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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)	
)	
DISTRICT OF COLUMBIA)	
FIRE AND EMERGENCY SERVICES)	PERB Case No. 02-A-08
DEPARTMENT,)	
)	Opinion No. 728
Petitioner,)	
)	
)	
)	
and)	
)	
AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES, LOCAL 3721,)	
)	
)	
Respondent.)	
)	

DECISION AND ORDER

The District of Columbia Fire and Emergency Services Department (“FEMS”, “Petitioner” or “Agency”), filed an Arbitration Review Request (“Request”) in the above caption matter. Specifically, FEMS seeks reversal of an Arbitrator’s¹ Award which found that FEMS violated its collective bargaining agreement (CBA) with the American Federation of Government Employees, Local 3721 (“AFGE”, “Respondent” or “Union”).² AFGE opposes the Request.³

The issue before the Board is whether “the Award on its face is contrary to law...” D.C. Code§1-605.02(6) (2001 ed.).⁴

¹Charles Donegan was the Arbitrator in this matter.

²The underlying grievance asserted that FEMS violated the parties’ CBA by requiring paramedics to work 24 hour shifts, when their contract specified that their shifts were not to exceed 12 hours a day.

³The reasons for AFGE’s opposition are outlined in detail in its document entitled, “AFGE Local 3721’s Opposition to Arbitration Review Request.” (“ Opposition”).

⁴Throughout this Opinion, all references to the D.C. Code refer to the 2001 edition.

In 1999, FEMS instituted a new program which paired paramedics with firefighters on fire engines in an attempt to improve response times for reaching accident scenes. The paramedics served on a voluntary basis. The Union objected to this new program because it required paramedics to work 24 hour shifts, instead of the 12 hour shifts allowed by the plain language of their collective bargaining agreement with FEMS.⁵ As a result, the Union filed a grievance concerning the matter. After the grievance reached the arbitration stage, the Arbitrator found that FEMS had violated the plain language of the parties' CBA. Specifically, he concluded that FEMS had improperly allowed Emergency Personnel to work twenty-four (24) hour shifts, despite the fact that the language in the paramedics' CBA specified that their shifts were not to exceed twelve (12) hours. (Award at pgs. 8-9).

FEMS takes issue with the Arbitrator's Award. Specifically, the Agency asserts that the Arbitration Award, on its face, is contrary to law.⁶ Furthermore, FEMS argues that it had authority

⁵ An Addendum to the AFGE and FEMS CBA described the work schedules for Emergency Ambulance Bureau Personnel and provided the following:

Emergency Ambulance Bureau personnel shall work twelve (12) hour shifts as their normal scheduled daily tour of duty and which shall continue to constitute for pay and leave purposes, a forty (40) hour workweek in a 24-week cycle.

This Addendum was incorporated into the parties' CBA. (See, Award at pg.4).

⁶As a procedural matter, FEMS argued that the grievance was not arbitrable on the basis of untimeliness, based on the fact that the Union did not file it's grievance until the new program had been in place for over a year. The Arbitrator dismissed this argument by finding that the Agency's action was a continuing violation; therefore, the time for filing a grievance had not expired. The Board concludes that this finding is reasonable and supported by the record.

In addition, FEMS relied on Federal Labor Relations Authority (FLRA) precedent for its argument that the Arbitrator's Award was in error because it abrogated a management right. See, Department of the Treasury, U.S. Customs Service and National Treasury Employees' Union (DOT and NTEU), 37 FLRA 309, 314 (1990). According to DOT and NTEU, an arbitration award abrogates a management right when the award precludes an Agency from exercising that management right. Furthermore, FEMS asserts that a management right cannot be waived or relinquished through collective bargaining. See, Southwestern Power Administration and International Brotherhood of Electrical Workers, Local 1002, 22 FLRA 475, 476 (1986). While this may be the case according the FLRA precedent, the Board has established that management

(continued...)

to institute the change based on Managements' exclusive statutory right to set an employee's tour of duty⁷ and maintain the efficiency of the government, pursuant to D.C. Code §1-617.08 (a)(4) and(5).

