

midnight shift tour of duty. During this shift, MPD directed the Grievant to transport a prisoner from the Fifth District to the Central Cell Block.³ The Grievant awoke the prisoner for transport to the Central Cell Block. The prisoner was not cooperative and repeatedly insulted and directed several expletives towards the Grievant.⁴ While waiting to be processed for transport, the prisoner requested to use the restroom. The prisoner was handcuffed by another MPD officer after using the restroom. When the Grievant attempted to check the prisoner's handcuffs, the prisoner pulled away and attempted to turn toward the Grievant.⁵ The Grievant pulled-up on the handcuffs and fast walked the prisoner to the transport van.⁶ Once at the transport van, the prisoner repeatedly refused to enter as ordered.⁷ The transport van has four steps. The prisoner sat on fourth step, fell to the floor of the wagon but left her legs and feet hanging outside of the door.⁸ The prisoner attempted to kick the Grievant.⁹ The Grievant then pulled the prisoner from the transport van onto the concrete floor. Another MPD officer assisted the prisoner off the ground. The MPD officer walked the prisoner up the four steps of the van. The prisoner attempted to kick the officer. Thereafter, the Grievant executed a take-down of the prisoner in the transport van and used hand controls while waiting for leg shackles.¹⁰ The prisoner suffered injuries to her face and arm. After arriving at the Central Cell Block, MPD officers photographed the injuries, gave the prisoner the opportunity to provide a written statement, and transported the prisoner to Providence Hospital for treatment.¹¹

On June 13, 2018, the United States Attorney's Office (USAO) issued a letter declining criminal prosecution.¹² On October 17, 2018, the Grievant was served with a Notice of Proposed Adverse Action (NPAA).¹³

The NPAA charged the Grievant as follows:

Charge No. 1: Failure to Obey Orders and Directives- Specification No. 1: Use of Force Not Justified (placing arrestee in prone position for three minutes),¹⁴ Specification No. 2: Use of Force Not Justified (pulling arrestee from transport van causing her to land on back),¹⁵ Specification No. 3: Use of Force Not Justified (taking arrestee down on van steps),¹⁶ Specification No. 4: Failing to call for immediate medical attention for arrestee after use of force,¹⁷ Specification No. 5: Failure to immediately notify an official of the use of force on an arrestee.¹⁸

³ Award at 14.

⁴ Award at 14.

⁵ Award at 14.

⁶ Award at 15.

⁷ Award at 15.

⁸ Award at 15.

⁹ Award at 15.

¹⁰ Award at 15.

¹¹ Award at 16.

¹² Award at 16.

¹³ Award at 18.

¹⁴ Award at 19.

¹⁵ Award at 19.

¹⁶ Award at 19.

¹⁷ Award at 19.

¹⁸ Award at 20.

Charge No. 2: Using unnecessary and wanton force- Specification No. 1- Use of unnecessary force by solo tactical takedown of handcuffed arrestee.¹⁹

Based on the Charges, MPD proposed termination as the appropriate penalty. On May 21, 2019, an Adverse Action Hearing was held before a Panel. The Panel found the Grievant guilty of all Charges and unanimously recommended termination.²⁰ On July 18, 2019, the Grievant appealed the Panel's determination to the Chief of Police. The Chief of Police denied the appeal.²¹ Thereafter, FOP invoked arbitration pursuant to the parties' collective bargaining agreement.²²

B. Arbitrator's Findings

The parties submitted the following issues to the Arbitrator:

1. Whether MPD violated the 90-day rule as set forth under D.C. Official Code § 5-1031 with respect to instituting the proposed adverse action against the Grievant?
2. Whether evidence presented by MPD was sufficient to support the Charges against the Grievant?
3. Whether termination was an appropriate penalty?²³

Before the Arbitrator FOP argued that MPD violated the 90-day rule. FOP asserted that MPD had notice that the 90-day rule began to run when MPD issued an incident number on November 18, 2017.²⁴ FOP argued that MPD presented no evidence of a criminal investigation or referral to the USAO before the issuance of the letter declining prosecution. FOP contends that 141 days lapsed between the case assignment and the letter declining prosecution, and another 86 days passed between the letter declining prosecution and the issuance of the NPAA.²⁵ The FOP argued that the 90-day rule is mandatory and in the alternative the delay by MPD was not de minimis. The FOP argued that it preserved its right to argue timeliness under the 90-day rule because it raised the issue in the appeal to the Chief of Police. FOP argued that there was not sufficient evidence to support a finding of guilt on either Charge²⁶ and that termination was not the appropriate penalty because the Panel improperly weighed the *Douglas factors*.²⁷

