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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of)	
)	
District of Columbia)	
Metropolitan Police Department,)	PERB Case No. 10-A-01
)	
Petitioner,)	Opinion No. 1032
)	
and)	
)	Arbitration Review Request
Fraternal Order of Police/Metropolitan)	
Police Department Labor Committee)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an arbitration award ("Award") determining that MPD's implementation of the "All Hands On Deck" ("AHOD") initiative violated the terms of the parties' collective bargaining agreement ("CBA"). The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes MPD's Request. ("Opposition"). MPD's Request and FOP's Opposition are before the Board for its disposition.

II. Discussion

This case arises out of MPD's efforts to implement AHOD. AHOD is an MPD initiative, the stated purpose of which is "to have positive interaction with citizens, address community concerns, provide a physical presence in neighborhoods throughout the city, arrest offenders of the law, and to reduce crime and the fear of crime." (Award at p. 5 (quoting Union Exhibit 4)).

MPD sought to accomplish these goals by requiring all MPD officers to work three-day weekends in May, June, July, August, November, and December of 2009. (See Award at p. 5). MPD informed members of the police force of the AHOD initiative in a January 7, 2009 teletype sent by the Chief of Police, Cathy L. Lanier. (See Award at p. 4). MPD officers were not permitted to schedule days-off on any of the dates listed in the teletype, nor could officers schedule leave on any of these dates unless such leave had been planned prior to January 7, 2009. (See Award at p. 4).

On January 23, 2009, FOP Chairman Kristopher Baumann filed a class grievance alleging that the teletype violated Articles 1, 4, 24, and 40 of the CBA. FOP then demanded bargaining on the matters set forth in the teletype. Chief Lanier denied FOP's grievance and found that there was no requirement to bargain over AHOD. On February 24, 2009, FOP demanded arbitration in accordance with Article 19, Part E, Section 2 of the parties' CBA. (See Award at p. 6).

Arbitrator John Truesdale held a hearing on this matter on June 17, 2009. (See Award at 6). The arbitrator heard testimony from two witnesses, FOP Chairman Baumann on behalf of the Union and Assistant Chief Alfred Durham on behalf of MPD. (See Award at pgs. 7-16). Chairman Baumann testified that AHOD was not implemented to respond to a bona fide police emergency, but rather was a public relations campaign. (See Award at p. 7). Baumann further described the impact AHOD had on police officers' schedules and the reasons why, in his view, AHOD violated the parties' CBA. (See Award at pgs. 7-8). In particular, Baumann testified that AHOD violated Articles 1, 4, 24, and 49 of the CBA. (See Award at pgs. 8-9).

MPD called Assistant Chief Durham to testify on the Agency's behalf. (See Award at p. 11). Assistant Chief Durham explained that AHOD was designed to coincide with predicted spikes in crime and that a focus of AHOD was to increase the visibility of the police force during those times. In Durham's view, Articles 1, 4, 24, and 49 of the CBA were not violated because the January 7, 2009, teletype announcing AHOD provided more than fourteen days notice and members of the force could plan their time in advance. Durham further testified that the Mayor delegated authority to the Chief of Police to determine whether MPD's ability to carry out its mission would be handicapped if it were unable to change days off for police officers. (See Award at p. 12).

On cross-examination, Durham testified that there had not been any written statement issued by the Mayor suggesting that MPD would be "seriously handicapped" in the absence of AHOD. (See Award at p. 13). Durham also expressed his belief that Mayor's Order 2000-83 delegated authority to the Chief of Police to determine whether MPD would be so handicapped. (See Award at p. 13). After eliciting testimony suggesting that MPD often relied on Mayor's Order 2000-83 as the delegating authority to make the "seriously handicapped" determination, FOP introduced Mayor's Order 2008-92, which specifically rescinded the Chief of Police's authority concerning personnel and rulemaking. (See Award at pgs. 13-14). MPD did not object

to the introduction of this evidence. (See Award at p. 23). Durham further conceded that neither the Mayor nor the Police Chief declared an emergency, and Durham could not provide crime statistics that explained why certain AHOD dates were moved. (See Award at pgs. 14-15).

