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

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee,)	
)	
Complainant,)	PERB Case No. 11-E-02
)	
v.)	Opinion No. 1592
)	
District of Columbia Metropolitan Police)	
Department,)	
)	
Respondent.)	

DECISION AND ORDER

The petitioner Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”) has filed in this proceeding a “Motion for Enforcement of PERB Order Granting Petition for Enforcement and to Initiate Enforcement Proceedings in D.C. Superior Court.” FOP alleges that the respondent Metropolitan Police Department (“MPD”) has failed to comply with an arbitration award. MPD subsequently filed the “Agency’s Response and Motion to Dismiss Petition for Enforcement of PERB Decision and Order.” The two motions are before the Board for disposition.

- I. Statement of the Case**
 - A. The Arbitrator’s Opinion and Award**
 - 1. Background**

FOP seeks enforcement of a decision and order sustaining a grievance arbitration award concerning MPD’s 2009 All Hands on Deck initiative (“AHOD”). The Arbitrator, the late John Truesdale, explained in his Opinion and Award (“Award”) that the grievance arose from a January 7, 2009 teletype (“the Teletype”) that Chief Cathy L. Lanier sent to the force. The

Teletype listed the dates for the 2009 AHOD. Those dates were eight 3-day weekends from May to December 2009, identified as Phases I through VIII.¹ The Teletype stated:

All sworn members of the Department are to take part in this effort. All members will work an 8-hour tour of duty on the aforementioned dates. No member shall be scheduled for day [sic] off on these dates. All leave is restricted for these dates unless already approved for leave prior to January 7, 2009. Additionally, the optional sick leave program will be suspended for these AHOD phases.²

On January 23, 2009, FOP Chairman Kristopher Baumann filed a class grievance stating that the Teletype violated Articles 1, 4, 24, and 49 of the parties' collective bargaining agreement ("CBA") and demanding bargaining. On February 23, 2009, the Chief denied the grievance and denied that there was a requirement to bargain concerning the Teletype. The next day FOP demanded arbitration in accordance with the CBA.³

Phase I was originally scheduled to occur May 15-17, 2009, but on March 5, 2009, the Chief sent another teletype announcing that she had rescheduled Phase I to April 24-26, 2009, when the World Bank and the International Monetary Fund were to hold meetings. This teletype concluded:

No member shall be scheduled for the day off on Friday, April 24, 2009. All leave is restricted for Friday, April 24, 2009 unless already approved for leave prior to March 5, 2009. Teletype 02-009-09 (Spring IMF/World Bank Meetings) restricted leave for April 25-26th, 2009.⁴

As revised, the eight Phases of the 2009 AHOD were as follows:

Phase I	April 24-26, 2009
Phase II	June 5-7, 2009
Phase III	June 26-28, 2009
Phase IV	July 10-12, 2009
Phase V	July 24-26, 2009
Phase VI	August 3-5, 2009
Phase VII	November 13-15, 2009
Phase VIII	December 17-19, 2009

¹ Award 5, 6.

² Award 5.

³ Award 6.

⁴ Award 6.

On June 17, 2009, after the first two Phases had occurred, the Arbitrator held an evidentiary hearing on the grievance.⁵ The Arbitrator issued his Award September 9, 2009. In his Award the Arbitrator stated that the only issue before him was “whether Chief Lanier’s 2009 AHOD initiative violates Articles 1, 4, 24, and 49 of the parties’ CBA.”⁶

Article 1, Section 3 states that the parties “agree to honor and support the commitments contained herein.”⁷ Article 4 states in pertinent part:

The Union recognizes that the following rights, when exercised in accordance with applicable law, rules and regulations, which in no way are wholly inclusive, belong to the Department:

1. To direct employees of the Department.
2. To determine . . . the tour of duty. . . .
6. To take any action necessary to carry out the mission of the Department in an emergency situation, and to alter, rearrange, change, extend, limit or curtail its operations or any part thereof. . . .
8. To formulate, change or modify Department rules, regulations and procedures, except that no rule, regulation or procedure shall be formulated, changed or modified in a manner contrary to the provisions of this Agreement.⁸

Article 24 provides in pertinent part:

Section 1

Each member of the Bargaining Unit will be assigned days off and tours of duty that are either fixed or rotated on a known regular schedule. Schedules shall be posted in a fixed and known location. Notice of any changes to their days off or tours of duty shall be made fourteen (14) days in advance. If notice is not given of changes fourteen (14) days in advance the member shall be paid, at his or her option, overtime pay or compensatory time at the rate of time and one half, in accordance with the provisions of the Fair Labor Standards Act. . . .

Section 2

The Chief or his/her designee may suspend Section 1 on a Department wide basis or in an operational unit for a declared emergency, for crime, or for an unanticipated event.⁹

⁵ Award 5-6.

⁶ Award 23.

⁷ Award 4, 24.

⁸ Award 4.

⁹ Award 5, 24.

Article 49, section 5 provides:

All terms and conditions of employment not covered by the terms of this Agreement shall continue to be subject to the Employer's direction and control. However, when a Departmental order or regulation directly impacts on the conditions of employment of unit members, such impact shall be a proper subject of negotiation.¹⁰

2. The Arbitrator's Findings and Award

The Arbitrator found that MPD violated Article 24, Section 1:

MPD argues that because the Chief of Police gave more than 14 days notice of the AHOD schedules, it complied with the scheduling provisions of Article 24. But in fact, as stated by the Union, the Teletype was issued on January 7, 2009, without any notice, advising that for 8 weekends no leave would be permitted (unless leave had already been approved before January 7) and every member of the Department would be working those weekends. Subsequently, the Phase I Teletype changed, without notice, the May dates to a new leave ban for the April dates.¹¹

The Arbitrator also found that the Chief failed to make a finding under Section 2 of Article 24 that would have allowed her to suspend Section 1 of Article 24.

