

II. Discussion

On November 4, 2004, grievant Sergeant Alberta "Renee" Holden injured her back while on-duty, and immediately went out on sick leave from the Metropolitan Police Department (MPD or Department). (See Attachment 1 at 3.) The following day, Sgt. Holden went on several errands with a friend, Lieutenant Sharon McInnis. (*Id.*) Later, they went to the "Shady Oak Inn" on Marlboro Pike, in Prince George's County, Maryland where Sgt. Holden consumed one "Long Beach Ice Tea." (See Attachment 1 at 4.) A couple of hours later, Sgt. Holden began to feel back pain from her on-duty accident and took two prescriptions: Motrin and Flexeril. (*Id.*) Shortly after leaving in her car, Sgt. Holden struck the rear of a civilian vehicle and drove away without realizing she had struck the vehicle. (See Attachment 1 at 1.) She was subsequently placed under arrest for "driving while under the influence" and for "hit and run traffic collision." (See Attachment 1 at 2.)

Thereafter, in connection with DRD# 304-05, Sgt. Holden was also involved in a misunderstanding regarding a work detail. (See Attachment 2 at 2.) In an appointment with Mr. Gabriel Fayomi, Sgt. Holden told him that she wanted to return to work in a limited duty capacity. (See Attachment 4 at 16.) Mr. Fayomi told Sgt. Holden that he would be willing to do so "if she had a job where she didn't have to climb stairs." (See Attachment 4 at 8.)

On April 18, 2005, Sgt. Holden returned to the PFC for her follow-up appointment. She told Mr. Fayomi that she had found a place to work (at Recruiting) where she did not have to climb stairs. (See Attachment 4 at 8.) In response, Sgt. Holden was given a return to duty date of April 20, 2005. (See Attachment 2 at 1.) Upon checking out of the PFC on April 18, 2005, Sgt. Holden was asked by a person in the clinic liaison staff what was going to be her duty assignment. (See Attachment 2 at 2.) Sgt. Holden advised her that it was "Recruiting" and that Mr. Fayomi would not put her back to limited duty until she found a place to work without steps. (*Id.*) Sgt. Holden then witnessed the civilian clerk pull out a Limited Duty Program Information Sheet and write Sgt. Holden's name and assignment as "Recruiting." Knowing that this was incorrect, Sgt. Holden asked the clerk if she intended to write "Recruiting" above the "assigned unit" heading or if she just meant to do so over the "limited duty assignment" location. (*Id.*) The clerk informed Sgt. Holden that the notation "Recruiting" was only to appear in the space reserved for limited duty assignment. As the clerk was on the telephone assisting another person, Sgt. Holden marked through the word "Recruiting" on the line that stated assigned unit and wrote "4D" (Fourth District) in the slot for assignment. (*Id.*) Sgt. Holden also indicated that she wrote the word "Recruiting" in the space for limited duty assignment and then she signed the paper and returned the completed form to the clerk. (*Id.*)

Once Sgt. Holden returned home, she advised her Lieutenant, Suleika Brooks, of her upcoming change in duty status and that she was to report to Recruiting. Lt. Brooks questioned the detail to Recruiting, and Sgt. Holden recalled that Lt. Brooks stated that she "expected" her to be at the Fourth District station for her limited duty appointment. (See Attachment 2 at 4.) In response, Sgt. Holden told Lt. Brooks that she would fax her the clinic papers that she had supporting her detail to Recruiting, and that she would wait for her call after she received the paperwork. (*Id.*) After sending the fax, Sgt. Holden never heard back from Lt. Brooks. (*Id.*)

On April 20, 2005, Sgt. Holden reported to Recruiting for limited duty. After a couple of hours, Sgt. Holden was informed that Captain Anderson wanted to have a conference call. (Captain Anderson was on leave.) During the call, Captain Anderson instructed Sgt. Holden to take her clinic paperwork to human resources for approval. Sgt. Holden complied, and met with Lt. Paul Niepling while at Human Resources. During this meeting, Lt. Niepling told Sgt. Holden that in order to be properly detailed to Recruiting, Captain Anderson needed to write a memorandum through channels requesting her. (*Id.*) That same day, on behalf of Sgt. Holden, Lt. McInnis prepared a memo/letter requesting Sgt. Holden's detail to Recruiting for Captain Anderson's signature. Later, Sgt. Holden received a call from recruiting informing her that the letter had been signed and faxed to Human Services. (*Id.*)

Later that evening, Sgt. Holden received a call from Lt. Brown stating that the Commander of the Fourth District, Hilton Burton, was considering writing her up for being absent without leave (AWOL), on April 20, 2005. Sgt. Holden explained that she had been working at Recruiting, and inquired as to where she should respond going forward. Lt. Brown told her to respond to the Fourth District the following day - April 21, 2005. As ordered, Sgt. Holden went to the Fourth District to work limited duty and was forced to walk up and down the stairs there at that district. (*Id.*) Subsequently, an investigation was conducted concerning the circumstances surrounding her reporting to Recruiting for work.

