Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
District of Columbia Department of Human Services,	)	
Petitioner,	)	PERB Case No. 23-A-04
v.	)	Opinion No. 1845
American Federation of State, County, and Municipal Employees, District Council 20, Local 2401,	)	
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case

On May 23, 2023, the District of Columbia Department of Human Services (DHS) filed an arbitration review request (Request)[1] pursuant to the Comprehensive Merit Personnel Act (CMPA) seeking review of an arbitration award (Award) dated May 1, 2023.[2] On June 22, 2023, the American Federation of State, County and Municipal Employees, District Council 20, Local 2401 (AFSCME), filed an opposition to the Request (Opposition). In the Award, the Arbitrator determined that DHS violated its obligations under the parties' collective bargaining agreement (CBA) by unilaterally restricting an employee (Grievant) from working overtime shifts. The Arbitrator concluded that DHS committed an unjustified or unwarranted personnel action under the Federal Back Pay Act and ordered DHS to pay the Grievant the overtime pay she would have otherwise received if she had been permitted to work overtime.[3] DHS seeks review of the Award on the grounds that the Award is contrary to law and public policy.[4]

[1] The initial Request lacked a certificate of service and therefore was deficient under Board Rule 502.6. DHS cured the deficiency by providing a certificate of service on June 7, 2023. All subsequent filings relate back to the May 23, 2023 Request.
[2] D.C. Official Code § 1-605.02(6). The Award, while dated May 1, 2023, was emailed to the parties by the Arbitrator on May 2, 2023.
[3] Award at 23, 25.
[4] Request at 3.

Upon consideration of the Arbitrator's conclusions, applicable law, and the record presented by the parties, the Board holds that the Award is not contrary to law and public policy. Therefore, the arbitration review request is denied.

II. Arbitration Award

A. Background

The Arbitrator made the following factual findings. The Grievant began working for the District government in 2001 and transferred to DHS's Family Services Administration in October 2018.[5] In December 2019, DHS appointed the Grievant to her current position as a Homeless Coordinator.[6] The Grievant received ratings of "valued performer" and "highly effective performer" during annual performance reviews for the 2018-2019, 2019-2020, and 2021-2022 review periods.[7] The Grievant received a Human Services Hero award in October 2020.[8]

The Grievant routinely volunteered for overtime shifts prior to the COVID-19 pandemic.[9] Beginning in March 2020, DHS sought employee volunteers to work overtime for multi-agency relief programs created to support vulnerable individuals who contracted COVID-19.[10] Overtime shifts for this purpose initially fell under the Isolation and Quarantine Program (ISAQ), which housed COVID-positive individuals at motels for quarantine.[11] Eventually, these overtime shifts were transferred to the Pandemic Emergency Program for Medically Vulnerable Individuals (PEP-V).[12] PEP-V oversaw housing for individuals unable to stay at homeless shelters because of medical vulnerabilities to COVID-19.[13] The District government intended PEP-V "to be stand-alone and temporary."[14] DHS confirmed that the PEP-V sites, while initially staffed by DHS employees, then a combination of staff members and contractors, were intended to be staffed entirely by contractors.[15] In fact, at the time of the hearing before the Arbitrator, DHS staff members were not covering any PEP-V overtime shifts.[16]

DHS initially scheduled overtime shifts on a monthly basis, but eventually systemized the overtime shifts with DHS employees' regularly assigned shifts.[17] Weekend program shifts

[5] Award at 3.
[6] Award at 3.
[7] Award at 4-5. The record before the Arbitrator did not include a performance review for the 2020-2021 fiscal year. Award at 6.
[8] Award at 5.
[9] Award at 6.
[10] Award at 6-7.
[11] Award at 6.
[12] Award at 7.
[13] Award at 7.
[14] Award at 8.
[15] Award at 10.
[16] Award at 10.
[17] Award at 6.

