Government of the District of Columbia
Public Employee Relations Board

In the Matter of: District of Columbia Metropolitan Police Department, Petitioner, and Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Fred Johnson), Respondent.	PERB Case No. 09-A-02 Opinion No. 961

DECISION AND ORDER

I. Statement of the Case:

The District of Columbia Metropolitan Police Department ("MPD") filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an Arbitration Award ("Award") that rescinded the termination of bargaining unit member Fred Johnson ("Grievant").

Arbitrator John Truesdale found that: "that the matter [was] arbitrable, but that the MPD did not timely begin the adverse action in question. [In addition, he indicated that] [u]nder the circumstances, [he did] not need to reach the remaining issues, including the merits of the adverse action." (Award at p. 2). As a result, he rescinded the termination and directed that the Grievant be reinstated with back pay and interest. (See Award at p. 14). MPD contends that the: (1) Arbitrator exceeded his authority; and (2) Award is contrary to law and public policy. (See Request at p. 2). The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") opposes the Request.

The issues before the Board are whether "the arbitrator was without or exceeded his or her jurisdiction" or whether "the award on its face is contrary to law and public policy." D.C. Code §1-605.02(6).

II. Discussion

Fred Johnson (the Grievant) was appointed to MPD in 1984. At the time of the events under review here, the Grievant was a Sergeant and was assigned to the Violent Crimes Unit Homicide Branch. "The instant matter arose out of an incident that occurred on March 31, 2003. A week prior to that date, Harry Wheeler, the father of Grievant's daughter Brittainy's son Trayvon,[1] had come to the home at 79 R Street, N.W., Washington, D.C., where Brittainy lived with her mother, her maternal grandmother, her aunt, and her son. Her paternal grandmother, two aunts, two cousins, and two children lived next door, at 81 R Street. Brittainy was then 19, Trayvon two. Wheeler gave Brittainy a shoe box containing $17, 000 (she counted it) to hold for him because he might be facing prison time. She put the shoe box and the money it contained in a drawer in her mother's bedroom." (Award at pgs. 2-3).

On March 31st the house was burglarized by two men who took the $17,000. "Brittainy recognized one of them as being Michael Taylor whom she knew because he lived 'up the street.' After the men left, she ran next door, while her mother called Brittainy's father, the Grievant. In the meantime, Brittainy had called Wheeler who came over and left after learning about the robbery. At Wheeler's subsequent trial, [Brittainy] testified that she did not tell Wheeler about Taylor at the time, but that she told him in the late-morning hours of the next day, April 1." (Award at p. 3).

The Grievant arrived at 79 R Street in the early afternoon of March 31st. Upon his arrival and hearing about the robbery, he summoned Wheeler who came at once. "Wheeler and the Grievant had a heated discussion in which the Grievant threatened to 'hurt' Wheeler if he did not stay away from his daughter. At one point, Wheeler told the Grievant, 'I'm going to do what I have to do and I'll go to jail behind this one.' After further discussion, Wheeler left. According to Brittainy's testimony at the Wheeler trial, she did not name Taylor to her father at that time, but that her sister, Azuredee Perkins, told the Grievant that night, March 31." (Award at p. 3).

The Grievant did not report the incident to the police, but before leaving 79 R Street he told Brittainy to do so and she said she would. However, she did not. "At Wheeler's trial, the Grievant testified that as a police officer he had no requirement to make the report himself because he was not the victim of the robbery nor did he live at 79 R Street." (Award at p. 3).

"On April 1, 2003, Wheeler hired someone to kill Michael Taylor and later that day Taylor was shot and killed. Upon learning of this on the evening of April 1, and having learned that Brittainy had not made a police report, the Grievant told Detective Anthony Brigidini (assigned to investigate Taylor's murder) and Brigidini's Sergeant, Paul Wingate, at about 10 p.m. on April 1 that he had information relative to the case. The Grievant told Brigidini about the robbery, about Wheeler's statement that 'I'm going to do what I have to do and I'll go to jail

[1]The arbitrator noted that there "was some variety in the briefs in the spelling of these names. In Harry Wheeler's trial, Brittainy Johnson herself spelled [her] name for the record as used here." (Award at p. 2, n. I)

behind this one,' and about 'Mike from up the street.' Detective Brigidini relayed this information to Lieutenant Lamar Greene and Commander (then Captain) Michael Anzallo who took a statement from the Grievant on April 3, 2003, in which the Grievant recounted what he had learned about the March 31 robbery, the 'go to jail behind this one' statement, and having learned about 'Mike from up the street' on March 31. MPD Internal Affairs Division (IAD) was notified but no discipline was initiated against the Grievant at that time. The Grievant continued on full-duty status, and MPD was 'monitoring' the situation." (Award at pgs. 3-4).

