Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Metropolitan Police Department,	
Petitioner,	PERB Case No. 17-A-06
v.	Opinion No. 1635
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Duane Fowler),	
Respondent.	

DECISION AND ORDER

Petitioner Metropolitan Police Department ("MPD") filed an arbitration review request appealing an Opinion and Award ("Award") that ordered the reinstatement of an employee MPD had terminated. MPD asserts that the Award on its face is contrary to law and public policy and submits that the decision of the arbitrator should be reversed.

Having reviewed the Award, the pleadings of the parties, the arbitration record submitted by 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 lacks the authority to grant the requested relief.

I. Statement of the Case

After MPD terminated the employment of Officer Duane Fowler ("Fowler"), the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") requested arbitration. The parties submitted briefs to Arbitrator Roger P. Kaplan as well as the record of MPD's adverse action proceeding.

A. Award

1. Facts

The Arbitrator issued the Award on March 24, 2017. In the Award the Arbitrator relates facts drawn from the record of the adverse action proceeding. The case arose on June 13, 2009, when Fowler, while off duty, was arrested for soliciting prostitution from an undercover MPD

police officer. Fowler denied to the arresting officers that he had agreed to anything with the undercover police officer.[1]

On June 18, 2009, the U.S. Attorney's Office for the District of Columbia ("USAO") offered Fowler an opportunity to avoid trial on a charge of solicitation. The terms of the offer were that if Fowler would complete the diversion program and admit criminal responsibility for the solicitation charge, the USAO would enter a *nolle prosequi* with the court.[2]

On June 26, 2009, the USAO filed a criminal action for solicitation of prostitution in D.C. Superior Court. Fowler accepted the USAO's offer on June 28, 2009, and completed the diversion program on July 4, 2009. The USAO entered a *nolle prosequi* as agreed. The court dismissed the case July 16, 2009.[3]

After the case was dismissed, MPD's Internal Affairs Division prepared a report with findings regarding alleged misconduct by Fowler. In the course of preparing the report, Internal Affairs Division Agent Steven Chew interviewed Fowler on August 12, 2009. During the interview Fowler denied that he agreed to pay for sex with the undercover police officer. Agent Chew determined that this denial was untruthful because Fowler had admitted criminal responsibility for the solicitation charge.[4]

MPD issued a notice of proposed adverse action dated November 20, 2009. The notice contained two charges drawn from offenses listed in General Order 120.21. Charge 1 was conviction of a criminal offense or of any offense in which the member pleads guilty, is found guilty following a plea of *nolo contendere*, or "is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction."[5] The charge cited Fowler's arrest and admission of criminal responsibility as the specification for the offense. Charge 2 was willfully and knowingly making an untruthful statement. The specification was that Fowler denied to Agent Chew that he had agreed to exchange money for sex while knowing that he had accepted criminal responsibility for doing so.[6]

An MPD adverse action panel held a hearing on the charges. It sustained the charges and recommended that Fowler be terminated from his employment. The Director of Human Resources accepted the recommendation and issued a final notice of adverse action. The Chief of Police denied Fowler's appeal on July 13, 2010. FOP then took the case to arbitration.[7]

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[1] Award 7-8.
[2] A *nolle prosequi* is an entry by a prosecutor upon the record that he will "no further prosecute" a criminal case. Black's Law Dictionary 857 (7th ed. 2000).
[3] Award 8.
[4] Award 9.
[5] Award 9-10; Request Ex. 2, Record of the Adverse Action Proceeding (hereafter "Record") at 2.
[6] Award 10.
[7] Award 11.

2. Issues

The Arbitrator found the issues before him to be:

> 1. Whether the Metropolitan Police Department violated the 90 day rule pursuant to D.C. Code § 5-1031.b with respect to Charge 1 (solicitation of prostitution)?
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> 2. If not, was the evidence sufficient to support Charge 1?
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> 3. Was the evidence sufficient to support Charge 2 (untruthful statement)?
>
> 4. Was termination an appropriate penalty for any proven charges?[8]

Because the Arbitrator found in favor of the union on Issues 1 and 3, he did not reach Issues 2 and 4.

The first issue concerns section 5-1031(a-1)(1) of the D.C. Official Code, which requires an adverse action to be commenced not more than 90 business days after MPD has notice of the act or omission in question. Section 5-1031(b) tolls the running of the 90 days during an investigation. The Award states, "The Union relied on District of Columbia Code Section 5-1031.b in support of its contention that the Employer failed to issue the November 20, 2009 Notice to Fowler within 90 days of June 18, 2009, the date the USAO offered Fowler the opportunity to enter the Program."[9] MPD argued that the criminal investigation was not concluded until the court dismissed the case July 16, 2009, and as a result the adverse action was commenced timely.

