

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)	
Metropolitan Police Department,)	
)	
Petitioner,)	PERB Case No. 10-A-12
)	
v.)	
)	Slip Opinion No. 1215
Fraternal Order of Police/ Metropolitan Police Department Labor Committee,)	
)	
)	
Respondent.)	
)	
)	
)	
)	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Metropolitan Police Department (“MPD” or “Department”) filed an Arbitration Review Request. The Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”) opposes the Arbitration Review Request.

On October 3, 2006, the Union (“Union”) filed a Step One Group Grievance with Shannon Cockett, the then-Assistant Chief of Police of the Metropolitan Police Department’s Office of Human Services. The grievance alleged that the Department “failed to properly compensate the Group for their appearances in court as required by General Order 206.1” (See Award p. 1) The FOP further alleged that the Group was required to respond to Court and handle matters in accordance with applicable Department general orders and that the Group was required to attend court outside of their regular tours of duty. The Group alleged that they were entitled to two (2) hours of overtime compensation in accordance with the Collective Bargaining Agreement (CBA), the Department General Orders, and District of Columbia law. (See Award p. 1.) On October 19, 2006, the Union filed a Step Two Grievance with the D.C. Chief of Police. On October 27, 2006, the Chief of Police denied the grievance. On November 14, 2006, the Union filed a Demand for Arbitration with the Chief of Police. The Parties held the arbitration hearing on August 26, 2009. The parties issued briefs on October 16, 2009. On December 5, 2009, Arbitrator Clark issued his Decision and Interim

Order sustaining the FOP's grievance and ordering the Department to provide "call-back" overtime compensation to members directed to perform administrative court-related duties. He also directed the Department to pay the FOP's attorney's fees and pre-judgment interest on all back pay.

II. Discussion

This issues before the Board are whether "the arbitrator was without, or exceeded his or her jurisdiction" and whether "the award on its face is contrary to law and public policy." (D.C. Code §1-605.02(6) (2001 ed.)

A. The Arbitrator has authority under Article 4 of the Parties' Agreement to consider the subject matter of the grievance

As identified by the grievance, Article 4 of the Collective Bargaining Agreement ("Management Rights") provides, in part, that management rights are to be "exercised in accordance with applicable laws, rules and regulations." (See JE-1).

The arbitrator found that the Agency's general orders are enforceable in arbitration by authority of the above-identified language set forth in Article 4 of the CBA. Thus, it follows that the Arbitrator is authorized to order compliance with applicable general orders, in the event that he or she finds that the Agency has not exercised its rights in accordance with the meaning of those orders.¹

B. The Arbitrator's Decision was not contrary to law or public policy.

According to Arbitrator Clark, the Agency violated Article 4 by failing to properly execute General Order 206.1 (I)(J) and General Order 206.1 (1)(A)(3) with respect to payment of overtime to members. The grievance claims that the Agency "has failed to properly compensate the Group for their appearances in court as required by General Order 206.1 [,]" based upon its claim that the Agency committed a violation of General Order 206.1 (I)(A)(3) ("Call-Back Overtime"). (See JE-1). Arbitrator Clark analyzed this argument in light of the interrelationship between General Order 206.1 (I)(J) ("Court Appearances") and General Order 206.1 (I)(A)(3).

General Order 206.1 (I)(J) authorizes payment of overtime for court duty and payment of call-back overtime for court-related work that is not court duty. Additionally, General Order 206.1 (I)(A)(3) sets rules of payment for call-back overtime. There are two types of overtime that are relevant to this case: court duty overtime and call-back overtime. (See Findings No. 7 and 8, and Findings No. 10 and 11, for definitions).

¹ (See, e.g., *District of Columbia Public Schools and Teamsters Local Union No. 639*, PERB Case No. 95-A-06, Opinion No. 423 at 5: "Unless expressly provided to the contrary, when parties agree to submit a matter to arbitration they not only agree to be bound by the Arbitrator's interpretation of the collective bargaining agreement but also to his interpretation of related rules and/or regulations."); *District of Columbia Fire Dep 'I and bit 7 Ass 'n of Firefighters*, PERB Case No. 82-A-1, Opinion No. 30 (1982) in which the Board concluded that the arbitrator did not exceed his jurisdiction by finding agency violated an applicable law, as authorized by language contained in the parties' collective bargaining agreement.