included both DHS employees and "temporary agency workers."[18] While under ISAQ, the Grievant generally worked three (3) to six (6) shifts a week.[19] As the ISAQ program grew, the Grievant was selected as a co-lead for the program.[20] The Grievant's responsibilities included staffing the program, and ensuring program clients had their dietary needs met and had access to transportation for medical appointments.[21] Between April 2020 and June 2020, the Grievant worked five (5) 12-hour shifts weekly, keeping a similar overtime schedule through the end of 2020, in response to DHS e-mail requests for staff volunteers.[22]

Between late 2020 and early 2021, these overtime shifts were transferred from ISAQ to PEP-V. Eventually, the Grievant's overtime shifts were reduced to three (3) 12-hour shifts per week, one weeknight and two weekend shifts.[23] The Grievant continued to work 3 overtime shifts per week until late March 2021. During the week of March 21, 2021, DHS determined that the program only required two (2) overtime shifts per week by full-time staff as a result of an increase in contracted staff, and therefore reduced full-time staff overtime shifts to 2 weekend shifts per week across the board, including the Grievant.[24]

On May 28, 2021, the Chief Human Resources Officer (Officer) called the Grievant[25] to discuss multiple instances of allegedly concerning conduct by the Grievant that "required coaching regarding de-escalation, peer encounters, and staffing concerns."[26] The Officer informed the Grievant over the phone that "an investigation would be conducted into [the Grievant's] behavior and [the Grievant] was not to report back to the PEP-V site until further notice."[27] The Grievant emailed the Officer the same day requesting the Officer provide in writing the allegations against the Grievant and an explanation of why she had been instructed not to report to her weekend overtime shifts.[28] The Grievant requested confirmation that the allegations cited by the Officer specifically involved the Grievant's conduct, which the Officer confirmed, stating that "the two situations outlined in [the Officer's] email did involve the Grievant's time with PEP-V."[29]

The Grievant believed that the Officer's May 28, 2021 e-mail indicated that the Grievant could not work any form of overtime until after the completion of an investigation.[30] On August 10, 2021, the Grievant's Union Representative e-mailed the Officer, requesting a status update on the investigation of the Grievant.[31] After receiving no response, the Union Representative e-

[18] Award at 7.
[19] Award at 6.
[20] Award at 7.
[21] Award at 7.
[22] Award at 7.
[23] Award at 8.
[24] Award at 8.
[25] Award at 8, 10.
[26] Award at 10-11. At this time, the Grievant was not made aware of the full list of concerning instances. Award at 11.
[27] Award at 8.
[28] Award at 9.
[29] Award at 10.
[30] Award at 12.
[31] Award at 12.

mailed the Officer again on September 9, 2021. After receiving no response, the Grievant's attorney issued a demand letter arguing that "any genuine questions that might have prompted [the Officer's] actions should have been laid to rest"[32] and requesting that DHS restore the Grievant's ability to work overtime and compensate the Grievant for wrongly withheld overtime hours.[33] The letter also stated that, if the investigation was still ongoing, the Grievant would consent to investigative interviews.[34] After receiving "no substantive response"[35] from DHS, the Grievant's attorney sent a follow-up letter requesting that DHS restore the Grievant's ability to work overtime, compensate the Grievant for lost overtime, and treat the Grievant equitably and reiterating the Grievant's willingness to submit to investigatory interviews.[36] On December 10, 2021, AFSCME submitted a Step 4 grievance to DHS, requesting a response within fifteen (15) days, in accordance with Article 22 of the parties' CBA.[37] After receiving no response, AFSCME requested grievance arbitration on January 14, 2022.[38]

B. Arbitrator's Findings

The parties submitted the following issue to the Arbitrator for consideration: "whether the Agency violated Article 17 of the Collective Bargaining Agreement when it barred the Grievant from participating in overtime activities. If so, what shall the remedy be?"[39]