The Arbitrator recognized that under Article 4 management retains its right to determine the tour of duty but does so only when that right is exercised in accordance with applicable laws, rules and regulations.¹² He stated that D.C. Official Code § 1-612.01(b) "establishes tours of duty in specified detail 'except when the Mayor determines that an organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased.'"¹³ The Arbitrator found that the right to determine the tour of duty was not exercised in accordance with D.C. Official Code § 1-612.01 because this determination was not made. The Mayor did not make that determination, and he rescinded an earlier delegation of his personnel and rulemaking authority to the chief of police.¹⁴

In conclusion the Arbitrator made these findings:

¹⁰ Award 5, 24.

¹¹ Award 26.

¹² Award 24, 26.

¹³ Award 24 (quoting D.C. Official Code 1-612.01(b)(2)).

¹⁴ Award 25-26.

I find that the Union has met its burden here in establishing that Chief Lanier's 2009 AHOD initiative violated Article 1 of the CBA in that it did not honor and support the commitments contained in Articles 4, 24, and 49; violated Article 24 by suspending the provisions of Section 1 without having declared an emergency, for crime, or other unanticipated event; and violated Article 49, Section 5, by not having negotiate[ed] with the Union when a Department order directly impacted on the conditions of employment of unit members.¹⁵

Having sustained the grievance, the Arbitrator issued the following Award:

MPD is directed to rescind the January 7, 2009 teletype; promptly advise The Force that it has done so; and, beginning with the date of this Class Grievance, to comply with the requirements of Article 24, Section 1, concerning overtime pay or compensatory time at the rate of time and one half in accordance with the provisions of the Fair Labor Standards Act.¹⁶

MPD appealed the Award by filing an arbitration review request with the Board. MPD contended that the Arbitrator exceeded his authority by considering the order by which the Mayor rescinded his delegation of personnel and rulemaking authority to the Chief. MPD objected that FOP had not disclosed that exhibit to MPD before the hearing. MPD further argued that the Award was contrary to law and public policy because a correct application of all the relevant mayoral orders would lead to the conclusion that adoption of the 2009 AHOD was within MPD's authority and in conformity with the CBA. On August 5, 2011, the Board issued a decision and order on the arbitration review request, Opinion No. 1032. The Board found no merit in MPD's arguments and found no statutory basis for setting aside the award.¹⁷ MPD did not request judicial review of the August 5, 2011 decision and order.

B. The Enforcement Proceedings before the Board

A month after the Board issued Opinion No. 1032, FOP filed the instant Petition for Enforcement alleging that MPD had failed to comply with the Award. The petition lists the dates of nine affected weekends in 2009 and includes in its list both the original and the revised dates of Phase I, May 15-17 and April 24-26, respectively. FOP states that members had originally been restricted from requesting leave May 15-17 but have not been compensated for this leave restriction.¹⁸ FOP further asserts that as a result of the Award "MPD was required to pay

¹⁵ Award 27.

¹⁶ Award 27.

¹⁷ *D.C. Metro. Police Dep't and F.O.P./Metro. Police Dep't Labor Comm.*, 59 D.C. Reg. 6455, Slip Op. No. 1032, PERB Case No. 10-A-01 (2011).

¹⁸ Pet. for Enforcement of PERB Decision and Order 4 n.3.

overtime to all members of the bargaining unit at a rate of time and a half for all of these 8 hour tours, as well as penalty pay in accordance with the FLSA for the same amount.”¹⁹

MPD filed an Opposition in which it “admits that it has not appealed the Board’s decision and that it has not complied with the Award and Board Order as interpreted by the FOP in its Petition, but denies that the FOP’s interpretation of the Award in its Petition is consistent with the Award.”²⁰ MPD also “denies that it is flatly refusing to comply with the Award.”²¹

On November 17, 2011, the Board issued Opinion No. 1222 regarding the Petition for Enforcement. After repeating with slight alterations five pages of text taken from Opinion No. 1032 wherein the Board had set forth its reasons for rejecting MPD’s arbitration review request, Opinion No. 1222 granted the Petition for Enforcement.²² The Board’s order stated, “The Board shall proceed with enforcement of Slip Op. No. 1032 pursuant to D.C. Code §1-617.13(b) (2001 ed) if full compliance with Slip Opinion 1032 is not made and documented to the Board within ten (10) days of the issuance of this Decision and Order.”²³

MPD moved for reconsideration. In the motion MPD referred to its denial of allegations in the petition and to its dispute with FOP over the interpretation of the Award. MPD observed that the Board had apparently resolved those disputes in FOP’s favor but did not explain how or why.²⁴ MPD claimed to document compliance with the Award as ordered by the Board. Attached to the motion was an affidavit averring that individuals listed in payroll records attached to the affidavit were paid the amounts indicated on the attachment on November 18, 2011, the day after the Board issued Opinion No. 1222.²⁵

The Board denied the motion for reconsideration in Opinion No. 1234, issued December 21, 2011. Again the Board repeated almost verbatim five pages of text taken from Opinion No. 1032 on the reasons for denying MPD’s arbitration review request.²⁶ Then turning to the proceeding that was before the Board—MPD’s motion for reconsideration of the granting of FOP’s petition—the Board characterized MPD’s documentation of compliance as new evidence added to the factual record on an issue not previously presented to the Board. Because the affidavit and its attachment had not been previously submitted, the Board found “that the affidavit and attachment may not serve as a basis for reconsideration of the Board’s order”²⁷ even though the Board itself had instructed MPD to submit documentation of compliance. The Board denied the motion for reconsideration and again issued an order stating, “The Board shall

¹⁹ Pet. for Enforcement of PERB Decision and Order 4.

