Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 631,	
Petitioner,	
and	PERB Case No. 05-A-09
	Opinion No. 839
District of Columbia Water and Sewer Authority,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

In the above captioned matter, the American Federation of Government Employees, Local 631 ("Union" or Petitioner") filed an Arbitration Review Request ("Request"). The Union seeks review of an arbitration award ("Award") which (1) rescinded the District of Columbia Water and Sewer Authority's classification of the position of Technical Writer as exempt from overtime compensation; and (2) upheld the remaining disputed reclassifications of positions as exempt status. The Union asserts that the Award is contrary to law and public policy. The Water and Sewer Authority ("WASA") opposes the request.

The issue before the Board is whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02(6) (2001).

II. Discussion:

On December 3, 2001, and August 18, 2004, WASA took administrative action to designate certain positions in WASA's Department of Engineering and Technical Services as "exempt" from the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-262 ("FLSA"). (Award at p. 3). The Union filed[1] grievances alleging that WASA's designations of these positions as exempt: (1) violated Article 3 of the parties' collective bargaining agreement ("CBA"); (2) violated the FLSA; and (3) deprived members of overtime pay. (Award at p. 3). WASA denied the grievances, and the Union invoked arbitration.

The Arbitrator identified the issue before him as follows:

> Did [WASA] violate the applicable provisions of Article 3 of the parties' [CBA] and relevant provisions of the [FLSA] when, on or about December 3, 2001, and August 18, 2004, it designated the position classifications listed below exempt under the FLSA, thereby depriving the employees occupying these position classifications of overtime compensation?
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> Hydraulic Engineer, DS-13
> Civil Engineer, DS-13
> Grants Management Specialist, DS-13
> Electrical Engineer, DS-13
> Structural Engineer, DS-13
> Mechanical Engineer, DS-13
> Capital Finance Program Specialist, DS-13
> Technical Writer (Engineering), DS-13
> Mechanical Engineering Technician, DS-13
> Civil Engineering Technician, DS-13
> Electrical Engineer, DS-11
> Civil Engineer, DS-12
> Mechanical Engineer, DS-11
> Engineer II, Civil (Design), DS-11
> Environmental Engineer, DS-11[2]

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[1] The Grievances were filed on February 21, 2002, and August 19, 2004.

[2] Although recorded here as DS-11, the position descriptions in the record of the Engineer II, Civil (Design), DS-11 and Environmental Engineer, DS-11 classifications indicate that they are actually graded at DS-12. (See Award at p. 4).

(Award at p. 4).

The Arbitrator examined Article 3 of the parties' CBA, which provides in pertinent part as follows:

> Article 3, Section D - Exempt Employees
>
> Exempt employees shall not be eligible for or receive overtime but shall be eligible for and receive compensatory time for actual hours worked in excess of their regular scheduled tour of duty as authorized by an employee's immediate supervisor. . . .

In his reasoning, the Arbitrator noted that section 213(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide "executive," "administrative," "professional" and "outside sales employees." To qualify for the exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455.00 per week.

Regulations adopted by the Department of Labor and relevant to the Arbitrator's analysis define "administrative" employee as an individual whose primary duty is office or non-manual work directly related to management policies or general business operations of the employer or his customers. 29 C.F.R. § 541. In addition, the administrative employee (1) customarily exercises independent judgment and discretion; (2) regularly and directly assists the proprietor or an employee in a bona fide executive or administrative capacity; (3) performs under general supervision work along specialized or technical lines, requiring special training, experience or knowledge; (4) performs special tasks under general supervision; and (5) is compensated on a salary basis. The Arbitrator noted that the FLSA regulations define "salary basis, as when the employee receives . . . a predetermined amount of compensation, which may not be reduced for absences of less than one day." 29 C.F.R. § 541.118.