"On June 21, 2003, the Washington Post ran a story headlined 'Officer Key Figure in Murder Case,' recounting Detective Brigidini's testimony on June 18, 2003, in a D.C. Superior Court hearing. Brigidini testified concerning the 'go to jail behind this one' remark and his view that the Grievant 'absolutely' had a duty to file a report about the robbery." (Award at p. 4). The article quoted Assistant Chief of Police Peter Newsham as saying that "[a]n officer has an obligation to report crimes . . . that are reported to them. But when one family member reports it to another, it is more difficult to say what should be done." (Award at p. 4). The article reflects that the Grievant was interviewed by the Post for the story and quoted him as saying that he "had no need to report Wheeler's words." (Award at p. 4).

The Grievant apparently continued on full-duty status. On February 22, 2005, the Grievant testified at the murder trial of Harry Wheeler. On February 25, 2005, Wheeler was convicted of first-degree murder. Following the trial, questions arose concerning the Grievant's testimony and the matter was referred to MPD 's Internal Affairs Division ("IAD").

On March 23, 2005, Detective Brigidini was interviewed by Sergeant Anthony Langley and Detective Theresa Ostazeski. (See Award at p. 4). "On the basis of this interview and after reviewing the transcript of the Grievant's testimony in Wheeler's murder trial, IAD determined that cause existed to charge the Grievant with either criminal or administrative misconduct and placed the Grievant on Non-Contact duty status". (Award at p. 4). IAD forwarded the matter to the United States Attorney's Office ("USAO") for review of a possible perjury charge. "On June 7, 2005, that office issued a Letter of Declination." (Award at p. 4).

"On June 23, 2005, the Grievant, accompanied by an FOP Representative, was interviewed by two IAD officers (Sergeant Anthony Langley and Detective Dwayne Jackson). . . He was advised that because he had received the Letter of Declination, from that point forward the case was administrative in nature and he was read the Reverse Garrity Warnings. He was told that even if he disclosed information indicating that he might be guilty of criminal conduct, neither self-incriminating statements nor the fruits of such statements would be used against him." (Award at p. 4).

On July 18, 2005, the Assistant Chief of Police ("ACOP") advised the Director of the Disciplinary Review Office, that Sergeant Langley's investigation sustained the allegations that the Grievant:

> failed to report or document the apparently armed home invasion of his daughter's home . . . and sustains the allegation that [the Grievant] also learned the name of a possible robbery suspect on the day of the robbery, yet he did not give this information to MPD detectives for possible follow-up . . . and sustains the allegation that [the Grievant] heard Mr. Harry Wheeler, a convicted drug dealer, threaten retribution in his presence yet [the Grievant] failed to notify proper authorities about the threat and subsequently, Mr. Wheeler made good on the threat by having Mr. Michael Taylor, the robbery suspect killed. (Award at p. 5).

On October 7, 2005, MPD charged the Grievant with "Neglect of Duty" and "Conduct Unbecoming an Officer."[2]

MPD proposed to suspend the Grievant for thirty (30) workdays. He was given 15 business days to respond which he did on October 29, 2005. (See Award at p. 6). On December 19, 2005, the Grievant was given Final Notice of Adverse Action finding that he was guilty of the charges and specifications and would be suspended for thirty (30) workdays. He was advised that he had ten business days to file a written appeal with the Chief of Police. On January 3, 2006, the Grievant appealed. On January 19, 2006, Chief of Police Charles H. Ramsey: (1) denied the Grievant's appeal; (2) recommended that the Grievant be discharged; and (3) advised the Grievant of his right to a hearing before a Trial Board. (See Award at p. 6). On January 23, 2006, the Grievant requested a hearing. (See Award at p. 6).

The three member Trial Board conducted a hearing on February 27, 2006. The Grievant pleaded "Not Guilty" to all charges and specifications, except charge No. 2, Specification No. 2,

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[2]MPD issued the following charges against the Grievant:

(a) Charge No. 1: Violation of General Order Series 1202, Number 1, Part I-B-14, which prohibits: "Neglect of any duty to which assigned as required by the rules and regulations adopted from time to time by the Department."

(b) Charge No. 2: Violation of General Order Series 1202, Number 1, Part I-B-12, which prohibits: "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia."

"Guilty, With Explanation." (Award at p. 6). By letter of April 5, 2006, the Grievant was served with Final Notice of Adverse Action, finding him guilty of the Charges and Specifications. Attached to the Notice was a copy of the Panel's memorandum detailing its findings, conclusions, and recommendations.[3] "The Panel was unanimous in finding [the Grievant] guilty as charged, but divided 2-1 on the penalty. Two members recommended that the Grievant be dismissed . .; one Panel member recommended that he receive a 90-day suspension without pay." (Award at p. 6). The Grievant was advised that he could appeal to the Chief of Police within ten days, which he did on April 20, 2006. (See Award at p. 6). On May 8, 2006, Chief of Police Charles H. Ramsey denied the Grievant's appeal. (See Award at p. 6). On May 22, 2006, FOP invoked arbitration.