²⁰ Opp’n to Pet. for Enforcement ¶ 8.

²¹ Opp’n to Pet. for Enforcement ¶ 9.

²² *F.O.P./Metro. Police Dep’t Labor Comm. and D.C. Metro. Police Dep’t*, 59 D.C. Reg. 6945, Slip Op. No. 1222, PERB Case No.11-E-02 (2011).

²³ *Id.* at 6.

²⁴ Mot. for Recons. 3-4.

²⁵ While the motion for reconsideration was pending, FOP moved for leave to file an amended petition for enforcement. The record does not reflect that leave was granted.

²⁶ *F.O.P./Metro. Police Dep’t Labor Comm. and D.C. Metro. Police Dep’t*, 59 D.C. Reg. 7171, Slip Op. No. 1234 at 1-5, PERB Case No. 11-E-02 (2011).

²⁷ *Id.* at 6.

proceed with enforcement of Slip Op. No. 1032 pursuant to D.C. Code §1-617.13(b) (2001 ed) if full compliance with Slip Opinion 1032 is not made and documented to the Board within ten (10) days of the issuance of this Decision and Order.”²⁸

On January 6, 2012, MPD filed with the Board a “Documentation of Compliance,” which attached the affidavit and payroll records that it attached to its motion for reconsideration. FOP filed an opposition to the documentation of compliance. FOP argued that the documentation of compliance must be rejected because the payments MPD documented were admittedly incomplete, did not compensate all members time and one half for each day of the 2009 AHOD, and did not include liquidated damages of an additional time and one half.

On January 18, 2012, MPD filed with the D.C. Superior Court a “Petition for Review of Agency Decision.” MPD asked the court to vacate the Board’s decision and order of November 17, 2011, asserting that that decision and order failed to make necessary factual findings and failed to articulate a justification for its conclusions. Although MPD requested review of the Board’s November 17, 2011 decision and order granting the petition for enforcement and did not request review of its August 5, 2011 decision and order sustaining the Award, the court stated, “In the petition before the Court MPD contends that PERB’s decision and order to affirm the Arbitrator’s Award was an abuse of discretion and thereby erroneous as a matter of law. . . . PERB’s affirming of the Arbitrator’s Award was not an abuse of discretion.”²⁹ The court also stated, “MPD does not provide this Court, as it must under the CMPA and Agency Rule 1(g), with any guiding legal precedent or analysis that supports its assertions that PERB’s decisions granting FOP’s Petition for Enforcement and denying MPD’s Motion for Reconsideration are ‘rationally indefensible.’”³⁰ The court dismissed MPD’s request for review.

In view of the court’s ruling, FOP filed on August 30, 2013, a “Motion for Enforcement of PERB Order Granting Petition to Enforce and to Initiate Enforcement Proceedings in D.C. Superior Court” (“Motion for Enforcement”). FOP states that full payment requires compliance with Article 24, Section 1 concerning overtime or compensatory time at the rate of time and a half in accordance with the Fair Labor Standards Act (“FLSA”) for all members of the union for all hours of all announced days of the nine AHOD weekends.³¹

MPD then filed a “Response and Motion to Dismiss Petition for Enforcement of PERB Decision and Order” (“Motion to Dismiss”). In the Motion to Dismiss, MPD makes three points. First, MPD argues that it has complied with the requirements of Article 24, Section 1 concerning compensation. It attached an affidavit and payroll records that allegedly showed payments to members of the bargaining unit (“Members”) who worked outside their schedules April 24-26 and June 4-7 of 2009. MPD argues that the six subsequent phases of AHOD that took place after

²⁸ *Id.*

²⁹ *D.C. Metro. Police Dep’t v. D.C. Pub. Employee Relations Bd.*, Civ. Action No. 2012 CA 000439 slip op. at 1, 2 (D.C. Super. Ct. July 19, 2013).

³⁰ *Id.* at 3. Superior Court Agency Review Rule 1(g) provides, “This Court shall base its decision exclusively upon the administrative record and shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law.”

³¹ Mot. for Enforcement 11.

the arbitration hearing were not within the scope of the Award.³² MPD insists that neither the order to rescind the Teletype nor any other language in the Award eliminated the six phases that had not occurred at the time of the hearing.³³ MPD explained that it calculated the payments in the following manner:

As members had already been compensated at a straight time rate for the non-overtime worked performed on those dates, those members who worked outside their regularly scheduled tours of duty were compensated with an additional half-time their rate of pay for all hours worked outside their normal schedule in full compliance with the Award and Article 24 (Scheduling), Section 1 of the parties' labor agreement. The total of the straight-time rate that was originally provided to members, combined with the halftime payment made in 2011, totaled the time and a half rate payment required under the labor agreement and the arbitrator's decision.³⁴

Second, MPD states that in compliance with the Award it rescinded the Teletype and so notified the force by issuing another teletype.³⁵ Third, MPD argues that the compensation sought by FOP beyond what MPD has paid is not supported by the Award and is not appropriate. MPD asserts that no language in the Award directs it to compensate Members for each day of all nine announced 2009 AHOD weekends.³⁶

FOP filed an Opposition to the Motion to Dismiss in which it claims that the Board and the Superior Court already rejected MPD's arguments and its claim of compliance. FOP also contends that MPD failed to promptly notify the force of the rescission of the Teletype and that all nine announced phases of AHOD are included in the Award, not just the two phases for which MPD has made partial payment.

