

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
District of Columbia Fire and Emergency Medical Services,)	
)	
Petitioner,)	
)	PERB Case No. 06-A-20
and)	
)	Opinion No. 895
)	
International Association of Firefighters, Local 36, (on behalf of Firefighters Mayo and Roach),)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

The District of Columbia Fire and Emergency Medical Services ("FEMS") filed an Arbitration Review Request ("Request") seeking review of an Arbitration Award ("Award") that sustained the grievance filed by the International Association of Firefighters, Local 36 ("Union"). The Union opposes the Request.

The issues before the Board are whether the: (1) Arbitrator exhibited bias towards the Union during the arbitration hearing; (2) "arbitrator was without authority or exceeded his or her jurisdiction"; and (3) "award on its face is contrary to law and public policy" D.C. Code § 1-605.02(6) (2001 ed.).

II. Discussion:

On May 25, 2005, FEMS issued Special Order 20, 2005 (hereinafter "Special Order 20" or "Clean-shaven Policy") entitled "Fit Testing 1: Compliance with Article XXI Order Book." The Order forbade members to have facial hair which: (1) comes between the sealing surface of the facemask facepiece and the face; or (2) interferes with valve function. Prior to June 6, 2005, the effective date for Special Order 20, 2005, members were permitted to have beards that did not exceed ¼ inch length. After June 6, 2005, members were required to be clean shaven. In addition, the Special Order 20 stated that:

Members who have a medical condition which prevents them from being properly fit-tested, including but not limited to, Pseudo Folliculitis Barbae ("PFB"), shall be ordered to report to the Police and Fire Clinic for an evaluation and referral to their private physicians. The members shall be placed on their own sick leave until they are cleared to return to duty.

Two firefighters, Mayo and Roach, complied with the Clean-shaven Policy. However, the process of shaving resulted in the breakout of PFB symptoms such as swelling, bleeding, bumps, sores and infection. Because of this condition, Firefighter Mayo was unable to wear his respirator mask due to pain and was required to take sick leave from June 9 to June 19, 2005. Firefighter Mayo requested permission to use Performance of Duty leave ("POD") for his absence, but his superiors had not ruled on that request by the date of the Arbitration hearing. Firefighter Roach was also unable to use his respirator and he was required to take sick leave. Firefighter Roach also requested POD, but the request was denied. Seven other firefighters have also been required to take sick leave due to outbreaks of PFB caused by compliance with the Clean-shaven Policy.

The Union filed a grievance alleging that FEMS' denial of POD leave violated the rules, regulations and established practices that govern sick leave. FEMS denied the grievance and the Union invoked arbitration.

At Arbitration the Union argued that regardless of whether FEMS had the authority to impose a clean-shaven policy, it must grant POD leave to those employees who suffer PFB as a result of complying with that policy. (See Award at p. 9). In support of this argument, the Union claimed that the shaving issue had been made part of the conditions of employment, and that the injury associated with PFB would not have occurred but for the duty to comply with the Clean-shaven Policy. (See Award at p. 10).

FEMS countered that the grievance was not arbitrable because the decision to implement a clean-shaven policy was a management right. In addition, FEMS asserted that "[b]ecause performance of duty is not in the collective bargaining agreement the arbitrator is powerless to decide a performance of duty matter." (Award at p. 11).

Regarding arbitrability, the grievance alleged that FEMS had exceeded its managements rights under D.C. Code § 1-617.08, by denying POD leave to employees. The Union asserted that the Grievants were entitled to such leave under D.C. Code § 1-612.03(j), which prohibits firefighters from being charged sick leave for an absence due to injury resulting from the performance of duty.

The Arbitrator stated that the issue in the grievance was **not** whether FEMS could institute a clean-shaven policy, but whether FEMS should provide POD leave if adverse health consequences result from compliance with the policy. (See Award at pgs. 12-13). The Arbitrator found that the grievance concerned whether the sick leave provisions of the parties' collective bargaining agreement ("CBA"), Article 33¹, had been violated by the Clean-shaven Policy. The Arbitrator concluded that the grievance was arbitrable since the grievance directly challenged FEMS' alleged violation of the sick leave provisions of the parties' CBA. (See Award at p. 15).

