Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
National Association of Government Employees, Local R3-07	)	
Petitioner	)	PERB Case No. 18-A-07
v.	)	Opinion No. 1673
Office of Unified Communications	)	
Respondent	)	

DECISION AND ORDER

The National Association of Government Employees, Local R3-07 ("Union") filed this arbitration review request ("Request") on January 3, 2018. The Union appeals from Arbitrator Edward J. Gutman's award ("Award") denying a grievance the Union filed with the Office of Unified Communications ("Agency").

The narrow circumstances under which the Comprehensive Merit Personnel Act ("CMPA") permits the Board to modify, set aside, or remand an award are "if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means."[1] The Union contends that the Arbitrator exceeded his authority and that the Award is contrary to law and public policy.

The Board finds that the Union was not aggrieved by the Arbitrator's determination that the Union's Fair Labor Standards Act claim was not grievable and further finds that the Request presents no statutory basis for setting aside the Award's disposition of the Union's remaining claims.

[1] D.C. Official Code § 1-605.02(6).

I. Statement of the Case

A. The Grievance

On June 17, 2013, the Union filed a group grievance asserting that the Agency had extended the shifts of bargaining unit employees to 12.5 hours in violation of the parties' collective bargaining agreement ("CBA"), a compensation agreement, a memorandum of understanding, and the Fair Labor Standards Act ("FLSA"). The grievance alleges, "On April 18, 2013, OUC notified employees that it was extending employees' work hours to 12.5 hours per shift, which includes an unpaid ½ [hour] break. Since that time, employees have also been assigned to new tours of duty, based on the increase in hours."[2]

The grievance objects to the extension of work hours on four grounds. First, the Union asserts that a chain of contractual and statutory provisions requires the Agency to comply with the District Personnel Manual's limitation on the number of hours an employee may work each day during a compressed work schedule. The Union argues that Article 21(A)(2) of the CBA requires the Agency to adhere to District law when establishing tours of duty. District law, in section 1-204.22(3) of the D.C. Official Code, requires the Agency to establish and follow a comprehensive merit personnel system. Pursuant to that statute and the CMPA, the Agency is bound by the District Personnel Manual. Chapter 12, section 1210.4 of the District Personnel Manual, in turn, provides that the work schedule of an employee working a compressed work schedule may not exceed 10 hours for any work day. The grievance contends that the Agency violated this restriction. Second, the grievance contends that the shift extension violates a prohibition of involuntary 12-hour shifts found in a memorandum of understanding the parties executed in 2006 ("MOU"). Third, the grievance asserts that a compensation agreement between the District and Compensation Units 1 and 2 ("Compensation Agreement") provides that the parties must jointly negotiate a compressed work schedule. The grievance asserts that the Union is a party to the Compensation Agreement, but the Agency did not negotiate the new compressed schedule with the Union. Finally, the grievance contends that employees are entitled to back pay in the amount the FLSA requires for hours worked over 40 in a week.[3]

The grievance requested the following resolution:

1. Effective immediately, OUC shall cease and desist with the implementation of the extended 12½ hour shift.
2. Effective immediately, OUC shall comply with the aforementioned rules, regulations and CBA provisions with regards to establishing the number of hours per shift exceeding 10 hours.
3. The Agency shall comply with Article 2 l; Section A: 2 of the CBA and Article 8 of the Compensation Agreement when determining employees' tours of duty.

[2] Opp'n Ex. 1 at 1.
[3] Opp'n Ex. 1 at 2-3.

4. The Agency shall award back pay, with interest, at the rate of one and a half times the regular hourly wage, for all hours each employee works that exceeds 40 hours in one week, until the 12 hour shift is changed.
5. All other relief deemed appropriate.[4]

The Agency denied the grievance on August 26, 2013. The Union demanded arbitration.