General Order 206.1(I)(J) authorizes the Agency to pay court duty overtime for performance of court duty. (See Finding No. 8). "Court duty," in terms of the type of work performed, is defined rather narrowly - it means "attendance by a member in an official capacity, excluding appearances such as a defendant at court or at a quasi-judicial hearing." (See General Order 206.1(I)(J)(1)). "Court duty" includes appearances at preliminary hearings, trials, grand juries, and witness conferences. (See Finding No. 7). It follows from the language of the General Order that the Agency is authorized to pay court duty overtime only for work that is defined and/or identified as court duty.

Arbitrator Clark found the latter point to be critical as the language of General Order 206.1(I)(J), along with the language of General Order 701.01, Attachment B make clear that there are quite a number of court-related functions performed by members in court that are not identified as "court duty." First, the language of General Order 206.1(I)(J)(1) shows that the regulatory provision for paying court duty overtime is different from the regulatory provision for paying other overtime: "The provisions of Public Law 89-282 [later codified as D.C. Code § 5-1304 - Arb.],² which deal with computing the compensation to be given to members entitled to "court time," are different from other provisions of the law providing for monetary or compensatory time for overtime performed." The language of General Order 206.1(I)(J)(2) shows that "court duty overtime" is paid for "court duty," but is not paid for court-related work that is not court duty: "[members are not entitled to court duty overtime when the purpose of their attendance in court includes routine paperwork such as returning warrants...]" The distinction between "court duty" and "administrative and investigative court-related functions" is further defined by General Order 701.01, Attachment B. That provision states that "administrative and court-related functions" "do not constitute court appearances within the legislative intent of D.C. Official Code § 5-1304,"³ and then sets forth a "partial list" of 19 such functions, none of which could reasonably be said to fall under the definition of "court duty." Arbitrator Clark concluded, based upon reading the above-cited language set forth in General Order 206.1(I)(J)(1) and General Order 701.01, Attachment B, that "court duty" and "administrative and court-related functions" are classified differently. Members' work under

² Public Law 89-282 was eventually codified as D.C. Code § 5-1304. *See* Leg. History of D.C. Code § 5-1304; *See also* *Hilbert v. District of Columbia*, 788 F.Supp. 597, 599 (D.D.C. 1992). Because that statute has been repealed with respect to police officers in the District of Columbia (See D.C. Code § 1-632.03), the Agency is not bound to implement the specific provisions set forth therein. However, because General Order 206.1(I)(J) and General Order 701.01, Attachment B, both explicitly refer to D.C. Code § 5-1304, that statute is helpful in ascertaining the meaning of those General Orders. The Arbitrator further notes that the chapeau to General Order 206.1 states that this same Public Law 89-282 "provides authorization for compensation for overtime work performed by members of the department." The Arbitrator assumed that General Order 206.1 retained its force and effect, post-repeal of D.C. Code § 5-1304, as both Parties cited the authority of General Order 206.1 at the hearing and in their briefs.

³ As relevant here, D.C. Official Code sec. 5-1304(a)(10) sets forth the following definition of "court duty." That section states, "Court Duty" means attendance by a officer or member in his official capacity, excluding his appearance as a defendant, at court or at a quasi-judicial hearing." That is the same functional definition of "court duty" set forth in General Order 206.1(I)(J)(I). It follows that the phrase "court appearances" set forth in General Order 701.01, Attachment B has the same effective meaning as "court duty", set forth in General Order 206.1(I)(J)(1).

those classifications is also paid differently, as demonstrated by the payment rules set forth and authorized by General Order 206.1 (I)(J)(2)(a) and General Order 206.1 (I) (A)(3).

The language of General Order 206.1(I)(J)(2) states that members are "not entitled to court duty overtime" when performing court-related functions such as "routine paper work" or "returning warrants." Those two functions are listed among the 19 examples of "administrative and investigative court-related functions" set forth in General Order 701.01, Attachment B, Under General Order 206.1 (I)(J)(2)(a). Members who are directed to appear in court for administrative purposes are not paid "court duty overtime," but rather are compensated under the rules as set forth for "call-back overtime." Arbitrator Clark concluded that the functions set forth by General Order 701.01, Attachment B, are court-related administrative functions for purposes of eligibility for call-back overtime under General Order 206.1(I)(J)(2)(a).⁴ Therefore, it is necessary to look at the rules for call-back overtime, set forth in General Order 206.1 (I)(A)(3), to determine circumstances in which members are authorized to receive call-back overtime for performing "administrative and investigative court-related functions" set forth by General Order 701.01, Attachment B.⁵