DHS argued that restricting the Grievant from working overtime constituted an exercise of management rights and failed to show a violation of the parties' CBA.[40] DHS noted that the record showed that overtime by DHS employees under the PEP-V program was intended to be temporary and that PEP-V sites no longer employ DHS staff members.[41] DHS contends that the prohibition of the Grievant from working overtime at PEP-V sites did not extend to other voluntary overtime programs, but also that the Grievant had no expectation of continued overtime at PEP-V sites.[42]

DHS argued that the PEP-V shifts constituted discretionary overtime to which the Grievant did not have a "clear entitlement," and therefore the Grievant could not receive a monetary remedy for any missed overtime under the Federal Back Pay Act, relying on the D.C. Court of Appeals case *Mitchell v. District of Columbia*.[43] DHS further argued that its actions in restricting the Grievant from working overtime were based on "well-documented instances showing that the Grievant was

[32] Award at 12-13.
[33] Award at 13.
[34] Award at 13.
[35] Award at 15.
[36] Award at 15.
[37] Award at 15.
[38] Award at 17.
[39] Award at 2.
[40] Award at 18.
[41] Award at 17.
[42] Award at 17.
[43] Award at 17.

not a good fit for the PEP-V overtime program,"[44] rather than arbitrary and capricious actions resulting in an unjustified or unwarranted personnel action against the Grievant.[45]

AFSCME argued that the plain meaning of Article 17 of the CBA obligates DHS to ensure overtime opportunities are distributed equitably and fairly to bargaining unit members, once management has determined that overtime is necessary.[46] AFSCME pointed to DHS's failure to investigate the Grievant or provide her with an opportunity to respond to allegations.[47] AFSCME argued that DHS had consistently attributed the Grievant's overtime restriction to her alleged misconduct until the arbitration hearing, where DHS then alleged the Grievant was merely "rolled off" of the overtime shifts as per operational procedures to replace DHS staff volunteers with contractors.[48] AFSCME contended that DHS violated Article 17 because DHS placed an unequal and inequitable restriction on the Grievant's ability to perform overtime.[49] AFSCME requested that the Arbitrator uphold the grievance, order DHS to clear the Grievant of wrongdoing and remove any references to the overtime restriction and investigation from the Grievant's personnel records, reinstate the Grievant's ability to sign up for available overtime opportunities, and provide a "make-whole" remedy to the Grievant for the losses associated with the improper overtime restriction, including but not limited to damages or compensation equal to the regularly scheduled overtime denied the Grievant.[50] AFSCME also requested attorney fees.[51]

The Arbitrator examined Articles 2 and 17 of the parties' CBA, rejecting DHS's arguments that restricting the Grievant from overtime shifts was an exercise of management rights that did not constitute disciplinary action against the Grievant.[52]

The Arbitrator found inconsistencies in DHS's assertions of misconduct by the Grievant and investigation regarding the Grievant compared to later statements claiming the restriction of the Grievant's overtime work was perfunctory to effectuate the long term goals of the PEP-V program.[53] The Arbitrator scrutinized DHS's failure to respond to AFSCME's repeated requests for: (1) updates on the investigation; (2) opportunities for the Grievant to address the alleged misconduct; or (3) the restoration of the Grievant's ability to volunteer for overtime shifts.[54] The Arbitrator rejected DHS's claim that the Grievant could have volunteered for other overtime opportunities, emphasizing the language of the email sent to the Grievant and her supervisor stating that the Grievant would not be needed for "any" overtime shifts until further notice.[55] The Arbitrator determined that, despite assertions to the contrary, DHS had never directly, internally

[44] Award at 18.
[45] Award at 18.
[46] Award at 18.
[47] Award at 19.
[48] Award at 19.
[49] Award at 19.
[50] Award at 19.
[51] Award at 20.
[52] Award at 20, 23.
[53] Award at 21.
[54] Award at 21.
[55] Award at 22.

investigated the Grievant.[56] The Arbitrator concluded that DHS restricted the Grievant's ability to work overtime as a result of allegations that "if true, would have been subject to the disciplinary process in the Collective Bargaining Agreement."[57]