Noting that "[t]he Act itself does not set out when an ongoing investigation is no longer ongoing,"[10] the Arbitrator considered a case cited and relied upon by both parties, *District of Columbia v. D.C. Office of Employee Appeals and Robert L. Jordan* (hereafter "*Jordan*").[11] In that case, the D.C. Court of Appeals interpreted the phrase "conclusion of the criminal investigation" as used in section 1-617.1(b-1) of the D.C. Code, which the Arbitrator described as "an earlier similar statutory provision."[12] The Arbitrator stated that according to *Jordan*, "conclusion of a criminal investigation" must involve action taken by an entity with prosecutorial authority and that "action by the prosecutorial authority includes the review of evidence and the decision to charge an individual with a crime, or decide that charges should not be filed."[13] According to the Award, the court said that those two decisions by a prosecutorial authority mark the completion of a criminal investigation. This case involved a decision to file charges rather than a decision that charges should not be filed. Charging an individual with a

[8] Award 2-3.
[9] Award 11.
[10] Award 12.
[11] 883 A.2d 124 (D.C. 2004).
[12] Award 12.
[13] Award 12-13.

crime before completion of an investigation would disserve the defendant, the public, and the prosecutor, the Arbitrator opined.[14] Rejecting the two alternative dates proposed by the parties, the Arbitrator concluded that "the USAO completed its investigation before it filed the solicitation of prostitution charge on June 26, 2009."[15]

The Arbitrator found that the adverse action was commenced when MPD served Fowler with a notice of proposed adverse action. That service occurred approximately two weeks more than 90 calendar days after June 26, 2009. As a result, he concluded that the adverse action was not commenced within the time required by section 5-1031(a-1)(1).[16]

The Arbitrator added that no information was provided establishing that de minimis violations may be ignored, but even if a de minimis argument were available, it was unlikely that it could have prevailed in this case.[17] The Arbitrator dismissed Charge 1.

The final issue addressed by the Arbitrator was whether the evidence was sufficient to support Charge 2, willfully and knowingly making an untruthful statement. The statement in question was Fowler's denial to Agent Chew that he had agreed to have sex for money with an undercover police officer on June 13, 2009. Fowler's statement to Agent Chew was consistent with his statement to the arresting officers. But in MPD's view it was inconsistent with the acknowledgement of criminal responsibility that Fowler made as part of his agreement with the USAO.

The Arbitrator stated that "MPD misinterpreted the significance of Fowler's acknowledgement of criminal responsibility."[18] The Arbitrator said the acknowledgement was a way for Fowler to avoid trial and possible conviction. It was not an admission that Fowler no longer believed his version of the events of June 13, 2009, and it did not require him to stop believing his version. The Arbitrator also determined that the Fowler's statement to Agent Chew was not deceitful because Fowler knew that Agent Chew was already aware of Fowler's version as well as the undercover officer's version. For those reasons, the Arbitrator found that MPD did not have substantial evidence to sustain Charge 2.[19]

As a remedy, the Arbitrator awarded reinstatement of Fowler with back pay[20] "adjusted to offset any money earned by Fowler during the many years he has been away from the MPD."[21]

B. Arbitration Review Request

MPD timely filed an arbitration review request ("Request") in which it contends pursuant to section 1-605.02(6) of the D.C. Official Code that the Arbitrator's conclusions on both

[14] Award 15.
[15] Award 15.
[16] Award 15-17.
[17] Award 17, 17 n.4.
[18] Award 20.
[19] Award 22.
[20] Award 22, 26.
[21] Award 22 n.5.

charges are contrary to law and public policy.[22] The Request attached the Award, the record of the adverse action panel that was submitted to the Arbitrator,[23] and a D.C. Superior Court decision cited in the Request.

Regarding Charge 1, MPD argues that the Arbitrator's conclusion that MPD violated the 90-day rule is based on a clear misinterpretation of *Jordan* and is therefore contrary to law and public policy. Additionally, MPD suggests that the Arbitrator's interpretation is incompatible with the demands of the Fifth Amendment privilege against self-incrimination. Regarding Charge 2, MPD contends that the Award is contrary to law restricting credibility determinations to the finder of fact.

FOP timely filed an Opposition. Regarding Charge 1, FOP argues that the Arbitrator's interpretation of case law submitted to him was bargained for and must be upheld. It contends that the Arbitrator interpreted *Jordan* correctly while MPD does not. In addition, the Fifth Amendment privilege does not prevent MPD from bringing an adverse action while a criminal case is pending. Regarding Charge 2, FOP denies that the Arbitrator made a credibility determination. Rather, FOP argues, he interpreted the responsibility clause in an agreement Fowler signed. FOP characterizes MPD's argument as an evidentiary disagreement.

II. Discussion

A. Whether the Arbitrator's Conclusion that MPD Violated the 90-day Rule with Respect to Charge 1 (Solicitation of Prostitution) Was Contrary to Law and Public Policy

A petitioner must cite specific law and public policy in support of its claim that an arbitrator's award is contrary to law and public policy.[24] MPD cites section 5-1031(b) and argues that the Arbitrator misinterpreted it.[25]

Each party points to a different standard that the D.C. Court of Appeals has approved for reviewing an arbitrator's interpretation of a statute. The two standards are reconcilable and apply in different situations, as will be discussed below.