On August 2, 2005, District of Columbia Metropolitan Police Department Officer Alberta Renee Holden was served with Notice of Proposed Adverse Action (Notice). (See Attachment 3). The Notice consolidated the two (2) investigations by the Department: DRD# 304-05 and DRD# 324-05. (See Attachment 3.) The Notice, proposed by then Assistant Chief Shannon Cockett, Director of Human Services, alleged four (4) charges of misconduct concerning DRD# 304-05 (1) Fraud in Securing an Appointment; (2) Willfully and Knowingly Making an Untruthful Statement; (3) Willfully Disobeying Orders or Insubordination; and (4) Conduct Unbecoming an Officer.

Charge No. 1:

Violation of General Order 1202.1, Part I-B-17, which reads in part, "*Fraud in securing appointment or falsification of official records or reports*". This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No.1:

In that on April 18, 2005, you purposely altered a Metropolitan Police Department official document, which reflected that you were detailed to the Recruitment Branch. In a written statement, you acknowledged that you wrote the word "Recruiting" in the Limited Duty Section on the Limited Duty Program Information Sheet. You did so without approval from any official from either the Executive Assistant Chief of Police or Chief of Police offices.

Charge No. 2:

Violation of General Order 1202.1, Part I-B-7, which states: "conviction of any member of the force in any court of competent jurisdiction of any quasi criminal offense or of any offense

in which the member pleads guilty, receives a verdict of guilty or a conviction 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. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported to their commanding officers their involvement. This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1:

In that on May 11, 2005, you appeared before Judge Northrop at the Prince George's County Court House, Traffic and Criminal Court in Upper Marlboro, Maryland, the charges against you were "Nolle Prosequi".

Charge No. 3:

Violation of General Order 1202.1, Part I-B-5 which states in part, "Willfully disobeying orders or insubordination." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1:

In that on April 18, 2005, you were given a directive by Lieutenant Suleika Brooks, the Administrative Lieutenant of the Fourth District to respond to the Fourth District for your Limited Duty Assignment on April 20, 2005 to work in the station. Lieutenant Brooks further advised you that you would be expected to work at the Fourth District until such time that a memorandum or teletype was received from the Executive Assistant Chief of Police or the Office [of the] Chief of Police came out detailing you out of the district.

Specification No.2: In that on April 20, 2005, you responded to the Recruiting Branch for your tour of duty instead of the Fourth District as directed by Lieutenant Brooks on April 18, 2005

In response to the Arbitration Award issued on September 11, 2009, The District of Columbia Metropolitan Police Department seeks review of the Arbitration Award and requests that the Award be set aside. (See Arbitration Review Request at 2).

The District of Columbia Metropolitan Police Department seeks review of the Arbitration Award because:

(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. As noted above, a copy of the AA is attached.

As a threshold matter, we note that a very high bar must be satisfied in order for the Board to set aside an Arbitrator's decision on law and public policy grounds. In order for such action to be taken, the Award "on its face" must be contrary to a particular law and public policy. *PERB Rule 538.3(b)*. As PERB has acknowledged, D.C. Code Section 1-605.2(6) and Rule 538.3 narrowly restrict the scope of PERB grievance arbitration review and a mere disagreement as to an arbitrator's findings and conclusions and interpretation of the parties' collective bargaining agreement is "not a sufficient basis for concluding that an award is contrary to law or public policy, or that the arbitrator exceeded his jurisdiction." *See, D.C. Water and Sewer Authority and AFGE Locals 63J. 872, 2553 AFSCME Local 2091, NAGE Locals R3-06 and-06*, PERB Case No. 01-A-03, Opinion No. 652, 48 DCR 8137, 8138 (2001) citing *D. C. Metropolitan Police Department and Fraternal Order of Police, Metropolitan Police Department Labor Committee*, PERB Case No. 84-A-05, Slip Op. 85, 31 DCR 4159 (1984); *see also, D.C. Department of Corrections and Fraternal Order of Police Department of Corrections Labor Committee (Watkins)*, PERB Case No. 99-A-02, Opinion No. 586, 46 DCR 6284 (1999).