As required by the language of General Order 206.1(I)(J)(2)(a), members are paid call-back overtime under authority of General Order 206.1(I)(A)(3)(a) for performance of administrative or investigative court-related functions, on those days when members are not otherwise performing court duty, when the following conditions obtain: (1) the member is ordered to return to duty to perform administrative or investigative court-related functions; (2) on a particular day when the member is scheduled for a day off, or (3) at a time when the member's tour of duty either has not started or has been completed for that particular day.⁶

⁴ General Order 206.1(I)(J)(2), like General Order 701.01, Attachment B, identifies "obtaining or returning arrest warrants" as a "routine" or administrative function. This congruence in identification of administrative duties is support for the Board's conclusion that the court-related functions identified by General Order 701.01, Attachment B, fall under the category of court-related functions that are eligible for call-back overtime under authority of General Order 206.1(I)(J)(2)(a).

⁵ The language of General Order 206.1(I)(J)(2), when read together with 206.1(I)(J)(2)(a), makes clear that members may be paid court duty overtime for time that includes performance of court-related administrative functions, as long as the "the purpose of their attendance at court" is for performance of "court duty" rather than for court-related functions. For the most part, as relevant here, that language means that members may be paid court duty overtime for the entire length of time that they perform court-related work as long as some of that time in court is actually spent on court duty.

⁶ The Arbitrator noted that the parties did not discuss the force and effect of General Order 206.1(I)(A)(3)(b) either at the hearing or in their briefs. As relevant here, the language of that provision states that call-back overtime will be paid if the call-back occurs on a day off, for any purpose (See General Order 206.1(I)(A)(3)(b)(3)); but if the call-back occurs on off duty time and is "for some regular administrative purpose," then the member receives compensatory time rather than paid overtime (See General Order 206.1(I)(A)(3)(b)(1)). The effect of this rule would seem to be that members will be paid call-back overtime for performing "administrative and investigative court-related functions" on a member's day off, but if a member is called back at a time when the member's tour of duty either has not started or has been completed for that particular day, then the member will receive call-back compensatory time rather than paid overtime for that call-back work.

Arbitrator Clark concluded that the evidence showed that the Agency did not properly execute General Order 206.1(I)(J) and General Order 206.1(I)(A)(3) with respect to payment of overtime to members. Arbitrator Clark found that the Joint Exhibits submitted by the Parties demonstrated that, on several occasions, the Grievants were paid less than two hours overtime, for work in court that occurred on days that were either those members' day off, or on regularly scheduled days outside of their normal tour of duty. (See Finding No. 19). Those documents do not detail what functions those members actually performed while they were at court- the data merely show that the purpose of the assignments was for the members to perform work in court. Based upon those exhibits, Arbitrator Clark could only speculate whether the members performed court duty or non-court duty while there. Arbitrator Clark acknowledged that clarity on this point is critical. As the foregoing analysis shows, members may only be paid call-back overtime when they perform no court duty during the time they are required to be in court.⁷

According to the testimony of Inspector Burton, CLD recently discovered that members had been receiving court duty overtime for performing administrative and investigative functions while they were on CANS assignments. (See Finding No. 18). This finding shows that the Agency did not, at the time of the grievance, have a system in place for separating court duty assignments from non-court duty assignments. By extension, this also shows that the Agency was not in compliance with the rules, under General Order 206.1(I)(J) and General Order 206.1 (I)(A)(3), for paying call-back overtime when members performed administrative work while in court. Thus, Inspector Burton's testimony revealed it was very likely that the Agency directed members, through CANS assignments, to appear in court in order to perform administrative functions, either on their day off or during a break in service on their regular tour of duty - occasions for which the members should have been paid, but were not, under the rules for call-back overtime.

According to Arbitrator Clark, the evidence identified in the foregoing section demonstrates that the Agency failed to properly execute General Order 206.1 (I)(J) and General Order 206.1 (I)(A)(3) with respect to payments of overtime to members. As a result, the Agency violated Article 4 of the Parties' Agreement. That violation of the Agreement authorizes and requires the Arbitrator to construct a remedy designed to compensate affected members for overtime that they should have, but did not, receive. For the above reasons, Arbitrator Clark sustained the grievance.

When a party files an arbitration review request, the Board's scope of review is extremely narrow.⁸ Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

⁷ See footnote 4.

