

John C. Truesdale, Esq.
Arbitrator

ARBITRATION

In the Matter of the Arbitration Between

**Fraternal Order of Police/Metropolitan
Police Department Labor Committee**

And

FMCS Case No. 09-54894 (Class Grievance – AHOD Initiative)

The District of Columbia Metropolitan Police Department

Opinion and Award

This arbitration arises pursuant to the Collective Bargaining Agreement between the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP, the Union) and the District of Columbia Metropolitan Police Department (MPD, the Department), under which they selected the undersigned Arbitrator, John C. Truesdale (according to the procedures of the Federal Mediation and Conciliation Service), and under which his Award shall be final and binding on both Parties.

The hearing was held on June 17, 2009, at the MPD Office of Labor and Employee Relations, 300 Indiana Avenue N.W., Washington, D.C. Throughout the hearing, the Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of relevant exhibits, and for argument. All witnesses testified under oath as administered by the Arbitrator. There was a transcript of the proceeding. Copies of briefs were served by the Parties on each other and on the Arbitrator postmarked August 14, 2009.

Appearances

For the Fraternal Order of Police/Metropolitan Police Department Labor Committee

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For The District of Columbia Metropolitan Police Department

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District of Columbia Metropolitan Police Department
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Issues

The Parties stipulated that there were no procedural impediments to arbitration, and the matter is properly before the Arbitrator for decision on the merits.

FOP (the Union) stated the issues as follows (U. Ex. A):

Whether the AHOD initiative violates the parties' collective bargaining agreement ("CBA") and the provisions of Articles 1, 4, 24 and 49.

Whether, consistent with Article 4 of the parties' CBA, Chief Lanier and the MPD violated Article 4 by establishing AHOD schedules that were not permitted by the applicable laws, rules and regulations, including violating the Comprehensive Merit Personnel Act, D.C. Code § 1-612.01, D.C. Code § 1-617.06, and generally establishing AHOD without proper statutory or regulatory authority or valid delegation of power.

Whether Chief Lanier and the Mayor failed to make requisite findings of a crime emergency or a seriously handicapping effect, and establish necessary rules and regulations for making such a determination.

Whether the MPD failed to adequately compensate the class for all time scheduled during the AHOD initiative at the rate of time and one-half, as required for these violations.

Whether any non-union members of the MPF were provided notice of AHOD restrictions prior to the issuance of teletype 01-033-09.

MPD (the Employer) stated the issues as follows (A. Ex. 1):

1. Whether Chief Lanier and the MPD violated Article 4 or CMPA provisions by establishing AHOD schedules.
2. Whether Chief Lanier has the proper statutory or regulatory authority, or delegation of power to establish AHODs.
3. Whether Chief Lanier was required to declare a crime emergency or a seriously handicapping effect in order to establish AHODs.
4. Whether MPD adequately compensated the class for all time scheduled during the AHOD initiative.
5. Whether any non-union members of MPD were provided notice of AHOD restrictions prior to the issuance of teletype 01-033-09.

While there is considerable agreement in the wording of the Parties' statements of the issues, MPD's statement contains no reference to Articles 1, 24, and 49 of the CBA. I find that the Union's statement more closely reflects the issues as developed on the record.

For the reasons set forth below, I find that Union's grievance has merit and, accordingly, shall sustain the grievance and provide for an appropriate remedy.

Relevant D.C. Legal Provisions

D.C. Official Code § 1-612.01 Hours of work. (U. Ex. 6)

(a) A basic administrative workweek of 40 hours is established for each full-time employee and the hours of work within that workweek shall be performed within a period of not more than 6 of any 7 consecutive days;

(1) *Omitted*

(2) *Omitted*

(b) Except when the Mayor determines that an organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, tours of duty shall be established to provide, with respect to each employee in an organization, that:

(1) Assignments to tours of duty are scheduled in advance over periods of not less than one week;

(2) The basic 40 hour workweek is scheduled on 5 days, Monday through Friday when practicable, and the 2 days outside the basic workweek are consecutive;

(3) The working hours in each day in the basic workweek are the same;

(4) The basic nonovertime workday may not exceed 8 hours;

(5) The occurrence of holidays may not affect the designation of the basic workweek;

(6) Breaks in working hours of more than 1 hour may not be scheduled in a basic workday except under rules and regulations on flexible work schedules as provided in subsection (e) of this section.

(c) *Omitted*

(d) *Omitted*

(e) The Mayor shall issue rules and regulations governing hours of work. Such rules and regulations shall provide for the use of flexible work schedules within the 40 hour workweek when such schedules are considered both practicable and feasible.

D.C. Official Code § 1.617.04 Unfair Labor Practices (U. Ex. 7)

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

(2) *through (5) Omitted*

(b) Employees, labor organizations, their agents, or representatives are prohibited from:

(1) Interfering with, restraining, or coercing any employee or the District in the exercise of the rights guaranteed by this subchapter;

(2) *through (5) Omitted*

Mayor's Order 2000-83 (May 30, 2000) Delegation and Sub-Delegation of Authority (U. Ex. 17)

By virtue of the authority vested in me as Mayor of the District of Columbia . . . and pursuant to the District of Columbia Government Comprehensive Merit Personnel Act of 1978 . . . it is hereby ORDERED that:

A through D Omitted

E. Notwithstanding paragraphs A, B and C of this Order, the Chief of Police is delegated personnel and rulemaking authority vested in the Mayor over the Metropolitan Police Department under the CMPA.