The United States Supreme Court has stated that a public policy challenge to an arbitration award "must be well defined and dominant and is to be ascertained 'by reference to laws and legal precedents, and not from general considerations of supposed public interests.'" *W.R. Grace and Co. v. Local Union 759, Intern. Union of United Rubber, Cork, Linoleum and Plastic Workers of America*. 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). The possibility of setting aside an arbitration decision on the basis of public policy is an "extremely narrow" exception to the longstanding principal that reviewing bodies must defer to an arbitrator's interpretation of the contract. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986).

Petitioner needs to demonstrate that the arbitration award "compels" the violation of an explicit, well-defined, public policy grounded in law or legal precedent. *See United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29 at 43 (1987); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234, 1239 (D.C. Cir. 1971). The violation must be palpable and to the point where law and public policy "mandates that the Arbitrator arrive at a different result." *MPD v. FOP/MPD Labor Committee*, 47 D.C. Reg. 7217, Slip Op. No. 633 at p.2, PERB Case No. OO-A-04 (2000). MPD, therefore, must demonstrate that its purported law and public policy challenge is sufficient "to invoke the 'extremely narrow' public policy exception to enforcement of arbitrator awards." *District of Columbia Metropolitan Police Dept. v. District of Columbia Public Employee Relations Bd.*, 901 A.2d 784, 789 (D.C. 2006).

For the reasons set forth in detail herein, the Department fails in every respect to meet this high burden, and the requested relief of arbitration review cannot be granted.

III. Argument

A. *Petitioner's Claims are Mere Disagreements with the Arbitrator's Findings and Conclusions.*

Petitioner requests arbitration review, arguing in part that the Arbitrator's Award constitutes a violation of law and public policy. For the following reasons, MPD failed to state a ground upon which PERB may modify an award; therefore, MPD's request must be denied.

1. The 90-Day Rule is a Jurisdictional Right Created by Statute and Cannot be Waived.

The Department contends that the Grievant waived her right to assert a violation of the 90-day rule when she failed to raise it during the proceedings below. *See Arbitration Review Request* at 6-7. The Union does not dispute that this issue is being asserted for the first time at arbitration. According to the Department, based on the Grievant's failure to raise the violation of the 90-day rule during the proceedings below, she has effectively waived the right to assert it, and is therefore precluded from asserting it during arbitration.

While certain provisions of the parties' collective bargaining agreement prohibit a party from raising issues at arbitration which were not asserted below, the 90-day rule and other jurisdictional protections are not subject to such limitations. Jurisdictional challenges can be asserted at any point in the procedures, and therefore cannot be waived. In *Adamson v. Metropolitan Police Department*, OEA Matter No. 1601-0041-04 (February 14, 2006) (*Grievant's Reply Brief, Attachment 2*). The Office of Employee Appeals (OEA) ruled on a similar set of circumstances involving an officer's challenge to the Department's jurisdiction based on MPD's failure to comply with the 55-day rule, which required the Department to issue a final decision within 55 days of the date the officer requests a hearing. There, the OEA held that:

"[since the 55-day rule is mandatory, Agency **must** process an adverse action in accordance with the rule. Therefore, a violation of the rule is an **absolute** bar to the finalization of adverse action. Viewed thusly, the rule is essentially equivalent to a lack-of-jurisdiction claim, which of course can be raised at any time. Thus, I conclude that Employee was not precluded from raising his "55-day rule" claim for the first time before me.

Grievant's Reply Brief, Attachment 2 at 18 (emphases in original).

Application of this principle to the 90-day rule is even more persuasive. Unlike the 55-day rule, which is a creation of the parties' collective bargaining agreement, the 90-day rule is **statutory**. By failing to provide written notice of DRD No. 324-05 until 200 days following Sergeant Alberta Holden's arrest, the Department lacked jurisdiction to assert those charges on August 1, 2005. Once the 90-day period elapsed, the Department essentially lost jurisdiction over the charges against Sergeant Holden stemming from her November 5, 2005 arrest. Because there was no jurisdiction, this defense can be asserted at any time. Accordingly, there is no merit to the Department's assertion that Sergeant Holden waived the right to assert a 90-day rule violation.