Four years later, an arbitration hearing was conducted.[5]

Following the arbitration hearing, the parties submitted post-hearing briefs to the Arbitrator. The arguments made by the Union's brief were: the grievance is arbitrable; the Agency violated a past practice by suspending payments to 911 operators for their break time; the 12.5-hour shift violates the CBA and the Compensation Agreement; and the Agency violated the FLSA. The arguments made by the Agency's brief were: the claim that the 12.5-hour shift violates the CBA and the Compensation Agreement is moot; the FLSA claim is not substantively arbitrable; the Union is estopped from making a claim regarding payment for break time that it excluded from the grievance; and the claim regarding payment for break time is without merit.

B. The Award

1. Arbitrator's Findings of Fact

The Arbitrator found that on April 24, 2006, the Agency and the Union signed an MOU providing that employees working 8-hour shifts would not be forced to work 12-hour shifts and that employees working 12-hour shifts would be permitted to return to an 8-hour shift upon request.[6]

Subsequently, on September 21, 2006, the Union and the Agency entered into a four-year CBA. In Article 21(A)(2), the CBA provided,

> Special schedules shall be established for employees who are assigned in a twenty-four (24) operational unit and are required to work on Saturday and/or Sunday as part of their regular workweek. These schedules will be followed when scheduling bargaining unit employees to their various tours of duty, which shall be consistent with D.C. law.[7]

[4] Opp'n Ex. 1 at 3-4.
[5] The Arbitrator explained that "[t]he delay of 4 years between the filing of the grievance and the arbitration hearing occurred because neither party pursued Arbitration." The Arbitrator added that according to the Union when the Agency agreed to arbitration, it said that some issues were blocked by a settlement agreement, but ultimately the Agency said it would arbitrate all issues. Award 12.
[6] Award 3.
[7] Award 4.

Article 28 of the CBA contained a merger clause stating, "This collective bargaining agreement represents the complete agreement between the parties for the term and cancels and supersedes any and all previous agreements entered into between the parties."[8] The Arbitrator added that the MOU was a "previous agreement entered into between the parties"[9]

The Arbitrator stated that on September 28, 2012, the Union filed an unfair labor practice complaint, PERB Case No. 12-U-37, alleging that in 2012 the Agency sought to implement a 12-hour schedule without consulting the Union or providing information. The unfair labor practice complaint was settled and voluntarily withdrawn on July 30, 2014. The settlement agreement was not introduced into evidence at the hearing but was provided to the Arbitrator without objection in post-hearing communications.[10] In the settlement agreement the Union agreed to "waive, release and forever discharge from liability the Agency and the Government of the District of Columbia, as well as its officers, agents, employees and representatives (in their official and personal capacities), from any claims, demands, or causes of action that the Union has or may have arising out of and in connection with any factual allegation set forth in the unfair labor practice complaint. . . ."[11]

Thereafter the Union and other certified representatives of Compensation Units 1 and 2 entered into a Compensation Agreement with the District effective April 1, 2013, to September 30, 2017.

On April 18, 2013, the Agency announced that a transition to a 12-hour shift would begin June 16th of that year. However, somewhat earlier in June the Agency reassigned 911 operators to a biweekly schedule that was in effect before 2008 ("Schedule"). In week 1 of the Schedule the operators were to work four 12.5-hour days. In week 2 the operators were to work two 12.5-hour days and one 8.5-hour day. The Union objected to the Schedule in a June 11, 2013 letter in which it asserted its rights under the MOU. On June 14th, the Agency replied that the CBA canceled and superseded previous agreements between the parties. The Union then filed the instant grievance.[12]

In early 2017, the Agency ended its administration of 12.5-hour shifts.[13]

2. Arbitrator's Conclusions of Law

The Arbitrator began his analysis of the record by noting that the Union, as the charging party, bore the burden of proving a violation of the CBA. He found that the Union's efforts to prove a violation were undermined by a succession of agreements superseding earlier agreements and by the settlement of the Union's unfair labor practice complaint a year after the grievance was filed.[14]

[8] Award 4.
[9] Award 4 n.2.
[10] Award 9.
[11] Award 15-16.
[12] Award 6.
[13] Award 12.
[14] Award 15.