At arbitration, the Union asserted that WASA failed to meet the requirement that the incumbent employees be paid on a salary basis because WASA requires the incumbent employees to take leave for partial-day absences. (Award at p. 9). In addition, the Union argued that WASA cannot make such deductions in leave based upon principles of public accountability under the public employer exception to the FLSA's salary basis test. (Award at p. 9). The Union contended that public employer exception required WASA to show that its pay system is subject to any state or local law which prohibits payment to employees for absences from work and that WASA failed to make that showing. (Award at p. 9-10). The Union claimed that the deduction from pay for a partial day absence, when leave is not used, "is based purely on [WASA's] discretionary choice." (Award at pgs. 9-10). In addition, "with regard to the specific qualifications, experience and duties of each of the professional and administrative positions, the Union maintain[ed] that, in each instance, [WASA] has not met one or more of the standards of the FLSA to support exemption from overtime pay requirements." (Award at p. 9).

WASA countered that although the employees occupying the positions at issue are required to utilize leave for partial-day absences, "the docking of accrued leave does not jeopardize their exempt status." (Award at p. 10). WASA claimed that "a deduction from leave is not equivalent to a reduction in salary." (Award at p. 10). In addition, WASA contended that "[a]s a public employer, [WASA's] time and attendance policies were established pursuant to principles of public accountability, and [WASA] has an obligation to ensure that citizens' funds are used appropriately. As a public employer, [WASA] cannot pay its employees for hours in which they perform no work, and it must require that all of its employees utilize leave for any absence from work, including partial-day absences. Thus, [WASA] is entitled to claim the public employer exception to the salary basis test." (Award at pgs. 10-11) (Emphasis added).

The Arbitrator stated that under the FLSA, the exempt status of the disputed positions "is determined under the standards required for the 'learned professional' exemption or the 'administrative' exemption." (Award at p. 8).[3] Also, the Arbitrator stated that there is a public employer exception to the salary basis test which provides that an employee of a public agency who otherwise meets the salary basis requirements of the FLSA shall not be disqualified from exemption if the pay system (which prohibits payment for absences from work) is established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability. (Award at p. 11; 29 C.F.R. § 541.710(a)).

The Arbitrator found that WASA presented sufficient evidence that the employee positions at issue met the salary basis test for exemption from the overtime requirements of the FLSA. The Arbitrator also determined that there was no evidence that pay had been deducted from the salaries of the employees at issue, only that leave was deducted for partial-day absences and that utilization of leave for partial day absences does not impact an employees' exempt status. (Award at p. 11). In addition, the Arbitrator found that WASA's pay system was established pursuant to principles of public accountability in accordance with 29 C.F.R. §

[3] The specific requirements for exemption as a bona fide professional employee are summarized below. There are two general types of exempt professional employees. Relevant to this case are the learned professionals. To qualify for the learned professional exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week; (29 C.F.R. § 541.300)

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

- The advanced knowledge must be in the field of science or learning; and

- The advanced knowledge must be customarily acquired by a prolonged course of specialized instruction.

(29 C.F.R. § 541.301(a)).

541.710. Therefore, the Arbitrator concluded that WASA was entitled to claim the public employer exception to the salary basis test. (Award at p. 12).

Regarding the job duties and responsibilities of the incumbent employees, the Arbitrator found that the engineer position titles met the learned professional exemption due to, not only their knowledge of an advanced type in the field of science or learning customarily acquired by a prolonged course of instruction or study, but also because of their exercise of a "substantial level of discretion and professional judgment." (Award at pgs. 14-18).[4]

Concerning the engineering technicians, the Arbitrator opined that these positions met the criteria for the administrative exemption.[5] (Award at pgs. 18-19). The Arbitrator also found that the positions of Grants Management Specialist, DS-13 and Capital Finance Program Specialist, DS-13, also met the criteria for an administrative exemption. (Award at p. 20). The only position the Arbitrator found not to meet the criteria for an administrative exemption was the position of Technical Writer (Engineering Specifications) DS-13, held by James Spicer. (Award at pgs. 21-22).