F Omitted

G. Effective Date: This Order shall become effective immediately.

/s/ Anthony A. Williams
Mayor

Mayor's Order 2008-92 (June 26, 2008) Delegation and Sub-Delegation of Authority (U. Ex. 20)

By virtue of the authority vested in me as Mayor of the District of Columbia . . . and pursuant to the District of Columbia Government Comprehensive Merit Personnel Act of 1978 . . . it is hereby ORDERED that

A. The Director, D.C. Department of Human Resources (DCHR), is delegated the authority vested in the Mayor to implement the CMPA and, with the concurrence of the City Administrator or the Mayor, to issue rules and regulations to implement the CMPA.

B and C Omitted

D. Rescission: Mayor's Order 2000-83, dated May 30, 2000, is hereby rescinded.

E. EFFECTIVE DATE: This Order shall become effective immediately.

/s/ Adrian M. Fenty
Mayor

MEMORANDUM¹

FROM: Wayne C. Witkowski, Deputy Attorney General, Legal Control Division

Date: June 13, 2008

Subject: Legal Sufficiency Review of Draft Mayor's Order for Director of the Department of Human Resources and Agency Heads

... The primary purpose of this Order is to rescind the personnel and rulemaking authority delegated to the Chief of the Metropolitan Police Department (MPD) over MPD in Mayor's Order 2000-83 (May 30, 2000).

Mayor's Order 2009-117²

June 19, 2009

Subject: Amendment to Mayor's Order 2008-81, Joint Delegation of Personnel Authority dated June 5, 2008
By virtue of the authority vested in me as Mayor of the District of Columbia . . . it is hereby ORDERED that;

1. This Mayor's Order shall amend Mayor's Order 2008-81, *Joint Delegation of Personnel Authority*, dated June 5, 2008, for the purpose of including language inadvertently omitted. Pursuant to this amendment, subparagraph (1) of paragraph (F) shall read as follows:

"1. The personnel and rulemaking authority vested in the Mayor over officers and members of The MPD under D.C. Official Code §§ 1-604.04 and 1-604.06 (2006 Repl.);"

2. EFFECTIVE DATE: This order shall become effective *nunc pro tunc* to June 5, 2008.

/s/ Adrian M. Fenty

Mayor

Relevant CBA Provisions) (U. Ex. 1)

The Labor Agreement between the Government of the District of Columbia Metropolitan Police Department and the Fraternal Order of Police MPD Labor Committee (effective through September 30, 2008)

Article 1 – Preamble

Sections 1, 2, and 4 Omitted

Section 3

The parties hereby affirm without reservation the provisions of this Agreement, and agree to honor and support the commitments contained therein. The parties agree to resolve whatever differences may arise between them through the avenues for resolving disputes agreed to through negotiations of this Agreement.

Article 4 – Management Rights

The Department shall retain the sole right, authority, and complete discretion to maintain the order and efficiency of the public service entrusted to it, and to operate and manage the affairs of the Metropolitan Police Department in all aspects including, but not limited to, all rights and authority held by the Department prior to the signing of this Agreement.

Such management rights shall not be subject to the negotiated grievance procedure or arbitration. The Union recognizes that the following rights, when exercised in accordance with applicable laws, 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
- 3 through 5. Omitted*
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.
- 7. Omitted*
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.

Article 19 – Grievance Procedure

Sections A, B, C, and D Omitted

E. Arbitration

¹ This Memorandum was attached to U. Ex. 20

² I am including Mayor's Order 2009-117 here for ease of reference, but as will be seen in the section entitled Discussion, below, I adhere to my August 10, 2009 ruling denying MPD's request to reopen the hearing.

Sections 1 through 4 Omitted

Section 5

(1), (3), (5), and (6) Omitted

(2) The parties to the . . . appeal shall not be permitted to assert in such arbitration proceedings any ground or to rely on any evidence not previously disclosed to the other party.

(4) The arbitrator shall not have the power to add to, subtract from or modify the provisions of the Agreement in arriving at a decision on the issue presented and shall confine his decision solely to the precise issue submitted for arbitration.

(7) A statement of the arbitrator's fees and expenses shall accompany the award. The fee and expense of the arbitrator shall be borne by the losing party, which shall be determined by the Arbitrator.

Article 24 – Scheduling

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. The notice requirement is waived for those members assigned to the Executive Protection Unit and the Office of Professional Responsibility.

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.

Sections 3 and 4 omitted

Article 49 – Duration And Finality Of Agreement

Sections 1, 2, and 3 Omitted

Section 4

This agreement shall remain in effect until September 30, 2008 . . . and will be automatically renewed for one (1) years periods thereafter unless either party gives to the other party written notice of intention to terminate or modify the Agreement one hundred and fifty (150) days prior to its anniversary date

Section 5

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.