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[22] The Board has the power to "[c]onsider appeals from arbitration awards pursuant to a grievance procedure; provided, however, that such awards may be modified or set aside or remanded, in whole or in part, only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means" D.C. Official Code § 1-605.02(6).

[23] The record attached to the Request contains the notice of proposed adverse action, the investigative report and its attachments, notifications of hearing dates, the request for hearing, documentation of waiver of the 55-day rule, the transcript of the adverse action hearing, exhibits admitted into evidence, correspondence submitted, the findings and recommendations of the adverse action panel, the final notice of adverse action, the appeal to the Chief of Police, the Chief of Police's response to the appeal (final agency action), and the request for arbitration.

[24] *FOP/MPD Labor Comm. (on behalf of Nieves-Campos) v. MPD*, 62 D.C. Reg. 2868, PERB Case No. 1495 at 5, PERB Case No. 14-A-11 (2014).

[25] Award 12.

1. Standard Advocated by FOP

FOP contends that MPD is bound by the Arbitrator's interpretation of the 90-day rule and of the *Jordan* case.[26] In support of its position, FOP quotes from the decision of the U.S. Court of Appeals for the D.C. Circuit in *American Postal Workers Union v. U.S. Postal Service.*[27]

In that case, the Postal Service agreed in its collective bargaining agreement with the union to comply with "applicable law." In the passage quoted by FOP, the court set forth the appropriate standard of review of arbitral statutory interpretation in that situation:

> 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. Thus, the parties may not seek relief from the courts for an alleged mistake of law by the arbitrator. They have agreed to be bound by the arbitrator's interpretation without regard to whether a judge would reach the same result if the matter were heard in court.[28]

Because the Postal Service had agreed to comply with "applicable law," the court held that the arbitrator "had the authority to consider legal rules, including the possible requirement of a *Miranda* warning, in construing the contract."[29]

In *Metropolitan Police Department v. Public Employee Relations Board*,[30] the D.C. Court of Appeals quoted the above passage from *American Postal Workers Union* as authority for deference to an arbitrator's interpretation of a *contract.* The parties bargained for the arbitrator's interpretation of the contract, the court said.[31] This Board, in turn, citing *Metropolitan Police Department v. Public Employee Relations Board*, acknowledged that just as it defers to an arbitrator's interpretation of the contract "the Board must also defer to the arbitrator's interpretation of external law incorporated into the contract."[32]

An example of incorporation of external law into a contract is found in *D.C. Fire and Emergency Medical Services v. D.C. Public Employee Relations Board*.[33]

> In this case, the parties' collective bargaining agreement seemed to require the arbitrator to interpret an external law—here, § 156 of

[26] Opp'n 11.
[27] 789 F.2d 1 (D.C. 1986).
[28] *Id.* at 6-7 (quoted in Opp'n at 8-9).
[29] *Id.* at 3.
[30] 901 A.2d 784, 789 (D.C. 2006).
[31] *Id.*
[32] *F.O.P./Dep't of Corr. Labor Comm. (on behalf of Lee) and D.C. Dep't of Corr.*, 59 D.C. Reg. 10952, Slip Op. No. 1324 at 5, PERB Case No. 10-A-16 (2010).
[33] 105 A.3d 992 (D.C. 2014).

> the D.C. Appropriations Act—in order to decide whether FEMS had breached Article 18, the CBA's overtime provision. That is because Article 18 utilized the phrase "as permitted by law" to qualify the overtime provision in question. By seeking the arbitrator's opinion on the validity of Article 18, then, the parties to arbitration were essentially asking the arbitrator whether § 156 was temporary or permanent law. [34]

However, the court expressed reservations about deferring to an arbitrator's interpretation of a statute even in this narrow situation: "At the same time, this court appreciates the dangers inherent in such an expansive view of the arbitration process. After all, PERB would not otherwise enjoy deference in interpreting . . . a statute that PERB does not administer[,] and FEMS's contention that parties 'may not skirt a legal prohibition by contracting for an arbitration award and then asking a court to defer to a resulting illegal award' is well-taken."[35]

The logic behind deference to an arbitrator's statutory interpretation under the circumstances discussed above is that arbitrators derive their authority from the parties' consent as expressed in their agreement to arbitrate.[36] Pursuant to their negotiated agreement, the parties authorize the arbitrator to interpret the agreement's provisions.[37] The arbitrator has the sole authority to interpret the contract.[38] The arbitrator maintains that authority even when "contract interpretation requires the arbitrator to interpret law that is incorporated by reference."[39]

In this case, however, FOP does not contend that interpretation of any part of the parties' collective bargaining agreement requires interpretation of section 5-1031(b) of the D.C. Official Code. The parties in their briefs and the Arbitrator in his Award discuss the statute alone, as an independent requirement separate and apart from the parties' collective bargaining agreement, which they do not refer to at all. The collective bargaining agreement is not even in the record the parties submitted to the Board. Thus, the Arbitrator's sole authority to interpret the collective bargaining agreement cannot be extended to encompass section 5-1031(b). The deferential standard of review advocated by FOP is inapplicable to the Arbitrator's interpretation of section 5-1031(b).