Based upon these findings, the Arbitrator concluded that of the fifteen positions at issue, "fourteen position classifications [were] properly and legally designated as exempt under the [FLSA]." (Award at p. 23). As a remedy, the Arbitrator directed that Mr. Spicer "be reimbursed for any overtime pay or other benefits he should have received but for the wrongful designation of [his] position as exempt." (Award at p. 23). The Arbitrator also directed that the parties share the cost of the arbitration fees equally.[6]

In its Request, the Union contends that the Arbitrator's Award is contrary to law and public policy. WASA opposes the request.

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[4] The engineer position titles include: Civil Engineer, DS-12; Civil Engineer, DS-13; Hydraulic Engineer, DS-13; Structural Engineer, DS-13; Electrical Engineer, DS-11; Electrical Engineer, DS-13; Mechanical Engineer, DS-13; Mechanical Engineer, DS-11; Environmental Engineer, DS-11; and Engineer II, Civil (Design), DS-12.

[5] The engineering technician titles include: Civil Engineering Technician, DS-13; and Mechanical Engineering Technician, DS-13.

[6] Article 58, Section H, of the parties' CBA states:

> Arbitrator
>
> . . .
>
> 11. A statement of the arbitrator's fee and expenses shall accompany the award. The fee and expenses of the arbitrator shall be borne by the losing party. In cases where it is unclear whether a party lost the case, the arbitrator shall apportion the costs.

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

1. the arbitrator was without, or exceeded his or her jurisdiction;
2. the award on its face is contrary to law and public policy; or
3. the award was procured by fraud, collusion or other similar and unlawful means.

D.C. Code § 1-605.02 (2001 ed.).

The Union's position is that the second of those circumstances is present here. In its Request, the Union contends that the Arbitrator's Award is contrary to law and public policy because WASA failed to meet the salary basis test for the incumbent positions. (Request at p. 2). In addition, the Union asserts that WASA did not establish that the incumbent positions met the criteria for the administrative or learned professional exemptions. (Request at pgs. 2-3).

The Union asserts that the Award is on its face contrary to law and public policy. First, the Union alleges that the Arbitrator's decision was contrary to law, namely the Fair Labor Standards Act, because in finding that there were no actual deductions in the pay of employees for partial-day absences, the Arbitrator effectively held that there must be evidence of actual deductions in pay to find WASA in violation of the FLSA. In support of this argument, the Union cites *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993), and *Auer v. Robbins*, 519 U.S. 452 (1997), for the proposition that no evidence of actual deductions is necessary to find an employer in violation of the FLSA. (Request at p. 10). The Board has reviewed the *Kinney* and *Auer* cases cited by the Union and find them to be not applicable to the present case. Neither *Kinney*, nor *Auer*, nor the Union's Request take into consideration the FLSA's public employer exception to the salary basis test. The Board is aware of no reason to disturb the Arbitrator's finding that WASA's policy fulfills the conditions for the public employer exception.

Second, the Union asserts that the Arbitrator's findings with regard to the administrative and learned professional exemptions under the FLSA were either "contrary to the law and evidence" or unsupported by the evidence. (Request at pgs. 13-16). The Union's arguments dispute the Arbitrator's evaluation of the evidence presented on the nature of the positions in question. The Union's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. *See Univ. of D.C. and Univ. of D.C Faculty Ass'n*, 38 D.C. Rev. 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991). We also find that the Union's disagreement with the Arbitrator's findings and evaluation of the evidence does not present a statutory basis for review. *See D.C. Pub. Schs. and Washington Teachers' Union Local 6*, 43 D.C. Rev. 1203, Slip Op. No. 349, PERB Case No. 93-A-01 (1996).

In view of the above, we find no merit to the Union's arguments. We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be contrary to law or public policy. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The American Federation of Government Employees, Local 631'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
Washington, D.C.

October 6, 2011

In view of the above, we find no merit to the Union's arguments. We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be contrary to law or public policy. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The American Federation of Government Employees, Local 631'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
Washington, D.C.

October 6, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-A-09 is being transmitted via U.S. Mail to the following parties on this the 6th day of July 2012.

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