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**Government of the District of Columbia**

**Public Employee Relations Board**

_____		)
In the Matter of:		)
		)
District of Columbia Metropolitan Police		)
Department,		)
		)
	Petitioner,	)
		)
	v.	)
		)
Fraternal Order of Police/Metropolitan Police		)
Department Labor Committee,		)
		)
	Respondent.	)
_____		)

PERB Case No. 13-A-08  
Opinion No. 1507

**DECISION AND ORDER**

This matter is before the Board upon a timely arbitration review request (“Request”) filed by petitioner District of Columbia Metropolitan Police Department (“MPD”), which argues that that the Award is contrary to law and public policy. The respondent Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) filed an Opposition.

**I. Statement of the Case**

MPD appeals from determinations that the arbitrator made regarding certain mayoral delegations of authority to the chief of police (“Chief”). The delegations allegedly authorized the Chief to change work schedules in order to implement the Chief’s “All Hands on Deck” initiative (“AHOD”) in 2010. AHOD involved restricting leave and 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 five three-day weekends or “phases.” On April 14, 2010, the Chief issued a teletype to the force informing them of the restrictions and phases of the initiative. The first phase of the 2010 AHOD was May 7-10, 2010, and the fifth and last was October 22-24, 2010. (Award at 2-3.) Two later teletypes issued additional directives regarding the 2010 AHOD.

MPD contends that the mayor delegated to the Chief his authority to alter the basic tour of duty established by D.C. Official Code section 1-612.01(b), which provides:

Except when the Mayor determines that an organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, tours of duty shall be established to provide, with respect to each employee in an organization, that:

- (1) Assignments to tours of duty are scheduled in advance over periods of not less than 1 week;
- (2) The basic 40 hour workweek is scheduled on 5 days, Monday through Friday when practicable, and the 2 days outside the basic workweek are consecutive;
- (3) The working hours in each day in the basic workweek are the same.

The arbitrator found that MPD did not prove a delegation to the Chief of the mayor's authority under section 1-612.01(b). Because the Chief lacked the lawful authority to alter tours of duty, the arbitrator found "violations of Article 1, Section 3 as well as Article 4 [of the parties' collective bargaining agreement] which requires management's rights to be 'exercised in accordance with applicable laws, rules and regulations. . .'" (Award at 18.)

The arbitrator found that the 2010 AHOD also violated articles 24 and 49 of the collective bargaining agreement. He issued the following award: "The grievance is sustained. The MPD will compensate all FOP members at a rate of time-and-one-half for any violation of Article 24 for all applicable AHOD initiative days announced for 2010." (Award at 20.)

MPD requests that the Board reverse the Award pursuant to its authority to set aside an award where "the award on its face is contrary to law and public policy." D.C. Official Code § 1-605.02(6). The law and public policy upon which MPD relies are Mayor's Orders 2012-28 and 2009-117. MPD contends that, contrary to the arbitrator's findings, those orders delegated to the Chief the authority to order the changes in tours of duty that are the subject of the Union's grievance in this matter. As set forth below, the Board finds that MPD has failed to present statutory grounds for setting aside the Award, noting that MPD does not challenge the basis for the award of compensation and that the challenge it does raise is merely an evidentiary dispute.

## **II. Discussion**

In its Opposition, the Union repeatedly argues that rulings of the arbitrator other than his ruling on the mayor's orders remain unchallenged by MPD. As a result, even if the mayor's orders were to be admitted and found applicable, the decision would remain unchallenged. (Opp'n at 6-7, 18, 21.)

The Union is correct that MPD does not challenge the arbitrator's finding that MPD violated article 49 of the collective bargaining agreement by failing to bargain over the impact of AHOD. More significantly, MPD also does not challenge the arbitrator's findings regarding article 24 of the collective bargaining agreement. Article 24 provides:

**Section 1**

Each member of the Bargaining Unit will be assigned days off and tours of duty that are either fixed or rotated on a known regular schedule. Schedules shall be posted in a fixed and known location. Notice of any changes to their days off or tours of duty shall be made fourteen (14) days in advance. If notice is not given of changes fourteen (14) days in advance the member shall be paid, at his or her option, overtime pay or compensatory time at the rate of time and one half, in accordance with the provisions of the Fair Labor Standards Act.

**Section 2**

The Chief or his/her designee may suspend Section 1 on a Department wide basis or in an operational unit for a declared emergency, for crime, or for an unanticipated event.

(Award at 11.)

Section 2 of article 24 authorizes the suspension of section 1 “for a declared emergency, for crime, or for an unanticipated event.” The Union combines “for a declared emergency, for crime” into a single condition for suspension—“a crime emergency”—and asserts that the Chief admitted that she never declared a crime emergency to implement AHOD. (Opp’n at 11, 13, 15, 17.) The arbitrator treats a declared emergency and crime distinctly, but similarly concludes that the Chief did not make the required determination for a suspension of section 1:

[T]he Chief’s determinations, as stated in the All Hands on Deck document, fell short of providing a contractual basis under Article 24, Section 2 to suspend Section 1 for a “declared emergency” or an “unanticipated event.” In the context of these two conditions, even assuming that the “crime” element constitutes a separate condition, it is reasonably read as involving more tangible events than occurrences which had been projected several months prior to the predicted dates.