Section 6 Omitted

The Teletype (U. Ex. 4)

Date Of Request: January 7, 2009

9 To The Force

15 Description of Wanted Person Or Message

Due to last year's successes and our continuing efforts to reduce crime, I will continue with our agency's All Hands On Deck Initiative (AHOD) for calendar year 2009. The purpose of the AHOD Initiative is to have positive interaction with citizens, address community concerns, provide a physical presence in neighborhoods throughout the city, arrest offenders of the law, and to reduce crime and the fear of crime. Listed below are the dates for the 2009 AHOD

- Phase I. May 15th, 16th, and 17th, 2009
- Phase II. June 5th, 6th, and 7th, 2009
- Phase III. June 26th, 27th, and 28th, 2009
- Phase IV. July 10th, 11th, and 12th, 2009
- Phase V. July 24th, 25th, and 26th, 2009
- Phase VI. August 3rd, 4th, and 5th, 2009
- Phase VII. November 13th, 14th, and 15th, 2009
- Phase VIII. December 17th, 18th, and 19, 2009

All sworn member 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 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.

Members assigned to patrol districts will work in their assigned districts. Members assigned to non-patrol units will receive their AHOD assignments in the near future.

Bureau Head Approval
/s/ Cathy L. Lanier
Chief of Police

The Phase I Teletype (A. Ex. 6)

Date Of Request March 5, 2009

9 To The Force

15 Description Of Wanted Person Or Message

Change of Dates for Phase I – All Hands on Deck (AHOD)

On January 7, 2009 Teletype 01-023-09 (AHOD Schedule) was published announcing Phase I of AHOD was scheduled for May 15-17, 2009. Due to National Police Week activities occurring during the same period, I have rescheduled Phase I – AHOD to April 24-26, 2009. This AHOD will coincide with the World Bank and the International Monetary Fund spring meetings.

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 25th-26th, 2009.

Bureau Head Approval
/s/ Cathy L. Lanier
Chief of Police

Overview

On January 7, 2009, District of Columbia Chief of Police Cathy L. Lanier sent a teletype to The Force (U. Ex. 4, the Teletype) advising that the All Hands On Deck (AHOD) initiative would be continued for calendar year 2009. The teletype listed eight three-date weekends in May, June, July, August, November, and December, depicted as Phases I through VIII, for the AHOD initiative. The Teletype stated that all sworn members of MPD are to take part, will work an 8-hour tour of duty on these dates, and shall not be scheduled for day off on these dates. The teletype also stated that all leave is restricted for these dates unless already approved prior to January 7, 2009.

On January 23, 2009 (U. Ex. 8), FOP Chairman Kristopher Baumann filed a class grievance stating that issuance of the Teletype violated Articles 1, 4, 24, and 49 of the CBA. FOP demanded bargaining.

By letter of February 23, 2009 (U. Ex. 9), Chief Lanier stated that there was no requirement to bargain and denied the grievance.

On February 24, 2009 (U. Ex. 10), FOP demanded arbitration in accordance with Article 19, Part E, Section 2 of the CBA.

As noted, the hearing was held on June 17, 2009.

Union Witness

Kristopher Baumann became a police officer in Oregon beginning in 1990 or 1991, resigned to finish law school, obtained his law degree, was admitted to the Oregon Bar, obtained an LLM in taxation, was attorney advisor in the United States Tax Court for two years, and then joined the MPD as a police officer in 2002. He was appointed to the contract negotiations team which negotiated the current CBA, was elected Chief Shop Steward of the 7th District, and then was elected FOP/MPD Labor Committee Chairman, and re-elected in 2006.

Chairman Baumann identified the CBA (U. Ex. 1) which he said is in the “holdover phase” until a new agreement is agreed upon. He testified that the idea behind the All Hands On Deck initiative (AHOD) is to get everybody out on the street so the public and the media can see that all police officers are working. He said that AHOD is not a crime initiative because it isn’t directed at where the real crime occurs. Although AHOD is scheduled for weekends, in some districts the high crime days are Tuesdays or Wednesdays. He also said that AHOD is citywide and not tailored to address specific crime problems in different districts. He testified that Chief Lanier has publicly stated that AHOD is a public relations issue; she had never declared a crime emergency. He identified U. Ex. 2 (testimony of Chief Lanier before the D.C. Council), noting her statement on Page 6 that “The importance of interacting with people in EVERY community when there is NO CRISIS cannot be overstated.” (*emphasis in original*) Chairman Baumann said that AHOD is a preplanned event, not a response to an unplanned event.

Chairman Baumann stated that AHOD had started in 2007 and had been challenged on a number of occasions. He identified U. Ex. 3 (Hearing Examiner’s Report and Recommendations in PERB Unfair Labor Practice Case No 8-U-09). The Union had filed an unfair labor practice (ULP) complaint on November 28, 2007, asserting that MPD had committed a ULP by implementing the AHOD initiative without first bargaining with the Union. Chairman Baumann noted that the Hearing Examiner determined that the matter must be decided by arbitration. He testified that there are between six and ten other AHOD grievances, some class and some individual, pending arbitration, and that this case was the first to reach the hearing stage.

Chairman Baumann identified U. Ex. 4, Chief Lanier's January 7, 2009, teletype to The Force, announcing the dates for the eight 2009 weekend phases of AHOD. He said that the teletype stated that

"The purpose of the AHOD initiative is to have positive interactions with citizens, address community concerns, provide a physical presence in neighborhoods throughout the city and arrest offenders of the law, and to reduce crime and the fear of crime."