The Arbitrator found that DHS regularly scheduled overtime for its employees and that other similarly situated DHS employees continued to work overtime at PEP-V sites beyond when DHS restricted the Grievant's ability to work overtime.[58] The Arbitrator held that DHS violated Article 17 of the parties' CBA, which requires overtime work to be "equally distributed among employees."[59] The Arbitrator further held that the CBA's management rights clauses did not allow DHS to violate the "clear and unambiguous language in Article 17 regarding the allocation of overtime."[60] The Arbitrator concluded that DHS's restriction of the Grievant's ability to work overtime shifts during its purported investigation of her alleged misconduct constituted an "unjustified or unwarranted personnel action" under the Federal Back Pay Act.[61]

The Arbitrator rejected DHS's reliance on a D.C. Court of Appeals case where that court declined to award back pay for discretionary, unscheduled overtime that the plaintiff might have earned.[62] The Arbitrator noted that the court had explicitly maintained that the elimination of an employee's future overtime eligibility in violation of a statute, regulation or collective bargaining agreement could allow for an entitlement to overtime as a remedy.[63] The Arbitrator concluded that DHS's violation of the parties' CBA in restricting the Grievant's overtime shifts entitled the Grievant to back pay under the Federal Back Pay Act.[64] Therefore, the Arbitrator upheld the grievance and ordered DHS to restore the Grievant's eligibility for overtime and pay the Grievant for the overtime hours she would have worked between May and December 2021, as well as pay AFSCME reasonable attorney fees.[65]

III. Discussion

Section 1-605.02(6) of the D.C. Official Code permits the Board to modify, set aside, or remand a grievance arbitration award in only three narrow circumstances: (1) if an 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.[66]

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[56] Award at 21. Despite finding that no investigation occurred, the Arbitrator also addressed the allegations made against the Grievant and noted the Grievant's responses to specific allegations, once known, as well as the Grievant's consistent high ratings in performance reviews. Award at 21-22.
[57] Award at 22.
[58] Award at 22.
[59] Award at 23.
[60] Award at 23.
[61] Award at 23-24.
[62] Award at 24 (citing *Mitchell v. District of Columbia*, 736 A.2d 228 (1999)).
[63] Award at 24.
[64] Award at 24.
[65] Award at 25. The Arbitrator accepted AFSCME's undisputed calculation that the Grievant would have worked 636 hours of overtime but for the restriction placed on her. Award at 24.
[66] D.C. Official Code § 1-605.02(6).

A. The Award is not contrary to law and public policy.

DHS requests the Board's review of the Award on the grounds that the Award is contrary to law and public policy.[67] The Board's review of an arbitration award on the grounds that it is contrary to law and public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling.[68] The narrow scope limits potentially intrusive judicial review under the guise of public policy.[69] The requesting party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result."[70] The Board may not modify or set aside an Award as contrary to law and public policy in the absence of a clear violation on the face of the Award.[71]

DHS argues that the Arbitrator misapplied the Federal Back Pay Act in the Award.[72] DHS again cites *Mitchell*, which noted that the Federal Back Pay Act "is not itself a jurisdictional statute….Unless some other provision of law commands payment of money to the employee for the 'unjustified or unwarranted personnel action' the Back Pay Act is inapplicable."[73] DHS argues that the Arbitrator erroneously applied the parties' CBA as the "needed provision of law."[74]

DHS's reliance on *Mitchell* is unpersuasive. In *Mitchell* the court found that "unjustified or unwarranted personnel actions" include "acts of commission as well as omission with respect to [a] *nondiscretionary* provision of law, Executive order, regulation, or collective bargaining agreement."[75] The Arbitrator distinguished the circumstances of this case from *Mitchell*, concluding that Article 17 of the parties' CBA mandated the equitable distribution of overtime amongst employees. Although the CMPA guarantees management's right "[t]o direct employees of the agencies,"[76] management rights do not grant agencies unlimited discretion nor allow agencies to violate bargained-for provisions of their CBAs. The Arbitrator reasonably concluded that, while the determination to request volunteers for overtime may be exclusively a management decision, management is still bound by the CBA in distributing that overtime.[77] Therefore, unlike in *Mitchell*, the overtime hours at issue here were not purely discretionary.