Following a conference involving the parties and the Board's Executive Director, FOP filed a supplemental memorandum in support of its Motion for Enforcement. In that memorandum, FOP reiterates that the Award requires payment to all Members for all nine announced weekends. FOP further argues that a correct calculation of compensation must include "an additional equal amount as liquidated damages" as provided in the FLSA, that scheduling violations in addition to the leave restriction require compensation, and that even by its own method of calculation MPD's compensation for the first two phases is incomplete.

The case was set for a hearing on December 18, 2014. A continuance of the hearing was granted at the request of MPD. The Executive Director met with the parties again on February 18, 2015, to discuss using the Office of Pay and Retirement Services to assist in resolving factual

³² Mot. to Dismiss 6.

³³ Mot. to Dismiss 6-7.

³⁴ Mot. to Dismiss 4-5.

³⁵ Mot. to Dismiss 5.

³⁶ Mot. to Dismiss 6.

disputes. As a result of the meeting, the parties were requested to engage in mediation. A mediation conference took place April 21, 2015. The mediation conference did not succeed in obtaining a settlement of the case. In a subsequent letter to the Executive Director, FOP requested the Board to move forward with the enforcement proceeding.

III. Discussion

A. The Board's Authority to Enforce its Orders

The Comprehensive Merit Personnel Act ("CMPA") empowers the Board to "[s]eek appropriate judicial process to enforce its orders and otherwise carry out its authority under this chapter"³⁷ and further provides that "[t]he Board may request the Superior Court of the District of Columbia to enforce any order issued pursuant to this subchapter."³⁸ The Board has no statutory authority to seek enforcement of decisions rendered by third parties, such as the awards of arbitrators, or other decisions rendered pursuant to contractual agreements.³⁹ Thus, when there is no decision and order sustaining an arbitration award, the Board has no authority to seek judicial process.⁴⁰ But where a party has allegedly failed to abide by a decision and order of the Board sustaining an arbitration award, the Board can seek enforcement of its own order pursuant to Board Rule 560.1.⁴¹ In addition, when a party fails or refuses to implement an arbitration award where there is no dispute over its terms, such conduct constitutes a failure to bargain in good faith and, thus, an unfair labor practice.⁴²

Accordingly, the Board has granted petitions to enforce its orders sustaining arbitration awards where the agency's "reasons for failing to implement the terms of the arbitrator's award did not constitute a genuine dispute over the terms of the award."⁴³ Similarly, failure to implement an arbitrator's award is not an unfair labor practice when interpretation of the award is in dispute by the parties.⁴⁴

³⁷ D.C. Official Code § 1-605.02(16).

³⁸ D.C. Official Code § 1-617.13(b).

³⁹ *Council of Sch. Officers, Local 4 v. D.C. Pub. Sch.*, 59 D.C. Reg. 6138, Slip Op. No 1016 at 11, PERB Case No. 09-U-08 (2010); *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 39 D.C. Reg. 9617, Slip Op. No 295 at 3, PERB Case No. 91-U-18 (1992).

⁴⁰ *F.O.P./Dep't of Corr. Lab. Comm. (on behalf of Claiborne) v. Dep't of Corr. Lab. Comm.*, 60 D.C. Reg. 10834, Slip Op. No. 1398 at 4, PERB Case No. 12-E-09 (2013).

⁴¹ *D.C. Metro. Police Dep't v. F.O.P./Metro. Police Dep't Labor Comm.*, 997 A.2d 65, 79 (D.C. 2013). Board Rule 560.1 provides, "If any respondent fails to comply with the Board's Decision within the time period specified in Rule 559.1, the prevailing party may petition the Board to enforce the order."

⁴² *D.C. Metro. Police Dep't.*, 997 A.2d at 79; *AFGE Local 1000 v. D.C. Dep't of Emp't Servs.*, 60 D.C. Reg. 5247, Slip Op. No. 1368 at 2, PERB Case No.13-U-15 (2013).

⁴³ *AFSMCE Dist. Council 20, Local 2921 v. D.C. Pub. Sch.*, 51 D.C. Reg. 4170, Slip Op. No. 731 at 2, PERB Case No. 03-U-17 (2003).

⁴⁴ *Int'l Bhd. of Police Officers, Local 446 v. D.C. Health & Hosp. Pub. Benefit Corp.*, 47 D.C. Reg. 7184, Slip Op. No. 622 at 4, PERB Case No. 99-U-30 (2000).

The remedy of an enforcement proceeding is unavailable in another circumstance. Where the alleged refusal to implement the terms of a decision rendered pursuant to the parties' contract presents an issue of contract interpretation, the Board lacks statutory authority to enforce compliance.⁴⁵

B. The Posture of this Case

In Opinion No. 1032 the Board sustained the Award. FOP petitioned for enforcement of that order of the Board. The Board granted the petition and stated in both its prior orders in this case "The Board shall proceed with enforcement of Slip Op. No. 1032 pursuant to D.C. Code §1-617.13(b) (2001 ed) if full compliance with Slip Opinion 1032 is not made and documented to the Board within ten (10) days of the issuance of this Decision and Order."⁴⁶ With its exhibits to its Motion to Dismiss, MPD has submitted documentation of alleged compliance.