He said that the teletype impacted everybody's schedules including the CBA rules. He said that the leave-restriction language prevented any Union members from taking any more than a five-day vacation throughout the entire summer. He noted that the leave restriction began on the date of the teletype, January 7, 2009, citing examples of the problems caused thereby. He said that the teletype was not issued in response to an emergency, an unplanned event, or for the efficiency of the service. He said the teletype "wipes away the scheduling protections" that are in the CBA.

Chairman Baumann identified Request for Documents, dated June 12, 2009 (U. Ex. 5). He said he did not have proof that management, non-FOP members, were receiving notice of the AHOD prior to its issuance, only "anecdotal" information. He said the letter was misdated, and was actually sent June 16.

Chairman Baumann identified U. Ex. 6 (D.C. Official Code § 1-612.01) which states that "except when the Mayor determines that an organization will be seriously handicapped in carrying out its functions" tours of duty shall be established for all D.C. employees, including the police department, and rules and regulations shall be issued governing hours of work. He also identified U. Ex. 7 (D.C. Official Code § 1.617.04) and said that it prevents members of the bargaining unit from being treated differently than non-bargaining unit member and that it is an unfair labor practice to do so.

Chairman Baumann testified concerning the provisions of Articles 1, 4, 24, and 49 of the CBA (U. Ex. 1); identified the Class Grievance subject of this arbitration (U. Ex. 8); Chief Lanier's denial of that grievance (U. Ex. 9); and the Union's demand for arbitration (U. Ex. 10).

Referring to the CBA, Chairman Baumann said that MPD is violating Article 1 by not supporting its commitments. Referring to Article 24, he said that scheduling is done based on the policies and procedures that were in place when the CBA was signed. The AHOD initiative, he said, violated not only the assigned days off and tours of duty, but how all of that is done.

There has not been a declared emergency or an unanticipated event. Special Order 99-20 (U. Ex. 11) has been rescinded, he said, but it was in effect when the CBA was signed and its policies and procedures are followed in the patrol districts; nothing new has been negotiated. MPD has never advised the Union, he said, that a different order governs how scheduling occurs. Tours of duty are being assigned outside of what is allowed under 99-20. He gave as an example a patrol officer working days with Friday and Saturday off; AHOD, he said, takes away his known schedule.

Chairman Baumann said that under Article 49, Section 2, of the CBA the Parties waived any rights to negotiate, to change any of the provisions bargained for. He referred to Article 4 and said that when MPD exercises its management rights, it must do so in accordance with applicable law, rule or regulation. The Mayor had made no determination that MPD would be seriously handicapped, no rules or regulations have been promulgated. Members are not being assigned consecutive days off, the days are being split.

Chairman Baumann identified U. Ex. 12, a grievance filed by Officer Terrence Welsh³ in 2007, complaining that an AHOD initiative on Monday, August 6, and Tuesday, August 7, resulted in his normal Sunday/Monday days off being changed to Sunday/Wednesday. He said that then-Commander Diane Groomes, now Assistant Chief of Patrol, agreed that “the Department violated D.C. Code by changing and splitting the days off” of Officer Welsh. (U. Ex. 13)

Chairman Baumann testified concerning an arbitrator’s award in 1994 in *FOP/MPD Labor Committee (Officer William J. Dolan) and MPD (Chief of Police, Fred Thomas & General Counsel, Vernon S. Gill)*, AAA Case No. 16 39 00248 93, April 5, 1994 (U. Ex. 14) that dealt with the need for “handicapping” language. D.C. PERB denied MPD’s Arbitration Review Request. (U. ex. 15)

Responding to a question about the Chief’s denial of the current grievance, in which she distinguished the *Dolan* decision by stating that it was before the Mayoral delegation of authority (U. Ex. 9), he said that there was no specific cite to what delegation she was referring to, and that even assuming a delegation of authority, the statute requires that there be a “seriously handicapped” showing and the promulgation of rules and regulations, neither of which has occurred. He said that no one had notice of specific schedules and tours of duty. He

³ This officer’s name is variously referred to as Welsh, Welch, and Walsh in the record.

said that as of January 7, 2009, leave was restricted without giving two weeks' notice that that was going to occur. He said the Chief did not explain her denial, "notwithstanding Commander Groomes' decision," of this grievance. He said that Special Order 99-20 may have been rescinded but it was in effect when the CBA was signed and the policies exist. He said the CBA was signed on January 28, 2005; Chief Lanier was confirmed, he said, in March 2007. He disagreed with the Chief's assertion that there has been no change in any of the terms and conditions of employment and that the Union had not requested bargaining. He said the Union had requested bargaining and that its failure to bargain is pending as a ULP. He said that MPD should stop violating the CBA, stop violating the statute, and compensate the members who had their schedules changed with time-and-a-half as provided for in Article 24.

On cross-examination, Chairman Baumann agreed that there had been no final decision on the pending ULP case. When the International Monetary Fund meets, he was asked, is not leave restricted and members not permitted to take leave? He answered that leave is not prohibited, but that leave is restricted to a certain percentage. He agreed that there have been leave restrictions applied to the entire force. He said that Commander Groomes had agreed that the D.C. Code and the CBA had been violated and that Officer Welsh would be compensated. He said that it was a response to an individual grievance, not a class or a group, not a "legal decision."