The Department asserts that the Arbitrator improperly relied upon the previous decision in *Adamson*. This argument is flawed and represents a faulty reading of the Arbitrator's decision. In its Arbitration Review Request, the Department states in part: "By using the term 'forces' the Arbitrator implies that *Adamson* sets some sort of precedent that he must follow." See *Opinion and Award* at 6. This reasoning misstates the Arbitrator's position. In his decision, Arbitrator Barrett states that "[g]iven this situation, the *Adamson* decision forces a delay-prone process to take notice of specific contractual and/or statutory dead-lines regardless of when they are raised." See *Opinion and Award* at 9.

The Department's argument misses the Arbitrator's point. In his decision, the Arbitrator does not assert that he is forced to follow *Adamson*, but rather that the decision in *Adamson* forces the adverse action process to be cognizant of deadlines, be they statutory or contractual. Nowhere in his opinion does the Arbitrator state that because of *Adamson* he is forced to follow binding legal precedent. Rather, the arbitrator outlines how the process of raising an adverse action against a member of the Metropolitan Police Department is riddled with delay. *Id.* The *Adamson* decision forces the parties involved in this process (the Department and members of the Metropolitan Police Department) to be aware of time limits and guidelines. The *Adamson* decision does not, however, address or involve binding legal precedent for arbitrators to follow. This argument is simply another attempt to disguise the Department's dissatisfaction with the Arbitrator's decision as legitimate grounds for a review of the decision.

2. D.C. Code Section 12-309 is an Improper Analogy.

The Department attempts to draw a parallel between the 90-day rule and District of Columbia Code §12-309, in an attempt to argue that the 90-day rule is a mere "notice" requirement and subject to waiver. Under the Department's reasoning, given that the Grievant pursued this matter, with the assistance of counsel, for a number of years before first asserting the 90-day rule in her arbitration brief, she in effect "waived" the defense of the 90-day rule. See *Arbitration Review Request* at 7-8.

Grievant agrees with the Department's portrayal of D.C. Code § 12-309 as a "notice" requirement. Primarily used in the realm of civil litigation against the District, this code section requires injured parties to place the District of Columbia on notice of their potential claim within six months of the subject incident. This notice is required to be given in letter to the Mayor and the Office of the Attorney General, and is required to delineate the facts of the incident and the purported injuries, providing the District of Columbia with sufficient information to investigate the claim. In addition, the Department is correct in its assertion that courts in the District of Columbia have found that the notice requirements of § 12-309 can be waived. See *Arbitration Review Request* at 7-8.

The 90-day rule prescribed in D.C. Code § 5-1031(a) is more than a notice requirement. District of Columbia Code § 5-1031(a) states:

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

D.C. Code Section 5-1031 (Emphasis added.)

While the notice requirement set forth in D.C. Code § 12-309 is a "procedural prerequisite to the filing of a civil action," (*See Arbitration Review Request* at 7), the 90-day rule concerns the commencement of an adverse action against a member of the Metropolitan Police Department. In that sense, the 90-day rule is not mere **notice** of the action, but rather the **commencement of the action itself**.

It follows, therefore, that the 90-day rule is more than a notice requirement; rather, it is jurisdictional in its scope. By failing to provide written notice of DRD No. 324-05 until 200 days following Sergeant Alberta Holden's arrest, the Department lacked jurisdiction to assert those charges on August 1, 2005. Once the 90-day period elapsed, the Department essentially lost jurisdiction over the charges against Sergeant Holden stemming from her November 5, 2005 arrest. Because there was no jurisdiction, the defense can be asserted at any time. The Department may take exception with the arbitrator's perceived reliance upon *Adamson*, but as the only guidance on the issue, the *Adamson* opinion provides some insight into the true nature of the 90-day rule.

3. Arbitrator Barrett Utilized the Proper Standard of Review.

A portion of the Department's challenge to the arbitrator's decision concerns the standard used by Arbitrator Barrett to evaluate the perceived violation of the 90-day rule. *See Arbitration Review Request* at 8-10. In particular, MPD asserts that Arbitrator Barrett incorrectly applied a credibility determination to the Department's argument, and used this credibility aspect as an additional basis for finding that the Department violated the 90-day rule.

In its Arbitration Review Request, the Department argues that while they knew that the Grievant had been involved in the underlying incident on or about November 6, 2004, they did not know that she left her home without notifying command until her interview with Internal Affairs, which was conducted on May 24, 2005. This, however, does not save the Department from their violation of the 90-day rule. District of Columbia Code section 5-1031 states:

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

D.C. Code Section 5-1031 (Emphasis added).