Having determined that the case was arbitrable, the Arbitrator focused on the merits of the case. The Arbitrator utilized workers' compensation principles to determine if the results of shaving, in order to comply with the Clean-shaven Policy, can be considered to be an injury incurred in the performance of duty. Specifically, the Arbitrator was guided by language in *Clark v. District of Columbia Department of Environmental Services*, 743 A. 2d 722 (D.C. 2000), in which the District of Columbia Court of Appeals held that the Workers' Compensation Act establishes a "presumption of compensability for injuries suffered on-the-job" and that:

An injury arises out of employment so long as it would not have happened *but for* the fact that conditions and obligations of the employment placed claimant in a position where he was injured.
Id. at 727 (emphasis in the original).

Relying on the *Clark* analysis, as well as the CBA, the Arbitrator determined that shaving, pursuant to Special Order 20 constituted conditions and obligations of employment, and, therefore, constituted the performance of duty. (See Award at pgs. 18-19). Consequently, the Arbitrator concluded that FEMS violated Firefighters Mayo and Roach's rights under the parties' CBA by requiring them to take sick leave, rather than POD leave, when they were unable to work due to an injury sustained because of compliance with Special Order 20. (See Award at p. 19). As a remedy, the Arbitrator ordered that FEMS restore all sick leave used by Mayo and Roach and other monetary benefits they might have obtained if they had been granted POD status for the absences involved in the matter. (See Award at p. 21).

¹ Article 33, Sick Leave Administration, of the parties' CBA states that "Employees shall be charged sick leave for time spent while on duty seeking diagnosis and/or treatment for non-duty related illnesses or injuries."

FEMS takes issue with the Award. Specifically, FEMS claims that the Arbitrator lacked jurisdiction to hear the matter. In addition, FEMS claims that the Arbitrator was biased towards the Union throughout the proceedings. Lastly, FEMS argues that the Award is contrary to law and public policy in that it ignores safety considerations. (See Request at pgs. 2-3). The Union opposes the Request.

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. If "the arbitrator was without authority, 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."

D.C. Code § 1-605.02(6) (2001 ed.).

In the present case, regarding the issue of arbitrability, FEMS asserts that the "arbitration should not have occurred; the Arbitrator is without power to hear the matter because the valid statute, D.C. Official Code § 1-617.08 (2001 Ed.) (management rights) preempts the Arbitrator's jurisdiction to consider the union's grievance." (Request at p. 2).

This Board has previously held that arbitrability is an initial question for the arbitrator to decide, if the parties challenge jurisdiction on this ground. *District of Columbia Department of Public Works and American Federation of Government Employees, Local 872*, 38 DCR 5072, Slip Op. No. 280 at p. 3, PERB Case No. 90-A-10 (1991) (citing *American Federation of State, County and Municipal Employees, Local 20, AFL-CIO v. District of Columbia General Hospital and District of Columbia Office of Labor Relations and Collective Bargaining*, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989)).

In addition, we have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the [CBA]." *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator's decision must be affirmed by a reviewing body "as long as the arbitrator is even arguably construing or applying the contract." *Misco, Inc.*, 484 U.S. at 38. We have explained that:

[by] submitting a matter 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 and conclusions on which the decision is based.”