Shown a copy of a June 9, 2000⁴ Mayor's Order 2000-83 (Agency Ex. 1) he said that it conferred upon the Chief of Police, personnel and rulemaking authority over the MPD under the CMPA.

Asked what specific provisions of Article 49 he believed had been violated, he responded: Section 2 and Section 5 by making changes that violated Article 24; by changing the way days are assigned and tours of duty are assigned; changing a known and regular schedule; and posting the teletype in a known and fixed location. He was asked, is it not a management right to determine the number, type and grade of employees assigned, the work project, tour of duty, methods and processes by which such work is performed? His response was yes, when it is exercised in accordance with applicable laws, rules and regulations.

Shown a teletype of May 15, 2008 (A. Ex. 2) he said that it came from the Chief of Police and rescinded Special Order 99-20. He was shown A. Ex. 3 (transcript of a PERB

⁴ Mayor's Order 2000-83, introduced as Agency Ex. 1, is dated May 30, 2000.

hearing) and he said that the Chief said that she wanted to put police officers out walking around the community when there's not a crisis, to get as many police officers out into the community as possible and for community relations.

When asked, he said that he did not know if the D.C. Code specifically addresses annual leave or leave. He agreed that people take vacations when they take them, not necessarily in the summer. He said that if Tuesdays and Wednesdays are his days off and he works day work, the January 7 teletype in no way informed him what his schedule would be. He agreed that the teletype told everyone that they would have to work, for example, May 15 and 16, and the days of the other phases. He said that he had only anecdotal information with respect to management leave during the phases.

He was directed to D.C. Code 1-612.01 which states that the basic 40-hour week is five days, Monday through Friday, which he agreed would not be practicable for the majority of police officers.

On re-direct, Chairman Baumann said that Commander Groomes, in her decision on the Welsh grievance, said that non-consecutive days off would not happen in the First District (her command). He said that Special Order 99-20 has been rescinded, but is still being followed by MPD. In reference to U. Ex. 5, he said that Request No 19 reflected that the Union is not interested in names but in statistics. He said Request No. 20 was to learn if a preview of the January 7 teletype had been provided to management.

On re-cross, Mr. Baumann was asked to review a teletype of May 12, 2009 (A. Ex, 5), which listed the names of non-patrol officers, their duty assignments or tours of duty, and their duty status. He said that although there were 14 days between the date of the teletype and the dates of Phase II, it was still a violation of the CBA

In response to a question by the Arbitrator, Chairman Baumann said the rescission of Special Order 99-20 (A. Ex. 2) said that "Commanding Officers shall schedule their members in accordance with the Collective Bargaining agreement," meaning the scheduling policies that are in effect, which is 99-20.

Employer Witness

Alfred Durham is the Assistant Chief of Police. He has been with MPD for twenty years; his current position with MPD is Executive Officer, a post he has held for 2½ years. He described Chief Lanier's emphasis on research as to when and where crime was occurring in

the city. AHOD was declared an initiative and not a crime emergency, he said, because of the crime emergency declared in 2006 by the prior Chief during which police officers had to work 12 hours a day, 6 days a week. He said that Chief Lanier felt that was unhealthy and a morale buster and vowed never to do that; she wanted to come up with another initiative that would circumvent that so she would not have to declare a crime emergency. He said the AHOD initiative was intended to address Part 1 offenses, the most violent crimes: robberies, homicides, sexual assaults, ADW's (assaults with dangerous weapons). AHOD was created, he said, to deploy resources at critical times in neighborhoods throughout the city. Visibility was definitely a focus of AHOD, he said. Instead of 700 officers on an evening shift, there would be 1300, and even increase those numbers on a midnight shift.

Assistant Chief Durham testified that the first AHOD was started in June 2007. Each time there is a different focus, "trying to engage the community, have visibility, and get officers out there to do their job." Each AHOD involves "every available body." Certain units have to be staffed and can't be deployed. Others are on military leave or sick leave and can't be deployed. Leave approved before January 7, 2009, is honored. Requests for leave because of a child graduating from high school that were sent to the Chief's office, he said, were granted. He said he couldn't speak to those he didn't know about.

The AHOD dates were selected, he said, for days predictable from research that crime would go up. Referring to U. Ex. 4 (January 7, 2009, "the Teletype"), he noted that it issued five months before the first AHOD (May 15, 16, 17). The members knew then when AHODs were going to occur and could plan their time. The teletype did not violate Articles 1, 4, 24, and 49, he said, because it gives more than 14 days' notice. He said he was the one who posts the AHOD schedules and tries to get them out for the members at least 30 days, no later than 21 days, in advance. The teletype only established the dates of the AHODs, not the tours of duty. The teletypes for those have to be gotten out also.