FOP argues that "MPD has failed to provide *any* evidence that it complied with the payment obligations in the 1222 enforcement order beyond the payments which were already rejected by the PERB and the D.C. Superior Court as insufficient in Opinion 1234 and Superior Court Order in 2012 CA 000439 P(MPA)."⁴⁷ It is not true, however, that the Board and the Superior Court rejected MPD's payments as insufficient. In Opinion No. 1234 the Board did not admit or consider the proffered evidence of the payments, and the Superior Court did not refer to the payments in its opinion. Neither opinion could have considered the evidence subsequently submitted with MPD's Motion to Dismiss. FOP acknowledges that the affidavit and payroll records submitted with the Motion to Dismiss are not the same as what MPD previously submitted.⁴⁸ We proceed then to consider, for the first time, whether MPD has documented compliance with the Award.

C. The Teletype and the Compensable Phases of the Award

The first two things the Award orders MPD to do are "to rescind the January 7, 2009 teletype [and] promptly advise The Force that it has done so." As exhibit 4 to its Motion to Dismiss, MPD submitted a teletype dated July 31, 2013 and signed by Chief Lanier. It is addressed to "THE FORCE" and states "Teletype 01-023-09 (AHOD Calendar for 2009) is hereby rescinded."⁴⁹

⁴⁵ *AFSMCE Dist. Council 20, Local 2921 v. D.C. Pub. Sch.*, 42 D.C. Reg. 5685, Slip Op. No. 339 at 6, PERB Case No. 92-U-08 (1992) (failure to implement the terms of a step 3 grievance decision). *See also AFGE, Local 872 v. D.C. Water & Sewer Auth.*, Slip Op. No. 1102 at 5, PERB Case No. 08-U-49 (Mar. 4, 2011) ("Whether or not Respondent's actions violated the parties' CBA presents an issue for contract interpretation. Accordingly, the Board declines to exercise its statutory authority to seek or enforce compliance with decisions rendered pursuant to the parties' contractual agreement.").

⁴⁶ *F.O.P./Metro. Police Dep't Labor Comm. and D.C. Metro. Police Dep't*, 59 D.C. Reg. 6945, Slip Op. No. 1222 at 6, PERB Case No.11-E-02 (2011) (granting petition for enforcement), 59 D.C. Reg. 7171, Slip Op. No. 1234 at 6, PERB Case No. 11-E-02 (2011) (denying motion for reconsideration).

⁴⁷ Opp'n to Motion to Dismiss 4.

⁴⁸ Opp'n to Motion to Dismiss 7.

⁴⁹ Motion to Dismiss ex. 4.

FOP argues that the July 31, 2013 teletype does not constitute compliance with the directive to MPD “to rescind the January 7, 2009 teletype [and] promptly advise The Force that it has done so.” FOP quotes a definition of “promptly” but fails to observe that “promptly” modifies advise rather than rescind: after MPD rescinds the Teletype, it must “promptly advise The Force that it has done so.” MPD promptly—concurrently, to be precise—advised the force of the rescission of the Teletype.

While MPD complied with this aspect of the Award, it chose to rescind the Teletype after all the phases it announced had taken place. MPD takes the position that there should be no consequences for delaying compliance beyond the time when it would have had any practical effect. The Award contains no cease and desist order, MPD argues, and does not compel compensation for any phases occurring after the arbitration evidentiary hearing.⁵⁰ FOP correctly responds that MPD “ignores the fact that had the MPD complied with the Arbitration Award in a timely manner, the teletype would have been immediately rescinded and none of the later stages of AHOD in 2009 would have occurred because they would not be authorized.”⁵¹

MPD’s position also ignores the Award’s ongoing requirement whereby MPD is directed “beginning with the date of this Class Grievance, to comply with the requirements of Article 24, Section 1, concerning overtime pay or compensatory time.” This directive has a beginning date—January 23, 2009, the date of the filing of the grievance—but has no ending date with respect to the grievance. The grievance alleged that the Teletype, which announced all the phases of the 2009 AHOD through Phase VIII ending December 19, 2009, violated the CBA, and the Arbitrator agreed. Had MPD rescinded the Teletype before any more illicit phases occurred, it would have avoided the obligation to comply with the requirements of Article 24, Section 1 concerning overtime and compensatory time with respect to such phases. Instead, as FOP states, MPD “made the deliberate choice that it would have to continue to provide the compensation awarded for the remaining phases of AHOD.”⁵²

MPD admits it has paid no compensation for Phases III to VIII. The Award requires MPD to pay compensation pursuant to Article 24 for those phases to Members affected by them. In this regard, FOP’s Motion for Enforcement is well taken and is granted. Therefore, MPD’s Motion to Dismiss is denied.

D. Compensation Owed

We next consider the nature of the compensation MPD owes for all phases, those for which MPD has made payments and those for which it has not. In its Motion for Enforcement and its Supplemental Memorandum, FOP contends that the payments MPD has made are incomplete because the payments (1) do not compensate all Members for all violations of the CBA, (2) do not include liquidated damages as a penalty, and (3) do not fully compensate Members even pursuant to MPD’s method of calculating compensation.

⁵⁰ Mot. to Dismiss 6-7.

⁵¹ Opp’n to Motion to Dismiss 9-10.

⁵² Opp’n to Mot. to Dismiss 10.

1. Compensation of All Members for All Violations

FOP disagrees with MPD on the scope of compensation in several respects having to do with the hours for which time and a half compensation must be paid and the contractual violations that give rise to liability for time and a half compensation. FOP asserts that MPD conceded in litigation before the Superior Court that Opinion No. 1222 applies to all relief FOP requested.⁵³ Opinion No. 1222 speaks for itself. It does not address the issues of scope of compensation raised by FOP in its Motion for Enforcement and its Supplemental Memorandum.