2. Standard Advocated by MPD

The U.S. Court of Appeals for the D.C. Circuit distinguished the deferential standard of review discussed above from the type of review that is appropriate when considering asserted conflicts between an arbitration award and the law:

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[34] *Id.* at 997 (D.C. 2014). *See also Sheet Metal Workers' Int'l Ass'n v. United Transp. Union*, 767 F. Supp. 2d 161, 176 (D.D.C. 2011) (finding that a contract incorporated external laws by providing that "the laws of the District of Columbia shall be deemed to govern the interpretation and performance of this Agreement").
[35] 105 A.3d at 997.
[36] *Washington Teachers' Union Local # 6 v. D.C. Pub. Sch.*, 77 A.3d 441, 446 (D.C. 2013).
[37] *MPD v. PERB*, 901 A.2d at 789; *D.C. Pub. Sch. v. AFSCME, Dist. Council 20, Local 2093 (on behalf of Hemsley)*, 31 D.C. Reg. 3020, Slip Op. No. 79 at 2, PERB Case No. 84-A-02 (1984).
[38] *FOP/MPD Labor Comm. v. MPD*, 63 D.C. Reg. 14055, Slip Op. No. 1592 at 13, PERB Case No. 11-E-02 (2016).
[39] *Electrolux Home Prods. v. United Auto., Aerospace, & Agric. Implement Workers*, 416 F.3d 848, 853 (8th Cir. 2005) (citing *Am. Postal Workers Union v. U.S. Postal Serv.*, 789 F.2d 1, 6 (D.C. 1986)).

> Although a court owes deference to the arbitrator's interpretation of the CBA, an arbitration award that is in "explicit conflict" with "other laws and legal precedents," *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (internal quotation marks omitted); *see also Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982), is unenforceable.[40]

MPD directs the Board's attention to a comparable standard of review approved by the D.C. Court of Appeals in *Fraternal Order of Police/Department of Corrections Labor Committee v. D.C. Public Employee Relations Board*.[41] In that case an arbitrator ordered the Department of Corrections to pay to certain terminated employees back pay in accordance with the Back Pay Act. The arbitrator stated that "in the absence of any citation to authority to allow offset of interim earnings against back pay due," he would not "direct such offset."[42] The Department of Corrections appealed to the Board, arguing that the Back Pay Act not only allowed but required offset. Noting that the Back Pay Act authorized payment of "an amount equal to all or any part of the pay . . . less any amounts earned by the employee through other employment," the Board held that with respect to offset of earnings the award "violates a specific law."[43] The Board reversed the portion of the award that disallowed offset for interim earnings.[44] In affirming the Board's decision and order, the court of appeals stated:

> As we read the PERB decision, it reflects the Board's interpretation that one circumstance in which an arbitrator's award "on its face is contrary to law and public policy" within the meaning of the CMPA (specifically, D.C. Code § 1–605.02(6)) is where, in arriving at the award, the arbitrator looks to an external law for guidance and purports to apply that law, but overlooks or ignores the law's express provisions. . . .
>
> [W]e are obligated to defer to the PERB's interpretation of the CMPA language unless the interpretation is plainly erroneous, a conclusion we are unable to reach here. As we ourselves have previously reasoned, the statutory reference to an award that "on its face is contrary to law and public policy" may include an award that was premised on "a misinterpretation of law by the arbitrator that was apparent 'on its face.'" *MPD* [*v. D.C. Public Employee Relations Board*], 901 A.2d [784,] 787–88 (italics omitted). That is precisely what the PERB found to exist here.[45]

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[40] *Am. Postal Workers Union v. U.S. Postal Serv.*, 550 F.3d 27, 32 (D.C. Cir. 2008).
[41] 973 A.2d 174 (D.C. 2009).
[42] *Id.* at 176.
[43] *D.C. Dep't of Corr. and F.O.P./Dep't of Corr. Labor Comm. (on behalf of Layne)*, 59 D.C. Reg. 3337, Slip Op. No. 820 at 11, PERB Case No. 05-A-02 (2006).
[44] *Id.* at 11-12.
[45] 973 A.2d at 177-78. *See also D.C. MPD v. FOP/MPD Labor Comm. (on behalf of Ray)*, 59 D.C. Reg. 12663, Slip Op. No. 1317 at 7, PERB Case Nos. 10-A-23 and 10-A-24 (2012) (citing and quoting case). The court acknowledged, in contrast, the deferential standard that applies "where an arbitrator is called upon actually to

