Notice: This deci may be formally revised before it is publ d in the District of Columbia Register. Parties should prc y notify this office of any formal errors hat 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 DEPARTMENT,	PERB Case No. 02-A-08
Petitioner,	Opinion No. 756
and	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3721,	
Respondent.	

DECISION AND ORDER

This matter involves a Motion for Reconsideration filed by the District of Columbia Fire and Emergency Medical Services Department ("FEMS", "Petitioner" or "Agency"). FEMS is requesting that the Board vacate its Decision and Order issued on September 30, 2003. (Opinion No. 728). In Opinion No. 728, the Board found, *inter alia*, that the Arbitrator's decision in this matter was *not* contrary to law.[1] In making this finding, the Board upheld an Arbitrator's decision which determined that FEMS violated its collective bargaining agreement (cba) with the American

[1]The detailed facts and issues presented by this case are set forth in the Board's Decision and Order, Slip Op. No. 728. However, a brief summary of the facts and main issue follows:

> In Slip Op. No. 728, the District of Columbia Fire and Emergency Services Department filed an Arbitration Review Request. Specifically, FEMS was seeking reversal of an Arbitrator's Award which found that FEMS violated its collective bargaining agreement with the American Federation of Government Employees, Local 3721. The issue before the Board was whether "the Award on its face [was] contrary to law..." D.C. Code §1-605.02(6) (2001 ed.).

Federation of Government Employees, Local 3721 ("AFGE" or "Union"). Specifically, the Board upheld an Arbitrator's decision which found that FEMS violated the parties' cba by scheduling paramedics to 24 hour shifts[2], when the express language of the cba limited the paramedics' shifts to 12 hours.[3] FEMS asserted that, *inter alia,* management rights provisions of the D.C. Code allowed the Agency to extend the paramedics' hours of work and that the Arbitrator's decision was contrary to law. The Board rejected FEMS' arguments and concluded that they amounted to a mere disagreement with the Arbitrator's decision. Furthermore, the Board found that the Arbitrator's conclusion was based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law or public policy. In view of the above, the Board denied FEMS' Arbitration Review Request. District of Columbia Fire and Emergency Services Department v. American Federation of Government Employees, Local 3721, 51 DCR 4158, Slip Op. No. 728, PERB Case No. 02-A-08 (2004).

FEMS' Motion for Reconsideration (Motion) asserts that the Arbitrator's Award should be reversed because the Arbitrator lacked subject matter jurisdiction. As a result, the Agency argues that the original grievance was not arbitrable. Specifically, FEMS contends that there was no collective bargaining in effect between the parties at the time the grievance was filed[4]; therefore, no grievance could be arbitrated.

In its Response to FEMS' Motion for Reconsideration (Response) , AFGE asserts that FEMS' Motion should be dismissed because it was untimely filed.[5] In addition, AFGE contends

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[2]In 1999, FEMS instituted a new program which paired paramedics with firefighters on fire engines in an attempt to improve response times for reaching accident scenes. The paramedics served on a voluntary basis. The Union objected to this new program because it required paramedics to work 24 hour shifts, instead of the 12 hour shifts allowed by the express language of its collective bargaining agreement with FEMS.

[3]The Arbitrator determined that FEMS had waived its management right to set hours of work when it negotiated 12 hour shifts with AFGE, on behalf of the paramedics.

[4]FEMS asserts that the collective bargaining agreement between AFGE and FEMS had expired by its own terms on September 30, 1993.