⁸ In addition, Board Rule 538.3 - Basis For Appeal - provides:

In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:

- (a) The arbitrator was without authority or exceeded the jurisdiction granted;
- (b) The award on its face is contrary to law and public policy; or
- (c) The award was procured by fraud, collusion or other similar and unlawful means.

1. If "the arbitrator was without, or exceeded his or her jurisdiction";
2. If "the award on its face is contrary to law and public policy"; or
3. If the award "was procured by fraud, collusion or other similar and unlawful means." D.C. Code § 1-605.02(6) (2001 ed.).

The Board's scope of review, particularly concerning the public policy exception, is extremely narrow. Furthermore, the U.S. Court of Appeals, District of Columbia Circuit, observed that "[i]n *W.R. Grace*, the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" Obviously, the 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).⁹ 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). See also, *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 A2d 319, 325 (D.C. 1989).

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. We decline MPD's request that we substitute the Board's judgment for the arbitrator's decision for which the parties bargained. MPD had the burden to specify "applicable law and 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). Instead, MPD repeats the same arguments considered and rejected by the Arbitrator; this time asserting that the Arbitrator misinterpreted the parties' CBA.

We have held that a disagreement with the Arbitrator's interpretation does not render an award contrary to law. See *DCPS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 49 DCR 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. MPD's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. See *University of the District of Columbia and UDC Faculty Association*, 38 DCR 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991).

The Board has held, as has the Court of Appeals for the Sixth Circuit, that:

⁹ See *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 2176, 76 L. Ed. 2d 298 (1983).

we will consider the questions of 'procedural aberration'.... [And ask] [d]id the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator 'arguably construing or applying the contract'? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made 'serious,' 'improvident' or 'silly' errors in resolving the merits of the dispute.

* * *

The Court's repeated insistence that the federal courts must tolerate "serious" arbitral errors suggests that judicial consideration of the merits of a dispute is the rare exception not the rule. At the same time we cannot ignore the specter that an arbitration decision could be so "ignor[ant]" of the contract's "plain language," [citation omitted] ... as to make implausible any contention that the arbitrator was construing the contract.... Such exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that.... [Citation omitted.]

This view of the "arguably construing" inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes....

Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M, 475 F. 3d 746, 753 (2007) (overruling *Cement Divisions, Nat. Gypsum Co. (Huron) v. United Steelworkers of America, AFL-CIO-CLC, Local 135*, 793 F.2d 759).

The Board finds nothing in the record that suggests that fraud, a conflict of interest or dishonesty infected the Arbitrator's decision or the arbitral process. No one disputes that the collective bargaining agreement committed this grievance to arbitration and the Arbitrator was mutually selected by the parties to resolve the dispute. (See *Michigan*, at p. 754). Therefore, the Board rejects the argument that the Arbitrator exceeded his authority.

In addition, we have found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.¹⁰ See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). Here, MPD states that the Arbitrator is prohibited from

¹⁰ We note that if MPD had cited a provision of the parties' CBA that limits the Arbitrator's equitable power, that limitation would be enforced.

issuing an award that would modify, or add to, the CBA. However, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that MPD violated the parties' CBA he also had the authority to determine the appropriate remedy. Contrary to MPD's contention, the Arbitrator did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, the Arbitrator acted within his authority. The Board finds that MPD's argument asks that this Board adopt its interpretation of the CBA and merely represents a disagreement with the Arbitrator's interpretation. As stated above, the Board will not substitute its, or MPD's, interpretation of the CBA for that of the Arbitrator. Thus, MPD has not presented a ground establishing a statutory basis for review.

The Board holds that Arbitrator Clark did not exceed his jurisdiction nor was his decision contrary to law or public policy. Therefore, the Board denies the MPD's request for an Arbitration Review.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Arbitration Review Request is denied.
2. Pursuant to Rule 559.1, this Decision and Order is final upon issuance.

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

November 4, 2011.

CERTIFICATE OF SERVICE


This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 10-A-12 are being transmitted via Fax and U.S. Mail to the following parties on this the 4th day of November, 2011.

David R. Ricksecker, Esq.
Sara L. Faulman, Esq.
Woodley & McGillivray
1101 Vermont Ave, NW, Suite 1000
Washington, D.C. 20005
Telephone: 202-833-8855

FAX & U.S. MAIL

Mark Viehmeyer, Esq.
MPD Representative
300 Indiana Avenue, N.W.
Room 4126
Washington, D.C. 20001
Telephone: 202 724-4253

FAX & U.S. MAIL


Sheryl V. Harrington
Secretary