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

In the Matter of:)	
)	
American Federation of)	
Government Employees, Local 3721,)	
(Grievant Steven Chasin),)	
)	PERB Case No. 10-A-13
Petitioner,)	
)	Opinion No. 1251
vs.)	
)	
District of Columbia Fire and)	
Emergency Medical Services Department,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, Local 3721 (“Petitioner” or “Union”) filed an Arbitration Review Request (“Request”) seeking review of an arbitration award (“Award”) that found that grievant Steven Chasin (“Grievant”) was properly charged three hours of Absence Without Leave (“AWOL”) on July 28, 2008, and July 29, 2008. The Union asserts that the award was contrary to law and public policy. Request at 2. The District of Columbia Fire and Emergency Medical Services Department (“Respondent” or “Agency”) filed a document styled Opposition to Union’s Arbitration Review Request (“Opposition”).

Petitioner then filed a document styled Reply to Agency’s Opposition to Union’s Arbitration Review Request (“Reply”), which was followed by Respondent’s first Motion to Strike. Petitioner next filed a document styled Union’s Opposition to Agency’s Motion to Strike, to which the Agency responded with Respondent’s Second Motion to Strike.

The issues before the Board are (a) whether “the award on its face is contrary to law and public policy,” D.C. Code § 1-605.02(6) (2001 ed.); and (b) whether the Agency’s first and second motions to strike should be granted.

II. Arbitrator's Award

The Arbitrator found that during the relevant time period, Grievant's supervisor was Captain Roberto Hernandez, Jr., and that by choosing to disregard Capt. Hernandez's directions Grievant was properly charged three hours of AWOL on July 28 and 29, 2008. Award at 7-8. The Arbitrator relied on the following facts:

1. In 2006, Grievant was assigned to the Agency's Office of the Medical Director as the technical support manager of the Agency's Electronic Patient Care Record ("ECPR") program. Grievant also served as Chief Shop Steward of Local 3721, for which he was granted administrative leave as necessary.
2. Grievant's office was headed first by Dr. Michael Williams, then by Battalion Chief Stack, and subsequently Capt. Roberto Hernandez.
3. Standard duty hours were officially 8:00am until 4:30pm, subject to variations authorized by supervisors. When Capt. Hernandez took charge in April 2007, he found the working hours to generally be 8:15am to 4:45pm.
4. Dr. Williams authorized Grievant to work from 6:00 or 7:00am to 2:00 or 3:00pm, with occasional variations of 9:00 or 10:00am to 5:00 or 6:00pm, usually with no lunch break.
5. Capt. Hernandez took charge of the ECPR program in June 2007. Later that summer, Grievant asked for and received Capt. Hernandez's permission to work one day a week from 6:00am to 2:00 or 2:30pm in order to accommodate Grievant's volunteer schedule at a Virginia volunteer fire department. In early 2008, Capt. Hernandez also approved Grievant's request to work a later schedule on days when he needed to take his daughter to school.
6. In May 2008, Grievant began using an unusual amount of sick leave, apparently due to personal problems which he confided to Capt. Hernandez. Grievant's hours became erratic. In July 2008 Grievant would arrive as late as 9:30 or 10:00am and leave as early as 2:00pm, without always notifying Capt. Hernandez. An employee complained that Grievant's absences made it necessary for the employee or Capt. Hernandez to cover Grievant's job duties. Capt. Hernandez spoke with Grievant more than once about his attendance problems, insisting that Grievant work his full eight hour shift and inform Capt. Hernandez of any deviations from the schedule.
7. On some occasions Grievant informed the payroll clerk that he had been granted annual leave for certain hours without producing a leave slip showing supervisorial approval. No other employee did this.
8. On July 21, 2008, Grievant submitted an e-mail to Deputy Chief Kenneth Jackson requesting administrative leave for himself and another union officer to deal with union

business on July 23-24, 2008.¹ Deputy Chief Jackson responded that the request as outlined could not be granted, but that half of the time would be granted for each day. Grievant nevertheless took the full day off on both dates, informing the payroll clerk that he would use annual leave for the hours in which administrative leave had been denied.

9. On July 25, 2008, Capt. Hernandez delivered AWOL notices to Grievant for July 23 and 24, along with a Letter of Direction stating:

This Letter of Direction is being issued to you because of your recent Absence Without Leave (AWOL) and erratic work hours.