(a) Compensation for the Leave Restriction

The first issue of the scope of compensation raised by FOP concerns the hours for which Members are entitled to time and a half compensation. FOP alleges in its Petition that “[a]s a result of the arbitrator’s order, the MPD was required to pay overtime to all members of the bargaining unit at a rate of time and one half for all of these 8 hour tours, as well as penalty pay in accordance with the FLSA for the amount.”⁵⁴ In conformity with that position, FOP claims that all Members should be compensated for all hours of May 15-17, a weekend in which AHOD compelled no one to work outside his tour of duty because Phase I was moved from those dates to April 24-26. FOP contends that compensation is owed for those days because Members originally had been restricted from requesting leave for May 15-17. MPD denies that FOP’s interpretation is supported by any language in the Award.⁵⁵

As the parties have separately pointed out, neither of them sought clarification of the Award from the Arbitrator during the sixty days during which he retained jurisdiction for that purpose. Each separately had its own understanding of the Award and may have seen no need to seek confirmation of its understanding from the Arbitrator. The instant dispute over the meaning of the Award arose when FOP filed its Petition for Enforcement just under two years after the sixty-day period ended.

FOP argues that because the Arbitrator found that the Teletype’s restriction of leave violated Article 24, he thus “found, without qualification, that the AHOD award applies to all members of the D.C. Police Union for all AHOD weekends in 2009 [for] which the leave was announced as restricted in the teletype, *regardless of whether the members worked or whether their schedules were changed.*”⁵⁶ Contrary to FOP’s assertion, the Arbitrator’s finding that the leave restriction violated Article 24 does not necessarily yield the conclusion that Arbitrator found that the Article entitles all Members to time and a half compensation for all hours of all days of all weekends regardless of whether they worked or had their schedules changed. If the Arbitrator intended that his remedy included paying Members time and a half when they did not work, he did not say so. What he said was that MPD must “comply with the requirements of Article 24, Section 1, concerning overtime pay or compensatory time at the rate of time and one half in accordance with the provisions of the Fair Labor Standards Act.” This is very different

⁵³ Opp’n to Mot. to Dismiss 7-8.

⁵⁴ Pet. for Enforcement 4.

⁵⁵ Mot. to Dismiss 5-6; Opp’n to Pet. for Enforcement ¶ 8.

⁵⁶ Supplemental Mem. 3 (emphasis added).

from the language FOP requested in its post-hearing brief to the Arbitrator. There FOP requested an order compelling that “[t]he MPD will compensate all members at a rate of time and one-half for any violations of Article 24 for all applicable AHOD initiative days announced for 2009.”⁵⁷

Even though the Arbitrator did not phrase the Award as FOP requested, FOP characterizes the Award as if he had. FOP states that “as set forth clearly in the Arbitration Award, the MPD is required to compensate members . . . for all 27 days [for] which AHOD was announced in 2009, regardless of whether the member’s tour was changed or whether the member worked.”⁵⁸ However, that requirement is not set forth clearly in the Award or set forth at all. The Arbitrator, who has the sole authority to interpret the contract, does not explain how to apply the compensation provision of Article 24 when the violation is a restriction of the ability of employees to request leave and the leave that the employees would have requested is not known. In that situation there are no particular hours of employment that must be treated differently from other hours, as is the case where a particular employee works certain hours outside his tour of duty or, in the case of the FLSA, which the Article references as a standard, where an employee works over forty hours. The FLSA identifies the hours for which overtime must be as those in excess of forty hours.⁵⁹

Article 24, Section 1, in contrast to the FLSA, does not specify the period for which compensation is to be paid. It provides, “Notice of any changes to [members’] days off or tours of duty shall be made fourteen (14) days in advance. If notice is not given fourteen (14) days in advance the member shall be paid . . . overtime or compensatory time. . . .” The period for which compensation is to be paid under Article 24 can be easily deduced where the change compelled a Member to work certain hours on his assigned days off without proper notice, but that is not the case with a leave restriction, which is not mentioned in the Article. On that issue the Award is not ambiguous; it is completely silent.

The parties have a genuine dispute over the application of the compensatory provisions of Article 24, Section 1 to the leave restriction. Resolving that dispute requires an interpretation of the contract that the Arbitrator did not provide. Under those circumstances, the Board will not seek enforcement compelling MPD to comply with the Award or with the CBA as interpreted by FOP.⁶⁰

(b) Compensation for Alleged Additional Violations

FOP claims that, in addition to the Article 24 violations discussed above, the Arbitrator recognized that other contractual violations caused by AHOD entitle Members to time and a half compensation that is yet to be paid.

⁵⁷ FOP’s Post-Hearing Br. 22.

⁵⁸ Supplemental Mem. 4

⁵⁹ “[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation *for his employment in excess of the hours above specified* at a rate of not less than one and one-half times the regular rate at which he is employed.” FLSA § 207(a)(1); 29 U.S.C. § 207(a)(1) (emphasis added).

⁶⁰ See notes 42-44 *supra* and accompanying text.

The first such violation is based upon Article 4 of the CBA. Article 4 states that the union recognizes that certain management rights, including the right to determine the tour of duty, belong to MPD “when exercised in accordance with applicable laws, rules and regulations, which are in no way wholly inclusive.” As noted, the Arbitrator stated that D.C. Official Code § 1-612.01(b) “establishes tours of duty in specified detail ‘except when the Mayor determines that an organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased.’”⁶¹ He found that the right to determine the tour of duty was not exercised in accordance with applicable law because the Mayor did not make this determination.

