

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

| | | |
|---|---|-----------------------|
| In the Matter of: |) | |
| |) | |
| Metropolitan Police Department, |) | |
| |) | |
| Petitioner, |) | PERB Case No. 16-A-08 |
| |) | |
| v. |) | Opinion No. 1608 |
| |) | |
| Fraternal Order of Police/Metropolitan Police |) | |
| Department Labor Committee, |) | |
| |) | |
| Respondent. |) | |

DECISION AND ORDER

Petitioner Metropolitan Police Department (“the Department”) filed an arbitration review request (“Request”) seeking review of an Opinion and Award (“Award”) that sustained in part a group grievance brought by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“the Union”). By agreement of the parties, the Arbitrator left the determination of damages for the parties to negotiate. The Arbitrator stated that he retained jurisdiction “if their best efforts at settlement are unsuccessful.”¹

As we find the Request to be premature, we dismiss the Request without prejudice.

I. Statement of the Case

On December 10, 2008, the chief of police (“the Chief”) announced scheduling changes in preparation for the January 20, 2009 presidential inauguration. The schedule changes lasted from January 11, 2009, to January 24, 2009, and included twelve-hour shifts with only one day off per week.²

The schedule changes applied to members of the force assigned to the Metropolitan Police Academy (“MPA”). On January 21, 2009, the commander of the MPA informed staff of the MPA that effective immediately schedules would revert to eight-hour shifts with two days off per week.³ This readjustment led the Union to file a grievance on behalf of a group of five

¹ Award 3.
² Award 12.
³ Award 13.

officers assigned to the MPA.⁴ The Step One Group Grievance asserted in part that the January 21, 2009 schedule change was made without the fourteen days' notice required by article 24 of the parties' collective bargaining agreement ("CBA"). Having received no response to the Step One Group Grievance, the Union filed a Step Two Group Grievance with the Chief on February 20, 2009. In a letter of February 27, 2009, the Chief denied the grievance and gave her reasons for doing so.⁵

On March 10, 2009, the Union demanded arbitration of the group grievance. Six and a half years later, an arbitration hearing was held. The parties presented to the Arbitrator, Sean Rogers, these two issues for resolution: "Whether MPD violated CBA Articles 1, 4, 24 and 49 when it changed MPA members' work schedule on January 21, 2009? If so what shall be the remedy?"⁶ In the Award, the Arbitrator explained the procedure the parties had agreed upon for the separate resolution of those two issues:

The Parties agreed to bifurcate the dispute. I am initially to resolve the merits. If the Arbitrator finds that the answer to Issue [One] is **Yes**, then the proceeding will be bifurcated with regard to my consideration of damages. (Tr 16-17). For this reason, my Award is to be limited to a determination of liability with regard to FOP's assertion of an MPD CBA violation. Then the determination of damages will be initially left to the Parties to attempt [to] agree and settle.

Absent resolution and settlement of damages, then the Parties will reconvene the arbitration hearing and I am to resolve the dispute. For this reason, the Parties agree that I am to retain jurisdiction if their best efforts at settlement are unsuccessful.⁷

The parties submitted post-hearing briefs, and in due course the Arbitrator issued an Award on the liability issue. The Arbitrator found that the January 21, 2009 change in MPA members' schedules and days off violated articles 4 and 24 of the CBA and D.C. Official Code § 1-612.01 *et seq.* but did not violate articles 1 or 49 of the CBA or D.C. Official Code § 1-617.04(a).⁸

Regarding the remaining issue of damages, the Arbitrator alluded to arguments that the parties had made on damages. The Union had argued that the MPA members were entitled to time and a half pay plus liquidated damages under the Fair Labor Standards Act. The Department had argued that "public policy prohibits compensating the MPA members for work not actually performed."⁹ After noting the parties' bifurcation agreement, the Arbitrator stated how he intended to resolve the issue of damages:

⁴ Award 11.

⁵ Award 13-14.

⁶ Award 3.

⁷ Award 3.

⁸ Award 21, 23.

⁹ Award 23.

I find that more briefing is needed on the important issue of liquidated damages pursuant to CBA Article 24. I am not prepared to resolve the damages issue until I hear more from the Parties. Also, I find that this issue is more appropriate for resolution as part of an overall and final determination on damages.

Having established liability, I leave all damages issues initially to the Parties to attempt to reach an agreement in final resolution and settlement of the dispute. Absent resolution and settlement, either Party may reconvene a hearing or set an agreed briefing schedule without hearing for a final Award.¹⁰

On April 4, 2016, the Department filed the instant Request. The Union filed an Opposition to the Request on April 18, 2016.

II. Discussion

The Department's statutory basis for the Request is the Board's power to modify, set aside, or remand an arbitration award that "on its face is contrary to law and public policy."¹¹ The Department asserts that there is a public policy against "exaction of compensation for services not performed."¹² It argues that this policy is articulated by the National Labor Relations Act, as amended by the Taft-Hartley Act, which prohibits a certain type of "featherbedding." Section 8(b)(6) of the National Labor Relations Act (29 U.S.C. § 158(b)(6)) declares that "[i]t shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed." The Department states that the same policy is evident in decisions of the Supreme Court applying this statute. The Department claims that the Award violates¹³ and contravenes¹⁴ this policy but never explains how it violates or contravenes the policy.

In opposing the Request, the Union correctly points out that the Request does not challenge factual and legal findings of the Arbitrator that support his conclusion that the Department violated the CBA and D.C. Official Code § 1-612.01 *et seq.*¹⁵ Instead, the Union says, the Department raises "the defense of feather-bedding."¹⁶ The Union asserts that article 19(E) of the CBA bars this defense because the Department failed to raise it as a ground for denying the grievance in its February 27, 2009 letter.

