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**Government of the District of Columbia  
Public Employee Relations Board**

_____	)	
In the Matter of:	)	
	)	
The American Federation of Government	)	
Employees, Local 872,	)	
	)	
Petitioner,	)	
	)	PERB Case No. 04-A-17
and	)	
	)	Opinion No. 908
	)	
District of Columbia	)	
Water and Sewer Authority,	)	
Respondent.	)	
_____	)	

**DECISION AND ORDER**

**I. Statement of the Case:**

The American Federation of Government Employees, Local 872 ("Union", "AFGE" or "Petitioner") filed an Arbitration Review Request ("Request"). The Union seeks review of an Arbitration Award ("Award") that denied the Union's claim that the District of Columbia Water and Sewer Authority ("WASA" or "Respondent") had violated the Collective Bargaining Agreement ("CBA") by issuing a Memorandum designating WASA employees as essential employees with certain duties. The Union contends that the Arbitrator exceeded her jurisdiction and that the decision should be reversed. WASA opposes the Union's Request.

The issue before the Board is whether "the arbitrator exceeded his or her jurisdiction." D.C. Code § 1-605.02(6) (2001 ed).

**II. Discussion:**

On August 25, 2003, WASA issued a memorandum to all Water Services employees that stated:

Subject: Notification of Designation as an Essential Employee

This memorandum serves as official notification that you are designated an *Essential Employee*. As an Essential Employee, you will be required to work during periods of restricted operation, when the Authority has been closed or when non-essential employees have been released due to inclement weather, critical or hazardous conditions or a public emergency. The General Manager or designee has sole authority to declare such conditions.

As an *Essential Employee* you are required to:

- Remain at your duty station when an early dismissal is authorized for non-essential employees.
- Report to your duty station on time and as scheduled when a condition develops during non-working hours, which results in the closing of Authority offices, delayed opening or liberal leave is in effect.
- Remain accessible by telephone when off-duty to respond to inclement weather, critical or hazardous conditions or public emergency. When notified, you will report to work to perform tasks related to the situation or to maintain operations.
- Make every effort to report to work in such situations and, if unable to do so, immediately notify your supervisor of your inability to report to duty. Failure to report or remain on duty as required may result in a charge of Absence Without Leave (AWOL).

In addition to applicable normal pay and overtime provisions, you will be entitled to compensatory time on an hour-for-hour basis for work performed when the Authority is closed.

Please be advised that this *Essential Employee* designation is effective immediately and will remain in effect until you are otherwise notified. (Award at pgs. 4-5).

The Union filed a grievance on behalf of the Water Services employees, alleging that the memorandum had the effect of placing all the Water Services employees into an on-call status, thereby affecting the terms and conditions of employment without notification to the Union and without affording the Union an opportunity to bargain. (See Award at p. 5). As a remedy, the grievance sought compensation for all affected employees under "on-call pay" provisions of Article 7 of the CBA. (See Award at p. 6). The Union invoked arbitration, and the matter proceeded to hearings held on February 11<sup>th</sup> and 19<sup>th</sup>, 2004. (See Award at p. 6).

At arbitration, the Union argued that the issuance of the August 24, 2003 memorandum, in conjunction with a September 3, 2005<sup>1</sup> memorandum effectively placed all Water Services employees into on-call status between November 15, 2003, and February 28, 2004. (See Award at p. 18). In support of this claim, the Union points to the provisions of the August 25, 2003 memorandum requiring essential employees to work during periods of restricted operation. (See Award at p. 18). The Union also contends that the winter period is a restricted operation, and essential employees are required to remain available during their off-duty hours during an additional period of time between November 15, 2003, and February 28, 2004. Lastly, the Union claims that a previous arbitration award<sup>2</sup> presented identical facts and the award was in favor of the grievants granting on-call pay. (See Award at p. 14).

WASA countered that the Union's position is based on its taking portions of the language contained in the memorandum and the CBA out of context. (See Award at p. 16). WASA contends that nothing in the August 2003 memorandum contravenes the CBA. Moreover, WASA asserts that the Union failed to establish that the August 2003 Memorandum requires essential employees to be on-call.

In an Award dated June 5, 2004, Arbitrator Spilker denied the Union's grievance. The Arbitrator found that the August 2003 memorandum did not require essential employees to be in an on-call status during their off-duty hours. (See Award at p. 18). In addition, the Arbitrator determined that the August 2003 memorandum did not conflict with the provisions of the CBA.<sup>3</sup> (See Award at p. 21). The Arbitrator concluded that the August 2003 memorandum differed from the on-call provisions in Article 7 of the CBA, in that the August 2003 memorandum did not require essential employees to report to work. (See Award at pgs 19-20). The Arbitrator also distinguished this case from Arbitrator Strongin's 2003 Award which was relied upon by the Union. She stated that there was language in the 2002 memorandum considered by Arbitrator Strongin concerning

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<sup>1</sup>The September 3, 2005, memorandum identified the winter peak period, or period of restricted operation, to be between November 15, 2003 and February 28, 2004.