After Baumann and Durham testified, the arbitrator closed the record, and the parties submitted their briefs. (See Award at p. 23). A month after the record was closed, MPD requested that the arbitrator reopen the record in order for the arbitrator to consider Mayor's Order 2009-117, which was signed two days after the record closed on June 17, 2009. (See Award at p. 23). The arbitrator rejected this request on August 10, 2009. (See Award at p. 23).

Arbitrator Truesdale adopted the following issues for his consideration:

Whether the AHOD initiative violates the parties' collective bargaining agreement ("CBA") and the provisions of Articles 1, 4, 24 and 49.

Whether, consistent with Article 4 of the parties' CBA, Chief Lanier and the MPD violated Article 4 by establishing AHOD schedules that were not permitted by the applicable laws, rules and regulations, including violating the Comprehensive Merit Personnel Act, D.C. Code § 1-612.01, D.C. Code §1-617.06, and generally establishing AHOD without proper statutory or regulatory authority or valid delegation of power.

Whether Chief Lanier and the Mayor failed to make requisite findings of a crime emergency or a seriously handicapping effect, and establish necessary rules and regulations for making such a determination.

Whether the MPD failed to adequately compensate the class for all time scheduled during the AHOD initiative at the rate of time and one-half, as required for these violations.

Whether any non-union members of the MPD were provided notice of AHOD restrictions prior to the issuance of teletype 01-033-09.

(Award at p. 2).

At arbitration, FOP contended that MPD violated the CBA by implementing AHOD. FOP asserted that AHOD was a public relations campaign designed to improve the public's perception of MPD and was neither tailored to address any crime emergency nor constructed to

address crime patterns. (See Award at p. 16). FOP also contended that] MPD conceded as much, even admitting that AHOD was designed to circumvent the need to declare a crime emergency. (See Award at 16-17). In addition, FOP contended that the Chief of Police did not have authority to declare that MPD would be "seriously handicapped" if AHOD were not implemented, as the Mayor's Order, upon which MPD relied as the delegation of authority to make this declaration, had been rescinded. (See Award at p. 17). Furthermore, FOP argued that the Chief of Police also made no findings concerning whether MPD would be substantially handicapped if it were not to implement AHOD. (See Award at p. 17).

FOP argued that the teletype announcing the AHOD violated Article 24 of the CBA. Specifically, FOP asserted that Article 24 was violated because the teletype suspended the negotiated provision of the parties' CBA without any declaration that the AHOD was based on an emergency, or increases in crime, or any unanticipated event. (See Award at 18). FOP stated that, although Mayor's Order 99-20 had been rescinded, MPD and FOP still relied on its processes for determining schedules of police officers. Thus, according to FOP, because AHOD required officers to take non-consecutive days-off in contravention of the parties' practice, Article 24 was violated. (See Award at p. 18).

With regard to Article 49 of the CBA, FOP argued that AHOD changed the conditions and terms of employment because it directly interfered with the negotiated scheduling rights of FOP's membership. (See Award at p. 18). In FOP's view, MPD was required to bargain over these changes in the terms of employment but MPD failed to do so. (See Award at p. 18).

Article 4 of the parties' CBA requires that management rights are exercised in accordance with applicable laws, rules, and regulations. FOP contended that the rules and regulations in place required that the Mayor make a determination that MPD would be "seriously handicapped" if AHOD were not put in place. (See Award at p. 18). In addition, FOP asserted that a determination by the Chief of Police would not suffice because there was no authority delegated to her to make such a determination. Moreover, FOP also noted that the Chief had not made any such determination. (See Award at pgs. 18-19). FOP contended that, because the CMPA requires a finding that an agency is substantially handicapped before the agency can change work schedules, MPD's alteration of officers' schedules, in the absence of any effective declaration, violates the CMPA. (See Award at p. 19).

Finally, FOP argued that even if Chief Lanier had been delegated authority to make the "seriously handicapped" determination, MPD and the Mayor did not go through the formal rulemaking process as set forth in D.C. Code § 1-612.01(e). Specifically, FOP asserted that MPD and the Mayor set no new rules in place concerning AHOD that would allow MPD to change the work schedules of members of the force. (See Award at p. 19).