District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

“This jurisdictional authority applies equally to issues of arbitrability.” *Fraternal Order of Police/Metropolitan Police Department Labor Committee and District of Columbia Metropolitan Police Department*, 49 DCR 821, Slip Op. No. 670, PERB Case No. 01-A-09 (2001). “Moreover, the Board will not substitute its own interpretation for that of the duly designated Arbitrator.” *Id.*

In the present case, the question of arbitrability was previously raised by FEMS to the Arbitrator. The Arbitrator found the grievance arbitrable. FEMS’ argument merely represents a disagreement with the Arbitrator’s interpretation of the CBA and the CMPA, and his finding that the matter was arbitrable. Such grounds do not present a statutory ground for modifying or setting aside the Award. See, e.g., *D.C. Dept of Public Works and American Federation of State, County and Municipal Employees, District Council 20, Local 2091*, 39 DCR 3344, Slip Op. No. 219, PERB Case No. 88-A-02 (1989). Based on the foregoing Board precedent, the Board finds that FEMS has not presented a statutory basis for review. Therefore, the Board cannot reverse the Award on this ground.

As a second basis for review, FEMS contends that the Arbitrator was biased towards the Union during the proceedings. As a previously discussed, the Board may modify or set aside an award in only three limited circumstances. However, an allegation of bias is not one of these statutory bases. Instead, FEMS merely challenges the credibility determinations of the Arbitrator. (See Request at p. 3). As stated above, by submitting this matter to arbitration, FEMS is bound by the Arbitrator’s evidentiary findings and conclusions, which include credibility determinations. Moreover, there is no indication that FEMS raised the issue of bias or prejudice before the Arbitrator during the arbitration proceeding. This Board has held that a party may not base its arbitration review request on issues not presented to the arbitrator. See *District of Columbia Fire and Emergency Medical Services Department and American Federation of Government Employees, Local 3721*, __DCR__, Slip Op. No. 756, PERB Case No. 02-A-08 (2004). The Board finds that FEMS’ contention does not present a statutory basis for review. Therefore, the Board cannot reverse the Award on this ground.

As a third basis for review, FEMS argues that the Award is contrary to law and public policy because the “decision ignores best safety practices and forces the Agency to tolerate conditions that are potentially dangerous and costly.” (Request at p. 3).

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See, *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A.2d 319, 325 (D.C. 1989).

In the present case, FEMS has specified no applicable law or public policy that mandates that the Arbitrator arrive at a different result. Instead, FEMS asserts without any supporting argument that the Award would present unwarranted safety considerations. The Board finds that this assertion lacks merit and does not present a statutory basis for review.

The Board also notes that the Award did not interfere with FEMS' managerial authority to require firefighters to be clean shaven. Instead, the Arbitrator merely determined that a performance related injury may occur when complying with Special Order 20, thus requiring POD leave. FEMS' argument merely represents a disagreement with the Arbitrator's findings and conclusions. We have held that such a disagreement does not render an award contrary to law and public policy. *American Federation of Government Employees (Hawthorne) and District of Columbia Water and Sewer Authority, _DCR_, Slip Op. No. 727, PERB Case No. 03-A-05 (2003)*. Consequently, the Board cannot reverse the Award based on this ground.

In view of the above, we find that FEMS has not met the requirements for reversing the Arbitrator's Award. In addition, we find that the Arbitrator's conclusions are supported by the record, are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of her authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The District of Columbia Fire and Emergency Medical Services' 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.**

July 9, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-A-20 was transmitted via Fax and U.S. Mail to the following parties on this the 9th day of July 2007.

James T. Langford, Esq.
Attorney Advisor
Office of Labor Relations and
Collective Bargaining
441 4th Street, N.W.
820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Jonathan K. O'Neill, Esq.
Supervisory Attorney Advisor
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

FAX & U.S. MAIL

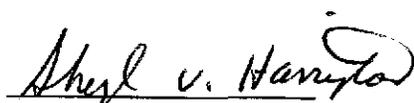
Courtesy Copies:

Daniel Dugan, President
Local 36, International Association
of Firefighters
2120 Bladensburg Rd. N.E.
Suite 210
Washington, D.C. 200018

U.S. MAIL

Michael Wolf, Arbitrator
4532 43rd Street
Washington, D.C. 20016

U.S. MAIL


Sheryl Harrington
Secretary