<sup>2</sup>The Union refers to a 2003 Award issued by Andrew Strongin which also concerned the instant parties.

<sup>3</sup>Specifically, the Union had alleged that the August 2003 memorandum conflicted with Article 7 - On-Call Pay; Article 11 - Compensatory Time; and Article 38 - Administrative Closings.

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winter peak periods that expressly stated that essential employees would be on call, and no such language was present in the August and September 2003 memoranda. (See Award at p. 21).

In their Request, the Union claims that the Arbitrator exceeded her jurisdiction by issuing an Award that did not find that the August 2003 memorandum conflicted with the provisions of the CBA. Therefore, the Union is requesting that the Board reverse the Award. WASA opposes the Union's Request.

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 asserts that the Arbitrator exceeded her jurisdiction because her Award did not derive its essence from the CBA.<sup>4</sup> In support of this argument, the Union contends that the Award, by upholding the policy set forth in the August 2003 memorandum, conflicts with the express terms of the CBA. Specifically, the Union argues that the Arbitrator should have found that the August 2003 memorandum in effect places all essential employees "on call" during their off-duty hours in the winter peak period. (See Request at p. 3). The Union also claims that the Award is in conflict with the CBA by not ruling as Arbitrator Strongin did in a 2003 Award between the parties. (See Request at p. 4). In that 2003 Award, Arbitrator Strongin determined that a 2002 memorandum concerning the duties of essential employees during the winter peak period had designated the grievants as on call, and awarded on-call pay to the affected grievants. (See Request Exhibit 3 at p. 10). In addition, the Union asserts that the Award imposes additional requirements not expressly provided in the CBA, by requiring essential employees to be on call during their off-duty hours in winter peak periods. In support of this contention, the Union alleges that the provisions of the CBA do not support this requirement. (See Request at pgs. 4-5).

One of the tests that the Board has used when determining whether an arbitrator has exceeded her 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 20*, 34 DCR 3610, Slip Op. No. 156 at p. 5, PERB Case No. 86-A-05 (1987). See also, *Dobbs, Inc. V. Local No. 1614, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*

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<sup>4</sup>In support of this argument the Union cites *D.C. Public Schools v. AFSCME, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at 5, PERB Case No. 86-A-05 (1987).

*of America*, 813 F.2d 85 (6<sup>th</sup> Cir. 1987). In *MPD and FOP/MPD Labor Committee*, 49 DCR 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 U.S. Court of Appeals’ 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 (6<sup>th</sup> Cir. 1986).

In the present case, the Board finds that the Award which denied the Union’s claim that the 2003 memorandum placed essential employees in an “on-call” status derived its essence from the CBA. Therefore, we find that the Award meets the *Cement Division* standard. Moreover, the Union has failed to establish that the Award conflicts with any express term of the CBA, nor does it impose additional requirements that are not expressly provided in the CBA. As a result, we conclude that the Award can be rationally derived from the terms of the parties’ agreement. Moreover, the Union’s contention requests that the Board adopt its interpretation of the 2003 memorandum as it relates to the CBA.

We have held and the District of Columbia Superior Court has affirmed that, “[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the [CBA].” *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int’l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator’s decision must be affirmed by a reviewing body “as long as the arbitrator is even arguably construing or applying the contract.” *Misco, Inc.*, 484 U.S. at 38. Also, we have explained that:

[by] submitting a matter to arbitration “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based.”

*District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police*

*Department Labor Committee (Grievance of Angela Fisher), 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).*

The Board finds that the Union's arguments represent a mere disagreement with the Arbitrator's interpretation of the August 25, 2003, memorandum as it relates to the CBA. In addition, the Board finds that this argument requests that this Board adopt the findings and conclusions of the Union. As stated above, the parties' have agreed to be bound by the Arbitrator's interpretation and it is not for this Board to substitute its judgment, or the Union's, for that of the Arbitrator. Consequently, the Board finds that the Union has failed to present a statutory basis for review and will not reverse the Award this ground.

In view of the above, we find that the Union has not met the requirements for reversing Arbitrator Spilker's Award. In addition, we find that the Arbitrator's conclusions are supported by the record, are based on a thorough analysis and cannot be said to be clearly erroneous or exceeding her jurisdiction under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

- (1) The American Federation of Government Employees, Local 872'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.**

**June 27, 2007**

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 04-A-17 was transmitted via Fax and U.S. Mail to the following parties on this the 27<sup>th</sup> day of June 2007.

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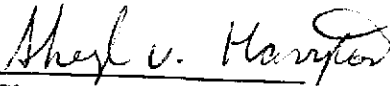
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