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

Fraternal Order Of Police/)	
Metropolitan Police)	
Department Of Labor Committee,)	
)	
Petitioner,)	
)	
and,)	
)	
District Of Columbia)	PERB Case No. 11-E-02
Metropolitan Police)	
Department,)	
)	Slip Opinion No. 1234
Respondent.)	
)	
)	STAFF RECOMMENDATION
)	
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DECISION AND ORDER

I. Statement of the Case

On December 5, 2011, the District of Columbia Metropolitan Police Department (“Agency” or “MPD”) filed a Motion for Reconsideration (“Motion”) regarding the Public Employee Relations Board’s (PERB) Slip Opinion No. 1222, issued on November 17, 2011. Slip Opinion 1222 ordered the MPD to comply with PERB’s Slip Opinion No. 1032. On September 27, 2011, the Fraternal Order of Police/Metropolitan Police Department of Labor Committee (“FOP” or “Petitioner”) filed “Petition for Enforcement of PERB Decision and Order” (“Petition”) regarding PERB Case No. 10-A-01 (Slip Op. No. 1032). FOP alleged that the District of Columbia Metropolitan Police Department (“MPD” or “Respondent”) failed to comply with Slip Op. No. 1032 which was issued on August 5, 2011. Specifically, FOP claimed that MPD failed to implement the terms of an Arbitration Award (“Award”) issued on September 9, 2009, and affirmed by the Board on August 5, 2011. (See PERB Decision and Order 10-A-01 and Petition at p.1.) In its Petition, FOP asked the Board to “to enforce the Award and Order pursuant to PERB Rule 560.1 and D.C. Code 1-617.13(b).” (See Petition at p.1). MPD opposed FOP’s Petition. On November 17, 2011, PERB issued Slip Opinion No. 1222 in which it granted FOP’s Petition and ordered the MPD to comply with PERB Slip Opinion 1032.

The MPD's current Motion for Reconsideration is before the Board for disposition.

II. Discussion

This case arises out of MPD's efforts to implement an "all hands on deck" directive ("AHOD"). AHOD is an MPD initiative, the stated purpose of which is "to have positive interaction with citizens, address community concerns, provide a physical presence in neighborhoods throughout the city, arrest offenders of the law, and to reduce crime and the fear of crime." (See Award at p. 5 (quoting Union Exhibit 4)).

MPD sought to accomplish these goals by requiring all MPD officers to work three-day weekends in May, June, July, August, November, and December of 2009. (See Award at p. 5). MPD informed members of the police force of the AHOD initiative in a January 7, 2009 teletype sent by the Chief of Police, Cathy L. Lanier. (See Award at p. 4). MPD officers were not permitted to schedule days-off on any of the dates listed in the teletype, nor could officers schedule leave on any of these dates unless such leave had been planned prior to January 7, 2009. (See Award at p. 4).

On January 23, 2009, FOP Chairman Kristopher Baumann filed a class grievance alleging that the initiative violated Articles 1, 4, 24, and 40 of the parties' collective bargaining agreement ("CBA"). FOP then demanded bargaining on the matters set forth in the teletype. Chief Lanier denied FOP's grievance and found that there was no requirement to bargain over AHOD. On February 24, 2009, FOP demanded arbitration in accordance with Article 19, Part E, Section 2 of the parties' CBA. (See Award at p. 6).

The Arbitrator held a hearing on this matter on June 17, 2009. The issue before him was whether Chief Lanier's 2009 AHOD initiative violated Articles 1, 4, 24 and 49 of the parties' CBA. The Arbitrator considered the arguments of MPD and FOP and, in his September 9, 2009 Award, ruled in favor of FOP. At the outset, the Arbitrator considered MPD's argument that it was unfairly surprised by the introduction of Mayor's Order 2008-92. (See Award at pgs. 22-23). The Arbitrator concluded that there was no evidence that FOP had previous knowledge of Order 2008-92 and deliberately withheld it. (See Award at p. 23). In the Arbitrator's view, if anyone should have known about this order, it was MPD. (See Award at p. 23). Moreover, the Arbitrator noted that MPD could have objected to the introduction of this exhibit at the hearing but did not. (See Award at p. 23). Furthermore, the Arbitrator determined that MPD could have requested time to review the order but did not. MPD only sought to reopen the proceedings thirty days after the record was closed. (See Award at p. 23).

