

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
)	
District of Columbia)	
Department of Finance and)	
Revenue,)	
)	
Petitioner,)	PERB Case No. 88-A-01
)	Opinion No. 217
and)	
)	
American Federation of)	
State, County and)	
Municipal Employees,)	
Council 20, Local 2776,)	
)	
Respondent.)	

DECISION AND ORDER

On October 14, 1987 the District of Columbia Government Department of Finance and Revenue ("DFR") filed an Arbitration Award Review Request with the District of Columbia Public Employee Relations Board (Board). DFR alleges that an Arbitration Award issued in a matter between it and the American Federation of State, County and Municipal Employees, Council 20, Local 2776 (AFSCME), is on its face contrary to law and public policy, and that the Arbitrator exceeded his authority or jurisdiction. AFSCME filed a document styled "Opposition To Arbitration Review Request" with the Board on November 2, 1987.

We hold that the Award is not on its face contrary to law and public policy and that the Arbitrator did not exceed his authority or jurisdiction. Therefore the Arbitration Award Review Request is denied.

The pertinent background of this matter is as follows.

On September 19 and 20, 1986, employees of the Real Property Division of DFR attended an "Advance," ^{1/} thereby entitling them to overtime compensation, which was paid in accordance with

^{1/} An Advance is defined as "a period of group withdrawal for study and instruction under a director." Arbitration Award Review Request at p.1.

District Personnel Manual (DPM) Implementing Guidance and Procedures, Chapter 11B, Subpart 7.2. ^{2/} AFSCME grieved the failure of DFR to compensate unit employees earning above the minimum rate of DS-10 in accordance with the Collective Bargaining Agreement between the parties. ^{3/} The grievance was denied and the matter proceeded to arbitration.

The Arbitrator upheld the grievance, ordering that the grievance be considered a class grievance commencing from September 23, 1986 to the "present" for all employees in the unit represented by the Local; that the Local be provided with payroll records showing all overtime hours worked by unit members for the time period; and that the Department comply with the Award within ninety (90) days of its issuance. ^{4/}

Pursuant to the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Section 1-605.2(6), the Board has the power to "[c]onsider appeals from arbitration awards pursuant to a grievance procedure: Provided, however, that such awards may be reviewed only if the arbitrator was without, or exceeded, his or her jurisdiction, the award on its face is contrary to law and public policy..."

^{2/} DPM Implementing Guidance and Procedures, Chapter 11B, Subpart 7.2 Overtime Compensation.

* * *

(E) Overtime pay rates. The overtime rate of pay is determined as follows:

1. For each employee whose rate of pay does not exceed the minimum rate for DS-10, the hourly overtime rate is one and one-half times his or her hourly rate of basic pay.
2. For each employee whose rate of basic pay exceeds the minimum rate for DS-10, the overtime hourly rate is one and one-half times the hourly rate of basic pay at the minimum rate of DS-10.

^{3/} Collective Bargaining Agreement

Article XXVII Administration of Overtime

Section 1 - Rate of Pay: Time and one-half of the employees regular hourly rate of pay shall be paid for work under any of the following conditions, but compensation shall not be paid twice for the same hours.

^{4/} The Board construes the word "present" to denote the date of the Award, which was September 17, 1987.

The issues before the Board are:

1. Did the Arbitrator exceed his authority by finding the issue of overtime payments within the jurisdiction of the agency and thus grievable under the collective bargaining agreement?
2. Did the Arbitrator exceed his authority by ordering the Department to comply with the Award within ninety (90) days?
3. Did the Arbitrator exceed his authority by treating the grievance as continuing and class-wide, encompassing all members of the bargaining unit?
4. Is the Arbitration Award on its face contrary to law and public policy because it departs from past practice?

DFR asserted that the Arbitrator exceeded his authority in finding the matter grievable because it fell within the exclusion stated in the Collective Bargaining Agreement, Article XXII, Section 10.^{5/} DFR claims it only administers overtime pay pursuant to the DPM and does not determine the rate. Thus DFR maintained that overtime pay is not a matter within the jurisdiction of the Department. We conclude, however, that the contract clearly sets forth the overtime obligations of the employer.^{6/}

DFR claimed that the Arbitrator exceeded his authority by ordering DFR to comply with the Award within ninety (90) days after its issuance. DFR maintains that because the Collective Bargaining Agreement does not impose such a time limit the Award is not drawn from the essence of the contract. However, an arbitrator has the full range of equitable powers to fashion a remedy where the contract does not specifically limit this authority, as is the case here. See District of Columbia Metropolitan Police Dept. and Fraternal Order of Police, 31 DCR 4156, Opinion No. 84, PERB Case No. 84-A-04 (1984); AFSCME, Council 20 and D.C. Dept. of Finance and Revenue, 31 DCR 4681, Opinion No. 118, PERB Case No. 85-A-03 (1985). Imposing time limits for compliance is within the arbitrator's equitable powers. Cf. Washington-Baltimore Newspaper Guild Local 36, v. The Washington Post Co., 621 F. Supp. 998 (D.D.C. 1985) (arbitrator's initial

^{5/} Collective Bargaining Agreement

Article XXII Grievance Procedure

* * *

Section 10 - Outside Issues: Matters not within the jurisdiction of the department/agency will not be processed as a grievance under this article.

^{6/} Under the provisions of the contract there is no basis for distinguishing between the District of Columbia or an agency thereof as to the ability to entertain a grievance.

award provided the parties with a sixty (60) day time limit in which to fashion their own remedy.) Thus, this allegation also is rejected.

Nor did the Arbitrator exceed his authority by treating the grievance as class-wide and a continuing violation. The Arbitrator found that "It makes no sense and does great harm if disputes over salary matters that rest on the same basic facts and are determined by the same rule or contractual clause require, for this resolution, that a grievance be filed each time." (Award at p.8.) This view is correct, especially since the grievance was filed in accordance with a contractual provision concerning the filing of grievances affecting a large group of employees. ^{7/}

DFR final contention, that the Arbitration Award is on its face contrary to law and public policy because it departs from past practice, is easily disposed of. While a past practice may be pertinent in analyzing an ambiguous contract provision, a past practice does not establish a law or public policy. ^{8/} Furthermore, past practice cannot alter the meaning of clearly unambiguous contract language. Elkouri & Elkouri, How Arbitration Works, p. 454-455 (4th ed. 1985); Fairweather, Practice and Procedure in Labor Arbitration, p. 201 - 207 (1983).

^{7/} Collective Bargaining Agreement

Article XXII Grievance Procedure
Section 3

* * *

- B. Any grievance of a general nature affecting a large group of employees and which concerns the misinterpretation, misapplication, violation or failure to comply with the provisions of the Agreement shall be filed at the option of the Union at the step or level of supervision where the grievance originates without resorting to previous steps.

^{8/} On January 27, 1988, the United States District Court for the District of Columbia struck down the regulation at issue herein, finding it violative of the Fair Labor Standards Act, 29 U.S.C. Section 201 et seq. Westfall et.al. v. District of Columbia et.al. C.A. No. 87-2275 (January 27, 1988). Though the case was decided subsequent to the issuance of the Award and the filing of the Arbitration Award Review Request, this decision clearly supports the Board's reasoning.

ORDER

IT IS ORDERED THAT:

This Arbitration Award Review Request is hereby denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

March 31, 1989