That approach to an arbitrator's statutory interpretation can be seen in *Teamsters Local Union 1714 v. Public Employee Relations Board*,[46] in which the D.C. Court of Appeals reversed and remanded a ruling of the Board on an arbitration review request. It ordered the Board to interpret section 1-617.3 of the D.C. Code and implementing regulations in order to determine whether the 45-day time limit they establish for decisions on proposed adverse actions was directory or mandatory and to give a full exposition of its reasons. On remand the Board interpreted the statute to be directory and the regulations to be mandatory. As a result, the Board found contrary to law and public policy the arbitrator's conclusion that the union must establish harmful error if relief were to be had for noncompliance with the regulation.[47] Neither the court's opinion nor the Board's decision and order on remand ever suggested that the parties bargained for the arbitrator's interpretation of the law or the regulations.

As there has been no suggestion that construction of the parties' contract requires application of section 5-1031(b) or that it is otherwise incorporated into the contract, the applicable standard in this case is that MPD may establish the Award to be contrary to law and public policy by demonstrating a misinterpretation of law by the Arbitrator that is apparent on the face of the Award.

3. Alleged Misinterpretation of Section 5-1031(b)

In an effort to show that the Award is contrary to law and public policy under that standard, MPD argues that the Arbitrator's misinterpretation of section 5-1031(b) regarding when a criminal investigation concludes "led to his determination that Employer violated the 90-day rule."[48]

Section 5-1031(a-1) and (b) of the D.C. Official Code establishes when the 90-day period begins and when it is tolled:

> (a-1) (1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member 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 had notice of the act or occurrence allegedly constituting cause.
>
> (2) For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.

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interpret the law." 973 A.2d at 177 n.3 (citing *D.C. MPD v. D.C. PERB*, 901 A.2d 784, 789 (D.C. 2006); *Am. Postal Workers Union v. U.S. Postal Serv.*, 789 F.2d 1, 2–3 (D.C.Cir.1986)).

[46] 579 A.2d 706 (D.C. 1990).

[47] *Teamsters Local Union No. 1714 (on behalf of Harrod) and D.C. Dep't of Corr.*, 38 D.C. Reg. 5080, Slip Op. No. 284, PERB Case No. 87-A-11 (1991).

[48] Request 12.

> (b) 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.

This statute provides that the 90-day period begins "on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence."[49] The Award does not address when that occurred, but the record contains a Preliminary Report Form dated June 13, 2009, with an IS number on it.[50] The statute further provides that if certain entities conduct a related investigation, the 90-day period "shall be tolled until the conclusion of the investigation." The Arbitrator determined that the conclusion of the investigation occurred no later than June 26, 2009, when the USAO filed charges against Fowler.

The foundation of MPD's argument against that determination is that the Arbitrator misinterpreted the *Jordan* case. That case involved section 1-617.1(b-1) of the D.C. Code, a statute that the court said had since been repealed.[51] In pertinent part section 1-617.1(b-1) provided:

> (b–1) (1) 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.
>
> (2) In the event that the act or occurrence allegedly constituting cause is the subject of an ongoing criminal investigation, the 45–day limit imposed by paragraph (1) of this subsection shall be tolled until the conclusion of the criminal investigation.

The facts of the case were that MPD requested the Inspector General to investigate fraudulent receipt of unemployment benefits by MPD's personnel director, Robert Jordan. The Inspector General issued a report on May 22, 1996. That report led to an affidavit for Jordan's arrest, which was signed July 18, 1996. Jordan was arrested August 8, 1996. On September 3, 1996, MPD issued to Jordan an advance notice of his removal. Jordan filed a petition for review of his removal with the Office of Employee Appeals ("OEA"). OEA held that the Inspector

[49] D.C. Official Code § 5-1031(a-1)(2).
[50] Record 382-83. The same IS number appears on subsequent disciplinary documents in Fowler's case.
[51] *Jordan*, 883 A.2d 124, 125 n.3 (D.C. 2005).

General's report of May 22, 1996, triggered the 45-day period. The notice was untimely served on Jordan more than 45 days later, OEA held. The D.C. Superior Court affirmed.

