Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department	
Petitioner	PERB Case No. 21-A-06
	Opinion No. 1 7 8 3
v.	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	
Respondent	

DECISION AND ORDER

I. Statement of the Case

On December 15, 2020, the District of Columbia Metropolitan Police Department (MPD) filed this Arbitration Review Request (Request) pursuant to Board Rule 538 of the Public Employee Relations Board, seeking review of an arbitration award (Award) dated November 24, 2020. The Award sustained the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (Union) on behalf of an employee (Grievant) who had been terminated from his position. The Arbitrator ordered MPD to rescind the Grievant's termination and restore all backpay and benefits. MPD requests review on the grounds that the Award is contrary to law and public policy.

Upon consideration of the Arbitrator's conclusions, applicable law, and record presented by the parties, the Board concludes that the Award is not contrary to law and public policy. Therefore, the Board denies MPD's Request.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. At the time of the Grievant's removal, he had been employed by MPD as a police officer for approximately thirteen (13) years.[1] On the evening of September 28, 2017, the Grievant, who was intoxicated, was arrested because of his

[1] Award at 1.

involvement in the assault of a restaurant employee.[2] A preliminary report with the MPD and an Incident Summary (IS) number were created the next day.[3] On May 7, 2018, the Grievant pleaded guilty in a Maryland state court to one count of second-degree assault, a misdemeanor.[4] On April 8, 2019, the court expunged the finding of guilt; the Grievant, whom the court had placed on probation in 2018, was given probation before judgment (PBJ) and his probation was terminated.[5]

MPD issued a Notice of Proposed Adverse Action (Notice) on October 29, 2018.[6] The Notice contained four charges: (1) "Conviction…", (2) "Conduct unbecoming an officer", (3) "Failure to obey orders or directives issued by the Chief of Police", and (4) "Drinking alcoholic beverages or beverage as defined in D.C. Official Code § 25-101, while in uniform off duty."[7] The Notice proposed termination.[8]

At the Adverse Action Hearing on April 10, 2019, the Grievant pled "Not Guilty" to Charges 1, 2 and 3.[9] He pled "Guilty" to Charge 4.[10] The Panel found the Grievant guilty on the contested charges and recommended termination of his employment.[11] On May 17, 2019, the Grievant received the Final Notice of Adverse Action.[12]

The Grievant appealed the Panel's decision to the Chief of Police, who denied the appeal.[13] The Grievant's employment was terminated.[14] Thereafter, the Union invoked arbitration on behalf of the Grievant.

B. Arbitrator's Findings

At arbitration, the Arbitrator considered the following issues:

(1) Whether the Department instituted adverse action against the Grievant in violation of D.C. Code section 5-1031 ('the 90-day rule')?

(2) Whether the Department prematurely instituted adverse action against the Grievant?

(3) Whether the Panel's guilty findings are supported by substantial evidence in the record?

(4) Whether termination is the appropriate penalty in light of the *Douglas* factors?[15]

On the first issue, the Arbitrator found that the 90-day rule was violated.[16] The Arbitrator noted that the incident involving the Grievant occurred on September 28, 2017.[17] MPD created an

[2] Award at 4.
[3] Award at 7
[4] Award at 5
[5] Award at 5-6
[6] Award at 8
[7] Award at 8-10
[8] Award at 10
[9] Award at 10
[10] Award at 10
[11] Award at 10
[12] Award at 10
[13] Award at 10-11
[14] Award at 10
[15] Award at 11
[16] Award at 40
[17] Award at 40

IS number on September 29, 2017.[18]The Arbitrator found that MPD had the burden to show that there was an ongoing criminal investigation after September 29, 2017, by one of the agencies enumerated in section 5-1031(b) of the D.C. Official Code,[19] but that MPD did not meet this burden. The Grievant was not served with MPD'S NPAA until October 29, 2018, 275 days after the 90-day period began to run. Therefore, the 90-day rule was not tolled and MPD violated the 90-day rule.[20] As a result, the Arbitrator overturned the Grievant's termination.

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an 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.[21] MPD requests review on the grounds that the award is contrary to law and public policy.

A. The Award is not contrary to law and public policy.

MPD argues that the Award is contrary to law and public policy because disciplinary charges were brought by MPD within 90 days of the Grievant's conviction.[22] Therefore, MPD argues that, under D.C. Official Code § 5-1031, those disciplinary charges were timely.[23] Further, MPD asserts that the disposition of the Grievant's criminal charges in Howard County marked the conclusion of the criminal investigation. MPD reasoned that a criminal investigation ends when a prosecuting entity has brought the criminal case to conclusion.[24]

MPD relies on a D.C. Court of Appeals case, *Jordan*, which addressed the issue of what constitutes the conclusion of a criminal investigation in a case regarding the 90-day rule.[25] In that case, the Court concluded that the conclusion of a criminal investigation must involve action taken by an entity with prosecutorial authority to either charge an individual with the commission of a criminal offense or decide that charges should not be filed.[26] Relying on *Jordan*, MPD, herein, asserts that a criminal investigation does not end until the prosecuting entity has brought the criminal case to conclusion.[27] Therefore, MPD concludes that there was an ongoing criminal investigation until the case's disposition on July 23, 2018.[28]