The Arbitrator found that a past practice, though argued by the Union in its brief, was neither alleged in the grievance nor supported by the record.[15]

Both parties agreed that the discontinuance of the 12.5-hour shifts in 2017 made the Union's non-monetary prayers for relief moot.[16] Regarding the monetary prayer for relief, the Arbitrator found that no evidence supported the Union's claim that the Schedule had adverse effects on bargaining unit members.[17]

The last claim that the Award deals with is the FLSA claim. The Arbitrator held that the CBA's grievance procedure permits an employee to grieve only contractual claims and does not permit an employee to grieve a statutory claim. "The FLSA," the Arbitrator concluded, "is a federal statute and therefore is not grievable under the CBA."[18]

The Award concludes as follows:

> The Union's grievance alleged violations of CBA Article 21 Section B and Article 7 of the Compensation Agreement. Proportionality as a criterion of fairness and the optics discussed above critically undermine the merits of the Union's claims and
>
> The Grievance is denied.[19]

B. Arbitration Review Request

The Request challenges two aspects of the Award: the Award's rejection of the FLSA claim and the Award's alleged failure to address the claim that the Schedule violated the CBA and the Compensation Agreement. The Union contends that in both aspects the Award is contrary to law and public policy and does not derive its essence from the CBA. The Union contends that the Arbitrator exceeded his authority by issuing an Award that does not derive its essence from the CBA. The Agency filed an opposition.

II. Analysis

A. The FLSA Claim

The Union appeals from the Arbitrator's rejection of its FLSA claim on two grounds. First, the Union argues that the Arbitrator exceeded his jurisdiction by modifying the CBA to exclude statutory claims that the CBA incorporates. And second, the Union argues that the

[15] Award 16-17.
[16] Award 12-13.
[17] Award 17.
[18] Award 17.
[19] Award 18.

decision that the CBA does not cover statutory claims is contrary to law and public policy, namely, the presumption of arbitrability.

Even if there were some merit to these arguments, the Board need not address them because a threshold issue is determinative. The Union's appeal from the Arbitrator's holding that an alleged FLSA violation is not grievable raises the issue of whether the Union is aggrieved by the Award in that regard. Board Rule 538.1 provides, "A party to a grievance arbitration proceeding who is aggrieved by the arbitration award may file a request for review with the Board not later than twenty-one (21) days after service of the award." To be aggrieved, a party must have an actual injury for which a remedy can be granted by the Board.[20]

The grievance asserts that "[t]he shift extension violates the Fair Labor Standards Act" and gives the following explanation for that assertion:

> The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a)(1) requires that nonexempt employees be compensated at one and a half times the regular rate for any work exceeding 40 hours in one week. Under the new schedule, effective June 16, 2013, employees will be required to exceed 40 hours per week.[21]

The grievance requested the Agency to "award back pay, with interest, at the rate of one and a half times the regular hourly wage, for all hours each employee works that exceeds 40 hours in one week, until the 12 hour shift is changed."[22]

The Arbitrator found that the Union put on no evidence that the Agency failed to compensate any employee—in the words of the grievance—"at one and a half times the regular rate for any work exceeding 40 hours in one week."

> [T]hough given opportunities to submit an analysis to substantiate its adverse effects claim, the Union produced no evidence to illustrate how any employee suffered the loss of overtime pay or any adverse consequences as a result of the OUC's conduct alleged in the grievance. This showing of potential and or actual loss of earnings could have been shown by payroll record of victims of OUC illegal scheduling. It was not and leaves the Union's claim unsupported by documented proof of its claim.[23]

[20] *Allison v. FOP/Dep't of Corr. Labor Comm.*, 61 D.C. Reg. 9085, Slip Op. No. 1482 at 3-4, PERB Case No. 14-S-04 (2014).
[21] Opp'n Ex. 1 at 3.
[22] Opp'n Ex. 1 at 4.
[23] Award 17.