[5]AFGE contends that FEMS' Motion is untimely because it was filed more than 10 days after the Board's Decision and Order in this matter was issued. Board Rule 559.2 provides, in pertinent part, that the Board's Decision and Order shall not become final if any party files a Motion for Reconsideration within ten (10) days after the issuance of the decision. The Board's Decision and Order was issued on September 30, 2003. However, AFGE argues that FEMS' Motion for Reconsideration was not filed until October 27, 2003. As a result, AFGE contends

(continued...)

that FEMS waived its right to argue non-arbitrability by participating in the arbitration proceeding[6]. Furthermore, AFGE notes that FEMS improperly raises its argument for the first time in its Motion for Reconsideration of the Board's decision in Opinion No. 728.[7]

Pursuant to Board Rule 559.2, a party has 10 days after the issuance of a Decision and Order to file a Motion for Reconsideration. See, Teretha Spain, Carlton Bulter, Ernest Durant and Deon Jones v. Fraternal Order of Police/Department of Corrections Labor Committee and District of Columbia Department of Corrections, 45 DCR 4780, Slip Op. No. 536, PERB Case Nos. 98-S-01 and 97-S-03 (1998). In the present case, FEMS' Motion for Reconsideration was filed 27 days after the issuance of the Board's Decision and Order.[8] As a result, we find that FEMS' Motion was untimely.

Notwithstanding the untimeliness of the Motion, we find that FEMS waived its arbitrability argument by failing to raise it prior to the time that the Board issued its final Decision and Order. FEMS raised its arbitratibility argument for the first time in this Motion for Reconsideration. FEMS had an opportunity to raise this argument on several occasions before now. For instance, FEMS could have raised this argument before the D.C. Superior Court when AFGE sought to compel arbitration. In addition, the argument could have been raised initially before the Arbitrator prior to the proceeding taking place or during the actual proceeding. Finally, the arbitrability argument could have been raised in FEMS' original Arbitration Review Request filed with the Board, but was not. The Board has held that arbitrability is an initial question for the arbitrator. American Federation of State, County and Municipal Employees, Council 20, AFL-CIO v. District of

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[5](...continued)
that FEMS' filing took place 27 days after the Decision and Order was issued in this matter.

[6]AFGE argues that it is well settled, that the failure to object to the arbitrability of an issue and to thereafter participate in the arbitration proceeding results in a waiver of the right to raise the issue of arbitrability Lopata v. Coyne, 635 A 2d 931, 937 (D.C. App. 1999).

[7]A review of the record reveals that FEMS had an opportunity to raise this arbitrability argument at various stages of this proceeding, including, but not limited to, the time when AFGE, Local 3721 sought to compel arbitration before the District of Columbia Superior Court. However, FEMS did not raise the argument at any time before this Motion for Reconsideration.

[8]FEMS acknowledges that its Motion is untimely filed. However, the Agency asserts that timeliness of the filing is no bar to its consideration because this motion involves questions of subject matter jurisdiction. FEMS provided no authority to support its argument that timeliness is not a bar in this instance. The Board finds no merit in this argument. Therefore, this argument is rejected.

Columbia General Hospital and the District of Columbia Office of Labor Relations and Collective Bargaining, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989). Furthermore, the Board has held that a party cannot appeal to the Board on issues not raised before the arbitrator. Washington Teachers' Union, Local 6, AFT, AFL-CIO v. District of Columbia Public Schools, 49 DCR 4357, Slip Op. No. 432, PERB Case No. 95-A-07 (2002). In view of the above, the Board will not allow FEMS to raise the arbitrability argument for the first time at this late stage.

Finally, we find persuasive AFGE's argument and authority supporting the proposition that the failure to object to the arbitrability of an issue and to thereafter participate in the arbitration results in a waiver of the right to raise the issue of arbitrability. See, Lopata v. Coyne, 735 A. 2d 931, 937 (D.C. App. 1999). Therefore, we conclude that FEMS waived its right to raise the issue of arbitrability and may not raise it now.

Based on the foregoing discussion, we conclude that FEMS has not presented evidence which supports the reversal of Opinion No. 728. Thus, FEMS' Motion for Reconsideration is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Motion for Reconsideration is denied.

2. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

August 31, 2004

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 02-A-08 was transmitted via Fax and U.S. Mail to the following parties on this the 31st day of August, 2004.

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