DHS's Request reiterates the arguments it made before the Arbitrator, primarily relying on its application of *Mitchell*, which the Arbitrator rejected in the Award. DHS added citations to several other cases in the Request, most of which were also cited in *Mitchell*. All of the cited cases

[67] Request at 3.
[68] *MPD v. FOP/MPD Labor Comm.*, 59 D.C. Reg. 3959 Slip Op. No. 925 at 12, PERB Case No. 08-A-01 (2012).
[69] *Id.*
[70] *Id.*
[71] *See D.C. DYRS and DCHR v. FOP/D.C. DYRS Labor Comm.*, 68 D.C. Reg. 46, Slip Op. No. 1800 at 8, PERB Case No. 21-A-09 (2021) (holding that an arbitrator did not exceed his jurisdiction in deciding an issue stipulated by the parties where the language of the CBA did not expressly limit the arbitrator's equitable power).
[72] Request at 3.
[73] Request at 4 (citing *Mitchell v. District of Columbia* at 230).
[74] Request at 4.
[75] *Id.* at 231 (citing *Brown v. Secretary of the Army*, 918 F.2d 214 at 220 (1990)).
[76] D.C. Official Code § 1-617.08(a)(1).
[77] Award at 23.

are distinguishable from the circumstances of this case. DHS argues that, because management "retains the sole right to 'direct the employees of the agency,'"[78] the restriction of the Grievant's overtime was discretionary and therefore not eligible for remedy under the Back Pay Act.[79] DHS cites two cases regarding the distinctions between discretionary and nondiscretionary provisions and pay under the Federal Back Pay Act – *Wells v. Federal Aviation Administration* and *Brown v. Secretary of the Army*.[80] In *Wells*, the court held that "it [was] undisputed in the record that overtime was discretionary,"[81] and that "loss of *discretionary* overtime is not a pay loss. Under the BPA, where a personnel action results in no pay loss, the personnel action may not be deemed unjustified or unwarranted [emphasis original]."[82] Unlike in *Wells*, the Arbitrator here concluded that the equitable distribution of overtime pay was nondiscretionary.

DHS then applies the definition of a "nondiscretionary provision" from *Brown*,[83] further arguing that Article 17 of the parties' CBA does not require the offering of overtime to employees, but merely requires that overtime, when offered, must be offered in an equitable manner.[84] However, in *Brown*, the court held that the appellants, who argued they would have received promotions but for unlawful discrimination by their employers, were not entitled to promotions "*before* they were denied them,"[85] as the employers, "in their discretion, could have decided to eliminate, or not to create, the sought-after positions."[86] Therefore, again, *Brown* is distinguishable as a case regarding the loss of discretionary advancement and pay. Here, the Arbitrator has placed no restrictions on DHS's discretion regarding the decision to offer overtime in general, but rather has simply enforced the CBA's requirement that overtime be distributed equitably amongst volunteers.

Finally, DHS argues that the Arbitrator erred by concluding that "because the Agency did not make an extra effort to steer the grievant towards other overtime opportunities, it used its management rights to violate the CBA."[87] DHS cites *AFGE 3721 v. District of Columbia* in support of its assertion that "courts have long upheld management rights in the face of a collective bargaining agreement between parties"[88] and that the parties' CBA does not negate the statutorily protected management right to direct employees.[89] However, as noted in the Request, the CBA at issue in *AFGE 3721*, an arbitrability dispute, "broadly retains for management all preexisting rights and, further, excludes from arbitration all management rights unless those rights are 'specifically