The Union does not deny that it was given opportunities to submit evidence supporting its claim. It does not, and cannot, contest the evidentiary finding that it submitted none. "By submitting a matter to arbitration, parties are bound by the Arbitrator's evidentiary and factual findings."[24]

The Union failed to prove that the FLSA was violated. The Union cannot claim to be injured by a decision that the CBA does not cover a statute that was not violated. The Union is in the same position it would have been in had the Arbitrator found that the CBA did cover FLSA violations. An argument that the Award injured the Union by not awarding relief under the FLSA would be unavailing. That argument does not identify an injury for which a remedy can be granted by the Board. Remanding the case so that the Arbitrator can find that the FLSA claim was grievable but not proven would be a futile exercise that would not remedy any actual injury.

As the Union was not aggrieved by the Arbitrator's decision regarding the FLSA, it lacked standing to file a request for review of that decision under Rule 538.1.[25]

B. The Contractual Claims

The Request states, "The Arbitrator's Decision also failed to derive its essence from the CBA and was contrary to public policy because he failed to address issues raised in the Grievance regarding the improper compressed work schedule."[26] The issues the Union contends the Arbitrator failed to address were the issues of whether the Agency's unilateral implementation of the Schedule violated Article 21 of the CBA and Article 7 of the Compensation Agreement. The Union contends that in his discussion and conclusion the Arbitrator failed to address whether the unilateral implementation of the Schedule violated either agreement.[27]

To the contrary, both the discussion and the conclusion address the alleged violation of the two agreements. The discussion section of the Award sets forth a sequence of events that includes the formation of both the CBA and the Compensation Agreement, and then the Arbitrator states, "The inconsistencies shown in these events and transactions undermine the weight of the legal arguments the Union relied on to corroborate the charges in the grievance to prove violations of the labor and compensation agreements."[28] The Award's conclusion states the issues the Union claims it omitted: "The Union's grievance alleged violations of CBA Article 21 Section B and Article 7 of the Compensation Agreement." Then it states its ruling on those issues: "The Grievance is denied."[29] The Arbitrator was not required to explain the reason for his decision.[30]

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[24] *MPD v. FOP/MPD Labor Comm.*, 64 D.C. Reg. 10152, Slip Op. No. 1639 at 4-5, PERB Case No. 16-A-12 (2017).
[25] *See Dupree v. FOP/MPD Labor Comm.*, 43 D.C. Reg. 5130, Slip Op. No. 465 at 2 n.2, PERB Case No. 96-U-05 (1996).
[26] Request 9.
[27] Request 9.
[28] Award 15.
[29] Award 18.
[30] *FOP/Dep't of Corr. Labor Comm. (on behalf of Jackson) v. D.C. Dep't of Corr.*, 61 D.C. Reg. 11301, Slip Op. No. 955 at 11, PERB Case No. 08-A-06 (2010) (citing *Lopata v. Coyne*, 725 A.2d 931, 940 (D.C. 1990)).

Although the Arbitrator could have given no explanation at all, he said that inconsistencies undermined the Union's contractual claims. And he said that the parties agreed that all non-monetary prayers were moot.[31] The grievance sought only non-monetary relief for the unilateral implementation of the Schedule. Assuming *arguendo* that the grievance sought monetary relief, none is available because the Arbitrator found that Union did not prove any damages.[32] These findings are sufficient to support the denial of the grievance.

The Agency argues that the Arbitrator gave another reason for his decision. The Agency asserts that "Arbitrator Gutman opined that the Union waived its contractual claims under a settlement agreement."[33] The Arbitrator was more guarded, stating: "The Agency argues this settlement agreement put the death knell to the grievance. The record may have provided unconvincing support for accepting the Agency's contention, but the detailed waiver language raised a level of doubt sufficient to consider giving putative validity to its waiver language."[34] If the Arbitrator did consider giving the waiver language validity, he did not disclose the result of his consideration.

Nevertheless, the Arbitrator did address and decide the contractual issues the Union raises in its Request. As a result, the Union has presented no basis upon which to modify, set aside, or remand the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is denied. The 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, Members Ann Hoffman, Barbara Somson, Douglas Warshof, and Mary Anne Gibbons

Washington, D.C.
July 26, 2018

[31] Award 13.
[32] Award 17.
[33] Opp'n 6.
[34] Award 16.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-A-07 was served via File & ServeXpress to the following parties on this the 31st day of July 2018.

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