Accordingly, FOP requested that the arbitrator order MPD to rescind the teletype instituting AHOD, pay officers time and one-half compensation, and pay costs associated with the arbitration. (See Award at p. 19).

MPD countered that AHOD reflected the exercise of a legitimate and reserved management right. (See Award at p. 19). Since the determination of work projects, along with granting leave, are solely within management's rights, and because AHOD is a continuation of a project that was implemented in years past, MPD argued there was no change in working conditions. (See Award at p. 19). MPD also noted to the arbitrator that it did not interfere with any leave approved prior to the teletype instituting AHOD, nor did it cancel any pre-approved leave. Thus, MPD asserted that it did not violate Article 1 of the CBA. (See Award at pgs. 19-20).

Furthermore, MPD argued that it did not violate Article 24 of the CBA because the agreement permits MPD to determine police officers' tours of duty. (See Award at p. 20). This, MPD contended, means that it had the bargained-for authority to implement work initiatives such as AHOD. (See Award at p. 20). As for FOP's contention that MPD violated the CMPA, MPD pointed to a determination by one of the Board's Hearing Examiners that there was no such violation under this initiative. (See Award at p. 20). In MPD's view, Mayor's Order 2000-83 was still in place, and a written determination that MPD would be "seriously handicapped" without AHOD was not required. (See Award at p. 20).

~~With regard to Mayor's Order 2008-92, MPD argued that it was unfairly surprised by FOP's introduction of the exhibit because FOP did not disclose the existence of this Order at any point before showing it to Assistant Chief Durham. (See Award at p. 20). This, according to MPD, was contrary to Article 19, Part E, Section 5(2) of the parties' CBA, which prohibits parties in arbitration from relying on evidence not previously disclosed to the other party. (See Award at 20-21). MPD continued that if Mayor's Order 2008-92 is considered, the arbitrator should have also considered Mayor's Order 2009-117 (signed two days after the hearing was closed). Order 2009-117 is designed to ensure that the Chief of Police's personnel authority remained intact. (See Award at p. 21).~~

MPD contested the other bases for FOP's arguments: that this case does not involve a question of consecutive days off so Article 24 is not at issue and that Article 49 is not at issue because it only concerns "terms and conditions of employment *not* covered" by the agreement. (See Award at p. 21). MPD concluded that AHOD required scheduling changes, but these were ordered in accordance with the terms of the CBA. MPD contended that Chief Lanier exercised her authority properly in determining that that MPD would be "seriously handicapped" without AHOD. (See Award at pgs. 21-22).

Arbitrator Truesdale considered the arguments of MPD and FOP, and, in his September 9, 2009 Award, ruled in favor of FOP. At the outset, the arbitrator considered MPD's argument that it was unfairly surprised by the introduction of Mayor's Order 2008-92. (See Award at pgs.

22-23). The arbitrator concluded that there was no evidence that FOP had previous knowledge of Order 2008-92 and deliberately withheld it. (See Award at p. 23). In the arbitrator's view, if anyone should have known about this order, it was MPD. (See Award at p. 23). Moreover, the arbitrator noted that MPD could have objected to the introduction of this exhibit at the hearing but did not. (See Award at p. 23). Furthermore, Arbitrator Truesdale determined that MPD could have requested time to review the order, but did not. MPD only sought to reopen the proceedings thirty days after the record was closed. (See Award at p. 23).

Concerning the merits of the grievance, the arbitrator focused on whether AHOD violated Articles 1, 4, 24, and 49 of the CBA. (See Award at p. 23). The arbitrator looked to the terms of the agreement, applicable statutes, and Mayor's Orders and determined that MPD violated those articles of the agreement. (See Award at pgs. 23-27).

In particular, the arbitrator determined that by implementing AHOD, MPD violated Article 24 of the CBA. (See Award pgs. 24-25). The arbitrator reviewed Chief Lanier's testimony in a previous case and stated that D.C. Code § 1-612.01 requires a five-day workweek with two consecutive days off. The arbitrator found that *neither* the Mayor nor Chief Lanier determined that there was any crime emergency or that MPD would be "seriously handicapped" without AHOD. Moreover, the arbitrator found that the Chief did not have the authority to make the "seriously handicapped" determination because her authority to do so was rescinded by Mayor's Order 2008-92. (See Award at p. 25). Since the arbitrator concluded that AHOD constituted a change in the terms and conditions of employment, the arbitrator found that Article 24 was violated by MPD. Additionally, the arbitrator found that the "seriously handicapped" determination must be in writing, based on his interpretation of D.C. Code § 1-612.01. (See Award at p. 26).

