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**Government of the District of Columbia**

**Public Employee Relations Board**

In the Matter of:	)	
	)	
District of Columbia Metropolitan Police	)	
Department,	)	
	)	PERB Case No. 13-A-06
Petitioner,	)	
	)	Opinion No. 1494
v.	)	
	)	
Fraternal Order of Police/Metropolitan Police	)	
Department Labor Committee,	)	
	)	
Respondent.	)	

**DECISION AND ORDER**

Before the Board is an arbitration review request (“Request”) filed by Petitioner District of Columbia Metropolitan Police Department (“Department”). The Respondent Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) filed an Opposition. The Department bases its Request upon the Board’s authority to modify, set aside, or remand an award where “the award on its face is contrary to law and public policy.” D.C. Official Code § 1-605.02(6). The Request was filed timely and in compliance with section 538 of the Board’s Rules. The law and public policy upon which the Department relies are Mayor’s Orders 2012-28 and 2009-117. The Department contends that those orders delegated to the chief of police (“Chief”) the authority to order the changes in tours of duty that are the subject of the Union’s grievance in this matter. In its Opposition, the Union responds that the Department ignored the other rulings by the arbitrator and, as a result, the mayoral orders would not change the result. Regarding the mayoral orders, the Union contends that they do not constitute law and public policy and do not prove a delegation of authority. For the reasons set forth below, the Board finds that the Department has failed to present statutory grounds for setting aside the Award.

**I. Statement of the Case**

The Union’s grievance alleged that the Department’s issuance of teletypes in 2011 implementing an initiative called “All Hands on Deck” (“AHOD”) violated three provisions of the parties’ collective bargaining agreement (“CBA”), articles 4, 24, and 49. AHOD involved temporarily changing officers’ tours of duty in order to deploy a greater number of officers to patrolling and to other duties dealing with the public during several three-day weekends.

The first provision the Department allegedly violated is article 4, wherein the Union recognizes that certain management rights, including the right to determine the tour of duty, belong to the Department "when exercised in accordance with applicable laws. . . ." The Union contended that AHOD was not in accordance with section 1-612.01(b) of the D.C. Official Code. That section requires that tours of duty be established so that "[t]he basic 40 hour workweek is scheduled on 5 days, Monday through Friday" with the same working hours in each day except "when the Mayor determines that an organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased." In the Union's view, this determination was not made. The second provision of the CBA that the Department allegedly violated was article 24. Section 1 of article 24 requires notice of any changes in days off or tours of duty to be made fourteen days in advance. Section 2 provides that "[t]he Chief or his/her designee may suspend Section 1 . . . for a declared emergency, for crime, or for an unanticipated event." The Union contended that this condition precedent was not met. Third, the Union contended that the Department failed to bargain over the orders implementing AHOD in violation of article 49 of the CBA.

The arbitrator found that the change in tours of duty was not made in accordance with section 1-612.01(b). While the Chief signed a document stating that the Department would be seriously handicapped in carrying out its functions and that costs would be substantially increased without altering work hours (Award 18), there was no valid delegation of authority for the Department to make that determination. (Award 19.) "Consequently," the arbitrator concluded, "the implementation of the 2011 AHOD initiative violated Articles 4 and 24 of the collective bargaining agreement." (Award 19.) In addition, the arbitrator found that an obligation to bargain regarding scheduling existed under Article 49. (Award 19.) Thus, the arbitrator sustained the grievance and directed the Department to rescind the teletypes announcing AHOD weekends for 2011 and restricting leave thereto. Further, the Award ordered the Department to cease and desist from changing schedules unless done in compliance with articles 4, 24, and 49 of the CBA and directed the Department to compensate officers covered by the CBA at a rate of time and one-half for all days on which their schedules were improperly changed.

In its Request, the Department asserts that the Award should be reversed because in Mayoral Order 2012-28, which the Department submitted with its post-hearing brief, the mayor delegated to the Chief all of his personnel and rulemaking authority over employees of the Department "*nunc pro tunc* to February 26, 1997." The Department contends that this "express grant of authority is, on its face, 'applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.'" (Request 5.) In addition, the Department asserts that the Chief's written findings in support of the 2011 AHOD, which the Department introduced into evidence, cited Mayoral Order 2009-117. The Department contends that Mayor's Order 2009-117 delegated to the Chief the mayor's personnel and rulemaking authority over members of the Department *nunc pro tunc* to June 5, 2008. (Request 6.) The Department argues that Mayor's Order 2009-117 "provides yet another basis for the Board to hold that the Award violated law and public policy and must be reversed." (Request 7.)

## II. Discussion

### A. Undisputed Findings of the Arbitrator

The Department asserts that “[t]he Mayor’s Order is critical, as the only basis for the Award in this matter is the Arbitrator’s conclusion that there was no ‘valid delegation’ of authority necessary for the Chief of Police to change schedules under D.C. Official Code § 1-612.01(b).” (Request 5.) The Union counters that there were other bases for the Award that the Department failed to dispute. The Request challenges the arbitrator’s ruling on the violation of article 4 resulting from noncompliance with section 1-612.01(b) but does not challenge the arbitrator’s ruling on article 24 or article 49. Consequently, the Union argues, “[e]ven if PERB finds for MPD on Mayor’s Order 2012-28 or 2009-117, PERB should not overturn the arbitrator’s ruling because the MPD ignores numerous other rulings by the arbitrator that were expressly stated as additional reasons why, even with the introduction of the Mayor’s Orders, the decision would remain unchanged.” (Opp’n 5.) As those undisputed rulings support the Award, “PERB has no reason to consider the review of this matter. . . .” (Opp’n 6.)