We have held that an Arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." D.C. Dept. of Public Works and AFSCME, Local 2091, 35 DCR 8186, Slip Op. No. 194, PERB Case No. 87-A-08 (1988). In addition, we have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association/NEA, 39 DCR 9628, Slip Op. No. 320 at p.2, PERB Case No 92-A-04 (1992). Also, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement and related rules and regulations as well as his evidentiary findings and conclusions upon which the decision is based." Id. Moreover, "[t]he Board will not substitute its own interpretation or that of the Agency's for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987).

In the present case, the Board finds that FEMS merely disagrees with the Arbitrator's decision and requests that we adopt its interpretation of the contract. However, as indicated above, we will not substitute our interpretation for that of the duly designated Arbitrator. In addition, we have held that a "disagreement with the arbitrator's interpretation. . . does not make the award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, Slip Op. No

⁶(...continued)

may waive its right by consenting to bargain over an issue where it has no duty to. To explain further, there are three categories of subjects for bargaining pursuant to the CMPA. Those categories include:(1) **mandatory subjects**- over which parties must bargain; (2) **permissible subjects**-over which parties may bargain and (3) **illegal subjects**- over which parties may not bargain. See, D.C. Public Schools and Teamsters Local 639 and 730, 38 DCR 2487, Slip Op. No. 273, PERB Case No. 91-N-01 (1991). While it is true that determining the tour of duty and the number of hours of in a workweek and in a workday, are management's rights pursuant to the CMPA, management may choose to bargain over the subjects. As a result, these subjects become permissible subjects of bargaining where no section of the CMPA expressly prohibits bargaining over the issue. In the present case, FEMS chose to bargain concerning the number of hours that paramedics may work and memorialized their agreement with AFGE in an Addendum to the parties' CBA. As a result, the subjects became permissible subjects of bargaining because management waived its exclusive right to bargain over the issue. FEMS does not point to any language in the D.C. Code which prohibits bargaining over the subject of hours of work.

⁷FEMS relies on precedent which held that pursuant to the CMPA, Management has the exclusive right to determine an employee's hours of work and tour of duty.

413, PERB Case No. 95-A-02 (1995).

The Board has stated that “to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result.” MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633, PERB Case No. 00-A-04 (2000).

After reviewing FEMS’s “contrary to law” argument, the Board finds that FEMS failed to cite any applicable law that has been violated.⁸

While FEMS correctly noted that establishing employee’s tour of duty and maintaining the efficiency of the government⁹ are management’s rights,¹⁰ over which the Agency is not required to bargain, it failed to recognize that it waived its right to set the hours of work for paramedics when it negotiated and reached an agreement with AFGE limiting the hours of work to twelve (12)¹¹. As a result, FEMS became bound by language that it negotiated and the Arbitrator found a violation of the CBA. (See, Award at pg. 56).

We find that the Arbitrator’s conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. FEMS merely disagrees with the Arbitrator’s conclusion. This is not a sufficient basis for concluding that the Arbitrator’s Award is contrary to law or public policy. For the reasons discussed above, no statutory basis exists for setting aside the Award; the Request is therefore, denied.

⁸This “contrary to law” argument is outlined in detail in footnote 6 of this Opinion.

⁹These Management’s rights are codified at D.C. Code §1-617.08.

¹⁰In the present case, we are not dealing with proposals in a negotiations setting. Instead, FEMS had *already negotiated over the subject of hours of work and agreed to limit the number of hours that paramedics could work in a day to 12 hours*. It was a part of the CBA which the parties chose to have Arbitrator Donegan interpret. Because the Arbitrator found that FEMS scheduled paramedics for more than 12 hours a day, he determined that the Agency violated the CBA.

¹¹ As noted earlier, the Board has held and the D.C. Court of Appeals has affirmed that management has the right under the CMPA to determine an employee’s Hours of Work, and that proposals by a union which seek to abrogate that right are non-negotiable. See, Drivers, Chauffeurs and Helpers Local Union No. 639, et.al. v. Public Employee Relations Board, 631 A.2d. 1205, 1211 (D.C. 1993) and D.C. Public Schools and Teamsters Local 639 and 730, 38 DCR 2487, Slip Op. No. 273, PERB Case No. 91-N-01 (1991). However, the Board has also held that a subject over which a party is not required to bargain may become a permissible subject of bargaining, if the Agency agrees to negotiate over the subject. See, Id.

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
Washington, D.C.

September 30, 2003