Arbitrator Truesdale found that FOP met its burden to show that MPD violated Articles 1, 4, 24, and 49 of the CBA. Arbitrator Truesdale ordered MPD to rescind the teletype ordering AHOD and comply with Article 24, Section 1 concerning overtime pay and compensatory time, in accordance with the Fair Labor Standards Act. The arbitrator retained jurisdiction only to clarify the remedy, if necessary. (See Award at p. 27).

MPD moved for reconsideration on September 18, 2009, which FOP opposed on September 23, 2009. Arbitrator Truesdale determined that he did not have authority to consider MPD's motion because his authority ended once his decision was rendered. (Order Denying Motion for Reconsideration, September 28, 2009).

MPD challenges the Award in its Request on the bases that the arbitrator exceeded his authority by considering Mayor's Order 2008-92 and that the Award is contrary to law and public policy. (Request at pgs. 4-11).

Section 1-605.02(6) of the CMPA provides the Board with the authority to overturn an arbitrator's award only: (1) "if the arbitrator was without, or exceeded, his or her jurisdiction"; (2) where "the award on its face is contrary to law and public policy"; or (3) where "was procured by fraud, collusion, or other similar and unlawful means." D.C. Code § 1-605.02(6) (2001). The deference the Board gives to arbitration awards is rooted not only in the CMPA, but also in the well-established principle that MPD and FOP have granted "the authority to the arbitrator to interpret the meaning of their contract's language...." *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57, 61-62 (2000) (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)).

When parties agree to arbitrate disputes under a CBA, the parties are bound by the arbitrator's interpretation of the contract, and the Board is not authorized to substitute its own interpretation of the CBA. *United Paperworkers Int'l. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987); *District of Columbia Metropolitan Police Dept. v. District of Columbia Public Employee Relations Board*, 901 A.2d 784, 789 (D.C. 2006) (quoting *Am. Postal Workers v. U.S. Postal Serv.*, 789 F.2d 1, 6 (D.C. Cir. 1986)). In sum, the Award is subject to "the greatest deference imaginable." *Utility Workers Union of America, Local 246 v. N.L.R.B.*, 39 F.3d 1210, 1216 (D.C. Cir. 1994).

A. The Arbitrator Did Not Exceed his Authority When He Considered Mayor's Order 2008-92.

The premise of MPD's argument that the arbitrator exceeded his authority is that the arbitrator considered Mayor's Order 2008-92. MPD contends that FOP did not tell MPD that it would rely on that document until the last minute, on the cross-examination of the last witness. (Request at p. 4). In MPD's view, Arbitrator Truesdale should not have considered this Order in light of Article 19, Part E, Section 5(2) on the CBA, which states:

The parties to the grievance or appeal shall not be permitted to assert in such arbitration proceeding any ground or to rely on any evidence not previously disclosed to the other party.

(Request at 5).

MPD argues that the arbitrator improperly relied on Order 2008-92 and improperly refused to reopen the proceedings to consider MPD's additional rebuttal evidence. In MPD's view, the arbitrator's consideration of this "undisclosed" evidence formed the basis of the Award, and therefore the Award should be overturned.

Following Supreme Court precedent, one of the tests that the Board has used when determining whether an arbitrator has exceeded his jurisdiction and was without authority to render an award is "whether the Award draws its essence from the collective bargaining

agreement.” *D.C. Public Schools v. AFSCME, District Council*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987); *See also United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *United States Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686, 693 (D.C. Cir. 2009). Therefore, even where the Board is convinced the arbitrator “committed serious error,” the arbitrator’s decision must be enforced as long as the arbitrator “is even arguably construing or applying the contract....” *See Misco*, 484 U.S. at 37-38; *See also Dobbs, Inc. v. Local No. 1614, Int’l. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987).