[78] Request at 5 (citing D.C. Official Code § 1-617.08(a)(1)).
[79] Request at 5.
[80] Request at 4-5.
[81] *Wells v. Federal Aviation Administration*, 755 F.2d 804 at 808 (1985).
[82] *Id*.
[83] "[A]ny provision of law, executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria." *Brown v. Secretary of the Army*, 918 F.2d 214 at 220 (1990).
[84] Request at 5.
[85] *Brown v. Secretary of the Army* at 220.
[86] *Id*.
[87] Request at 6.
[88] Request at 6.
[89] Request at 6.

abridged and abrogated in a separate distinctive article of the Agreement.'"[90] In that case, the court held the dispute at hand was explicitly excluded from arbitrability by the parties' CBA.[91] Here, the CBA has explicitly limited management's discretion in assigning overtime by requiring the equal distribution of such overtime. The CMPA protects certain management rights but does not prevent parties from coming to agreement on permissive subjects of bargaining that limit those management rights during the term of the agreement.[92] While the CMPA protects against construing agreements as a "more general waiver of a management right,"[93] it does not enable "management to repudiate any agreement it has, or chooses, to make" while that agreement remains active or under negotiation.[94] DHS is bound by the CBA it negotiated with AFSCME, which expressly limits management's discretion in assigning overtime shifts by requiring such assignments be distributed equally amongst employees qualified to complete the work.

The Board has held that a party's "mere disagreement" with an arbitrator "does not make the award contrary to law"[95] and public policy.[96] DHS does not deny that the parties jointly committed the instant dispute to arbitration and granted the Arbitrator authority to determine whether the restriction of the Grievant's overtime opportunities violated Article 17 of the parties' CBA.[97] DHS's arguments constitute mere disagreement with the Arbitrator's evidentiary findings and conclusions, and do not constitute grounds for reversal. DHS has not sufficiently demonstrated a clear violation on the face of the Award. Therefore, the Board finds that the Award is not contrary to law and public policy.

IV. Conclusion

For the reasons stated, the Board rejects DHS's arguments and finds no cause to modify, set aside, or remand the Award. Accordingly, DHS's Request is denied, and the matter is dismissed in its entirety.

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[90] Request at 6 (quoting *AFGE Local 3721 v. District of Columbia*, 563 A.2d 361 at 363 (1989).
[91] *AFGE Local 3721 v. District of Columbia* at 364.
[92] *UDC Faculty Association/Nat'l Education Association v. UDC*, 59 D.C. Reg. 6013, Slip Op. No. 1004 at 8-9, PERB Case No. 09-U-26 (2012) (holding that failure to maintain the *status quo* of previously bargained for working conditions and terms of employment during negotiations for a successor agreement violated the CMPA even though such terms included potentially non-mandatory subjects of bargaining that might impact management rights).
[93] *Id*. at 8.
[94] *Id.*
[95] *MPD v. FOP/MDP Labor Comm*, 62 D.C. Reg. 9178, Slip Op. No. 1516 at 3, PERB Case No. 14-A-12 (2015) (quoting *MPD v. FOP*, Slip Op. No. 933, PERB Case No. 07-A-08 (2008). The Board has established that "[a]n argument previously made, considered, and rejected is a 'mere disagreement' with the initial decision." *FOP/DOC Labor Comm. v. DOC*, 70 D.C. Reg. 6720, Slip Op. No. 1835 at 2, PERB Case No. 23-U-03 (2023) (quoting *Jackson v. Teamsters, Local 639*, 63 D.C. Reg. 10694, Slip Op. No. 1581 at 3, PERB Case No. 14-S-02 (2016).
[96] *Id.* at 7.
[97] Award at 2.

ORDER

IT IS HEREBY ORDERED THAT:

1. The 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

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser and Mary Anne Gibbons.

July 20, 2023
Washington, D.C.

APPEAL RIGHTS

A final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.