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

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| In the Matter of: |) | |
| |) | |
| Metropolitan Police Department |) | |
| |) | PERB Case No. 18-A-17 |
| Petitioner |) | |
| |) | Opinion No. 1702 |
| v. |) | |
| |) | |
| Fraternal Order of Police/ Metropolitan Police Department Labor Committee |) | |
| |) | |
| Respondent |) | |
| |) | |

DECISION AND ORDER

I. Introduction

On August 14, 2018, the Metropolitan Police Department (“MPD”) filed an Arbitration Review Request pursuant to the Comprehensive Merit Personnel Act (“CMPA”), section 1-605.02(6) of the D.C. Official Code. MPD requests the review of an arbitration award (“Award”) issued on July 24, 2018, granting the grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”) finding that the Grievant’s termination violated the D.C. Official Code §5-1031(2004) (“90-day rule”).

MPD asserts that the Award is contrary to law and public policy due to the Arbitrator’s improper interpretation of the 90-day rule and, despite the interpretation, at least one charge is timely. FOP filed a timely Opposition to the Request.

Pursuant to section 1-605.02(6) of the D.C. Official Code, the Board may modify, set aside, or remand a grievance arbitration award only when (1) the arbitrator was without or exceeded his or her jurisdiction; (2) the award on its face is contrary to law and public policy; or (3) the award was procured by fraud, collusion, or other similar unlawful means.

Upon consideration of the Arbitrator’s conclusions, applicable law, and record presented by the parties, for the reasons stated herein, the request is granted.

II. Statement of the Case

In 2011, the Grievant, a police officer with MPD for ten years, had been detailed to the Information Technology Division since 2009. The Grievant received an MPD laptop computer that he improperly allowed his ex-wife to use by sharing his password.¹ In March 2011, MPD ordered an inventory audit to locate all laptop computers. On August 15, 2011, the Grievant's laptop was located at the home of his ex-wife. On that day, MPD Internal Affairs Division ("IAD") interviewed the Grievant's ex-wife and subsequently revoked the Grievant's police powers and retrieved his service weapon.²

On November 11, 2011, IAD referred the matter to the United States Attorney's Office for the District of Columbia ("USAO"). On January 16, 2012, the USAO declined to prosecute the matter.³ Thereafter, on May 22, 2012, MPD served the Grievant with the Notice of Proposed Adverse Action.⁴

The Notice of Proposed Adverse Action contained four charges of misconduct. Charge 1 alleged that the Grievant made false statements related to providing an administrative password to an unauthorized user.⁵ Charge 2 alleged that the Grievant improperly provided an MPD laptop computer and administrative password to an unauthorized user.⁶ Charge 3 alleged that the Grievant failed to properly secure a service weapon.⁷ Charge 4 alleged that the Grievant failed to report his possession of the MPD laptop after learning of the inventory audit.⁸

On December 12, 2012, MPD conducted a trial board hearing. The Grievant was found guilty of all charges and served with the Notice of Final Adverse Action. On January 18, 2013, the Chief of Police denied the Grievant's appeal and terminated him from MPD.⁹ Subsequently, FOP invoked arbitration.

III. Arbitration Award

In accordance with the parties' collective bargaining agreement ("CBA"), the Arbitrator decided the issues based on the record submitted by the parties without a hearing. There were three issues to resolve:

1. Whether MPD timely served the Notice of Proposed Adverse Action in accordance with the requirements of D.C. Official Code §5-1031(2004), otherwise known as the 90-day rule;
2. Whether the evidence presented by MPD was sufficient to support the charges;
3. Whether termination was the appropriate penalty for the alleged violations.

¹ Award at 8.

² Award at 8.

³ Award at 9.

⁴ Award at 9.

⁵ Award at 5.

⁶ Award at 5.

⁷ Award at 5.

⁸ Award at 5-6.

⁹ Award at 9.

The Arbitrator determined that the 90-day rule was a threshold issue for resolving the dispute.¹⁰ The Arbitrator analyzed MPD's service of notice under the 90-day rule in conjunction with MPD General Order 201.22 that states, in pertinent, part "in the event of an ongoing criminal investigation, the 90-day period for providing notice shall be suspended until the conclusion of the investigation."¹¹

The Arbitrator examined a series of emails between IAD and USAO and determined that between November 14 and December 27, 2011, there was nothing that would satisfy the requirement of an ongoing investigation to toll the statute.¹²

The Arbitrator reversed the trial board. In the final calculation of the 90-day period, the Arbitrator found that 30 business days elapsed where there was no ongoing criminal investigation after the MPD referred the matter to the USAO. In addition, the Arbitrator found that 89 business days elapsed after the USAO declined to prosecute the matter until MPD served of the Notice of Proposed Adverse Action. The Arbitrator concluded that 129 days had elapsed, 39 more than permitted under the 90-day rule.¹³

In its brief before the Arbitrator, MPD asserted that the criminal investigation tolled the period between August 15, 2011, and January 16, 2012. MPD argued that service of the Notice of Proposed Adverse Action was timely on day 88.¹⁴ MPD also asked the Arbitrator to find that the 90-day rule is directory rather than mandatory.