¹⁰ Award 23.

¹¹ D.C. Official Code § 1-605.02(6). The other narrow grounds for review, which are not alleged in this case, are that "the arbitrator was without, or exceeded, his or her jurisdiction; the award . . . was procured by fraud, collusion, or other similar and unlawful means." *Id.*

¹² Request 9.

¹³ Request 6, 9.

¹⁴ Request 7, 8.

¹⁵ Opp'n 12.

¹⁶ Opp'n 5.

“Likewise,” the Union adds, “the MPD failed to raise ‘feather-bedding’ as a ground to deny the D.C. Police Union’s grievance at the arbitration hearing in this matter or in its post-hearing brief.”¹⁷ The Union proceeds to contradict this statement by arguing that “several pages of the MPD’s post-hearing brief were dedicated to its public policy argument” in terms that mirror the argument in the Request.¹⁸ The Union states that it responded to the public policy argument in its post-hearing brief,¹⁹ and it responds to the argument in its Opposition, asserting that the public policy is inapplicable to this case.²⁰ The Union contends that “the public policy argument made by the MPD in its ARR represent[s] an improper attempt to reargue legal positions that were already considered and rejected by Arbitrator Rogers.”²¹

Noting the bifurcation of the case, the Union argues in the alternative that “while the MPD’s public policy argument was rejected by Arbitrator Rogers in ruling in favor of the D.C. Police Union on the merits of its grievance, to the extent that the MPD’s ARR is considered a public policy challenge to awarding damages to the D.C. Police Union, this argument is premature and should be denied by PERB.”²²

Whether the CBA would bar the Department’s public policy argument if the Department did not raise it in denying the grievance is a question for the Arbitrator. It is the Arbitrator’s interpretation of the CBA, not the Board’s, for which the parties have bargained.²³

In the arbitration itself, the Department’s public policy argument was neither waived (by not being presented to the Arbitrator) nor adjudicated (by being rejected by the Arbitrator). The Arbitrator acknowledged the Department’s public policy argument and reserved consideration of it until the damages phase of the arbitration in accordance with the parties’ agreement to bifurcate the case.²⁴ The Arbitrator found a “violation of CBA Articles 4, 24” and the law,²⁵ but he has not found at this stage of the arbitration “a compensable violation,” as the Union claims.²⁶

Because the Arbitrator has yet to award the remedy of compensation but rather has deferred that issue for later consideration in a bifurcated proceeding, the Department’s contention that such a remedy violates public policy “is premature speculation,” as the U.S. Third Circuit Court of Appeals said in a similar case.²⁷ The Federal Labor Relations Authority (“FLRA”) has also declined to review arbitration awards on the basis of premature arguments. In cases in which an arbitrator issued an award but retained jurisdiction to consider awarding

¹⁷ Opp’n 5.

¹⁸ Opp’n 9.

¹⁹ Opp’n 9-10.

²⁰ Opp’n 6-7, 9-11.

²¹ Opp’n 11.

²² Opp’n 12.

²³ *D.C. Pub. Sch. v. Council of Sch. Officers, Local 4*, 63 D.C. Reg. 8980, Slip Op. No. 1574 at 11, PERB Case No. 15-A-05 (2016).

²⁴ Award 16-17, 23-24.

²⁵ Award 24.

²⁶ Opp’n 10.

²⁷ *Rite Aid N.J., Inc. v. United Food Commercial Workers Union, Local 1360*, 449 F. App’x 126, 129 (3d Cir. 2011) (Where parties to an arbitration bifurcated the issues of liability and remedy and the arbitrator issued an award on liability only, the court affirmed denial of a petition to vacate the award that was based on a public policy objection to a potential remedy).

attorneys' fees as a remedy, the FLRA has dismissed without prejudice the respondents' exceptions to that remedy.²⁸ The FLRA's dismissal of these cases without prejudice is consistent with the Board's practice of dismissing without prejudice appeals from an arbitrator's decision that is not a final award.²⁹

Therefore, the Department's Request is dismissed without prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The arbitration review request is dismissed without prejudice.
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 Chairman Charles Murphy and Members Ann Hoffman, Barbara Somson, and Douglas Warshof.

Washington, D.C.

January 12, 2017

²⁸ *Broad. Bd. of Governors Office of Cuba Broad. and AFGE Local 1812*, 66 F.L.R.A. 1012, 1018 (2012); *U.S. Dep't of Veterans' Affairs Med. Ctr. Coatesville, Pa. and NAGE Local R3-35*, 53 F.L.R.A. 1426, 1431-32 (1998).

²⁹ *D.C. Dep't of Consumer & Regulatory Affairs v. AFGE, Local 2725*, 59 D.C. Reg. 15198, Slip Op. No. 1338, PERB Case No. 11-A-01 (2012); *Univ. of D.C. and Univ. of D.C. Faculty Ass'n/NEA*, 38 D.C. Reg. 845, Slip Op. No. 260, PERB Case No. 90-A-05 (1990).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-A-08 is being transmitted via File & ServeXpress to the following parties on this the 13th day of January 2017.

Mark Viehmeyer
Metropolitan Police Department
300 Indiana Ave. NW, room 4126
Washington, DC 20001

Marc L. Wilhite
Pressler & Senftle P.C.
1432 K St. NW, 12th Floor
Washington, DC 20005

/s/ Najibah Almahdi

Program Analyst