Concerning the merits of the grievance, the Arbitrator focused on whether AHOD violated Articles 1, 4, 24, and 49 of the CBA. (See Award at p. 23). The Arbitrator looked to the terms of the agreement, applicable statutes, and Mayor's Orders and determined that MPD violated those articles of the agreement. (See Award at pgs. 23-27).

In particular, the Arbitrator determined that by implementing AHOD, MPD violated Article 24 of the CBA. (See Award pgs. 24-25). The Arbitrator reviewed Chief Lanier's testimony in a previous case and stated that D.C. Code § 1-612.01 requires a five-day workweek with two consecutive days off. The Arbitrator found that *neither* the Mayor nor Chief Lanier determined that there was any crime

emergency or that MPD would be "seriously handicapped" without AHOD. Moreover, the Arbitrator found that the Chief did not have the authority to make the "seriously handicapped" determination because her authority to do so was rescinded by Mayor's Order 2008-92. (See Award at p. 25). Since the Arbitrator concluded that AHOD constituted a change in the terms and conditions of employment, the Arbitrator found that Article 24 was violated by MPD. Additionally, the Arbitrator found that the "seriously handicapped" determination must be in writing, based on his interpretation of D.C. Code § 1-612.01. (See Award at p. 26).

The Arbitrator found that FOP met its burden to show that MPD violated Articles 1, 4, 24, and 49 of the CBA. The Arbitrator ordered MPD to rescind the teletype ordering AHOD and comply with Article 24, Section 1 concerning overtime pay and compensatory time, in accordance with the Fair Labor Standards Act. The Arbitrator retained jurisdiction only to clarify the remedy, if necessary. (See Award at p. 27).

MPD moved for reconsideration on September 18, 2009, which FOP opposed on September 23, 2009. The Arbitrator determined that he did not have authority to consider MPD's motion because his authority ended once his decision was rendered. (See Order Denying Motion for Reconsideration, September 28, 2009).

MPD challenged the Award in its Arbitration Review Request ("Request") on the bases that the Arbitrator exceeded his authority by considering Mayor's Order 2008-92 and that the Award is contrary to law and public policy. (Request at pgs. 4-11).

Section 1-605.02(6) of the CMPA provides the Board with the authority to overturn an arbitrator's award only: (1) "if the arbitrator was without, or exceeded, his or her jurisdiction"; (2) where "the award on its face is contrary to law and public policy"; or (3) when it "was procured by fraud, collusion, or other similar and unlawful means." D.C. Code § 1-605.02(6) (2001). The deference the Board gives to arbitration awards is rooted not only in the CMPA, but also in the well-established principle that MPD and FOP have granted "the authority to the arbitrator to interpret the meaning of their contract's language..." See *Eastern Associated Coal Corp. v. United Mine Workers of America*, DisL 17, 531 U.S. 57, 61-62 (2000) (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)).

When parties agree to arbitrate disputes under a CBA, the parties are bound by the arbitrator's interpretation of the contract, and the Board is not authorized to substitute its own interpretation of the CBA. See *United Paperworkers Int'l. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987); *District of Columbia Metropolitan Police Dept. v. District of Columbia Public Employee Relations Board*, 901 A.2d 784, 789 (D.C. 2006) (quoting *Am. Postal Workers v. U.S. Postal Serv.* 789 F.2d 1, 6 (D.C. Cir. 1986)). In sum, the Award is subject to "the greatest deference imaginable." See *Utility Workers Union of America, Local 246 v. N.L.R.B.*, 39 F.3d 1210, 1216 (D.C. Cir. 1994).

A. The Arbitrator Did Not Exceed his Authority When He Considered Mayor's Order 2008-92.

The Board concluded in Slip Op. 1032 that the Arbitrator did not exceed his authority when he made the Award in the FOP's favor.

MPD and FOP, pursuant to their CBA, agreed that the Arbitrator should determine whether MPD violated the CBA when it issued the teletype ordering AHOD. The parties therefore granted the Arbitrator authority to interpret the terms of the contract. The remaining question is whether the Arbitrator was even "arguably construing" the CBA. The Board finds that he was.

