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**Government of the District of Columbia**

**Public Employee Relations Board**

In the Matter of:	)	
	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee,	)	
	)	
Petitioner,	)	PERB Case No. 13-A-05
	)	Opinion No. 1500
v.	)	
	)	
District of Columbia Metropolitan Police Department,	)	
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

Before the Board is a petition filed by Petitioner Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) requesting the Board to review an arbitration award (“Award”) issued by Arbitrator Joel S. Trosch. The Union 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). Specifically, the Union claims in its arbitration review request (“Request”) that the arbitrator’s award of overtime to the Union’s members was not in accordance with how the Fair Labor Standards Act (“FLSA”) measures such compensatory awards. (Request 5.) As the Board finds that the Union’s position and Request are merely a disagreement with the arbitrator’s interpretation of the parties’ contract, the Board denies the Request and sustains the Award.

**I. Statement of the Case**

The Union appeals from an Award that sustained the Union’s grievance but did not award to the Union the liquidated damages that the Union had requested. The Union’s grievance alleged that the Department’s issuance of teletypes in 2011 implementing an initiative called “All Hands on Deck” (“AHOD”) violated the parties’ collective bargaining agreement (“CBA”). 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 remedies the Union requested included time and a half compensation for officers who were required to work as a consequence of schedule changes caused by AHOD and an equal amount of penalty damages. (Award 11.) In support of that request, the Union relied upon article 24, section 1 of the CBA and its reference to the FLSA. That section of the CBA provides in part:

If notice is not given of changes [to a member's days off or tour of duty] 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 Fair Labor Standards Act.

(Award 7; Request Ex. 4 at 27.) "Looking to the FLSA," the arbitrator wrote, the Union "argues that in order to avoid the imposition of penalty or liquidated damages, there is a substantial burden on MPD to establish that it attempted, in good faith, to comply with the law and demonstrate a reasonable basis for believing its action complied with its Article 24 obligations. The MPD failed, alleges the Union, to meet that burden." (Award 11.)

The arbitrator found that the implementation of AHOD violated several provisions of the CBA including Article 24. 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. (Award 20.) The arbitrator found that although an award of time and an half "seems to be a reasonable remedy for a violation of article 24's posting provision, the imposition of a penalty in addition based on the reference to the FLSA in Article 24 is a reach beyond the agreement and will not be awarded." (Award 20.)

Both parties appealed from the Award. The Department's arbitration review request contended that the Award's finding of a violation of the CBA by the Department was contrary to law and public policy. The Board denied the Department's arbitration review request. *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm.*, Slip Op. No. 1494, PERB Case No. 13-A-06 (Nov. 20, 2014). The Union's Request, which is now before the Board, appeals from the remedy for the violation. The Union contends that its "members are entitled to time-and-one half compensation (which was ordered by Arbitrator Trosch), plus an equal amount of liquidated damages (which was denied by Trosch)" (Request 10-11) and that the award is contrary to law and public policy due to the denial of liquidated damages. The law to which the Union calls the Board's attention is the FLSA, which provides for liquidated damages at 29 U.S.C. § 216(b) and is specifically referenced in article 24 of the CBA. The Department in its opposition asserts that the authorities interpreting the FLSA cited by the Union, while not relevant to the Union's claim that the Award must be overturned, recognize that awarding double damages under the FLSA is discretionary. The Department characterizes the Union's position as a disagreement with the arbitrator's interpretation of the CBA.

## II. Discussion

The Union's argument for the Department's liability for liquidated damages is as follows:

(1) The CBA calls for "overtime pay or compensatory time at the rate of time and one half, in accordance with the Fair Labor Standards Act."

(2) "The FLSA provides . . . as a remedy for wage or hour violations, '*an additional equal amount as liquidated damages.*' 29 U.S.C. § 216(b)." (Request 8.)

(3) "Thus, in addition to the undisputed amount owed, time-and-one-half for each day of AHOD scheduling violations incurred, the MPD is liable for liquidated damages in the same amount." (Request 8.)