"On November 28, 2007 the Acting Director of the MPD Labor and Employee Relations Unit advised the Grievant's counsel, James W. Pressler, Jr., that the Chief of Police was willing, with conditions, to reinstate certain officers; certain cases remained under consideration; and has 'considered but ultimately does not want to settle the following cases at this time' naming 30 officers alphabetically including the Grievant . . . On December 18, 2007, Mr. Pressler wrote to Assistant Attorney General Andrea G. Comentale, requesting that 28 named cases, including the Grievant's be promptly scheduled for arbitration proceedings through the FMCS process. On January 29, 2008, apparently not having received a reply Mr. Pressler wrote again to Ms. Comentale, enclosing a copy of the December 18 letter, and asking what steps were being taken to schedule the named cases for arbitration." (Award at pgs. 6-7).

On January 29, 2008, Ms. Comentale replied to Mr. Pressler's December 18, 2007, letter and informed him that since FOP was requesting arbitration, they should contact FMCS to schedule the arbitration hearing. Arbitrator John Truesdale was assigned to the case. The parties agreed to submit briefs in lieu of a hearing. (See Award at p. 7).

Arbitrator John Truesdale noted that the issues to be determined were as follows::

> (1) whether the matter was arbitrable? (2) whether the Metropolitan Police Department (MPD) violated District of Columbia Code by serving Sergeant Fred Johnson with notice of disciplinary action more than ninety (90) days after the MPD should have become aware of Sergeant Johnson's alleged misconduct?; (3) whether the Grievant preserved an argument on appeal?; (4) whether sufficient evidence exists to support the alleged charges?; and (5) whether termination was an appropriate remedy? (See Award at p. 2).

In its brief FOP claimed that it demanded arbitration within ten business days from any attempt at conciliation; therefore, the matter was arbitrable. Specifically, FOP

[3]The Arbitrator stated that he "could not find a date on the Panel's memorandum, other than the date on the covering letter." (Award at p. 6, n. 2).

indicated that there was no record evidence to support MPD's statement that "[o]n or about November 2007, [the] Grievant presented this matter to Respondent in an attempt to conciliate the case." (Award at p. 7). FOP indicated that MPD's argument that the statement that the "Chief of Police has considered but ultimately does not want to settle [the Grievant's] case at this time" marks the end of an 'attempt at conciliation' between the Parties is without merit. [Furthermore,] MPD's November 28, 2007 letter [gave] the distinct impression that the possibility of settlement and/or conciliation [had] not been foreclosed." (Award at p. 8).

In addition, FOP contended that the parties' CBA "places a mutual responsibility on the parties to conciliate and then eventually submit the matter to arbitration, if necessary. [FOP stated that] Article 19 makes repeated references to the 'parties' agreeing to meet at least once [i]n a last attempt at conciliation or to agree on a statement of the issue. [However,] [n]owhere does it place responsibility on the Grievant to formally submit the matter to arbitration. Article 19 places the responsibility on both parties to work cooperatively to submit the matter to arbitration. The CBA does not assign responsibility to the party demanding arbitration, but rather on the parties. In any event, when MPD transmitted its letter of February 6, 2008, to the Grievant's counsel, it did not affirmatively assert the alleged violation in the letter and thereby implicitly waived this argument. [Furthermore, FOP indicated that] [i]n this case, no effort was made to reach an agreement regarding the issues or arbitration, which indicates that conciliation and settlement efforts were ongoing. There is no evidence when MPD's letter of November 28, 2007, was received and thus that the Grievant's letter of December 18, 2007, was untimely in any event. Past practice demonstrates that MPD has never invoked Article 19.E.4 in the midst of ongoing settlement discussion." (Award at pgs. 8-9).

Also, FOP argued that MPD failed to provide its Notice of Proposed Adverse Action to the Grievant within the 90 days required by D.C. Code § 5-1031. In support of this position, FOP asserted the following:

> MPD took the Grievant's statement on April 3, 2003, and learned at that time of his actions that preceded the shooting of Michael Taylor. Under *Finch v. District of Columbia*, 894 A2d 419 (D.C. 2006), a grace period of ninety days after the September 30, 2004 effective date of § 5-1031 was reasonable. Three of the four specifications against the Grievant were provided to MPD in the Grievant's statement of April 3, 2003. The 90th business day after the effective date of § 5-1031 was February 11, 2005. The Grievant did not receive the Notice of Proposed Adverse Action until October 7, 2005. There are no special circumstances here that require the ninety-day grace period enunciated in *Finch* to be extended.