The Arbitrator construed D.C. Code § 1-612.01 to require either a crime emergency finding or a written determination that MPD would be "seriously handicapped" without AHOD. The Arbitrator found, as a matter of fact, that there was no crime emergency declared and that neither the Mayor nor the Chief of Police made any written determination that MPD would be "seriously handicapped" unless AHOD were implemented. Based on his interpretation of the law and his factual findings, the Arbitrator found that implementing AHOD violated the CBA because there was no crime emergency finding or "seriously handicapped" determination that would have allowed the suspension of the CBA's scheduling provisions. (See Award at p. 26). The Arbitrator's conclusion that MPD violated the terms of the CBA therefore drew its essence from the contract.

In its denial of the MPD's Arbitration Review Request, the Board found that the Arbitrator was well within his authority when he interpreted Article 19, Part E, Section 5(2) to permit him to consider Mayor's Order 2008-92. The Arbitrator was "the judge of the admissibility and relevancy of evidence submitted in an arbitration proceeding." See *Howard Univ. v. Metro. Campus Police Officer's Union*, 519 F. Supp. 2d 27, 36-37 (D.D.C. 2007), *aff'd* 512 F.3d 716 (D.C. Cir. 2008) (quoting *Pompano-Windy City Partners v. Bear Stearns & Co.*, 794 F.Supp. 1265, 1277 (S.D.N.Y. 1992)). FOP offered an exhibit to which MPD voiced no objection during the proceedings. The Arbitrator interpreted Article 19, Part E, Section 5(2) of the parties' CBA to permit him to consider evidence that had not been objected to before the record was closed. (See Award at p. 23). The Arbitrator's determination, that a party must object at the time of the proceeding, is consistent with the general admonition that parties are not allowed to keep some of their objections in their "hip pockets." See *Drivers, Chauffeurs A Helpers Local Union No. 639 v. District of Columbia*, 631 A.2d 1205, 1219 (D.C. 1993); See also Sup.Ct.R.Civ.P. 51(c) (parties must timely object to preserve issues). The Arbitrator therefore considered the terms of the CBA, gave his interpretation of the contract as bargained for by the parties, and properly exercised his authority to admit and consider Mayor's Order 2008-92. (See *Metro. Campus Police Officer's Union*, 519 F. Supp. 2d at 36-37.)

The same holds true of the Arbitrator's decision not to reopen the hearing to consider MPD's new evidence. "It is well-established that a highly deferential standard applies to arbitration decisions ... [and] it is equally well-established that courts are even more deferential regarding procedural decisions." See *American Postal Workers Union v. United States Postal Serv.*, 362 F. Supp. 2d 284,289 (D.D.C. 2005). Indeed, in arbitration proceedings, "[t]he required deference applies particularly to the arbitrators' procedural rulings. . . ." See *Nat'l Football League Players Ass'n v. Office and Professional Employees Intern, Union Local 2* 947 F.Supp. 540, 545 (D.D.C. 1996). The Arbitrator determined that he must make his decision on the facts as they existed at the time of the hearing. (See Award at 23). MPD's new evidence, Mayor's Order 2009-117, was not signed until two days after the hearing. Once again, the Board found that the Arbitrator's decision to reject consideration of this evidence, and his decision not to reopen the hearing fell well within his authority to control the proceedings. See *Metro. Campus Police Officer's Union*, 519 F. Supp. 2d at 36-37.

The Board found that the Arbitrator had the authority to consider Mayor's Order 2008-92, and MPD therefore did not provide any basis to modify or set aside the Award under the CMPA,

B. The Award Did Not Compel the Violation of Any Law and Public Policy.

The Board concluded that the Arbitrator's Award was not contrary to law and public policy. Pursuant to D.C Code § 1-605.02(6), MPD must show that "the award on its face is contrary to law and public policy." Parties seeking reversal of an arbitration award based on law and public policy have a high burden. The Supreme Court has stated that a public policy allegedly violated by 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." See *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)). MPD, therefore, must demonstrate that the public policy violation "suffice[d] to invoke the 'extremely narrow' public policy exception to enforcement of arbitrator awards." See *District of Columbia Metropolitan Police Dept. v. District of Columbia Public Employee Relations Bd*, 901 A.2d 784, 789 (D.C. 2006) (citing *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 789 F.2d 1,8 (D.C. Or. 1986)).