(Award at 18.) The Award orders MPD to “compensate all FOP members at a rate of time-and-one-half for any violation of Article 24 for all applicable AHOD initiative days announced for 2010.” (Award at 20.) As the Union points out, that Award, which is tied to article 24, would not be changed if the Board were to set aside the arbitrator’s findings that there was no delegation of mayoral authority and that as a result MPD violated articles 1 and 4 of the collective bargaining agreement. For that reason, the Request does not present a basis for setting aside the Award.

Moreover, the Request does not present a basis for modifying or setting aside the arbitrator’s findings regarding articles 1 and 4. Those findings result from the arbitrator’s evaluation of the Chief’s assertion in her Findings in Support of All Hands on Deck, dated May 3, 2010, (“Findings”) that “[a]s authorized by the Mayor, I am exercising my authority that allows me to change a member’s tour of duty within a work week to a tour different from their

known posted tour of duty.” The arbitrator stated that “MPD produced no substantial evidence to support this assertion.” (Award at 17.) The Request maintains that Mayor’s Order 2012-28 and Mayor’s Order 2009-17, both of which constitute law and public policy, contradict the arbitrator on this point. Thus, the Request contends that the arbitrator’s conclusion that the Chief did not have delegated authority is contrary to law and public policy and should be reversed. (Request at 7.)

Regarding Mayor’s Order 2012-28, MPD asserts that the order “clearly and explicitly grants the Chief of Police the relevant authority, retroactive to February 26, 1997.” (Request at 4.) MPD contends that “the Award does not contain any analysis or discussion that would support a conclusion that the Mayor’s Order was, in any way, invalid.” (Request at 4.) Notwithstanding, a review of the Award discloses that it does support that conclusion. The Award states that “the MPD’s reliance upon Mayor’s Order 2012-28 is misplaced where the authority was neither adequately nor timely delegated by the Mayor to the MPD or Chief Lanier for the 2010 AHOD.” (Award at 17.) The Award does not explain why the authority was not adequately delegated, but the basis for its assertion that the authority was not timely delegated is discernible from the Award. Mayor’s Order 2012-28 was dated February 21, 2012 ) whereas the Chief ordered the scheduling changes in question in April 2010. (Award at 2-4 9, 13, 17.) As we held in connection with the arbitration of the 2011 AHOD, the Board will not second guess an arbitrator’s interpretation of Mayor’s Order 2012-28 or its alleged retroactivity. *D.C. Metro. Police Dep’t v. F.O.P./Metro. Police Dep’t Labor Comm.*, Slip Op. No. 1494 at p. 4, PERB Case No. 13-A-06 (Nov. 20, 2014).

MPD contends that even if Mayor’s Order 2012-28 is deemed inapplicable, Mayor’s Order 2009-117 also delegates to the Chief the authority to order the scheduling changes and similarly mandates the arbitrator to arrive at a different result. (Request at 5.) MPD states that “the Award inexplicably holds that there was ‘no substantial evidence to support’ Chief Lanier’s assertion that she was exercising authority delegated from the Mayor.” (Request at 6) (quoting Award at 17.) MPD’s evidence for the Chief’s assertion is her citation to mayor’s orders in the fourth “Whereas” clause of the Findings. (Request at 6.) Concerning that citation, the arbitrator said that the Findings “references mayor’s orders not contained in this record of the proceedings.” (Award at 17.) MPD makes no claim to the contrary. Mayor’s Order 2009-117 was not in the record of the arbitration of the 2011 AHOD either. In that case, the Board held to be unreviewable the arbitrator’s conclusion that the Findings’ reference to the mayor’s order was insufficient proof of the delegation in the absence of the order itself in the record as an exhibit. *Metro. Police Dep’t*, Slip Op. No. 1494 at p. 4, PERB Case No. 13-A-06. *See also D.C. Metro. Police Dep’t and F.O.P./Metro. Police Dep’t Labor Comm. (on behalf of Sims)*, 60 D.C. Reg. 9201, Slip Op. No. 1390 at pp. 8-9, PERB Case No. 12-A-07 (2013) (declining to overturn an award based on the petitioner’s disagreement with the arbitrator’s finding that no record evidence supported tolling of the ninety-day rule).

Accordingly, the Request presents grounds neither for reversing the arbitrator’s conclusion regarding delegation nor for setting aside the Award. Therefore, MPD’s Request is denied.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Metropolitan Police Department's arbitration review request is denied.
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 Chairman Charles Murphy and Members Donald Wasserman, Keith Washington, Ann Hoffman, and Yvonne Dixon

Washington, D.C.  
January 15, 2015

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision in PERB Case No. 13-A-08 was transmitted to the following parties on this the 15th day of January 2015.

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/s/ Sheryl V. Harrington  
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