Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Fire and Emergency Medical Services,	
Petitioner,	PERB Case No. 10-A-09
v.	Opinion No. 1258
American Federation of Government Employees, Local 3721,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Fire and Emergency Medical Services Department ("Agency" or "Petitioner") filed an Arbitration Review Request ("ARR") in the above-captioned matter. The Agency seeks review of an arbitration award ("Award") that sustained the American Federation of Government Employees, Local 3721's ("Union or "Respondent") grievance filed on behalf of bargaining unit employees who work twelve hour rotating shifts as Paramedics or Emergency Medical Technicians. Arbitrator Jerome Ross found that the grievance was arbitrable and that the Agency violated the Fair Labor Standards Act ("FLSA") by failing to pay overtime to the aggrieved employees. (Award at 9-10).

In its ARR, Petitioner alleges that: (1) the Arbitrator exceeded the authority granted to him by the collective bargaining agreement ("CBA") by concluding that an alleged FLSA violation is arbitrable under the CBA's definition of a grievance; and (2) that the Arbitrator exceeded his the authority granted to him by the CBA because the Award does not "draw its essence from the contract." (ARR at 5).

The Union denies the Petitioner's allegations and asks that the Award be affirmed. ("Opposition"). The question before the Board is whether the Arbitrator exceeded his jurisdiction.

II. Discussion

When a party files an arbitration review request, the Board's scope of review is extremely narrow. *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, __ D.C. Reg. __, Slip Op. No. 1206 at p. 3, PERB Case No. 05-A-11 (2011). The Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award only in three limited circumstances: (1) If "the arbitrator was without, or exceeded his or her jurisdiction"; (2) If "the award on its face is contrary to law and public policy"; or (3) If the award "was procured by fraud, collusion or other similar and unlawful means." D.C. Code § 1-605.02(6) (2001).

The arbitration at issue in this case stemmed from a 2008 grievance filed on behalf of "all employees in the union represented by the Union, who work a twelve (12) hour rotating shift as their normally scheduled tour of duty." (Award at 3). In the grievance, the Union asserted that the Agency intentionally and willfully violated the FLSA following implementation of a renegotiated Compensation Agreement by failing to pay bargaining unit members overtime for working between 41 and 48 hours per week. (Award at 1, 6). The Arbitrator found the following facts:

> Paramedics and Emergency Medical Technicians (EMTs) in the bargaining unit work rotating twelve hour shifts. Historically, they have been scheduled to work two 12-hour day shifts (7a.m. – 7p.m.) followed by two 12-hour night shifts (7p.m. to 7a.m.). These four days are followed by four days off. As this eight day schedule progresses through seven day calendar weeks, some employees work 48 hours in a seven day week, and in other weeks they work 36 hours. Prior to October 2006, these employees were paid overtime for hours worked over 40 in a calendar week. Following implementation of the 2006 Compensation Agreement on October 1 of that year, the Agency discontinued paying overtime for hours 41-48, but continued to pay for hours worked over 48 in a week.
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> The D.C. regulations and the D.C. Code define a "compressed work schedule" as working 80 hours in a two-week period in which employees work less than ten workdays. Employees who work such a schedule are exempt from the FLSA provisions. The record reflects that, during the 2006 Compensation Agreement negotiations, the parties negotiated the language contained in Article 8, Section B.3 allowing for Compressed Work Schedules which exceeded eight hours in a day or 40 hours in a week "to be deemed the employee's regular tour of duty, and not be considered overtime within the confines of the specific compressed work schedule and this Article."

(Award at 2).

In the ARR, the Agency first argues that the Arbitrator exceeded the authority granted to him by the CBA by concluding that a FLSA violation is arbitrable. (ARR at 5). The Board has held that "[i]n any agreement containing an arbitration clause, there is a presumption of arbitrability." *Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 54 D.C. Reg. 2683, Slip Op. No. 819 at p. 10-11 (2007) (*citing Beatrice/Hunt Wesson, Inc.*, 16 LAIS 1060 (1989). Further, "[a] grievance...is considered arbitrable in the absence of any express provision excluding a particular grievance from arbitration." *Id.* There is no collective bargaining exemption to the FLSA in the parties' CBA. (Award at 3).

The District of Columbia Superior Court has affirmed the Board's previous holding 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. Sup. Ct. May 24, 1993). *See also United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). In *Misco*, the U.S. Supreme Court held that an arbitrator's decision must be upheld "as long as the arbitrator is even arguably construing or applying the contract." 484 U.S. at 38. The Board has held that "[b]y 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 D.C. Reg. 7217, Slip. Op No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *District of Columbia Metropolitan Police Department v. Fraternal Order of Police/Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip. Op. No. 738, PERB Case No. 02-A-07 (2004).

In the instant case, the Arbitrator was within his authority to determine that the grievance was arbitrable. The FLSA generally applies to the Agency and was not specifically excluded from the CBA. The Arbitrator met the *Misco* standard of "arguably construing or applying the contract," and thus the Agency is bound by the Arbitrator's interpretation of the CBA. The Agency merely disagrees with the Arbitrator's interpretation of the CBA, and the Board has long held that such grounds to not present a statutory basis for modifying or setting aside an award. *See, e.g., D.C. Dep't of Public Works and American Federation of State, County and Municipal Employees, District Council 20, Local 2091*, 39 D.C Reg. 3344, Slip Op. No. 219, PERB Case No. 88-A-02 (1989).

Additionally, the Arbitrator did not exceed the authority granted to him by the CBA by failing to derive his Award from the essence of the agreement. In support of its contention to the contrary, the Agency cites four factors from the Sixth Circuit's decision in *Cement Division, National Gypsum Co. v. United States Steelworkers of America*, AFL-CIO, Local 135, 793 F.2d 759 (6th Cir. 1986) (ARR at 4). However, the Board has agreed with the Sixth Circuit when it overruled *Cement Divisions* in *Michigan Family Resources, Inc. v. Service Employees*

International Union, Local 517M, 475 F.3d 746 (2007). In considering a similar "essence of the agreement" contention in *Michigan Family Resources*, the Sixth Circuit stated that:

> we will consider the questions of "procedural aberration"...[and ask]: [D]id the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in 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.
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> The Court's repeated insistence that the federal courts must tolerate "serious" arbitral errors suggests that judicial consideration of the merits of a dispute is the rare exception, not the rule. At the same time we cannot ignore the specter that an arbitration decision could be so "ignor[ant]" of the contract's "plain language," [citation omitted]...as to make implausible any contention that the arbitrator was construing the contract...Such exception, of course, is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that...This view of the "arguably construing" inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes...

National Ass'n of Government Employees, SEIU, Local R3-07 v. District of Columbia Office of Communications, __ D.C. Reg. __, Slip Op. No. 1203, PERB Case No. 10-A-08 (2011) (citing *Michigan Family Resources*, 475 F.3d at 753) (overruling *Cement Divisions*, 793 F.2d 759).

In the instant case, the Board finds nothing in the record to suggest that fraud, a conflict of interest, or dishonesty affected the Arbitrator's decision or the arbitral process. No one disputes that the collective bargaining agreement committed this grievance to arbitration and the Arbitrator was mutually selected by the parties to resolve the dispute. *See Michigan Family Resources*, 475 F.3d at 754. Hence, the Board rejects the argument that the Arbitrator exceeded his authority.

In view of the above, we find no merit to Petitioner's argument. We find that the Arbitrator's conclusions are based on a thorough analysis. In short, the Arbitrator's ruling cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority

under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Fire and Medical Services' 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.

April 25, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-09 was transmitted via Email and U.S. Mail to the following parties on this the 25th day of April 2012.

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