> The allegations of Charge No. 2 spring from the Grievant's testimony at the criminal trial of Harry Wheeler on February 22, 2005. The Grievant was in full duty status from that date until March 29, 2005. *Cause*, say FOP, is not the triggering factor, but rather *knowledge of the act itself.* § 5-1031 says that the 90-day period begins to run when the MPD knew or should have known of the occurrence allegedly constituting cause. Here the Notice of Adverse Action was not served until 111 business days had elapsed. (Award at p. 9).

Also, FOP noted that MPD's argument that the Grievant should be precluded from raising the assertion that the charges were insufficiently worded was without merit. Specifically, FOP asserted that the Grievant was disputing both the factual and legal bases for MPD's decision to terminate him. The Grievant is permitted to clarify the general arguments preserved in his appeal to the Chief of Police. (See Award at p. 9).

FOP argued that MPD: (1) failed to establish substantial evidence for the Grievant's termination; (2) failed to provide proper written notice of its charges identifying the relevant policies or laws violated; and (3) failed to issue an appropriate penalty commensurate with his conduct.[4] (See Award at p. 10).

In light of the above, FOP requested that the Grievant's termination be rescinded and that the Grievant be reinstated to MPD with full back pay and lost job benefits. In addition FOP requested that a revocation of termination be reflected in his personnel file, and that attorney fees be awarded. (See Award at p. 10).

MPD countered that this matter was not arbitrable because the Grievant failed to timely submit it to arbitration under the parties' CBA. Specifically, MPD asserted that Article 19.E.4 provides as follows:

> [s]ubmission to arbitration shall be made within ten (10) business days from any attempt at conciliation. Grievant originally requested arbitration on May 22, 2006, and thereafter let this matter lie dormant for approximately one and one-half years. On or about November 2007, Grievant presented this matter to MPD in an attempt to conciliate the case. On November 28, 2007, MPD formally advised Grievant it considered, but decided not to settle, the instant matter. Therefore, Grievant was required to request an arbitration panel by December 12, 2007. However, Grievant failed

[4]In support of this argument FOP noted that the "Grievant's unblemished disciplinary record, his performance evaluations, the failure to cite comparative discipline, failure to notify him of the policies alleged violated, his potential for rehabilitation, mitigating circumstances, and the adequacy of alternative sanctions." (Award at p. 10).

> to submit this matter to FMCS until on or about March 4, 2008, sixty-five business days from the date of the attempt to conciliate. In *Metropolitan Police Department v. D.C. Public Employee Relations Board,* 901 A.2d 784 (2006), the D.C. Court of Appeals established that time limits are a bargained-for procedural right which create in essence a substantive right such that a violation of that provision constitutes harmful error. (Award at p. 10).

MPD denied FOP's claim that MPD violated the "90-Day Rule" because it knew of the Grievant's misconduct on April 3, 2003, or at the latest, on February 22, 2005. Therefore, MPD argued that this argument lacked merit. (See Award at p. 10). Specifically, MPD claimed that the "latter charge related to the Grievant's testimony at the criminal trial on February 22, 2005, and therefore MPD could not have known of it in 2003 as it had not occurred yet. [Furthermore,] MPD argued that [t]he *Finch* Court stated that '[i]t is possible that the District could convince us that a grace period of more than ninety days [after the effective date of the Act] is required.' MPD [stated that it] considered [the] Grievant's conduct and took his statement on April 3, 2003, and Internal Affairs Division (IAD), also known as Office of Professional Responsibility (OPR) determined that Grievant's failure to take police action concerning the robbery and homicide did not warrant misconduct charges at that time. Instead, OPR decided to keep him 'out of the loop' and referred him to the MPD's Employee Assistance Program. MPD [argued that it] did not pursue the administrative investigation because of the pending criminal investigation against Harry Wheeler. [In light of the above, MPD asserted that] [t]he delay is commencing the adverse action on the former charge was reasonable in that regard." (Award at pgs. 10-11).

As for the latter charge, MPD noted that it "placed the Grievant on a Non-Contact status on March 29, 2005, and referred the matter of the Grievant's testimony at the criminal trial to the United States Attorney's Office ("USAO"). Also, MPD argued that it was not until March 29, 2005, that the MPD knew or should have known that there was cause to charge Grievant. On June 7, 2005, the USAO issued the letter of Declination and MPD determined there was sufficient evidence to constitute cause for the adverse action against the Grievant. MPD asserted that the period from February 22, 2005, through March 29, 2005, is not chargeable to MPD. Furthermore, when MPD commenced the adverse action, eighty-six business days had elapsed since MPD knew or should have known of the act or occurrence allegedly constituting cause and Grievant's argument to the contrary lacks merit." (Award at p. 11).