In the present case, the Arbitrator concluded that the AHOD, if implemented, would constitute a change to the scheduling provisions of Article 24 of the CBA. (See Award at p. 26). The Arbitrator examined D.C. Code § 1-612.01 to determine whether MPD had the authority to make such a change to a term of the CBA. The Arbitrator concluded that D.C. Code § 1-612.01 required a written determination that MPD would be "seriously handicapped" without AHOD, and that neither the Mayor nor the Chief of Police made any such determination. (See Award at p. 26). Accordingly, the Arbitrator found that MPD violated the CBA when it changed the terms of the contract in the absence of such a written determination. (See Award at p. 26). MPD does not challenge this core conclusion of the Arbitrator, which forms the basis of his decision. (See Request at pgs. 8-12). MPD's challenge to the Award on a law and public policy basis therefore fails.

MPD's law and public policy challenge to the Award is based on the Arbitrator's secondary conclusion that the Chief of Police did not have authority to make the "seriously handicapped" determination because such authority had been rescinded by Mayor's Order 2008-92. (See Request at pgs. 8-12). Even if the Board were to entertain MPD's argument that the Arbitrator misapplied the Mayor's Orders, MPD still does not present a basis to modify or set aside the Award on public policy grounds. No statutory basis existed for setting aside the Award.

C. Petition for Enforcement

On September 27, 2011, the FOP filed a Petition for Enforcement with the Board. FOP contended that MPD failed to comply with Slip Op. No. 1032. Specifically, FOP asserted that despite the Board's denial of the MPD's Arbitration Review Request, MPD did not provide the grievants with their back pay as required by the Award. FOP requested that the Board enforce Slip. Op. No. 1032 and compel MPD to comply with the terms of the Arbitrator's Award. The

Board's Decision and Order of November 17, 2011 ordered the MPD to comply with the terms of the Arbitration Award.

D. Motion for Reconsideration

In the instant case, the MPD filed a Motion for Reconsideration of PERB Slip Opinion No. 1222 on December 5, 2011. The MPD includes in its present Motion an affidavit from Priya Mathews, the Assistant Payroll Operations Manager for the Public Safety and Justice Cluster, and an attached spreadsheet (See Affidavit of Priya Mathews and Attachment 1) listing specified individuals and the total payments made to them by the MPD.

The Board notes that the MPD raised this new issue and added to the factual record information that was not previously submitted in their filings with PERB nor with the Arbitrator. The Board has held that "we will not permit evidence presented for the first time in a motion for reconsideration to serve as a basis for reconsidering...when the [Complainant] failed to provide any evidence at the afforded time." See *Mack, Simmons, Lee and Ott v. Fraternal Order of Police/Department of Corrections Labor Committee*, 45 DCR 1472, Slip Op. No. 521 at p. 3, PERB Case No. 97-S-01 (1988). The affidavit from Priya Mathews and the attached spreadsheet were not presented to PERB prior to the Board issuing Slip Opinion No. 1222 ordering the MPD to comply with PERB Slip Opinion No. 1032 affirming the Arbitration Award. Consequently the Board finds that the affidavit and attachment may not serve as a basis for reconsideration of the Board's order.

Consistent with Board precedent, the standard for a motion for reconsideration is clear legal error. The MPD has not alleged, with any particularity, any such clear legal error on the part of PERB in Slip Opinion No. 1222. As a result, the Board concludes that the MPD has failed to assert any grounds for the Board to reverse the Board's prior decision. See *White v. District of Columbia Department of Corrections and FOP/ DOC Labor Committee*, 49 DCR 8973, Slip Op. No. 686, PERB Case No. 02-U-15 (2002).

The Board denies the MPD's Motion for Reconsideration and affirms the Board's previous decision and order granting FOP's Petition for Enforcement.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department's Motion for Reconsideration is denied.
2. The Board shall proceed with enforcement of Slip Op. No.1032 pursuant to D.C. Code §1-617.13(b) (2001 ed) if full compliance with Slip Opinion 1032 is not made and documented to the Board within ten (10) days of the issuance of this Decision and Order.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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BY ISSUANCE OF THE PUBLIC EMPLOYEE RELATIONS BOARD

**Washington, D.C.
December 19, 2011**

CERTIFICATE OF SERVICE

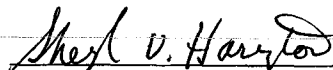
This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 11-E-02 are being transmitted via Fax and U.S. Mail to the following parties on this the 21st day of December, 2011.

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