbitrator directed the Department to restore the Grievant to work in a position consistent with his rank and experience and provide back pay.¹⁵

IV. Position of the Parties

The Department argues that the Arbitrator misconstrued the 90-day rule and General Order 120.21 when he found that the Grievant’s dismissal violated the 90-day rule. The Department argues that the Arbitrator incorrectly found that the 90-day clock started on March 8, 2011, and therefore expired in July of 2011.¹⁶ General Order 120.21 provides grounds for disciplining a Department member if they have been convicted of a crime or if they have been deemed guilty by the Department without a criminal conviction.¹⁷ The Notice of Proposed Adverse Action specified that the Grievant was being charged for the conviction, not the initial misconduct. The misconduct the Grievant was charged with, his criminal conviction, did not occur until December 21, 2011.¹⁸ The Department argues that, despite the clear language of

¹² Award at 6.

¹³ Award at 9.

¹⁴ Award at 8.

¹⁵ Award at 10.

¹⁶ Request at 9.

¹⁷ Request at 9.

¹⁸ Request at 10.

General Order 120.21, the Arbitrator determined that the underlying misconduct could only be the criminal act itself, not the conviction.¹⁹

The Union argues that the Department's complaint is a mere disagreement with the Arbitrator's findings and conclusions.²⁰ The attempted receipt of stolen property allegation and the subsequent conviction are not two separate acts of misconduct. The underlying conduct and the conviction are both the same "act or occurrence constituting cause."²¹ The Union argues that the Arbitrator correctly found that the 90-day rule required that the charges against the Grievant be dismissed.²²

The Department further argues that the Award is contrary to the dominant public policy of requiring police officers to preserve peace, protect life, and uphold the law.²³ The Department argues that to allow a police officer who has been found guilty of breaking the law to continue working would be directly at odds with this public policy. The Department looks to a case from the Connecticut Superior Court and another by the Court of Appeals of Ohio that vacated arbitration awards based on public policy grounds.²⁴ The Department also looks to various Department General Orders which require police officers to "observe, uphold and enforce all laws."²⁵

The Union argues that the Department is for the first time making a public policy argument.²⁶ Before the Arbitrator, the Department only argued with respect to how long the 90-day rule should be tolled. During arbitration, the Department did not challenge whether the Grievant's claim could be arbitrated on the basis of public policy. The Union argues that since the Department did not make a public policy argument to the Arbitrator, the Department cannot now make such arguments for the first time before the Board.²⁷

V. Discussion

The Union argues that the Department improperly brings a public policy argument for the first time on appeal, without first raising it before the Arbitrator. However, the public policy argument relates to the Board's authority to review arbitration awards, not to the legitimacy of the Department's action. As stated earlier, the CMPA permits the Board to modify, set aside, or remand an arbitration award if it is contrary to law and public policy. The Department's argument is properly before the Board.

¹⁹ Request at 10.

²⁰ Opposition at 19.

²¹ Opposition at 20.

²² Opposition at 23.

²³ Request at 10.

²⁴ Request at 11-12.

²⁵ Request at 13, citing General Order 201.26(I).

²⁶ Opposition at 17.

²⁷ Opposition at 17.

For the Board to find the Award was, on its face, contrary to law and public policy, the petitioner has the burden to show the applicable law and public policy that mandates a different result.²⁸ Regarding a criminal investigation, the 90-day rule states:

If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.²⁹

As stated earlier, the Arbitrator found that there was no evidence on the record of a criminal investigation after the date of the Grievant's arrest. The Department offers an interpretation of the 90-day rule and General Order 120.21 that differs from the Arbitrator's interpretation and results in a different timeline. By submitting a grievance to arbitration, the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings on which the decision is based; which would include his interpretation of section 5-1031(b) and General Order 120.21.³⁰ The Board may not modify or set aside the Award because the Department offers a different interpretation of the statute or General Order 120.21.

Finally, the Department argues that the Award is contrary to the public policy requiring police officers to preserve the peace, protect life, and uphold the law. The Board's scope of review, particularly concerning the public policy exception, is extremely narrow.³¹ The Board has adopted the U.S. Court of Appeals for the District of Columbia Circuit's holding that a violation of public policy "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 interest."³² The D.C. Circuit went on to explain that the "exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy."³³ In order to establish a public policy violation, the Department has cited other jurisdictions as well as its own General Orders; neither of which are "well defined and dominant" or "ascertained by reference to the laws and legal precedents." Moreover, General Orders are not law or public policy. In reference to General Orders, the Court of Appeals has stated that agency protocols and procedures "do not have the force or effect of a statute or an

²⁸ See *Fraternal Order of Police v. D.C. Pub. Emp. Relations Bd.*, 2015 CA 006517 P(MPA) at p.8.

²⁹ D.C. Official Code § 5-1031(b).

³⁰ *District of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 47 DC Reg. 7217, Slip Op. No. 633 at 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Comm. (Grievance of Angela Fisher)*, 51 DC Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

³¹ *American Postal Workers v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986).

³² *FOP/Dep't of Corr. Labor Comm. v. D.C. Dep't of Corr.* 59 D.C. Reg. 9798, Slip Op. 1271 at p. 2, PERB Case No. 10-A-20 (2012) (citing *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766(1983)).

³³ *American Postal Workers v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986).

administrative regulation. Rather, they provide officials with guidance on how they should perform those duties which are mandated by statute or regulation”.³⁴ Furthermore, the Board has already rejected this type of argument as a basis for overturning an Arbitrator’s Award.³⁵ The Department has failed to show the violation of an explicit, well-defined public policy grounded in law and or legal precedent. In the absence of a clear violation of law and public policy apparent on the face of the Award, the Board may not modify, set aside, or remand the Award as contrary to law and public policy.

VI. Conclusion

The Board rejects the Department’s arguments and finds no grounds to modify, set aside, or remand the Arbitrator’s Award. Accordingly, the Department’s request is denied and the Award is enforceable as written.

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.

Washington, D.C.

September 27, 2018

³⁴ *Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C. 1990).

³⁵ *MPD v. FOP/MPD Labor Committee*, 65 DC Reg. 7468, Slip Op.1667 at 4, PERB Case No. 18-A-04 (2018).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-09, Op. No. 1684 was sent by File and ServeXpress to the following parties on this the 28th day of September, 2018.

Marc L. Wilhite
Pressler Senftle & Wilhite, P.C.
1432 K Street, NW
Twelfth Floor
Washington, D.C. 20005

Andrea Commentale
Office of the Attorney General
Personnel and Labor Relations Section
441 4th Street, NW
Suite 1180N
Washington, D.C.

/s/ Sheryl Harrington
Public Employee Relations Board
1100 4th Street, SW
Suite E630
Washington, D.C. 20024
Telephone: (202) 727-1822