The Arbitrator rejected MPD's argument and its reliance on *Jordan.* The Board has previously found that this case is unpersuasive, as the Court's decision concerned a different statute.[29] Additionally, the Board concluded that the Court in *Jordan* did not mean that the U.S. Attorney's office concludes a criminal investigation when it charges an individual with the commission of a criminal offense.[30] Rather, the Court in *Jordan* was explaining what is meant by "prosecutorial authority" and that only an entity with prosecutorial authority could take an action

---

[18] Award at 40
[19] Award at 40
[20] Award at 40
[21] D.C. Official Code § 1-605.02(6).
[22] Pet'r Am. Req. at 16
[23] Pet'r Am. Req. at 16
[24] Pet'r Am. Req. at 16
[25] Pet'r Am. Req. at 17 (citing *District of Columbia v. D.C. Office of Employee Appeals*, 883 A.2d 124 (D.C. 2005) ("*Jordan*").
[26] Pet'r Am. Req. at 17
[27] Pet'r Am. Req. at 18
[28] Pet'r Am. Req. at 18
[29] *See Metro. Police Dep't v. Pub. Employee Relations Bd.*, 2018 CA 006737 P(MPA) (D.C. Super. Ct. Oct. 29, 2019) ("Lopez").
[30] *Id.*

that would conclude a criminal investigation.[31] Also, the Board stated, in PERB Case Number 17-A-06, that nothing in *Jordan* or the statute states that the period of limitation is tolled until the dismissal of the criminal case.[32]

A petitioner must demonstrate that the Award itself violates established law or compels an explicit violation of "well defined public policy grounded in law or legal precedent."[33] Furthermore, MPD has the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result."[34] The D.C. Court of Appeals has reasoned, "Absent a clear violation of law[,] one evident on the face of the arbitrator's award, the [Board] lacks authority to substitute its judgment for the arbitrator's."[35]

Here, MPD argues that overlapping criminal and disciplinary proceedings would create Fifth Amendment self-incrimination problems for the grievant. However, the Board has previously found this argument to be unpersuasive. The Supreme Court in *Garrity* held that the privilege against self-incrimination "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office."[36] MPD argued that D.C. Code Section 5-1031 does not define what constitutes the conclusion of a criminal investigation and therefore, MPD's determination of when the investigation concluded does not evince a "clear error."[37] However, the Board has previously held that the "clear error" standard from *Stokes* and *Anderson* does not apply to arbitral review of a Decision by an Adverse Action Panel because the decisions under review in *Stokes* and *Anderson* were not arbitrator decisions.[38] Further, PERB and the D.C. Superior Court have held that an arbitrator's factual determination of whether a criminal investigation tolled the 90-day rule is not a basis for overturning an arbitration award.[39]

Additionally, the Board has held that a disagreement with an arbitrator's choice of remedy does not render the Award contrary to law and public policy.[40] MPD disagrees with the Arbitrator's conclusion concerning when a criminal investigation tolled the 90-day rule.[41] However, the Arbitrator concluded that MPD failed to present evidence of an ongoing criminal investigation as required by the 90-day rule.[42] MPD's disagreement with a rival interpretation is not a sufficient basis for concluding that the Award is contrary to law and public policy. For the aforementioned reasons, MPD's Request is denied.

---

[31] *Id.*
[32] *Metropolitan Police Department v. Fraternal Order of Police*, PERB Case No. 17-A-06, 64 D.C. Reg. 10115 (2017).
[33] *Id.*
[34] *MPD v. FOP/MPD Labor Comm.*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).
[35] *Fraternal Order of Police/Dep't of Corr. Labor Comm. v. District of Columbia Pub. Emp. Relations Bd.*, 973 A.2d 174, 177 (D.C.2009)
[36] *Garrity v. N.J.*, 385 U.S. 493, 500 (1967) (holding that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.")
[37] Award at 40. *See also Stokes v. Dist. of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985) (where the Court stated that an arbitrator must base his or her decision solely on the administrative record and the agency decision should not be set aside if it is supported by substantial evidence in the record and not clearly erroneous as a matter of law). *See also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) (where the Court stated that to meet the "clearly erroneous" standard, "the reviewing court on the entire evidence must be left with the definite and firm impression that a mistake has been made).
[38] Award at 40. *See also MPD v. FOP/MPD Labor Comm. (re: Michael Thomas),* PERB Case No. 18-04, Slip Op. No. 1667 (2018).
[39] *MPD v. FOP*; PERB Case No.: 19-A-08, Slip Op. 1724 at p. 6 (2019) ("*Mendoza*"), *Metro. Police Dep't v. Pub. Employee Relations Bd.*, 2018 CA006737 PMPA, (D.C. Super. Ct., Oct. 29, 2019) ("Lopez")
[40] *DCHA v. Bessie Newell*, 46 D.C. Reg. 10375, Slip Op. No. 600, PERB Case No. 99-A-08 (1999).
[41] Award at 40.
[42] Award at 40.

IV. Conclusion

The Board rejects MPD's arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, MPD's Request is denied and the matter is dismissed in its entirety.

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 Douglas Warshof, Board members Barbara Somson, Mary Anne Gibbons, and Peter Winkler

April 15, 2021

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 21-A-06, Slip Op. No. 1783 was sent by File and ServeXpress to the following parties on this 22nd day of April 2021.

Daniel J. McCartin
CONTI FENN LLC
36 South Charles Street, Suite 2501
Baltimore, Maryland 21201

Rashaan Dickerson
Assistant Attorney General
400 6th Street NW, 9th Floor
Washington, D.C. 20001

/s/ Dawan Jones
Public Employee Relations Board