The D.C. Court of Appeals reversed the Superior Court and OEA on the ground that a "criminal investigation" could not have been concluded by the Inspector General:

> Upon a review of the plain language of the statute, we find that OEA and the Superior Court both erred in holding that the "conclusion of [the] criminal investigation" in this case occurred on May 22, 1996, when the Inspector General issued its report. . . . The natural meaning of the statutory language, however, is that the "conclusion of a criminal investigation" must involve action taken by an entity with prosecutorial authority—that is, the authority to review evidence, and to either charge an individual with commission of a criminal offense, or decide that charges should not be filed.
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> In this case, the Inspector General, while performing an investigation into the possible occurrence of criminal activity, was not vested with the power to initiate a criminal prosecution against Jordan.[52]

The court found that "in this case the criminal investigation was *at least* ongoing at the time of the issuance of the arrest warrant on July 18, which would render the MPD's commencement of an adverse action within the forty-five day time period required by the statute."[53]

In the Award, the Arbitrator interpreted this case in a manner that MPD contests:

> The Court stated that "conclusion of a criminal investigation" must involve action taken by an entity with prosecutorial authority. According to the Court, action by the prosecutorial authority includes the review of evidence and the decision to charge an individual with a crime, or decide that charges should not be filed. . . .
>
> The Court . . . set forth two (2) ways to identify when a criminal investigation was completed. One (1) way was when the prosecutorial authority charged an individual with a crime. . . .
>
> The second way to identify when a criminal investigation was completed is to determine the date the prosecutorial authority decided not to file a charge.[54]

[52] *Id.* at 128.
[53] *Id.*
[54] Award 12-14.

MPD is correct that this is not what the court said. As MPD discusses in its Request, the court referred to the authority either to charge or not to charge an individual in order to describe what it meant by prosecutorial authority. The court explained the meaning of prosecutorial authority because OEA and the Superior Court used an action of an entity without prosecutorial authority to mark the end of a criminal investigation. In referring to the authority to charge or not to charge, the court was not setting forth the actions of a prosecutorial authority that identify when a criminal investigation is completed. The opinion does not reflect when either of those events occurred in the case. The opinion only went so far as to say that the investigation was ongoing at the time of a different event, the issuance of the arrest warrant.

Further, the inquiry the court made into what type of entity may conclude a criminal investigation need not even be made under section 5-1031. Unlike section 1-617.1(b-1)(2), section 5-1031(b) specifies the entities whose investigations toll the 90-day period. The entities are not all prosecutorial, and the investigations are not all criminal. First, section 5-1031(b) lists entities conducting criminal investigations: "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." Then it lists entities conducting non-criminal investigations: "an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints." If "an act allegedly constituting cause" is the subject of either type of investigation, then "the 90-day period for commencing a corrective or adverse action . . . shall be tolled until the conclusion of the investigation." Under section 5-1031(b) the period for commencing an action is tolled until "the conclusion of the investigation" rather than "the conclusion of the *criminal* investigation," which was the wording construed by *Jordan*.

While the holding of *Jordan* does not support the Arbitrator's conclusion and, as we said in another case regarding section 5-1031(b), "is not persuasive, as the [court's] decision governed a different statute than the one at issue,"[55] neither does it preclude the Arbitrator's conclusion. As FOP correctly asserts, nothing in *Jordan* or the statute states that the period of limitation "is tolled until the conclusion of the criminal case, i.e., [when] the case is dismissed."[56] A D.C. Superior Court decision cited by MPD, *McCain v. D.C. Office of Employee Appeals*,[57] does not support a contrary conclusion. According to that decision, the court of appeals in *Jordan* found that a criminal investigation ended when "final action" was taken by an entity with prosecutorial authority.[58] Claiming to be following the court of appeals' interpretation, the Superior Court found that "the 90-day rule started on the day of Ms. McCain's conviction, October 8, 2009, when the prosecutorial body's exercise of its discretionary authority ended."[59] FOP asserts that this case "is of very little value even as persuasive authority"[60] because the court confused the date of conviction with the date of sentencing (and gave two different dates for the

[55] *See D.C. MPD v. FOP/MPD Labor Comm. (on behalf of Sims)*, 60 D.C. Reg. 9201, Slip Op. No. 1390 at 9, PERB Case No. 12-A-07 (2013).
[56] Opp'n 9.
[57] No. 2015 CA 004589 (D.C. Super. Ct. Feb. 8, 2017), *appeal docketed*, No. 17-CV-0248 (D.C. Mar. 3, 2017).
[58] *Id.* at 8.
[59] *Id.* at 9.
[60] Opp'n 10 n.2.

latter) and because the case is on appeal.[61] FOP's point is well taken. It may be added that the court does not explain how or where *Jordan* said that an investigation ended with the prosecutor's "final action" and that in any event, as discussed, *Jordan* is not persuasive authority with respect to section 5-1031(b).

It is insufficient to show that the Arbitrator misinterpreted the precise holding of a case governing a different statute: MPD's burden is to show that the Arbitrator misinterpreted the law. There was another basis for the Arbitrator's interpretation of the law besides *Jordan*:

> We would all like to believe that the USAO, or any prosecutor, would not file a charge against anyone until the investigation into alleged criminal activity was completed. To charge without a full, fair and complete investigation would be a disservice to the individual charged, the public and the prosecutor's office. With the above in mind, it follows that the USAO completed its investigation before it filed the solicitation of prostitution charge on June 26, 2009.[62]

That conclusion is not premised upon a misinterpretation of section 5-1031(b) apparent on the face of the Award. The law does not require a conclusion that the investigation continued after the USAO filed charges against Fowler.