Assistant Chief Durham testified that as it relates to the changing of the days off or the tours of duty within the same week, that goes back to the Mayor's delegation of authority to the Chief of Police "that it would seriously handicap, any changes in the schedule that's going to seriously handicap the agency's ability to perform or carry out its function." (T. 161-162) He said that MPD's mission would be seriously handicapped if it were not permitted to continue with AHOD. He said that the 13 or so AHODs so far have been productive. He said that the most

satisfaction he gets out of it is to see that people know what AHOD is, that they say we see your officers now. Crime has been reduced for every AHOD. After every AHOD there are crime briefings – what went right, what went wrong; feedback - some positive, some negative. Improvements have been noted for future AHODs. He repeated that without AHOD, MPD would be seriously handicapped in carrying out its functions.

Shown a teletype to The Force dated March 30, 2009 (A. Ex. 4), he explained that in February⁵ a teletype had been sent out advising that AHOD Phase I was changed from May 15-17 to April 24-26. All the other dates remained the same. This March 30 teletype gave the members, 25 days in advance, the tours of duty and the districts they'll be assigned to for the April AHOD. He said that split days off, which are a violation of Article 24, are not permitted and when it has occurred the Chief granted the grievances. However, if a member has requested a split day off, that has been honored. He identified a teletype to The Force dated May 12, 2009 (A. Ex. 5) setting tours of duty in the field for administrative personnel for the June 5-7 AHOD. He explained that Friday in an AHOD is a 24-hour day, Saturday is a 24-hour day, Sunday is only from midnight to 6:00 a.m. Patrol officers, he said, work their regular tours of duty. He corrected his reference to a February teletype, stating that it was sent out March 5, 2009 (A. Ex. 6), changing the dates of Phase I.

On cross-examination, Assistant Chief Durham, when asked where Chief Lanier had expressed her opinion that MPD would be seriously handicapped if it couldn't have AHOD's, said she had expressed it several times. He agreed she had not expressed that opinion in denying the instant grievance. He said that he was not privy to all the conversations that the Chief and the Mayor have, but that he had never seen anything in writing by the Mayor saying that serious handicapping would occur absent AHOD. He said that the Chief can make that determination, that it is his understanding that the Mayor had delegated that authority to the Chief of Police. Shown a copy of Mayor's Order 2000-83 (U. Ex. 17), he said that it was his understanding that it constitutes the delegation of power. Shown a letter from Assistant Chief of Police Groomes to FOP Chairman Baumann dated January 14, 2008 (U. Ex. 18), denying a grievance as untimely, he agreed that she had cited Mayor's Order 2000-83 as delegating to the Chief of Police the authority to make a "seriously handicapped" determination. He agreed that a letter from Chief Lanier dated February 6, 2008 (U. Ex. 19), denying a grievance as untimely, also cited Mayor's Order 2000-83 as the basis

⁵ He subsequently testified that the teletype was actually sent out March 5, 2009.

for her "seriously handicapped" determination. Assistant Chief Durham was then shown Mayor's Order 2008-92, dated June 26, 2008, which he agreed stated that "Mayor's Order 2000-83, dated May 30, 2000, is hereby rescinded." He was asked to read into the record the second paragraph of a June 13, 2008 Legal Sufficiency Review attached to the Mayor's Order:

"The primary purpose of the Order is to rescind the personnel and rulemaking authority delegated to the Chief of the Metropolitan Police Department (MPD) over MPD in Mayor's Order 2000-83 (May 30, 2000)."

He agreed that the Chief of Police's delegated authority that had been cited as the basis for establishing AHOD has been rescinded by the Mayor. He said that he did not have anywhere where the Chief has made an express finding of serious handicapping.

Assistant Chief Durham said that every person working AHOD only works two days, even though the initiative is for three days. It starts at 6:00 a.m. on Friday, and ends at 6:00 a.m. on Sunday. He said if scheduled to work day work, he would work 6:00 to 2:30 on Friday and 6:00 to 2:30 on Saturday; he would not work on Sunday. The midnight folks come in Friday night and work Saturday, and come in Saturday night and work until 6:00 a.m. Sunday. He agreed, however, that the teletype precludes scheduling a day off on any of the three-day weekends, even though a person would only be working for two days; leave is restricted for the entire three days. He called attention to the third paragraph of A. Ex. 5: "Once finalized, no changes shall be made to these assignments without the approval of the Executive Officer, Executive Office or the Chief of Police" as showing that legitimate requests for leave would be granted. He said that officers holding AHOD dates open have not been compensated. He said that he and the Chief talked to officers and AHOD requirements were modified as a result and that FOP was not included in these discussions. He testified that patrol officers know 14 days in advance what tour of duty they are working. He said that if MPD didn't put in leave restrictions, people would put in for leave, there wouldn't be anyone to work and that would seriously handicap MPD. If MPD didn't restrict leave, he said, people who have an all day work job, Monday through Friday and have to come to work an evening or a modified midnight shift, "they will put leave. They will go sick on you." (T. 212)

Assistant Chief Durham said he didn't have at this time the statistics to show why May 15-17 became less dangerous than April 24-26. He discussed why and how AHOD is having a significant impact. He said that Chief Lanier's AHODs are a softer version of the former Chief's 12-hour shifts called as a result of a State of Emergency. He agreed that under Article 24, Section

2, Section 1 is suspended when there is a State of Emergency, and that Chief Lanier had never declared an emergency in AHOD nor had she claimed it to be an emergency. Any changes in officers' days off or tours of duty are made more than 14 days in advance. He said he believed MPD could take a person on a night shift and tell them they were now on a day shift if given 14 days notice. He said that if Special Order 99-20 had been suspended, its procedures should not be followed any more. He said he didn't know what procedures are followed, but seniority was used before there was 99-20.