The Arbitrator found that the 90-day rule is mandatory and jurisdictional.¹⁵ Ultimately, the Arbitrator held that MPD violated the 90-day rule and ordered the Grievant reinstated with full backpay.¹⁶

IV. Position of Parties

A. MPD's Position

MPD argues that the Award is contrary to the plain language of the 90-day rule and therefore contrary to law and public policy. Notwithstanding the Arbitrator's interpretation that MPD violated the 90-day rule, MPD argues that Charge 1 was timely. MPD argues that the failure to provide any rationale for the dismissal of Charge 1 was contrary to law and public policy.¹⁷ Charge 1 alleged that the Grievant made a false statement to IAD on March 14, 2012, 55 days

¹⁰ Award at 9.

¹¹ Award at 10.

¹² Award at 12.

¹³ Award at 12.

¹⁴ Award at 12. The Arbitrator incorrectly found that the Notice of Proposed Adverse Action was served on day 89 after the USAO declined prosecution. The 89-day calculation failed to account for the Emancipation Day holiday.

¹⁵ Request at 8-9 n.16. While significant authority establishes that the 90-Day Rule is directory, see *FOP/MPD Labor Comm. v. MPD*, 63 D.C. Reg. 14526, Slip Op. 1595, PERB Case No. 15-A-12 (2016); *MPD v. FOP/MPD Labor Comm.*, 64 D.C. Reg. 10152, Slip Op. No. 1639, PERB Case No. 16-A-12 (2017); *MPD v. FOP/MPD Labor Comm.*, 64 D.C. Reg. 2012, Slip Op. No. 1606, PERB Case No. 16-A-19 (2016), MPD is not asking PERB to reverse the Arbitrator's decision on this basis.

¹⁶ Award at 16.

¹⁷ Request at 15.

before receiving the Notice of Proposed Adverse Action. MPD asserts that because the Award is void of discussion related to Charge 1 in the factual summary or legal analysis, the Arbitrator's analysis is neither thorough nor consistent with the law on its face.¹⁸

B. FOP's Position

FOP argues that the Board should deny the request because it is a mere disagreement with the determinations of the Arbitrator. FOP asserts that MPD did not carry its burden of showing the existence of a criminal investigation to toll the statute.¹⁹ In relation to Charge 1, FOP argues that MPD did not meet its burden to show that the Arbitrator misinterpreted the law or that law and public policy mandate a different outcome.²⁰ FOP argues that public policy requires Charge 1 to be considered untimely because the statements merged with the underlying untimely disciplinary action.²¹

V. Discussion

The law and public policy exception is "extremely narrow."²² The narrow scope limits potentially intrusive judicial reviews under the guise of public policy.²³ 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."²⁴ The violation must be so significant that law and public policy mandate a different result.²⁵ Here, the Arbitrator's decision conflicts with the plain language of the statute and is contrary to law and public policy.

The Arbitrator interpreted the 90-day rule along with MPD General Order 201.22 and determined that the disciplinary action implemented by the MPD was untimely. The 90-day rule states:

"(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department

¹⁸ Request at 15.

¹⁹ Additionally, FOP argues that MPD 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 MPD'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. MPD's argument is properly before the Board.

²⁰ Opposition at 20.

²¹ Opposition at 20-21 (citing *Alamedia v. State Personnel Board*, 15 Cal.Rptr.3d. 383, 395 (Cal. App. 2004)).

²² *American Postal Workers Union, AFL-CIO v. United States 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. 1487 at 8, PERB Case No. 9-A-05 (2014); *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. 925 at 11-12, PERB Case No. 08-A-01 (2012).

²³ *American Postal Workers* at 8.

²⁴ *Id.*

²⁵ *Id.*

or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the United States Attorney for the District of Columbia. . . the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.” D.C. Official Code §5-1031 (2004).

Also relevant to the discussion, MPD General Order 201.22 states:

“[I]n the event there is an ongoing criminal investigation into the act constituting cause by the MPD, the United States Attorney’s Office (USAO), or the Office of the Attorney General for the District of Columbia (OAG), or if there is an ongoing investigation by the Office of Police Complaints (formally the Office of Citizen Complaint Review), the 90-day time period shall be suspended until the conclusion of the investigation.”²⁶

The Arbitrator tolled the period between August 15, 2011 and November 11, 2011. The Arbitrator found that on November 11, 2011, IAD referred a preliminary report to the USAO for a criminal investigation and on January 16, 2012, the USAO declined to criminally prosecute the matter. The Arbitrator reviewed a series of emails between IAD and the USAO and found that the emails were clear and convincing documentation that there was not an “ongoing” investigation during the period of November 14, 2011, through December 27, 2011.²⁷ The Arbitrator determined that the 30 days within the period between IAD referral and USAO declination would not toll the statute.