FOP calls attention to one of the specifications of the tour of duty that section 1-612.01(b) requires absent this determination. Section 1-612.01(b)(2) requires that tours of duty be established such that “[t]he basic 40 hour workweek is scheduled on 5 days, Monday through Friday when practicable, and the 2 days outside the basic workweek are consecutive.”

FOP claims that “[f]or numerous D.C. Police Union members, as a result of AHOD, their days off were split and were not consecutive. This is an additional scheduling violation caused by the 2009 AHOD which Arbitrator Truesdale recognized entitles the members to time and one-half pay.”⁶² FOP does not, and cannot, support these assertions with a citation to the Award. The Arbitrator made no finding that, as result of AHOD, the days off of numerous Members were split and did not recognize that such a violation of Article 4 would entitle Members to time and a half compensation. The various articles of the CBA that AHOD violates, as well as the Arbitrator’s comments on them, need to be considered separately.⁶³ Unlike Article 24, Article 4 does not provide for time and a half compensation for its violation, and neither does section 1-612.01(b).

FOP makes a similarly unsupported claim with respect to tours of duty in the weeks surrounding the AHOD weekends. FOP asserts that, because of the improper suspension of Article 24, Section 1, “numerous D.C. Police Union member’s tours were changed during the weeks surrounding AHOD. . . . This is an additional scheduling violation caused by the 2009 AHOD which Arbitrator Truesdale recognized must be compensated.”⁶⁴ Again there is no citation to the Award. And nowhere in the Award did the Arbitrator find that tours of duty were changed in the surrounding weeks or that such changes must be compensated. He was not asked to make such findings. FOP requested compensation for “all AHOD initiative days.”⁶⁵ AHOD initiative days were Friday through Sunday on the designated weekends.⁶⁶

The only contention the Award reflects that FOP made to the Arbitrator regarding AHOD’s effect on surrounding days indicates that the effect was to reduce compensable changes to Members’ tours of duty. According to FOP, an assistant chief testified that once MPD began

⁶¹ Award 24 (quoting D.C. Official Code § 1-612.01(b)(2)).

⁶² Suppl. Mem. 8.

⁶³ See *D.C. Metro. Police Dep’t v. F.O.P./Metro. Police Dep’t Labor Comm.*, 61 D.C. Reg. 12839, Slip Op. No. 1494, PERB Case No. 13-A-06 (2014).

⁶⁴ Suppl. Mem. 8.

⁶⁵ Award 19.

⁶⁶ Award 14.

implementing AHOD, staffing shortages occurred on other days of the week, and as a result half of the Members were allowed to take their normal weekend days off.⁶⁷

MPD's failure to pay compensation that the Arbitrator did not award for violations he did not find is not a ground for filing an enforcement action.

2. Liquidated Damages

The Arbitrator's Award of compensation tracks the language of Article 24, Section 1, which provides, "If notice is not given of changes fourteen (14) days in advance the member shall be paid, at his or her option, overtime pay or compensatory time at the rate of time and one half, in accordance with the provisions of the Fair Labor Standards Act." FOP argues that by incorporating the language "in accordance with the provisions of the Fair Labor Standards Act" into the contract, the parties agreed that the calculation of damages would be guided by the law governing FLSA violations, specifically the damage provision in section 216(b) of the FLSA.⁶⁸

Section 216(b) of the FLSA provides that employers who violate certain provisions of the FLSA are liable to the affected employee or employees "in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." FOP contends that FLSA remedies are often employed for violations of other laws.⁶⁹ However, all the cases that FOP cites in support of that claim are Equal Pay Act cases.⁷⁰ The Equal Pay Act is a part of the FLSA.⁷¹

The Arbitrator could have written in his Award that MPD must pay liquidated damages of an additional time and a half (treble damages), but instead he ordered compensation at a rate of time and a half and did not say treble damages. Without an indication from the Arbitrator as to how he interpreted "the provisions of the Fair Labor Standards Act" as used in Article 24, the Board cannot assume that his interpretation had to be that on top of Article 24's penalty of overtime an additional equal amount must be added as another penalty. One could reasonably come to a different conclusion. In the only arbitral opinion on this issue to come before the Board, the arbitrator said in an award sustained by the Board:

This record is not at all clear that the reference to the FLSA in Article 24 was intended to incorporate the liquidated damages concept in that Article. The reference can be easily read to refer simply to the calculation of time and one-half as compensatory damages. Had the parties intended to inject the FLSA's liquidated damages penalty, there were far less obscure ways of doing so. Although the . . . award of overtime pay for hours worked in the

⁶⁷ Award 17.

⁶⁸ Supplemental Mem. 5.

⁶⁹ Supplemental Mem. 6.

⁷⁰ *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1097 (D.C. Cir. 1984); *Thompson v. Sawyer*, 678 F.2d 257, 278 (D.C. Cir. 1982); *Cody v. Private Agencies Collaborating Together, Inc.*, 911 F. Supp. 1, 5 (D.D.C. 1995).