The United States Court of Appeals for the Sixth Circuit, in *Michigan Family Resources, Inc. v. Service Employees International Union Local 517M*, 475 F.3d 746, 753 (6th Cir. 2007), has explained what it means for an award to “draw its essence” from a collective bargaining agreement by stating the following standard:

[1] Did the arbitrator act outside his authority by resolving a dispute not committed to arbitration?; [2] Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award?; and [3] [I]n resolving any legal or factual disputes in the case, was the arbitrator arguably construing or applying the contract? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made serious, improvident or silly errors in resolving the merits of the dispute.

475 F.3d 746, 753 (6th Cir. 2007) (internal quotations omitted).¹

MPD and FOP, pursuant to their CBA, agreed that Arbitrator Truesdale should determine whether MPD violated the CBA when it issued the teletype ordering AHOD. The parties

¹ In *MPD and FOP/MPD Labor Committee*, 49 D.C. Reg. 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001), the Board expounded on what is meant by “deriving its essence from the terms and conditions of the collective bargaining agreement” by adopting the Sixth Circuit decision in *Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135*, which explained the standard by stating the following:

An arbitration award fails to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement; and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement.

793 F.2d 759, 765 (6th Cir. 1986). However, the *Cement Division* standard has been altered by *Michigan Family Resources*.

therefore granted Arbitrator Truesdale authority to interpret the terms of the contract. The remaining question is whether the arbitrator was even "arguably construing" the CBA. The Board finds that he was.

Arbitrator Truesdale construed D.C. Code § 1-612.01 to require either a crime emergency finding or a written determination that MPD would be "seriously handicapped" without AHOD. The arbitrator found, as a matter of fact, that there was no crime emergency declared and that neither the Mayor nor the Chief of Police made any written determination that MPD would be "seriously handicapped" unless AHOD were implemented. Based on his interpretation of the law and his factual findings, Arbitrator Truesdale found that implementing AHOD violated the CBA because there was no crime emergency finding or "seriously handicapped" determination that would have allowed the suspension of the CBA's scheduling provisions. (See Award at p. 26). The arbitrator's conclusion that MPD violated the terms of the CBA therefore drew its essence from the contract.

The Board finds the arbitrator's consideration of Mayor's Order 2008-92 (and his refusal to reopen the proceedings to consider rebuttal evidence) to be inconsequential. The Mayor's Orders at issue in this case only relate to whether the Chief of Police had the authority to determine if MPD would be "seriously handicapped" without AHOD. The arbitrator found that the Chief made no such determination, regardless of whether she had the authority to do so or not. (See Award at pgs. 25-26). MPD, therefore, is incorrect when it contends that the outcome of the Award was based on the on Arbitrator Truesdale's acceptance of Mayor's Order 2008-92 into evidence.

The Board must interpret the award in such a way to conclude that the arbitrator acted within his authority so long as "the record disclose[s] a permissible route" to the arbitrator's conclusions. *Nat'l Postal Mail Handlers Union v. American Postal Workers Union, AFL-CIO*, 578 F. Supp. 2d 160, 162 (D.D.C. 2008) (quoting *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 532 (D.C. Cir. 1989)). Here, the record discloses a clear route to the arbitrator's conclusions, and the arbitrator was clearly interpreting the contract in reaching his determination. MPD simply presents a disagreement concerning the arbitrator's factual determinations and his interpretation of this term of the contract, neither of which constitutes a basis to set aside or modify the Award under the CMAA.

Furthermore, Arbitrator Truesdale was well within his authority when he interpreted Article 19, Part E, Section 5(2) to permit him to consider Mayor's Order 2008-92. Arbitrator Truesdale was "the judge of the admissibility and relevancy of evidence submitted in an arbitration proceeding." *Howard Univ. v. Metro. Campus Police Officer's Union*, 519 F. Supp. 2d 27, 36-37 (D.D.C. 2007), *aff'd* 512 F.3d 716 (D.C. Cir. 2008) (quoting *Pompano-Windy City Partners v. Bear Stearns & Co.*, 794 F.Supp. 1265, 1277 (S.D.N.Y. 1992)). FOP offered an exhibit to which MPD voiced no objection during the proceedings. Arbitrator Truesdale interpreted Article 19, Part E, Section 5(2) of the parties' CBA to permit him to consider