Also, MPD asserted that the Trial Board Panel's findings were based on substantial evidence. In support of this argument MPD stated that:

> In reviewing an administrative decision under the substantial evidence standard, the reviewing body must determine: (1) whether the deciding agency has made findings of fact on each material contested issues of fact; (2) whether there is substantial evidence supporting each factual finding; and (3) whether the conclusions of law follow rationally from the factual findings. The

> decision at issue in the instant case, . . . conforms to this standard in all respect. (Award at p. 11).

MPD claimed that the Grievant's argument that the charge lacked specificity should not be considered because it was being raised for the first time at arbitration in direct violation of the parties' CBA. Specifically, MPD noted that the FOP's claim "that the charges were insufficiently worded was not previously disclosed to MPD." (Award at p. 11). Therefore, MPD asserted that FOP was barred from raising this claim because "it is also a well-settled principle that issues may not be raised for the first time on appeal." (Award at p. 11).

Finally, MPD noted that the penalty of termination was appropriate and within its discretion. "MPD discussed at length the consideration given by the Trial Board Panel to each of the *Douglas* factors, and contended that MPD conscientiously considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness." (Award at pgs. 11-12). Accordingly, MPD stated that the Grievant's argument concerning the penalty was without merit.

In light of the above, MPD requested that the Grievant's termination should be upheld and the grievance denied.

In an Award issued on December 9, 2008, Arbitrator Truesdale determined that the issue was arbitrable and that MPD did not commence the adverse action within the required 90 day period. (See Award at p. 2). In support of this position Arbitrator Truesdale noted the following:

> The arbitrability question posed by the instant case is made more difficult by the state of the record. As noted above, there are huge gaps in the record submitted to the Arbitrator by the Parties in lieu of a hearing. I am not told when, if ever, any attempt at conciliation of the matter was made as seems to be required by Article 19.E.2 ("The parties agree to meet at least once in a last attempt at conciliation"); when or if this occurred is not apparent. MPD says that "On or about November 2007, [the] Grievant presented this matter to MPD in an attempt to conciliate the case," but without substantiation. Thus, the triggering date for the ten-day period to request arbitration has not been established. Inclusion of the language "at this time" in MPD's letter of November 28, 2007, would appear to indicate that conciliation efforts, if indeed they had begun, may not have been concluded. The January 29, 2008, and February 6, 2008, exchange of correspondence does nothing to clarify the situation. Although the February 6 letter puts the burden on FOP to contact FMCS to schedule the arbitrations of 28 cases, it does not cite any basis in the CBA for that position, nor does the letter say anything about the 10-day provision. I agree with FOP that the multiple CBA

references to the "parties" places the responsibility on both parties to work cooperatively to submit the matter to arbitration. The Parties' practice in this respect is not defined.

I find that the record does not establish that FOP failed to demand arbitration within ten business days from any (presumably final) attempt at conciliation, and that the matter is therefore arbitrable. In reaching this conclusion, I am not finding that MPD waived this argument by not making it before reaching arbitration, but rather that the record simply does not establish with sufficient clarity just what took place. In the circumstances of the case, I am placing that burden equally on both parties.

Under the *Finch* case,. . . MPD had 90 days from September 30, 2004, the effective date of D.C. Official Code § 5-1031, to commence an adverse action against the Grievant. As noted by FOP, that date would be February 11, 2005. On the basis of this record, I find that MPD did not meet the requirements of D.C. Official Code § 5-1031 in that it commenced the adverse action against the Grievant "more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the . . . . . [MPD] knew or should have known of the act or occurrence allegedly constituting cause."

In the interview with the Grievant on April 3, 2003, MPD learned all that it needed to know to support the charges that were ultimately served on the Grievant on October 7, 2005. Awareness of an alleged infraction, not proof that it is true, is the test that starts the 90-day period running. As of that date, MPD knew that the Grievant had not reported Wheeler's statement that he was "going to do what he had to do and I'll go to jail behind this one," and that he had not made a police report of the robbery. MPD argues that it gave the Grievant the benefit of the doubt and referred him for counseling rather than charge him with misconduct. While some might see this as commendable, it is not set forth in the CBA as a ground for tolling the 90-day period if a criminal investigation of the act constituting cause (the Grievant's actions, not Wheeler's) is underway. The CBA precludes me from writing into its provisions MPD's reasons for its delay in commencing the adverse action.

It must be kept in mind that the Washington Post's article of June 21, 2003, gave further basis for concluding that MPD "should have known." As for the specification that the Grievant had threatened to hurt Wheeler, I agree with FOP that this would have been discovered during a routine investigatory interview. In any event,

even if one concludes that MPD should not have known of this statement until February 22, 2005, the record indicates that the 90-day rule was violated even in that scenario.

I find without merit MPD's argument that the period from February 22, 2005, until March 29, 2005, cannot be counted against the 90-day period because during that time it was reviewing the transcript and interview.