MPD argued that the Arbitrator did not have jurisdiction over the statutory question, and in the alternative MPD argued that FOP waived its right to timeliness under the 90-day rule because it failed to raise the argument before the Panel.²⁸ MPD argued that the 90-day rule is not mandatory

¹⁹ Award at 20.

²⁰ Award at 20.

²¹ In the denial letter the Chief of Police asserted that the incident was referred to the USAO on December 15, 2017.

²² Award at 2.

²³ Award at 2.

²⁴ Award at 22.

²⁵ Award at 22.

²⁶ Award at 25-31.

²⁷ Award at 31-36.

²⁸ Award at 23.

and jurisdictional. Further, MPD argued that the 90-day rule was tolled for a criminal investigation from November 18, 2017 through June 3, 2018.²⁹ MPD argued that the record contained sufficient evidence to support a finding of guilt and that termination was the appropriate penalty.³⁰

The Arbitrator concluded that MPD violated the 90-day rule and rescinded the termination of the Grievant. The Arbitrator found that the 90-day rule is mandatory, and alternatively that the delay of MPD was not de minimis. The Arbitrator found that MPD failed to provide evidence that demonstrated that a criminal investigation tolled the 90-day rule before the USAO letter declining prosecution. The Arbitrator found that the NPAA was served 137 days after the 90-day rule expired and dismissed all charges against the Grievant.

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.³¹ MPD requests review on the grounds that the award is contrary to law and public policy.

MPD argues that Award is contrary to law and public policy because (1) the Grievant waived the right to challenge the 90-day rule during the hearing before the Panel and (2) the Arbitrator barred MPD from bringing disciplinary action within the timeframe explicitly authorized by the statute.³² MPD argues that 90-day rule is a directory rule and subject to waiver. Therefore, MPD argues that it was prejudiced by the Arbitrators decision to allow the timeliness argument to proceed. Notwithstanding waiver of the defense of timeliness, MPD argues that the service of the NPAA was timely served within 87 days of the USAO's letter declining prosecution, and thus, the Award is contrary to law on its face.³³

FOP argues that the Award is not contrary to law and public policy. FOP asserts that there is no binding precedent concerning the 90-day rule and therefore an arbitrator's decision that the rule is mandatory or directory cannot on its face be contrary to law and public policy. FOP argues that the Arbitrator's finding that there was not sufficient evidence of a criminal investigation to toll the 90-day rule was not contrary to law and public policy. FOP contends that MPD is raising the same arguments that it raised before the Arbitrator and merely disagrees with the Award.

²⁹ Award at 23.

³⁰ Award at 31-36.

³¹ D.C. Official Code § 1-605.02(6).

³² Pet'r Br. at 9.

³³ Pet'r Br. at 17-18.

The law and public policy exception is “extremely narrow.”³⁴ The narrow scope limits potentially intrusive judicial reviews under the guise of public policy.³⁵ MPD has the burden to demonstrate that the Award itself violates established law or compels an explicit violation of “well defined public policy grounded in law and or legal precedent.”³⁶ The violation must be so significant that law and public policy mandate a different result.³⁷ The Board may not modify or set aside the Award as contrary to law and public policy in the absence of a clear violation on the face of the Award.³⁸

Here, MPD fails to identify any specific law and public policy that has been violated. The Board has determined that an Award is not contrary to law and public policy, on its face, whether an arbitrator determines that the 90-day rule is directory or mandatory.