The Union’s argument requires consideration of what the arbitrator said about articles 24 and 49. Article 24 would have been violated if the Department had failed to give fourteen days’ notice of the changes in tours of duty as required by section 1 of the article and the Department also had not “suspend[ed] Section 1 . . . for a declared emergency, for crime, or for an unanticipated event” as provided in section 2. The latter element of the violation is met in this case. The Award states that “there is no assertion that a crime emergency had been declared in 2011 and thus there is no issue presented that any violation of Article 24, Section 1 was vitiated by reason of a declaration of a crime emergency under Article 24, Section 2.” (Award 15.) However, the Award does not find that there was a violation of article 24, section 1’s notice requirement. The Department contended that the teletypes were issued well in advance of the AHOD weekends and in no case posted less than fourteen days in advance. (Award 11-12.) The Award makes no finding to the contrary. It finds a violation of both article 4 and 24 but only as a result of noncompliance with section 1-612.01(b) of the D.C. Official Code due to the lack of a valid delegation.<sup>1</sup> Thus, with respect to these two articles the Department is correct that “the only basis for the Award is the Arbitrator’s conclusion that there was no ‘valid delegation’ of authority . . . under D.C. Official Code § 1-612.01(b).”

However, noncompliance with section 1-612.01(b) was not the basis for the arbitrator’s finding that the Department violated article 49. Article 49 provides, that “when a Departmental order or regulation directly impacts on the conditions of employment of unit members, such impact shall be a proper subject of negotiation.” The arbitrator found that “the institution of AHOD, with its scheduling and leave restriction components, impacted this vague situation

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<sup>1</sup> “Article 4 recognizes a management right to determine tours of duty, as long as such actions are consistent with laws and regulations. That was not the case here as [there is] no valid delegation of authority for the MPD to make the determination described in D.C. Code 1.612.01(b) and modify schedules in either D.C. Code 1.612.01(a)(2). Consequently, the implementation of the 2011 AHOD initiative violated Articles 4 and 24 of the collective bargaining agreement.” (Award 19.)

disclosed in the record, and an obligation to bargain existed under Article 49 under these circumstances.” (Award 19.) As the Union points out (Opp’n 6), the Department does not dispute the arbitrator’s finding that it violated article 49. The Request calls for the Award to be reversed (Request 8) but fails to address whether the article 49 violation is by itself a sufficient basis for the Award.

**B. Arbitrator’s Findings Regarding Delegation**

Moreover, the Department’s arguments regarding the mayoral orders that constitute its defense to a violation of article 4 are merely evidentiary issues rather than matters of law and public policy. The Department claims that Mayor’s Order 2012-28 was effective *nunc pro tunc* back to February 26, 1997, whereas the arbitrator held that “[t]he effective date of Order 2012-28 was the date of its issuance,”<sup>2</sup> a date that was after the 2011 AHOD. In so holding, the arbitrator was interpreting an ambiguous exhibit. The document says the Chief is delegated the mayor’s authority “*nunc pro tunc* to February 26, 1997,” but the document, which is dated February 21, 2012, also states directly above the mayor’s signature, “**EFFECTIVE DATE:** This Order shall become effective immediately.” (Request, unnumbered fourth exhibit at 2) (emphasis in original.) It is neither a party’s nor the Board’s interpretation of the evidence for which the parties bargained but rather the arbitrator’s. *Dep’t of Recreation & Parks and AFGE, Local 2741*, 46 D.C. Reg. 4406 Slip Op. No. 579 at 2, 2 n.1, PERB Case No. 99-A-01 (1999).

The other mayoral order upon which the Department relies, Mayor’s Order 2009-117, simply was not put into evidence. The Chief’s reference to it in her written findings in support of the 2011 AHOD was not, in the estimation of the arbitrator, which we find unreviewable, sufficient support for the Department’s affirmative defense that it had been delegated authority to make a determination pursuant to section 1-612.01(b). (Award 17.) The weight and the significance of evidence are within the arbitrator’s discretion, and a dispute over the exercise of that discretion does not state a statutory basis for modifying or setting aside the Award. *D.C. Hous. Auth. and AFGE, Local 2725*, 46 D.C. Reg. 6882, Slip Op. No. 591 at p. 2, PERB Case No. 99-A-04 (1999).

For the foregoing reasons, we find that the Department has failed to present statutory grounds for setting aside the Award.

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<sup>2</sup> Award 17.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The arbitration award is sustained.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of Board Chairperson Charles Murphy and Members and Members Donald Wasserman and Keith Washington

Washington, D.C.  
November 20, 2014

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision in PERB Case No. 13-A-06 was transmitted to the following parties on this the 24th day of November 2014.

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/s/ Sheryl V. Harrington  
Sheryl V. Harrington  
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