evidence that had not been objected to before the record was closed. (See Award at p. 23). The arbitrator's determination, that a party must object at the time of the proceeding, is consistent with the general admonition that parties are not allowed to keep some of their objections in their "hip pockets." *Drivers, Chauffeurs & Helpers Local Union No. 639 v. District of Columbia*, 631 A.2d 1205, 1211 & n.9 (D.C. 1993); See also Sup.Ct.R.Civ.P. 51(c). (parties must timely object to preserve issues). The arbitrator therefore considered the terms of the CBA gave his interpretation of the contract as bargained for by the parties, and properly exercised his authority to admit and consider Mayor's Order 2008-92. See *Metro. Campus Police Officer's Union*, 519 F. Supp. 2d at 36-37.

The same holds true of Arbitrator Truesdale's decision not to reopen the hearing to consider MPD's new evidence. "It is well-established that a highly deferential standard applies to arbitration decisions ... [and] it is equally well-established that courts are even more deferential regarding procedural decisions. *American Postal Workers Union v. United States Postal Serv.*, 362 F. Supp. 2d 284, 289 (D.D.C. 2005). Indeed, in arbitration proceedings, "[t]he required deference applies particularly to arbitrators' procedural rulings. . . ." *Nat'l Football League Players Ass'n v. Office and Professional Employees Intern. Union Local 2*, 947 F.Supp. 540, 545 (D.D.C. 1996). The arbitrator determined that he must make his decision on the facts as they existed at the time of the hearing. (See Award at 23). MPD's new evidence, Mayor's Order 2009-117, was not signed until two days after the hearing. The arbitrator's decision to reject consideration of this evidence, and his decision not to reopen the hearing fell well within his authority to control the proceedings. See *Metro. Campus Police Officer's Union*, 519 F. Supp. 2d at 36-37.

The arbitrator found, as a factual matter, that if anyone should have known of this Order it was the Chief of Police. (See Award at 23). In addition, the arbitrator found that there was no evidence that FOP had prior knowledge of Order 2008-92 and deliberately withheld it. (See Award at p. 23). The Board may not challenge the arbitrator's factual findings and must take such determinations as true. See *Misco*, 484 U.S. at 37-38 (parties agree to accept arbitrator's version of the facts); *United States Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686, 689 (D.C. Cir. 2009) ("arbitrator's improvident, even silly, fact finding does not provide a basis for a reviewing court to refuse to enforce the award") (quotation omitted). Here, the arbitrator, looking at the facts along with terms of the CBA, determined that FOP did not violate Article 19, Part E, Section 5(2) because FOP did not deliberately withhold the Order, which was a Mayoral Order issued to the MPD (and not FOP). (See Award at p. 23). The arbitrator was therefore construing the terms of the CBA in this case.

Finally, FOP introduced Mayor's Order 2008-92 as impeachment evidence. Assistant Chief Durham testified as to the bases for the authority for MPD to institute AHOD. At that point, FOP showed him Order 2008-92, to challenge his testimony concerning the bases of MPD's authority. (See Award at 13). The arbitrator's acceptance of impeachment evidence that had not been previously disclosed is consistent with standard trial practice that impeachment

evidence need not be listed as an exhibit. See Fed.R.Civ.P. 26(a)(3)(A) (parties need not disclose impeachment evidence in the pretrial disclosures); *McPheeters v. Black & Veatch Corp.*, 427 F.3d 1095, 1105 (8th Cir. 2005) (impeachment exhibit admissible even though not on exhibit list).²

Arbitrator Truesdale had the authority to consider Mayor's Order 2008-92, and MPD therefore does not provide any basis to modify or set aside the Award under the CMPA.

B. The Award Does Not Compel the Violation of Any Law and Public Policy.

MPD also contends that the Award contravenes law and public policy. (Request at pgs. 8-12). MPD suggests that the Arbitrator incorrectly applied Mayor's Order 2009-117, Mayor's Order 2008-92, Mayor's Order 2008-81, and Mayor's Order 2008-83. (Request at pgs. 8-12). A correct application of these Orders, MPD argues, would lead to the conclusion that MPD had the authority to implement AHOD, and that MPD did not violate the CBA. (Award at 8-12).