⁷¹ 29 C.F.R. § 1620.1.

event of a violation of Article 24 seems to be a reasonable remedy for a violation of the posting provision, the imposition of a penalty in addition based on the reference to the FLSA in Article 24 is a reach beyond the agreement and will not be awarded.⁷²

Arbitrator Truesdale was free to give the phrase a different interpretation, but he did not. He was not asked to interpret the phrase. In its grievance and in its post-hearing brief, FOP did not request time and one half plus an additional equal amount as it does now. It requested time and one half without reference to the FLSA.⁷³

Both parties have pointed out that the Board previously said in litigation in this matter before the Superior Court that the Board does not have authority to add liquidated damages to the Award.⁷⁴ The allegation that MPD has not complied with the Award because it has not paid liquidated damages presents an issue of contract interpretation that was not presented to the Arbitrator as well as a genuine dispute over the terms of the Award. Therefore, the Board lacks authority to enforce compliance in this regard.⁷⁵

3. Incomplete Compensation for Phases 1 and 2

In its Supplemental Memorandum, FOP gives several examples of Members who worked on AHOD weekends in Phases I and II when those days were not in their tour of duty or who had days off that were not consecutive yet received no compensation for those violations.

Section 1-612.01(b)(2) of the D.C. Official Code requires days off to be consecutive. As discussed, violations of section 1-612.01 and derivatively of Article 4 are not compensable with time and a half pay, unlike violations of Article 24. However, the alterations of tours of duty identified by FOP, if true, would be compensable with time and a half pay pursuant to Article 24. And, if MPD has not paid time and a half compensation in those instances, it has not complied with the Award.

FOP does not purport to present or to know of every instance of compensation that was improperly withheld from Members whose tours of duty were changed by Phases I and II. FOP asserts that a “comprehensive review of the MPD’s payments, failures to make payments, and the resulting penalties is more appropriately addressed in an enforcement proceeding.”⁷⁶ In its Opposition to the Motion to Dismiss, FOP said that in an enforcement action in Superior Court “MPD will have the burden of proving to the Court compliance with all aspects of the Arbitration Award.”⁷⁷

⁷² *F.O.P./Metro. Police Dep’t Labor Comm. v. D.C. Metro. Police Dep’t*, 62 D.C. Reg. 2879, Slip Op. No. 1500 at 4, PERB Case No. 13-A-05 (2014).

⁷³ Class Grievance 8; FOP’s Post-Hearing Br. 21, 22.

⁷⁴ Mot. for Enforcement 6; Mot. to Dismiss 8, Ex. 7 at 14.

⁷⁵ See notes 42-44 *supra* and accompanying text.

⁷⁶ Supplemental Mem. 12.

⁷⁷ Opp’n to Mot. to Dismiss 4.

These statements reflect a misunderstanding of the nature of an enforcement proceeding. The Board, not MPD, will be the plaintiff. In filing its complaint, the Board will represent to the court that the allegations of the complaint have evidentiary support.⁷⁸ The Board will not be asking the court to sort out the facts. Rather, the CMPA contemplates that the Board will already have made factual findings before coming to the court. Section 1-617.13(b) provides that when the Board requests the court to enforce an order, “[t]he findings of the Board with respect to questions of fact shall be conclusive if supported by substantial evidence on the record considered as a whole.”

The Board is empowered to hold hearings on any matter subject to its jurisdiction⁷⁹ and has held hearings on the issue of whether a party has complied with an arbitration award⁸⁰ and on the issue of whether a party has complied with an order of the Board.⁸¹ The Board directs that this matter be referred to a hearing examiner to conduct a hearing and make appropriate recommendations concerning the alleged failure of MPD to pay time and a half compensation to Members who worked during April 24-26, 2009, or June 5-7, 2009, on a day or time that was not in the Member’s tour of duty. As the petitioner, FOP will bear the burden to prove, by a preponderance of the evidence, MPD’s noncompliance with that aspect of the Award.⁸²

ORDER

IT IS HEREBY ORDERED THAT:

1. MPD’s Motion to Dismiss Petition for Enforcement of PERB Decision and Order is denied.
2. FOP’s Motion for Enforcement of PERB Order Granting Petition for Enforcement and to Initiate Enforcement Proceedings in D.C. Superior Court is granted in part. The Board shall proceed with enforcement of Slip Opinion No. 1032 pursuant to D.C. Official Code §§ 1-605.02(16) and 1-617.13(b) if full compliance with the Award with respect to Phases III through VIII of the 2009 AHOD is not made and documented within ninety (90) days of the issuance of this decision and order.
3. The Board’s Executive Director shall refer this matter to a hearing examiner to conduct a hearing and make appropriate recommendations concerning the alleged failure of MPD to pay time and a half compensation to Members who worked during April 24-26, 2009, or June 5-7, 2009, on a day or time that was not in the Member’s tour of duty.

⁷⁸ Super. Ct. R. 11(b)(3).

⁷⁹ D.C. Official Code § 1-605.02(7).

⁸⁰ *Washington Teachers’ Union, Local 6 v. D.C. Pub. Sch.*, 61 D.C. Reg. 2727, Slip Op. No. 1452 at 3-6, PERB Case No. 14-U-02 (2014); *F.O.P./Metro. Police Dep’t Labor Comm. (on behalf of Stimmel) v. D.C. Metro. Police Dep’t*, 60 D.C. Reg. 577 Slip Op. No. 1346 at 1-2, PERB Case No. 00-U-03 (2012).

⁸¹ *Haynesworth v. AFGE Local 631*, 45 D.C. Reg. 6719, Slip Op. No. 555 at 1, PERB Case Nos. 97-S-02 and 97-S-03 (1998) (dismissing motion for enforcement without prejudice).

⁸² *See AFGE Locals 631, 872, & 2553 v. D.C. Water & Sewer Auth.*, 59 D.C. Reg. 3323, Slip Op. No. 817 at 3, PERB Case No. 04-U-28 (2006); Board R. 550.16.

4. 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, Yvonne Dixon, and Douglas Warshof.

Washington, D.C.
September 22, 2016

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Number 11-E-02 is being transmitted to the following parties on this the 23d day of September, 2016.

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