Specifically you requested Administrative Leave for yourself, through Deputy Fire Chief Kenneth Jackson, for July 23rd and 24th, 2008 from 0700 through 1500 hours. As indicated in Deputy Chief Jackson's reply to you (copy attached), the request could not be honored, but that the agency will grant half the time requested. You were further instructed by Deputy Chief Jackson to adjust your request to reflect the change. You failed to follow Deputy Chief Jackson's instructions, and no administrative leave was granted by him for July 23rd and 24th, 2008. As you did not report for duty on July 23rd or 24th, 2008, and no annual leave was requested by you or granted, you are being charged 16 hours AWOL.

Additionally, your work schedule, with erratic arrivals and/or departures put an additional burden on your co-workers. They must either assume duties you would perform or allow work to remain incomplete or unfinished. Beginning Monday, July 28, 2008, your official duty hours are Monday through Friday 0815 to 1645, and you are expected to abide by these hours. Failure to do so may result in additional charges of AWOL and corrective or adverse action. If you wish to modify your work hours you may request it in writing and it will be given consideration.

Finally, announcing that you are taking annual leave without prior approval is unacceptable and will no longer be tolerated. Annual Leave usage must be requested in advance by you accompanied by a completed SF-71, and approved by me or, in my absence, Battalion Chief Stack or Deputy Chief Blalock.

10. Upon receipt of the Letter of Direction, Grievant e-mailed Capt. Hernandez and requested an alternate work schedule. Capt. Hernandez responded, denying the alternate work schedule because he did not consider it practical and feasible, as provided by D.C. Code § 612.01(e).

¹ In the EPCR program, Deputy Chief Jackson had authority to grant administrative leave and Capt. Hernandez had authority to grant sick and annual leave.

11. Grievant responded with another e-mail asking Capt. Hernandez to explain his reasons for the denial in detail, and disagreeing with Capt. Hernandez's statement that he "[could] not think of any work for [Grievant] to do at 0615 hours." Award at 4.
12. On Monday, July 28, Capt. Hernandez found Grievant at his desk at 7:00am. Capt. Hernandez reminded Grievant that the July 25 Letter of Direction specified his tour of duty as 8:15am to 4:45pm. Grievant responded that he had arrived at 6:00am and would leave at 2:00pm. Capt. Hernandez replied that he had not authorized Grievant to come in at 6:00am and that he would be charged as AWOL if he left before 4:45pm.
13. The same situation occurred the next morning, July 29. Capt. Hernandez served Grievant with notification of AWOL for unworked hours on July 28 and warned grievant that he would be charged with AWOL again if he left before 4:45pm that day. Hernandez subsequently learned that Grievant left at 3:00pm and charged Grievant as AWOL accordingly.
14. On July 30 Grievant submitted another administrative leave request for part of that day, which was approved by Deputy Chief Jackson. In informing Grievant of that approval by e-mail, Capt. Hernandez further advised Grievant:

Per our conversation this morning, in order to avoid any misunderstanding, you are reminded that your official duty hours, as stated in the letter of direction you received from me on Friday, July 25, 2008, are 0815 – 1645, Monday through Friday.

15. Grievant immediately replied that he had been at work since 6:20 that morning and would complete eight hours at 4:20pm, contending that the July 25 Letter of Direction constituted a transfer or reassignment requiring seven days' notice. (This contention was not pursued at the arbitration).
16. Grievant successfully grieved the July 23 and 24 AWOL charge, and on August 5 those hours were changed to administrative leave.

See Award at pp. 2-5.

The parties advanced the grievance over the July 28 and 29 AWOL charges. The Union argued before the Arbitrator that Grievant's working hours were informally determined and approved by Dr. Williams, while the Agency argued that no evidence supported that claim. The Agency went on to argue that Grievant addressed his July 25 request for an alternate work schedule to Capt. Hernandez, not Dr. Williams, and that Grievant sought Capt. Hernandez's approval to accommodate his volunteer work in Virginia and taking his daughter to school. *See Award at 6.*

The Union also claimed that upon finding Grievant at his desk at 7:00am on July 28 and 29, Capt. Hernandez did not order Grievant to stop working or leave the building and return at

8:15am. The Union argued that while Grievant's refusal to work the hours stated in the July 25 Letter of Direction may be grounds for disciplinary action, Grievant cannot have been AWOL on July 28 and 29 because he completed a full eight hours of work each day. *See Award at 5-6.*

The Agency contends that Grievant never sought formal approval of an alternative work schedule until after he received the July 25 Letter of Direction. Without supervisory approval of his alternative work schedule, Grievant was obliged to "comply first and grieve later" under the maxim consistently applied by arbitrators based on the need for management to direct the work force with a minimum of discord. *See Award at 6.*

The Arbitrator considered the positions of the parties and stated as follows:

Although the parties have verbally fenced over numerous regulations and contract provisions, this case essentially presents questions of fact: who had authority to authorize and approve Grievant's working hours and was such authorization and approval given for the hours Grievant worked on July 28 and 29, 2008?