Assistant Chief Durham was referred to A. Ex. 5, the line above Chief Lanier's signature, which reads: "As authorized by the Mayor, I am exercising my authority that allows me to change a member's tour of duty within a work week to a tour different from their known tour of duty." He speculated that she probably did not know that her authority had been rescinded. He said that MPD has not negotiated any aspect of AHOD with the FOP and is not required to.

On re-direct, Assistant Chief Durham said he was not aware that the Mayoral delegation of authority to the Chief of Police had been rescinded, nor, to his knowledge, was Chief Lanier aware of it. He said it is management's right to be able to change a member's tour of duty. He said there are leave restrictions for all members of the Department for, for example, the Fourth of July. Once the tours of duty are determined, everybody else is free to have their leave or days off. He said the AHOD schedules go to the non-patrol personnel, people who are not normally on the street patrolling. He said that once the delegation of authority was rescinded, he did not know of any other document giving the Chief personnel authority, and that she was acting in good faith when she made personnel decisions under AHOD. Referring to U. Ex. 6 (D.C. Code 1-612.01) he said there was no requirement that the Mayor's "seriously handicapped" determination be in writing, and that it could be based on a conversation between the Mayor and the Chief. He said that if the Districts still operate under 99-20, it would be without the Chief's knowledge. He said the Chief did not declare a State of Emergency for any of the AHODs. He said that when he came to the Department, he expected to work evenings, nights, Saturdays, Sundays, during riots, and special events; he did not consider it a 9 to 5 job.

On re-cross, Assistant Chief Lanier agreed that the Chief doesn't control when special events like the Fourth of July or the IMF meeting occur. He said an AHOD could be scheduled any weekend during the summer, but they are based on statistics, specific to certain days of the week and certain hours in certain neighborhoods. He agreed that the Chief changed the schedule from

May to April. He agreed that the need for all force when it comes to the event is created by the event, but when it comes to AHOD it is created by the Chief. He said that history shows that to get anybody to do anything you had to pay them overtime, but now in this economy the city doesn't have the money. He said "it's kind of interesting because they wouldn't complain about AHOD if we were paying them overtime, but because we're changing their days off it's okay." (T. 258) "This is bigger than just the schedule. It's about fighting crime, reducing crime in the city, having the citizens in this community trust the police. That's what this is all about, building relationships in the community to keep driving crime down." (T. 259)

On re-direct, Assistant Chief Durham said that when the AHOD was adjusted from May to April, the members still got 14 days notice.

On re-cross, he said that is an absolute management right to direct employees, tours of duty and methods and processes for AHOD. He agreed that Article 4, Section 2, said that management rights are subject to laws, rules and regulations.

Positions of the Parties

The Union

FOP (the Union) states that the Parties entered into the CBA January 28, 2005, and in accordance with holdover provision, it is still in effect and was in effect on January 7, 2009, when MPD issued the Teletype implementing AHOD initiatives for the 2009 calendar year. There was no advance notice to FOP members nor did any bargaining occur between MPD and the FOP. The Union contends that AHOD is a public relations campaign designed by Chief of Police Cathy Lanier to enhance the public's perception of the department and its efforts to fight crime. She testified before PERB, the Union says, that part of the reason for implementing AHOD was for "public relations." She has not declared a crime emergency at any point during the implementation of AHOD.

The Union contends that AHOD is not directed at addressing any particular crime initiative or tailored to address crime patterns. For example, in many districts the highest crime days are weekdays, not weekends when AHOD is scheduled. The Union notes that Assistant Chief Durham agreed that Article 24, Section 2, of the CBA provides the process and procedure whereby the Chief is permitted to declare a crime emergency and place restrictions on leave, but that MPD concedes that AHOD is not implemented in response to

any crime emergency, and Assistant Chief Durham even admitted that AHOD was an attempt by Chief Lanier to circumvent the formalities of declaring a crime emergency.

The January 7, 2009 teletype restricted leave without notice. On March 5, 2009, an MPD teletype changed the Phase I dates from May 15-17 to April 24-26, again without notice. The change of dates, the Union says, was not the result of crime data or statistics but to avoid a conflict with "National Police Week Activities occurring during the same period." No members were provided compensation for this leave restriction.

The Union staid that Assistant Chief Durham testified that once MPD began implementing AHOD, staffing shortages occurred on other days of the week with the result that 50% were allowed to take their normal weekend days off although they had been told to keep weekends open and leave was prohibited.

The Union points to MPD's stipulation that it relied on Mayor's Order 2000-83, which had delegated to the Chief the Mayor's responsibility to determine that "an organization would be seriously handicapped in carrying out its functions," as its authority to conduct AHODs. The Union contends that at the time that Chief Lanier issued the January 7 and March teletypes, MPD and the Chief had no authority to implement AHOD because Mayor's Order 2000-83 had been rescinded by Mayor's Order 2008-92. Assistant Chief Durham conceded, the Union says, that Chief Lanier made no expressed finding of serious handicapping. Although Assistant Chief Durham made frequent references to crime statistics, none were presented at the hearing. The Union contends that the fact that one of the AHOD weekends was changed for reasons having nothing to do with crime statistics, that staffing requirements have been changed from 3 days to 2 days, and from the entire force to the force less 50% who normally have off on weekends, demonstrates that AHOD is not an emergency crime fighting initiative but is designed for public relations and perception.