Pursuant to D.C. Code § 1-605.02(6), MPD must show that "the award on its face is contrary to law and public policy." Parties seeking reversal of an arbitration award based on law and public policy have a high burden. The Supreme Court has stated that a public policy allegedly violated by an arbitration award "must be well defined and dominant and is to be ascertained 'by reference to laws and legal precedents, and not from general considerations of supposed public interests.'" *W.R. Grace and Co. v. Local Union 759, Intern. Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66, (1945)). MPD, therefore, must demonstrate that the public policy violation "suffice[d] to invoke the 'extremely narrow' public policy exception to enforcement of arbitrator awards." *District of Columbia Metropolitan Police Dept. v. District of Columbia Public Employee Relations Bd.*, 901 A.2d 784, 789 (D.C. 2006) (citing *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986)).

²MPD directs the Board to Local Rules 16(b)(5) for the United States District Court for the District of Columbia, which states that exhibits must be listed in advance of trial, and argues that Article 19, Part E, Section 5(2) serves a similar purpose. (Request at p. 6 & n.1). The rules of the District Court for the District of Columbia, however, do not apply to the arbitrator. Instead of being subject to state or federal rules of civil procedure, arbitrators "are not constrained by formal rules of procedure . . ." See, e.g., *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444-45 (11th Cir. 1998) ("An arbitrator enjoys wide latitude in conducting an arbitration hearing.") In arbitration proceedings, "the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." *Id.* at 57-58. Thus, the local rules of the United States District Court for the District of Columbia are inapplicable in this case.

The "public policy exception" is "narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy.'" See American Postal Workers Union, 789 F.2d at 8. Furthermore, the public policy exception:

is not available for every party who manages to find some generally accepted principle which is transgressed by the award. Rather, the award must be so misconceived that it 'compels the violation of law or conduct contrary to accepted public policy.'

Revere Copper and Brass Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83 (D.C. Cir. 1980), cert. denied, 446 U.S. 983 (1980) (citing *Union Employers Division of Printing Industry, Inc. v. Columbia Typographical Union No. 101*, 353 F.Supp. 1348, 1349 (D.D.C.1973)).

Even if an arbitrator's award runs contrary to some generally recognized policy, it still does not justify applying the "public policy exception," unless the award is itself illegal or requires a party to act illegally. *District of Columbia Dept. of Corrections v. Teamsters Union Local No. 246*, 554 A.2d 319, 323 (D.C. 1989) (refusing to "apply some free-floating notion of 'policy'").

The Board must also defer to the arbitrator's interpretation of external law incorporated into the contract:

When construction of the contract implicitly or directly requires an application of 'external law,' i.e., statutory or decisional law . . . , the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the 'contract reader,' his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties to the contract.

District of Columbia Public Employee Relations Bd., 901 A.2d at 789 (citation omitted). Thus, the Board may not set aside the Award solely because the arbitrator may have made some legal error in reaching his conclusions.

It is not enough for MPD to raise supposed deficiencies in the arbitrator's legal reasoning. MPD bargained for Arbitrator Truesdale's interpretation of the CBA. Therefore, MPD must show that carrying out the Award would compel the violation of law and public policy. Arbitrator Truesdale ordered that MPD pay officers time and one-half pursuant to the terms of the Fair Labor Standards Act, and to rescind the teletype ordering AHOD. (See Award at p. 27). Carrying out this Award would not require the breach of any law and public policy. Even if the arbitrator arrived at this result through arguably faulty logic or a misapplication of

law, that is not enough for the Board to modify or set aside the Award. See D.C. Code § 1-605.02(6); *District of Columbia Public Employee Relations Bd.*, 901 A.2d at 789.