I cannot, on the basis of the record submitted to me, construct with exactitude the number of business days that can be permissibly counted against the 90-day period between September 30, 2004 and October 7, 2005. Eliminating those days that can be ruled out, however, such as the period from March 29, 2005, to June 7, 2005, during which time the matter of the Grievant's testimony in the Wheeler trial was pending before the USAO, it is clear that the number of countable days greatly exceeds 90. It is true that the *Finch* court indicated that a period longer that 90 days might be permissible, but, as FOP notes, MPD cites no factors to support why there are special circumstances here warranting longer grace period.

FOP, in its initial brief, calculates that 96 business days elapsed between September 30, 2004, and February 22, 2005, the date of the Grievant's testimony in the Wheeler trial. From that date until March 29, 2005, when the matter was referred to USAO, 25 business days passed. From June 7, 2005, when USAO's Letter of Declination was received, until October 7, 2005, when the Notice of Adverse Action was served, FOP calculated that 86 business days elapsed.

It is apparent that whether one uses the date of April 3, 2005, as the trigger for the 90-day period (once September 30, 2004, has been reached), or February 22, 2005, the requirements of the 90-day period were not met.

After careful review of the voluminous record documents in this matter, and the briefs of the Parties, I find that the matter is arbitrable and conclude that the MPD did not timely begin the adverse action in question. As noted above, I therefore do not *reach the remaining issues, including the merits of the adverse action.* I shall sustain the grievance and provide for an appropriate remedy. (Award at pgs. 12-14, emphasis added).

In view of the above, Arbitrator Truesdale rescinded the termination. In addition, he directed MPD to: (1) expunge from the Grievant's Official Personnel Record any record of his termination; (2) reinstate the Grievant to his position without loss of seniority; and (3) make the Grievant whole for loss of pay and benefits, with interest, from the date of his termination to the date of reinstatement, less net interim earnings. (See Award at p. 14). Also, Arbitrator Truesdale retained "jurisdiction for sixty days for the purpose of clarifying the remedy, if needed, upon request of the Parties and to consider a request, if any, for attorney fees (support for any such request should be briefed)." (Award at p. 14).

MPD is seeking review of Arbitrator Truesdale's award "because [it claims that:] (1) the award is contrary to law and public policy and (2) the arbitrator was without authority or exceeded his jurisdiction to grant the award." (Request at p. 2).

FOP opposes MPD's Request on the grounds that: (1) MPD's submission is untimely; and (2) MPD has failed to establish a statutory basis for granting the Request.

With respect to timeliness, FOP asserts that MPD's request does not comply with the twenty (20) day requirement of Article 19 § 6 of the parties' CBA. In support of this position FOP states the following:

> [E]ither party may file an appeal from an arbitration award to the PERB, not later than twenty (20) days after the award is served. . . (FOP's Opposition at p. 3)
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> Nothing in the negotiated CBA provides for an extension of time for filing an Arbitration Review Request in response to an Arbitrator's Opinion and Award due to service of an award by mail. Moreover, PERB Rule 501.4 which provides parties with an additional five (5) days, only does so "[w]henever a period of time is measured from the service of a pleading. . . " An Arbitrator's decision is not specifically listed as a "pleading" under PERB Rule 599. Therefore, under PERB's own rules, MPD's submission is untimely and is jurisdictional prohibited. (FOP's Opposition at pgs.3-4, n. 1).
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> The terms of the CBA, including Article 19 § 6, were bargained for and agreed to by the [MPD]. Here. . . the arbitrator's award was served by Arbitrator John Truesdale to the parties on December 9, 2008. [MPD,] however, filed its Arbitration Review Request on January 2, 2009.. . . Thus, [MPD] filed its arbitration review request four (4) days after the deadline for filing such requests, as established, and controlled by the CBA. Accordingly, as [MPD's] arbitration review request is untimely, it must be denied, and the arbitrator's award must be upheld. (FOP's Opposition at p. 3).

MPD did not file a response to FOP's timeliness argument.

In view of the above, the first issue to be determined is whether MPD's Request was timely filed. Board Rules 538.1, 501.4 and 501.5 provide in relevant part as follows:

> **538.1 - Filing**
> A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board **not later than twenty (20) days after service of the award . . . .** (Emphasis added).
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> **501.4 - Computation - Mail Service**
> Whenever a period of time is **measured from the service of a pleading and service is by mail, five (5) days shall be added to the prescribed period.** (Emphasis added)
>
> **501.5 - Computation - Weekends and Holidays**
> In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included. . . .**Whenever the prescribed time period is eleven (11) days or more, [Saturdays, Sundays and District of Columbia Holidays] shall be included in the computation.** (Emphasis added)

In addition, Board Rule 501.16 provides in pertinent part that "[s]ervice of pleadings shall be complete on personal delivery . . . depositing the document in the United States mail or by facsimile." Also, Board Rule 599 defines pleadings as "[c]omplaint(s), petition(s), appeal(s), request(s) for review or resolution(s), motion(s), exception(s), brief(s) and responses to the foregoing.