The Union does not dispute that authority to grant Grievant administrative leave was held by Deputy Chief Jackson and that authority to grant and approve Grievant's sick and annual leave was held by Capt. Hernandez. The only dispute is over authority to establish the hours of Grievant's regular tour of duty.

A degree of potential ambiguity about Grievant's supervision in the EPCR program was perhaps inherent in the division of responsibility, or "bifurcation" as Grievant described it; between medical matters or procedures subject to Dr. Williams' authority and operational matters or procedures subject to Capt. Hernandez's authority. Grievant may have believed he was authorized to work a schedule of his preference before Capt. Hernandez became project manager in 2007, but Grievant's conduct from that time forward demonstrated that he recognized that Hernandez, not Williams, had authority as supervisor of Grievant's duty schedule.

In the spring of 2007 Grievant addressed to Capt. Hernandez, not Dr. Williams, Grievant's request to vary his schedule one day a week for his volunteer work in Virginia and then to accommodate his daughter's travel to school each morning. It was Capt. Hernandez, not Dr. Williams, who later expressed to Grievant concerns about Grievant's schedule and insisted that Grievant work his full 8 hours and keep Hernandez informed of his schedule. There is no evidence that Dr. Williams ever concerned himself with Grievant's working hours or that Grievant ever treated Dr. Williams as his supervisor in that regard after Capt. Hernandez became project manager in June 2007.

Nor did Grievant's July 25 response to Capt. Hernandez's Letter of Direction, requesting approval of an alternative work schedule, suggest that it was Dr. Williams rather than Hernandez who had authority to direct Grievant's duty

hours. Indeed, it was Hernandez's approval, not Williams', which Grievant then sought for an alternative work schedule. Even in Grievant's argumentative response later on July 25 after Capt. Hernandez had disapproved that request, Grievant challenged only the grounds for Hernandez's disapproval, not Hernandez's authority to decide the matter.

It may well be that Grievant actually worked a full eight (8) hours, starting at 6:00a.m., on July 28 and 29. Grievant's testimony on that subject is uncontradicted. But the Union concedes that those were not the hours ordered by Capt. Hernandez's July 25 Letter of Direction, and the Union has not contested Hernandez's account of his reiteration of that order and his explicit warnings to Grievant on the mornings of July 28 and 29 that failure to comply with those prescribed hours would result in AWOL charges. (Hernandez's testimony regarding his reiteration of that order on July 28 and 29 may perhaps explain Grievant's failure to pursue his earlier argument that the Letter of Direction was effectively reversed by Chief Jeffrey's decision on Grievant's July 23 and 24 AWOL charges).

The Union also does not contest that it was Grievant's obligation to comply with a valid order of his supervisor and that if Grievant wished to pursue his disagreement with that order, his recourse was to "obey and grieve." Grievant himself testified, when asked why he felt it was his right to disobey Capt. Hernandez's direction, that "[i]t's not that I actually felt it was my right to do so. I needed to -- I actually needed to do it so I was able to pick up my daughter from day camp."

Grievant testified that he had "verbally, informally" brought his daughter's day camp problem to Capt. Hernandez's attention, but Grievant made no mention of that problem in his July 25 request for an alternative work schedule and there is no evidence that Grievant referred at all to that problem in his responses to Hernandez's warnings on the mornings of July 28 and 29.

Whatever impression of Dr. Williams' authority Grievant may have had before Capt. Hernandez became EPCR project manager in 2007, and whatever impression of lenity may have been given by Hernandez's efforts to accommodate Grievant's schedule requests in early 2008, by July of 2008 Grievant clearly recognized and understood that it was Capt. Hernandez who had authority to establish Grievant's duty hours. Whatever these hours may have been prior to July 25, 2008, Capt. Hernandez's Letter of Direction delivered to Grievant on that date unequivocally then established Grievant's duty hours as 8:15a.m. to 4:45p.m. until further notice.