Proof of subsequent investigatory activity by the USAO, on the other hand, might compel such a conclusion. This is a factual question rather than a legal question. As the court in *Jordan* indicated, the point at which a given investigation ends depends upon the facts of the particular case, and the facts could evince an ongoing investigation.[63] The *ABA Standards on Prosecutorial Investigations* states two purposes of a criminal investigation. The first is to "develop sufficient factual information to enable the prosecutor to make a fair and objective determination of whether and what charges should be brought and to guard against prosecution of the innocent." And the second is "to develop legally admissible evidence sufficient to obtain and sustain a conviction of those who are guilty and warrant prosecution."[64] MPD argues that if a criminal investigation ends when charges are filed, there would be no need for discovery or the gathering of evidence for trial as law and public policy require.[65] However, MPD needed to do more than express that concept in the abstract. As the party attempting to toll a statute of limitations, MPD bears the burden of proving circumstances that would toll the statute,[66] i.e., that

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[61] *Id.*
[62] Award 15.
[63] 883 A.2d at 128 (Twice referring to "this case," the court said, "We need not decide if, in this case, the arrest warrant or the actual arrest marked the conclusion of a criminal investigation. In many circumstances, even an arrest would not mark the conclusion of a criminal investigation. It is clear, however, that in this case the criminal investigation was *at least* ongoing at the time of the issuance of the arrest warrant. . . .").
[64] *ABA Standards on Prosecutorial Investigations*, standard 1.2(c) (3d ed. 2014).
[65] Request 16.
[66] *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979). *See also Nat'l R.R. Passenger Corp. v. Krouse*, 627 A.2d 489, 498 (D.C. 1993); *Rasmussen v. Reed*, 505 S.W.2d 222, 225 (Ark. 1974); *D.C. MPD v. FOP/MPD Labor Comm. (on behalf of Johnson)*, 63 D.C. Reg. 12573, Slip Op. No. 1590 at 4 n.27, PERB Case No. 16-A-01 (2016) ("[T]he Arbitrator determined that MPD failed to produce evidence that it conducted a criminal investigation.")

the USAO continued to conduct an investigation in order to gather evidence or for some other purpose after filing charges. MPD does not suggest that it offered any evidence to that effect, and the Award and the record reflect that it did not.

In addition, MPD implies that the Arbitrator's interpretation will pose problems for MPD's internal investigations and adverse actions. Citing the Supreme Court cases of *Garrity v. New Jersey*[67] and *Gardner v. Broderick*,[68] MPD claims that without the tolling provision of section 5-1031(b) "MPD would be placed in a position where administrative investigations and the commencement of adverse actions against officers would not be possible without infringing upon officers' Fifth Amendment privilege against self-incrimination."[69] MPD goes on to assert that requiring officers "to answer questions about a criminal charge in an administrative matter, before the criminal case proceeded to trial" would infringe the officers' constitutional privilege against self-incrimination.[70]

Even if the privilege against self-incrimination created such a dilemma, that dilemma would not require the statute to be read as tolling the period of limitation until trial when the statute sets a different demarcation. But there is no dilemma. In the two Supreme Court cases MPD cited, policemen were required to testify about their alleged misconduct under threat of removal. In *Garrity* the Court held that the privilege against self-incrimination "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office."[71] In *Gardner* the Court said that as long as an officer is not required to waive immunity with respect to use of his answers against him in a criminal proceeding, the privilege of self-incrimination does not bar dismissal of the officer for refusal to answer questions.[72] New York City's charter required termination of an officer or employee of the city who refused to waive immunity from prosecution on account of his testimony. The Court held that requirement to be unconstitutional.[73]

These cases do not prevent MPD from commencing adverse actions against officers before trial. If MPD questions an officer, it can either not compel the officer to answer or compel the officer to answer without requiring him to waive his immunity. These options are fully discussed in opinions of the U.S. District Court for the District of Columbia in *Evangelou v. District of Columbia*,[74] a case brought by a former MPD officer who alleged he was fired for

[67] 385 U.S. 493 (1968).
[68] 392 U.S. 273 (1968).
[69] Request 15.
[70] Request 16.
[71] 385 U.S. at 500.
[72] 392 U.S. at 276, 278.
[73] *Id.* at 279; *accord Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (reaffirming holdings of *Garrity* and *Gardner* "that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized.")
[74] 901 F. Supp. 2d 159 (D.D.C. 2012) (granting in part and denying in part MPD's motion to dismiss), 63 F. Supp. 3d 96 (D.D.C. 2014) (granting MPD's motion for summary judgment), *aff'd*, 639 F. App'x 1 (D.C. Cir.), *cert. denied*, 137 S. Ct. 234 (2016).

exercising his Fifth Amendment rights. The court explained that "if the government chooses to demand an answer from its employee, then that answer is immunized automatically."[75]

FOP claims that MPD has utilized these options and routinely brought adverse actions against officers while their criminal cases were pending. In support of that claim FOP attached documents from a disciplinary action as exhibits. Because those exhibits were not part of the arbitration record, they have not been considered.[76]

FOP's exhibits are not needed to reach the conclusion that MPD's misapprehension of the privilege against self-incrimination reveals nothing about the meaning of section 5-1031(b). Neither MPD's argument based upon the Fifth Amendment nor its argument based upon *Jordan* establishes that a misinterpretation of section 5-1031(b) is apparent on the face of the Award's disposition of Charge 1. Thus, MPD has failed to show that the Award's disposition of Charge 1 is contrary to law and public policy.