As the party attempting to toll the statute of limitations, MPD has the burden of proving circumstances that would toll the statute.²⁸ In this matter, the involvement of the USAO demonstrates that the Grievant’s conduct was the subject of a criminal investigation.²⁹ The express provision of the 90-day rule requires tolling if the act or occurrence allegedly constituting cause is the subject of a criminal investigation until the conclusion of a criminal investigation.³⁰ Here, the Arbitrator interpreted the word “ongoing” as set forth in General Order 201.22 to prevent the statute from tolling.

General Orders are among the matters entrusted to the arbitrator for interpretation.³¹ But General Orders do not have the effect of a statute or a regulation and cannot override provisions

²⁶ Fire and Police Disciplinary Action Procedure Act of 2004, Go-PER-201.22, Effective Date: June 1, 2005, Distribution B, Related to General Order 1202.1 (Disciplinary Procedures and Processes).

²⁷ Award at 12.

²⁸ *MPD v. FOP/MPD Labor Comm. ex rel. Fowler*, 64 D.C. Reg. 101115, Slip Op. 1635 at 13, PERB Case No. 17-A-06 (2017).

²⁹ See, *MPD v. PERB*, Civ. Case No. 2016 CA 009253 P(MPA) at 4 (D.C. Super. Ct. 2018).

³⁰ D.C. Official Code §5-1031(b) (2004).

³¹ *MPD v. FOP/MPD Labor Comm. ex rel. Robinson*, 59 D.C. Reg. 9778, Slip Op. 1261 at 4, PERB Case No. 10-A-19 (2012).

of law.³² An interpretation of a General Order that is in explicit conflict with the law and other legal precedents is unenforceable.³³

A judicial body may consult a dictionary to determine the common, accepted meaning of a word used in a statute.³⁴ The plain meaning is the meaning attributed to a document by giving the words their ordinary sense, without referring to extrinsic indications of the author's intent.³⁵

“When the plain meaning of the statutory language is unambiguous the intent of the legislature is clear, judicial inquiry need go no further. In determining the plain meaning, the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them It is appropriate for a court to look to dictionary definitions to determine the ordinary meaning of words which are used in a statute, but which are not defined in the statute or in related regulations.”³⁶

The relevant portion of the 90-day rule states, “[i]f the act or occurrence allegedly constituting cause is the subject of a criminal investigation . . . the 90-day period for commencing a corrective or adverse action . . . shall be tolled until the conclusion of the investigation.”³⁷ The word “subject” means “matter presented for consideration.”³⁸ The word “conclusion” means “outcome.”³⁹ Thus, when 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.

The Arbitrator's interpretation of General Order 201.22 stopped the tolling of the statute while the conduct continued to be the subject of a criminal investigation, prior to its conclusion.⁴⁰ This interpretation conflicts with the statute. Therefore, the award is unenforceable and contrary to law and public policy.

The Board finds that the disciplinary action was timely. The Board sets aside the Arbitrator's holding that MPD violated the 90-day rule. In addition, the Board remands the Award for a decision on (1) whether the evidence presented by MPD was sufficient to support the charges, and (2) whether termination was the appropriate penalty for the alleged violations.

³² *MPD v. FOP/MPD Labor Comm. ex rel. Macdonald*, 59 D.C. Reg. 3974, Slip Op. 928 at 3, PERB Case No. 07-A-04 (2012); *Abney v. District of Columbia*, 580 A. 2d 1036, 1040-41 (D.C. 1990); *Wanzer v District of Columbia*, 580 A. 2d 127, 133 (D.C. 1990).

³³ *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

³⁴ *Nat'l Union of Law Enforcement Assocs. v. Off. of Chief Med. Examiner*, 59 D.C. Reg.5365, Slip Op. 976 at 5, PERB Case No. 08-RC-01(2012).

³⁵ *Nat'l Union of Law Enforcement Assocs. V. Off. of Chief Med. Examiner*, 59 D.C. Reg.5365, Slip Op. 976 at 5, PERB Case No. 08-RC-01(2012).

³⁶ *Nat'l Union of Law Enforcement* at 5 (citing *Tippett v. Daly*, 964 A.2d 606 (D.C. 2009)).

³⁷ D.C. Official Code §5-1031 (2004).

³⁸ *Black's Law Dictionary* 1594 (4th Ed. Rev. 1968).

³⁹ *Merriam-Webster Collegiate Dictionary* 239 (Frederick C. Mish et al. eds., 10th ed. 1993).

⁴⁰ Award at 12.

VI. Conclusion

The Board accepts MPD's arguments and finds cause to set aside and remand the Arbitrator's Award. Accordingly, MPD's request is granted.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department Arbitration Review Request is hereby granted.
2. The Arbitrator is directed to make findings consistent with this decision.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.**

By unanimous vote of Board Chairperson Charles Murphy, Members Ann Hoffman, Barbara Somson, Douglas Warshof, and Mary Anne Gibbons

March 21, 2019

Certificate of Service

This is to certify that the attached Decision and Order in PERB Case No. 18-A-17, Opinion No. 1702 was sent by File and ServeXpress to the following parties on this the 26th day of March 2019.

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This is to certify that the attached Decision and Order in PERB Case No. 18-A-17, Opinion No. 1702 was sent by U.S. Mail to the following parties on this the 26th day of March 2019.

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