In the present case, FOP argues that Board "Rule 501.4 which provides parties with an additional five (5) days, only does so '[w]henever a period of time is measured from the service of a pleading. . .' ". (FOP's Opposition at pgs. 3-4, n.1). Furthermore, FOP asserts that an Arbitrator's decision is not specifically listed as a "pleading" under Board Rule 599. (See FOP's Opposition at p. 4, n.1). Therefore, FOP opines that under the Board's own rules, MPD can not add an additional five (5) days for mail service. As a result, FOP asserts that MPD was required to file its arbitration review request within twenty (20) days of service, namely December 29, 2009.

We note that D.C. Code § 1-605.02(6) provides that the Board shall have the power to "[c]onsider *appeals* from arbitration awards pursuant to grievance procedure. . . " (emphasis added). Thus, when Board Rule 599 is read in conjunction with D.C. Code § 1-605.02(6), it is clear that the term "appeals" refers to "appeals of arbitration awards". Therefore, the term "arbitration review request" found in Board Rule 538 is the same as the term "appeals" found in Board Rule 599. Therefore, an "arbitration review request" is considered a pleading and thus

covered by Board Rule 501.4. In view of the above, FOP's argument that Board Rule 501.4 does not cover "arbitration review requests", lacks merit.

In the present case, the parties acknowledge that on December 9, 2008, Arbitrator Truesdale: (1) issued his award; and (2) served the award to the parties by first-class mail. Pursuant to Board Rules 538.1, 501.4 and 501.5, MPD's "arbitration review request" had to be filed in this case no later than the close of business on January 5, 2009.[5] MPD's "arbitration review request" was filed on January 2, 2009. Therefore, consistent with Board Rules 538.1, 501.4 and 501.5, MPD's request was timely filed.

Having determined that MPD's request was timely filed, we would ordinarily focus on the merits of MPD's Request. However, for the reasons discussed below, we are not at this time going to rule on the merits of MPD's Request. Instead, we are requesting that the parties submit briefs.

As previously noted, Arbitrator John Truesdale indicated that two of the issues to be determined were as follows:

> (1) whether the matter was arbitrable? (2) whether the Metropolitan Police Department (MPD) violated the District of Columbia Code by serving Sergeant Fred Johnson with notice of disciplinary action more than ninety (90) days after the MPD should have become aware of Sergeant Johnson's alleged misconduct?

Arbitrator Truesdale ruled that the matter was arbitrable and found that MPD did not commence the adverse action within 90 days. As a result, Arbitrator Truesdale rescinded the termination. In reaching this determination, he stated the following:

> I cannot, on the basis of the record submitted to me, construct with exactitude the number of business days that can be permissibly counted against the 90-day period between September 30, 2004 and October 7, 2005. Eliminating those days that can be ruled out, however, such as the period from March 29, 2005, to June 7, 2005, during which time the matter of the Grievant's testimony in the Wheeler trial was pending before the USAO, it is clear that the number of countable days greatly exceeds 90. It is true that the *Finch* court indicated that a period longer that 90 days might be permissible, but, as FOP notes, MPD cites no factors to support why there are special circumstances here warranting longer grace period. (Award at pgs. 13-14).

[5]Pursuant to Board Rule 501.4 and 501.5, the beginning date for computing the five (5) day period for mail service and the twenty (20) day period for filing the request, were December 10, 2008 and December 14, 2008, respectively. Therefore, the twenty five (25) day period ended on January 5, 2009.

> After careful review of the voluminous record documents in this matter, and the briefs of the Parties, I find that the matter is arbitrable and conclude that the MPD did not timely begin the adverse action in question. As noted above, I therefore do not *reach the remaining issues, including the merits of the adverse action. I shall sustain the grievance and provide for an appropriate remedy.* (Award at p. 14, emphasis added).

In a January 28, 2010 opinion involving the same parties, the District of Columbia Court of Appeals reversed and remanded an Award in which the arbitrator dismissed FOP's grievance on procedural grounds and did not address the merits of the FOP's grievance. In that case, "[A]rbitrator Donald Doherty did not reach the merits of the dispute over delayed overtime compensation; instead, he ruled that the 'FOP had not filed a proper grievance because it had incorrectly cited terms that were not terms of the [CBA], nor had they been terms of the [CBA] at any time during its lifetime,' and that this mis-citation to an inoperative provision 'does not appear to be a mere technicality' but rather "has every appearance of a substantive reality." FOP filed an arbitration review request with the Board. FOP alleged that arbitrator Doherty's decision was contrary to law and public policy." *FOP/MPD Labor Committee and MPD*, Slip Op. No. 1011 at p. 4, PERB Case No. 03-A-03 (2010). In Slip Op. No. 726, the Board determined that the arbitrator's decision was not "contrary to law and public policy," Specifically, the Board noted:

> FOP merely disagrees with the Arbitrator's conclusion of non-arbitrability. This is *not* a sufficient basis for concluding that the Arbitrator's Award is contrary to law and public policy. Slip Op. No. 726 at p. 4.