In their attempt to argue that the 90-day rule was complied with, the Department asserts that while the Department knew of the Grievant's arrest on or about November 6, 2004, they did not know that she left her home without notifying command until May 24, 2005, during her interview with Internal Affairs. However, **knowledge** is not the standard set in the 90-day rule, but rather whether the department **knew or should have known**. The Department knew about the arrest and incident immediately following the incident, yet waited over six months to interview her in order to achieve clarity.

Arbitrator Barrett's determination that the Department violated the 90-day rule is proper and valid, and the FOP submits that MPD's challenge is nothing more than a thinly veiled disagreement with his findings. *See, D.C. Water and Sewer Authority and AFGE Locals 631, 872, 2553 AFSCME Local 2091, NAGE Locals R3-06 and -06, PERB Case No. 01-A-03, Opinion No. 652, 48 DCR 8137, 8138 (2001) citing D.C. Metropolitan Police Department and Fraternal Order of Police, Metropolitan Police Department Labor Committee, PERB Case No. 84-A-05, Slip Op. 85, 31 DCR 4159 (1984).*

4. The Arbitrator was Within His Right to Rely on Prior Decisions.

In its Arbitration Review Request, the Department argues that the Arbitrator's reliance upon two prior arbitration decisions was misguided, and as such his award is contrary to law. *See Arbitration Review Request* at 10. This averment set forth by the Department fails to provide any legal reasoning whatsoever in support of its position. Again, when seeking review of an arbitration award, the party seeking review must demonstrate more than mere disagreement with the arbitrator's decision. In support of their position that the Arbitrator's decision that then-Assistant Chief Cockett could not impose a higher penalty than that recommended by the Trial Board panel, the Department argues that "[t]he Arbitrator again seems to believe that he must somehow follow previous decisions of different arbitrators." *Id.* Arbitrator Barrett was free to give prior decisions whatever weight he deemed necessary. The Department cites to *Hotel Ass 'n of Washington, D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25*, 963 F.2d 388, 391 (D.C. Cir. 1992) in support of their position that a previous arbitration award does not create binding precedent. It is true that prior arbitration decisions do not create binding precedent, but it is **also** true that there is nothing **legally incorrect** about an arbitrator agreeing with prior arbitration decisions that involve the same, or substantially similar, factual situations.

Further, while the Department avers that "the Arbitrator failed to identify any reasoning to support his decision," this is incorrect on its face. On this issue, the Arbitrator stated in pertinent part:

On the third issue: (Whether Assistant Chief Cockett had the authority to increase the Adverse Action Panel's Penalty.) Arbitrator Johnson in a January 2006 Award, involving the same parties as the instant case (Union Exh. No. 16) found that Assistant Chief Cockett lacked authority to increase the penalty recommended by the Panel. Johnson's findings and conclusions are **fully consistent with the facts of the instant case**, therefore, this Arbitrator finds Assistant Chief Cockett did not have authority to increase the Panel's recommended penalty.

See Opinion and Award at 9.

Not only is there no indication Arbitrator Barrett believed he was **forced** to follow prior decisions, he also clearly stated specific reasoning to support his decision. He found a prior arbitration decision, with facts "fully consistent" with the facts of the instant case, and attributed the appropriate weight to that case. The Arbitrator was free to do so. The Department has failed to articulate any legal reasoning to support its contention that the Arbitrator's decision is flawed and that review is necessary. Therefore, the Department's request must be denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Arbitration Review Request is denied.
2. 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.,

October 7, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-04 was transmitted via Fax and U.S. Mail to the following parties on this the 7th day of October 2011.

Marc L. Wilhite, Esq.
Mark A. Schofield, Esq.
PRESSLER & SENFTLE, P.C.
927 15th Street, N.W.
12th Floor
Washington, D.C. 20005

FAX & U.S. MAIL

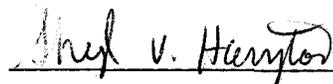
Mark Viehmeyer, Esq.
Metropolitan Police Department
300 Indiana Avenue, N.W.
Room 4126
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Jerome T. Barrett
Arbitrator
200 N. Maple Avenue
Suite 212
1724 Kalorama Road, N.W.
Falls Church, VA 22046

U.S. MAIL



Sheryl V. Harrington