Addressing MPD’s argument that the Arbitrator improperly found that the 90-day rule is mandatory, the Board notes that since the Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Best) decision, the Board has applied the Superior Court decision that the 90-day rule is directory, not mandatory. Notwithstanding, the Board does not have original jurisdiction over the statute establishing the 90-day rule. The Superior Court has rendered conflicting opinions as to whether the 90-day rule is mandatory or directory. Until the Court of Appeals has made a final determination on the issue, an award cannot be contrary to law and public policy, on its face, whether an arbitrator determines the 90-day rule is mandatory or directory. Therefore, the Board finds that the Award is not contrary to law and public policy.³⁹

Notwithstanding the Arbitrator’s finding that the 90-day rule is mandatory and subject to waiver, the Arbitrator conducted a balancing test under *JBG Properties*.⁴⁰ The Arbitrator found that the Grievant was prejudiced by MPD’s failure to retain evidence and that even if the 90-day rule was directory, the “balancing of equitable considerations did not excuse the untimely adverse action.”⁴¹ The Arbitrator’s holding that the 90-day rule is mandatory is not contrary to law and public policy.

³⁴ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019) (citing *Am. Postal Workers Union v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986), accord *MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. No. 1487 at 8, PERB Case No. 09-A-05 (2014); *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. No. 925 at 11-12, PERB Case No. 08-A-01 (2012)).

³⁵ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 6056, Slip Op. No.1702 at 4, PERB Case No. 18-A-17 (2019).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *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).

³⁹ *MPD v. FOP/MPD Labor Comm.*, 66 D.C. Reg. 15816, Slip Op. No. 1724 at 6, PERB Case No. 19-A-08 (2019).

⁴⁰ *JBG Properties Inc. v. D.C. Office of Human Rights*, 364. A.2d 1183 (D.C. 1976).

⁴¹ Award at 38.

Further, the Arbitrator has the authority to resolve issues of fact including determinations regarding the credibility, significance, and weight of the evidence.⁴² By agreeing to submit 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.”⁴³ Here, the Arbitrator found that FOP developed a factual record at the hearing with respect to the 90-day rule.⁴⁴ Moreover, the Arbitrator found that MPD failed to meet its burden of proof to demonstrate that the 90-day rule was tolled because MPD failed to provide evidence in the record that established a criminal investigation between November 18, 2017, and June 13, 2018.⁴⁵ The Arbitrator’s findings provide support for the conclusions that the Grievant did not waive the right to raise the 90-day rule as a defense and that the 90-day rule was violated.

MPD had the burden to specify “applicable law and public policy that mandates that the Arbitrator arrive at a different result.”⁴⁶ The Board finds that MPD merely disagrees with the Arbitrator. Therefore, the Board declines MPD’s request to substitute the Board’s judgment in place of the bargained-for decision of the Arbitrator.⁴⁷

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.

⁴² *DCDHCD v. AFGE Local 2725 AFL-CIO*, 45 D.C. Reg. 326, Slip Op. 527 at 2, PERB Case No. 97-A-03(1998). *AFSCME District Council 20 AFL-CIO v. D.C. General Hospital*, 37 D.C. Reg. 6172, Slip Op. 253, PERB Case No. 90-A-04 (1990).

⁴³ *FOP v. Dept. of Corrections* 59 D.C. Reg. 9798, Slip Op. 1271 at 2, PERB Case No. 10-A-20 (2012). *See MPD v. FOP/MPD Labor Comm.*, 47 D.C. Reg. 7217, Slip Op. 633 at p. 3, PERB Case No. 00-A-04 (2000); *MPD v. FOP/MPD Labor Comm. ex rel. Fisher*, 51 D.C. Reg. 4173, Slip Op. 738, PERB Case No. 02-A-07 (2004).

⁴⁴ Award at 37.

⁴⁵ Award at 39. The Arbitrator found that the Chief of Police’s assertion that the matter was referred on December 15, 2017, lacked an evidentiary basis.

⁴⁶ *MPD and FOP/MPD Labor Committee*, 47 D.C. Reg. 717, Slip Op. 633 at p. 2, PERB Case No. 00-A-04 (2000).

⁴⁷ *MPD v. FOP/MPD Labor Committee ex rel. Best*, 59 D.C. Reg. 12689, Slip Op. 1325 at 8, PERB Case No. 9-A-14 (2010).

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 vote of Board Chairperson Douglas Warshof and Members Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

January 29, 2021
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 21-A-02, Op. No. 1770 was sent by File and ServeXpress to the following parties on this the 3rd day of February 2021.

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