Concluding that by choosing to disregard Capt. Hernandez's direction "in the face of repeated warnings," Grievant was AWOL on July 28 and 29, 2008, during the hours from his departure until 4:45pm, the Arbitrator denied the Union's grievance. Award at 8.

III. Review Request

The Union filed the instant Arbitration Review Request, contending that the Award is contrary to law and public policy. Request at 2.

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

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.)²

The Union requested that the Board overturn the Arbitrator's Award as contrary to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 8 and its accompanying regulations, 29 CFR 785. The Union maintained that the Arbitrator's Award is contrary to law and public policy because an award that is contrary to a specific law *ipso facto* may be said to be contrary to the public policy that the law embodies. *Metro. Police Dep't. v. Fraternal Order of Police*, 901 A.2d 784, 789 (D.C. 2006); Request at 2. According to the Union, because Grievant performed eight hours of work on both July 28 and 29, 2008, the Agency is required to compensate Grievant under the FLSA. Request at 4. Failure to do so contravenes the FLSA and therefore the public policy underlying the FLSA. *Id.*

In support of their Request, the Union quotes several subsections of 29 CFR 785. Request at 2-3. One of the sections at the crux of the Union's argument is 29 CFR 785.11, which states:

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time. (Citations omitted).

² In addition, the same grounds are incorporated in Board Rule 538.3, "Basis for Appeal."

Request at 3. The Union also refers to 29 C.F.R. 785.13, which states:

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

Request at 3.

The Agency contends that the Union raises its FLSA argument for the first time in its Request. Opposition at 4. According to the Agency, it is "axiomatic that, for an appellate body such as the Public Employee Relations Board (PERB) to decide an argument, the argument has to be raised before the finder of fact." *Id.* The Agency alleges that Board precedent has held that the issues to be examined in an arbitration review request are limited to the evidence that was before the arbitrator during the arbitration hearing, and that PERB is obligated to dismiss the Union's Request. *Id.* at 5.

Additionally, the Agency contends that the Award is not "on its face contrary to law and public policy." Opposition at 6 (*quoting* D.C. Official Code § 1-605.02(6)). The Agency states that the Union has failed to identify a definitive public policy violated by the Award or the ways in which the Award compels a party to violate the law. Opposition at 6.

Finally, the Agency argues that even if the Board chooses to consider the FLSA issue, "[t]o find a violation of the FLSA in this case would vitiate management's ability to set employees' schedules because an employee could arrive at work any time he or she wanted, work eight hours and later claim that the FLSA requires payment for those hours even if they were performed outside of the schedule established by the employer." Opposition at 7.

IV. Motions to Strike

On March 8, 2010, the Union filed a document styled Reply to Agency's Opposition to Union's Arbitration Review Request ("Reply"). The Reply was filed approximately thirty days after the Opposition. In the Reply, the Union refutes the Agency's claim that the FLSA issue was not raised at arbitration and reiterates the arguments made in the Request.

In response, the Agency filed a Motion to Strike. In its Motion, the Agency argues that PERB Rule 538 does not allow for filings beyond an opposition to an arbitration review request. Respondent's Motion to Strike at 1-2. Further, the Agency states that it is up to the Board to seek additional briefs and that unsolicited briefs should not be considered. *Id.* at 2.

The Union next filed its Opposition to Agency's Motion to Strike, arguing that the correct question to ask is not whether the Union's rebuttal brief is explicitly permitted, but whether it is explicitly *prohibited*. Union's Opposition to Agency's Motion to Strike at 2.

Perhaps unsurprisingly, the Agency followed with a second Motion to Strike, with a substantially similar argument to the first Motion to Strike. *See* Respondent's Second Motion to Strike.

V. Discussion

A. Motions to Strike

PERB Rule 538 is silent as to filings beyond an Arbitration Review Request and an opposition to the Arbitration Review Request. The Board generally allows supplemental briefs in instances where the additional pleading responds to arguments advanced by the opposing party and does not raise new issues or arguments. *Fraternal Order of Police/Metro. Police Dep't Labor Comm. and Metro. Police Dep't*, 38 D.C. Reg. 847, Slip Op. No. 261, PERB Case No. 90-N-05 at *5, FN 1 (1991). The Board also considers whether the additional pleadings "cloud the issues" or are "unfairly prejudicial." *Charles M. Bagenstose v. Washington Teachers' Union, Local No. 6*, Slip Op. No. 894, PERB Case No. 06-U-37 at *2 (June 22, 2007). If there is no express prohibition against the additional pleadings and no objections from the opposing side, the Board allows the additional pleadings. *See Fraternal Order of Police/Dept. of Corrections Labor Committee, et al.*, 43 D.C. Reg. 1963, Slip Op. No. 370, PERB Case No. 93-R-04 at p. 3, FN 2 (1996); *District of Columbia Metro. Police Dep't and Fraternal Order of Police*, 39 D.C. Reg. 6232, Slip Op. No. 282, PERB Case No. 87-A-04 at p. 3, FN 3 (1992).