In the present case, Arbitrator Truesdale concluded that the AHOD, if implemented, would constitute a change to the scheduling provisions of Article 24 of the CBA. (See Award at p. 26). The arbitrator examined D.C. Code § 1-612.01 to determine whether MPD had the authority to make such a change to a term of the CBA. The arbitrator concluded that D.C. Code § 1-612.01 required a written determination that MPD would be “seriously handicapped” without AHOD, and that neither the Mayor nor the Chief of Police made any such determination. (Award at p. 26). Accordingly, Arbitrator Truesdale found that MPD violated the CBA when it changed the terms of the contract in the absence of such a written determination. (Award at p. 26). MPD does not challenge this core conclusion of the arbitrator, which forms the basis of his decision. (See Request at pgs. 8-12). MPD’s challenge to the Award on a law and public policy basis therefore fails.

MPD’s law and public policy challenge to the Award is based on the Arbitrator’s secondary conclusion that the Chief of Police did not have authority to make the “seriously handicapped” determination because such authority had been rescinded by Mayor’s Order 2008-92. (See Request at pgs. 8-12). Even if the Board were to entertain MPD’s argument that the arbitrator misapplied the Mayor’s Orders, MPD still does not present a basis to modify or set aside the Award on public policy grounds.

First, the arbitrator determined that at the time MPD implemented AHOD, the Chief of Police did not have the authority to make the “seriously handicapped” determination. (See Award at p. 23). MPD states that this conclusion is incorrect because Mayor’s Order 2009-117 retroactively restored the Chief’s authority to make this determination. (Request at pgs. 8-10). In the arbitrator’s bargained-for view, Mayor’s Order 2009-117 states that the Order is to be implemented as if it originally was signed on June 5, 2008. (See Award at 23). Mayor’s Order 2008-92 (rescinding was signed on June 26, 2008). (See Award at p. 23). The arbitrator expressed doubts that the Mayor’s Order 2009-117 would not have survived rescission by 2008-92, which was implemented after June 5, 2008. (See Award at p. 23). MPD disputes this interpretation and argues that Mayor’s Order 2008-81,³ as amended by Mayor’s Order 2009-117, remained in effect. (Request at p. 11). Even if the arbitrator’s interpretation of these Mayor’s Orders is wrong, this is not a basis to set aside or modify the Award. *District of Columbia Public Employee Relations Board*, 901 A.2d at 789.

Furthermore, whether the Mayor can retroactively change the fact of whether the Chief had authority to make the “seriously handicapped” determination is in doubt. MPD does not

³Mayor’s Order 2008-81 was never entered into evidence in the arbitration proceedings. (See Award at p. 23).

dispute that Mayor's Order 2008-92 stripped the Chief of the authority to make this determination. (See Request at p. 10 (removing the Chief's authority was an error)). Only after the hearing had concluded did the Mayor seek to retroactively provide the Chief with this authority. MPD contends that the government can act retroactively. (See Request at p. 10 (citing *United States v. Carlton*, 512 U.S. 26 (1994))). While the government may have the authority to act retroactively in certain instances, this does not end the question of whether the Mayor could retroactively empower the Chief to make the "seriously handicapped" determination here.

The arbitrator determined that only the Mayor could make the "seriously handicapped" determination under the CBA and CMPA, as the CBA stood on the date MPD sent the teletype ordering the AHOD. (See Award at 25). The later Mayor's Order does not alter the fact that the Chief did not have the authority to make this determination at the time.⁴ Courts faced with questions of retroactive delegation of authority have concluded that such retroactive delegation does not make an otherwise invalid act valid. (See *Timberland Paving & Constr. Co. v. United States*, 8 Cl. Ct. 653, 660 (Cl. Ct. 1985)) (retroactive delegation of authority to contracting official did not render invalid action valid). The Mayor's retroactive delegation of authority therefore may not have been valid in this case.

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

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
Washington, D.C.

August 5, 2011

⁴ The arbitrator further found that the Chief did not actually make the determination that MPD would be seriously handicapped without AHOD. (See Award at pgs. 25- 26).

CORRECTED CERTIFICATE OF SERVICE

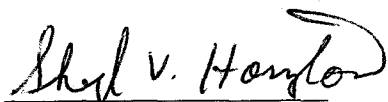
This is to certify that the attached Decision and Order in PERB Case No.10-A-01 was transmitted via Fax and U.S. Mail to the following parties on this the 5th day of August 2011.

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