B. Whether the Arbitrator's Conclusion that Charge 2 (Making an Untruthful Statement) Was Unsupported by Substantial Evidence Is Contrary to Law and Public Policy

MPD's position is that by concluding that Charge 2 was not supported by substantial evidence the Arbitrator failed to defer to the credibility determination of the trier of fact, which was the Adverse Action Panel. The Adverse Action Panel found that Fowler was not credible.[77] Further, in the agreement Fowler signed, he admitted that he had agreed to exchange money for sex.[78] "In essence," MPD asserts, "the arbitrator made a credibility determination as to Grievant, and found his testimony in the record to be credible regarding whether or not he in fact agreed to exchange money for sex. . . ."[79] That determination, MPD argues, is contrary to law and public policy requiring deference to the credibility determinations of a trier of fact.

MPD cites two cases in support of that proposition. In *Slater-El v. United States*,[80] the D.C. Court of Appeals stated that almost without exception a trier of fact's credibility determination is entitled to substantial deference.[81] In *Charles P. Young Co. v. D.C. Department of Employment Services*,[82] the court explained when this deference is due: "Traditionally, a hearing examiner's decision has been entitled to greater consideration if the examiner . . . has heard live testimony and observed the demeanor of the witnesses."[83] In that situation, "the examiner's personal observation of the demeanor and conduct of the witnesses is entitled to great weight."[84]

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[75] 901 F. Supp. 2d at 165.
[76] *See* PERB R. 538.1(f), 538.4.
[77] Request 17 (citing Record 455-82).
[78] Request 18.
[79] Request 17.
[80] 142 A.3d 530 (D.C. 2016).
[81] *Id.* at 538.
[82] 681 A.2d 451 (D.C. 1996).
[83] *Id.* at 457.
[84] *Id.*

The Arbitrator focused exclusively on the credibility of Fowler's statement to Agent Chew denying the offense. The Arbitrator concluded that Fowler's earlier acknowledgement of criminal responsibility did not establish that Fowler was willfully untruthful in his interview with Agent Chew. The Adverse Action Panel did not hear or observe Fowler during that interview. The deference discussed in *Charles P. Young Co.* is inapplicable to this situation.

But there was live testimony before the Adverse Action Panel that led the Panel to conclude that Fowler was guilty of the charges against him. As MPD indicates, the Panel found Fowler's testimony before it to be "incredible"[85] and found that "Officer Fowler continued to make false statements throughout the hearing."[86] On the other hand, the Panel found the testimony of the undercover police officer to be credible.[87] The Arbitrator did not discuss these credibility determinations or the degree to which they might support Charge 2.

Nevertheless, a claim that an arbitrator ignored evidence amounts to a dispute over the weight and probative value that the arbitrator attributed to the evidence. Such determinations are within the arbitrator's domain.[88] Determining the weight of evidence is within an arbitrator's domain even if the arbitrator bases his or her review solely on the record of an adverse action panel.[89] The Award states that the parties agreed that the Arbitrator's review "should determine whether substantial evidence exists to support the MPD decision to terminate Fowler." MPD does not contend that performing that function is contrary to law or public policy. That being the case, MPD has not cited specific law and public policy compelling a different conclusion regarding Charge 2.

III. Conclusion

The petitioner has not shown that the Arbitrator's disposition of either of the two charges is contrary to law and public policy. Consequently, no statutory basis exists for setting aside the Award.

[85] Record 476-77.
[86] Record 481.
[87] Record 476.
[88] *D.C. Dep't of Pub. Works v. AFGE, Locals 872, 1975, & 2553*, 49 D.C. Reg. 1140, Slip Op. No. 438 at 5, PERB Case No. 95-A-08 (1995).
[89] *D.C. MPD v. FOP/MPD Labor Comm. (on behalf of Bell)*, 63 D.C. Reg. 12581, Slip Op. No. 1591 at 7, PERB Case No. 15-A-06 (2016).

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is denied. The Award is sustained.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Members Douglas Warshof, Barbara Somson, and Mary Anne Gibbons.

Washington, D.C.

August 17, 2017

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 17-A-06 is being transmitted via File & ServeXpress to the following parties on this the 25th day of August 2017.

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