In the present case, there is no express prohibition in Rule 538 against pleadings beyond the opposition brief, but the Agency objects to the Union's Reply and its Opposition to Agency's Motion to Strike. The Union's additional pleadings do not raise new issues or arguments, nor do they cloud the issue or unfairly prejudice the proceedings. Upon balancing these considerations, the Union's additional pleadings will be allowed.

B. Arbitration Review Request

As to the Union's claim that the Award is on its face contrary to law and public policy, we disagree for the reasons discussed below.

First, we agree with the Agency that the Union raised its FLSA argument for the first time in the Request. The Union did not cite to the FLSA during the arbitration proceedings, nor did it refer to the FLSA by name or citation in its post-hearing brief. The Union's post-hearing brief was not sufficient to put the Arbitrator or the Agency on notice of a FLSA argument, nor is it the job of the Arbitrator to extrapolate the unstated statutory basis for such an argument. It is a well-settled legal principle that a party may not raise an argument for the first time on appeal. *See, e.g., Badawi v. Hawk One Sec., Inc.*, 21 A.3d 607, 613 n. 4 (D.C. 2011) (*quoting Goodman v. District of Columbia Rental Housing Comm.*, 573 A.2d 1293, 1301 (D.C. 1990) ("Absent a showing of 'exceptional injustice,' we cannot consider arguments 'not presented before the administrative agency at the appropriate time.'")). In the present case, the Union did not provide the arbitrator with a chance to consider a FLSA violation. It would be improper for the Board to consider such a violation now.

Second, the Union's disagreement with the Arbitrator's findings is not a sufficient basis for concluding that the Award is contrary to law or public policy. As stated above, the Board's scope of review, particularly concerning the public policy exception, is extremely narrow. 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." *Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Committee*, 47 DC Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000); *See also District of Columbia Public Schools and American Fed'n of State, County and Municipal Employees, District Council 20*, 34 DC Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987).

By submitting the grievance 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 on which the decision is based." *District of Columbia Metro. Police Dep't v. Fraternal Order of Police/ Metro. Police Dep't Labor Comm.*, 47 DC Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metro. Police Dep't and Fraternal of Police, Metro. Police Dep't Labor Comm. (Grievance of Angela Fisher)*, 51 DC Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004). Disagreement with the arbitrator's findings is not a sufficient basis for concluding that an award is contrary to law or public policy. *Metro. Police Dep't and Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 31 DC Reg. 4159, Slip Op. No. 85, PERB Case No. 84-A0-05 (1984).

Here, the Union asserts that the Award violates public policy because it is contrary to the FLSA, and therefore contrary to the public policy embodied in the FLSA. Request at 2. After considering the facts and legal arguments presented to him at the hearing and in the post-hearing briefs, the Arbitrator found that the Grievant was AWOL on July 28 and 29, 2008. Award at 8. The Union's mere disagreement with the Arbitrator's findings is not a sufficient basis for this Board to overturn the Arbitrator's Award. Therefore, the Union's Arbitration Review Request is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Motion to Strike and Second Motion to Strike filed by the District of Columbia Fire and Emergency Medical Services Department are denied.
2. The Arbitration Review Request filed by AFGE Local 3721 (Employee Steven B. Chasin) is denied.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

Decision and Order
PERB Case No. 10-A-13
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BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

March 28, 2012.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-18 is being transmitted via e-mail and U.S. Mail to the following parties on this the 28th day of March, 2012.

Steven B. Chasin
AFGE Local 3721
2941 Hickory Creek Court
Dumfries, VA 22026
sbchasin@local3721.org

U.S. MAIL and E-Mail

James T. Langford, Esq.
Attorney - Advisor
D.C. OLRCB
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001
James.langford@dc.gov

U.S. MAIL and E-Mail



Erin E. Wilcox
Attorney-Advisor