Therefore, the Board denied FOP's request. FOP filed a petition for review with the Superior Court. "Judge Alprin concluded, that FOP's mistake in citing an inapplicable provision in the grievance - when MPD had no misapprehension from the grievance about what the claimed violation actually concerned (and the claimed violation was covered by another CBA provision that was in effect) - was no grounds to refuse arbitration of the dispute, and that such refusal would contravene the strong public policy favoring agreed-to arbitration." *District of Columbia Public Employee Relations Board v. FOP/DOC Labor Committee*, 987 A.2d 1205, 1206 (D.C. 2010). The Board appealed Judge Alprin's decision. In the January 28, 2010, decision the Court of Appeals affirmed Judge Alprin's decision and remanded the case. In directing that the case be remanded to Arbitrator Doherty and directing that the arbitrator rule on the merits of the grievance, the Court of Appeals stated as follows:

> In these circumstances, the arbitrator's refusal to reach the merits of the dispute both frustrates the purpose reflected in the CBA to make "arbitration . . . the method of resolving grievances which have not been satisfactorily resolved" internally, Article 19(E), Section 1, and contravenes the "well defined and dominant" policy, *District of Columbia Metro. Police Dep't, supra*, 901 A.2d at 789, favoring arbitration of a

> dispute where the parties have chosen that course. Just as "Congress [has] declared a national policy favoring arbitration," *District of Columbia v. Greene*, 806 A.2d 216, 221 (D.C. 2002) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)), so has the District of Columbia. *See, e.g., Masurovsky v. Green*, 687 A.2d 198, 201 (D.C. 1997) ("Variously called a presumption, preference or policy, the rule favoring arbitration is identical under the D.C. Uniform Arbitration Act and the Federal Arbitration Act.") (citation omitted); *see also Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656, 668 (Md. 2003) (noting Federal and Maryland policies favoring enforcement of agreements to arbitrate); *Mission Residential, LLC v. Triple Net Props., LLC*, 654 S.E. 2d 888, 890 (Va. 2008) (noting Virginia's public policy favoring arbitration). Indeed, this preference for honoring parties' agreement to arbitrate disputes underlies the practical hands-off approach to review arbitrators' decisions, except in certain "restricted" circumstances. *District of Columbia Metro. Police Dep't, supra*, 901 A.2d at 787; *see Fraternal Order of Police, supra*, 973 A.2d at 177 n.2 (arbitrator's interpretation merits deference "because it is the interpretation that the parties 'bargained for'" (emphasis added)). *District of Columbia Public Employee Relations Board v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 987 A.2d 1205 (D.C. 2010).

In light of the Court of Appeals' January 28, 2010 decision we are choosing at this time not to rule on MPD's Request. Instead, we are directing that the parties submit briefs concerning whether the Court of Appeals' January 28, 2010 decision is applicable to this case. After reviewing the parties' briefs we will rule on the merits of MPD's Request.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Department Labor Committee's request that the Metropolitan Police Department's ("MPD") "arbitration review request" be denied as untimely, is denied.

2. The Board will not rule on the merits of MPD's "arbitration review request" until after the parties submit the briefs noted in paragraph 3.

3. The parties shall submit briefs concerning whether the District of Columbia Court of Appeals decision in *District of Columbia Public Employee Relations Board v. Fraternal*

Order of Police/Metropolitan Police Department Labor Committee, 987 A.2d 1205 (D.C. 2010) is applicable to this case and provide authority for their respective positions.

4. The parties briefs are due no later than thirty days after issuance of this Decision and Order.

5. 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.

July 14, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.09-A-02 was transmitted via Fax and U.S. Mail to the following parties on this the 14th day of July 2010.

James Pressler, Esq.
Three McPherson Square
927 15th Street, N.W.
12th Floor
Washington, D.C. 20005

VIA FAX & U.S. MAIL

Ross Buchholz, Esq.
Assistant Attorney General
441 4th Street, N.W.
Suite 1060 North
Washington, D.C. 20001

VIA FAX & U.S. MAIL

Marc L. Wilhite, Esq.
Three McPherson Square
927 15th Street, N.W.
12th Floor
Washington, D.C. 20005

VIA FAX & U.S. MAIL

Courtesy Copy:

John Truesdale, Esq.
7101 Bay Front Drive, #609
Annapolis, MD 21403

U.S. MAIL

Sheryl V. Harrington
Secretary