Although the Request asserts in a heading that "The Award is Contrary to Law and Public Policy" (Request 7), it contains no argument in support of that assertion. Nor does it repeat that assertion. The Request reviews the history that led to the inclusion of a reference to the FLSA in article 24 of the CBA. In this review, the Union asserts, as it did at the hearing (Award 18), that Arbitrator Joseph A. Sickles awarded time and a half for a violation of members' scheduling rights. (Request 6-7.) At the arbitration, the Union's chairman testified, "I think the message was pretty clear [that] you need to get something in your contract that provides this because the Arbitrator said I'm going to fashion this remedy but that's not a guarantee that the next Arbitrator would fashion the same remedy." (Request Ex. 3 at 31). The FLSA language was added to the contract, and the next arbitrator did indeed fashion the same remedy. The Request states, "The provisions were in place when the parties arbitrated before Arbitrator Truesdale and Arbitrator Truesdale found that AHOD violated D.C. Police Union members' scheduling rights and awarded D.C. Police Union members time-and-one-half compensation in accordance with the Fair Labor Standards Act." (Request 7-8.) As the Union's statement indicates, Arbitrator Truesdale did not supplement his award of time and a half with liquidated damages of an equal amount. (Request Ex. 14 at 27.) In the present case, Arbitrator Trosch made the very same award as the award that the contract amendment sought to codify as well as the award made after that amendment, and yet the Union claims Arbitrator Trosch's award is contrary to law and public policy.

The Request's discussion of the FLSA is no more persuasive than its review of the history that led to the reference to the FLSA in article 24. The Request notes that liquidated damages is the general rule under the FLSA, and it claims that the "remedy provisions of the FLSA are often employed for violations of other laws." (Request 9.) However, all the cases that the Union cites in support of that claim are Equal Pay Act cases.<sup>1</sup> The Equal Pay Act is a part of the Fair Labor Standards Act. 29 C.F.R. § 1620.1. The remainder of the Request consists of reasons the Union believes the Department's bad faith meets the requirements for being assessed liquidated damages under the FLSA.

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<sup>1</sup> *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1097 (D.C. Cir. 1984); *Thompson v. Sawyer*, 678 F.2d 257, 278 (D.C. Cir. 1982); *Cody v. Private Agencies Collaborating Together, Inc.*, 911 F. Supp. 1, 5 (D.D.C. 1995).

The FLSA's authorization of liquidated damages for violations of its provisions regarding minimum wages, overtime, and equal pay cannot be stretched into a public policy requiring liquidated damages for a contractual violation merely because the contract refers to the FLSA in connection with payment of time and a half. As the arbitrator observed, "The contract violation here is not a violation of FLSA's requirement of time and one-half of regular rate for those hours worked in excess of 40 hours in a work week." (Award 19.)

The issue before the arbitrator was what aspects of the FLSA are incorporated by reference in article 24, section 1. The Award's reasonable analysis of the issue leaves no doubt that the arbitrator's decision was based upon his interpretation of the contract.

This record is not at all clear that the reference to the FLSA in Article 24 was intended to incorporate the liquidated damages concept in that Article. The reference can be easily read to refer simply to the calculation of time and one-half as compensatory damages. Had the parties intended to inject the FLSA's liquidated damages penalty, there were far less obscure ways of doing so. Although the Arbitrator Sickles' award of overtime pay for hours worked in the event of a violation of Article 24 seems to be a reasonable remedy for a violation of the posting provision, the imposition of a penalty in addition based on the reference to the FLSA in Article 24 is a reach beyond the agreement and will not be awarded.

(Award 19-20.)

The Board finds that the Union's position and Request are merely a disagreement with the arbitrator's interpretation of the contract. The Union's disagreement with the arbitrator's interpretation of the contract does not render the award contrary to law and public policy. See *D.C. Dep't of Corrs. v. F.O.P./Dep't of Corrs. Labor Comm.*, 60 D.C. Reg. 7185, Slip Op. No. 1380 at 6, PERB Case No. 10-A-03 (2013). Therefore, the Union's Request is denied.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The 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.  
December 22, 2014

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 13-A-05 was transmitted to the following parties on this the 24th day of December 2014.

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**via File&ServeXpress**

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/s/ Sheryl V. Harrington  
Sheryl V. Harrington  
Secretary