Assistant Chief Durham testified that it was his opinion that MPD would be seriously handicapped if the AHOD initiative was not permitted, the Union says, but he admitted that the Chief had not made this determination, nor was he aware that the Mayor had ever reached that conclusion. Claiming delegation authority does not excuse MPD from promulgations of regulations, from its obligation to bargain in good faith, comply with the terms of the CBA, and negotiate any changes in working conditions.

FOP argues that by issuing the Teletype and the Phase I teletype MPD violated Article 1, 4, 24, and 49 of the CBA: Article 1 by not honoring the commitments of the CBA; Article 4 by not exercising its management rights in accordance with applicable laws, rules and regulations; Article 24 by suspending its negotiated provisions without having declared "an emergency, for crime, or for an unanticipated event." The Union cited the *Dolan* case (U. Ex. 14) in which the arbitrator had ruled that because a crime emergency had not been declared, the MPD could not change the tours of duty and days off without doing so in conformance with the CBA. That case and this case, the Union argues, involved the same issue and the same parties. The Union also cites the *Welsh* case (U. Ex. 12)

The Union argues that although 99-20 has been rescinded, its processes for scheduling were in effect when the CBA was negotiated and are relied upon in practice in the field. Although Assistant Chief Durham testified that 99-20 does not govern because it has been rescinded, he could not explain or identify how tours of duty are implemented in the field. He also testified that Article 24 was not violated because more than 14 days notice was given, but then testified that splitting days off violates Article 24. The Union argues that management officials are given an opportunity to apply for leave outside of the time frame granted to bargaining-unit members, resulting in disparate treatment under the CMPA.

The Union states Article 49 provides that when an MPD directly impacts a condition of employment, it shall be the subject of negotiation. The AHOD initiative directly interferes with the negotiated scheduling rights of the FOP membership, the Union argues, and any deviations in the express language and understanding between the parties must be negotiated by the parties, but MPD failed to do so in violation of Article 49.

The Union contends that by unilaterally and without notice changing established and negotiated terms and conditions of employment, MPD violated D.C. Code §1-617.04(a)(1) and (5) (CMPA), citing D.C. PERB cases. The Union also argues that MPD is required to bargain over changes in working conditions, but has failed to do so.

The Union points out that CBA Article 4 provides that management rights must be exercised in accordance with applicable laws, rules and regulations. The Union argues that in order to unilaterally alter the scheduling rights guaranteed by D.C. law and the CBA, the Mayor must determine that an organization would be seriously handicapped in carrying out its functions. At the time the Teletype and the Phase I Teletype were issued, Chief Lanier had

not made any express findings that without AHOD, the MPD would be seriously handicapped, nor had the Mayor made any such express findings. Absent a finding of a seriously handicapping effect, the AHOD initiative violated 1-612.01 and as a result, Article 4 of the parties' CBA.

D.C. Code 1-612.01(e) provides for the Mayor to propose rules regarding hours of work. The Mayor and MPD failed to go through the well-delineated rule-making process regarding the AHOD initiative. Even if the MPD and Chief Lanier were to be found to have delegated mayoral authority, the Mayor and the MPD failed to cite to any rules or regulations that have been promulgated under that authority. Assistant Chief Durham testified that MPD relied upon Mayor's Order 2000-83 for delegation of authority at the time the Teletype and the Phase I Teletype were issued, and conceded that Mayor's Order 2008-92 rescinded 2000-83.

The Union states that D.C. PERB has ruled that violations of Article 24 are to be paid as a penalty at time and one-half compensation. The Union requests, in specific detail, that the Arbitrator enter an order requiring MPD to cease violating the CBA, rescind the Teletype, adhere to the terms of the CBA, compensate all FOP members at a rate of time and one-half for all applicable AHOD initiative days, and pay all costs associated with this arbitration, including but not limited to, the arbitrator's fees and transcript copy cost.

The Employer

MPD says All Hands on Deck (AHOD) crime initiatives were implemented in 2007 and 2008, found to be successful, and were continued in 2009. They were welcomed in areas where the police officers were deployed. All able-bodied police officers of all ranks who are in a full-duty status are required to work during AHOD dates which are selected based upon crime trends.

In announcing the 2009 AHOD crime-fighting initiative, MPD says, the Chief of Police exercised a legitimate and reserved management right. By announcing it well in advance, the Chief abided by the applicable terms of the CBA.

MPD did not violate Article 1 of the CBA when it did not negotiate with FOP concerning the 2009 AHOD initiative. It is solely within management's reserved rights to determine work projects and initiatives and to grant leave. AHOD was first initiated over two years ago and its continuation in 2009 was neither "new" nor a change in members' working conditions. The ability to grant or deny leave is and has always been a management right.

The Chief did not interfere with any leave approved prior to January 7, 2009, or cancel any pre-approved leave; she restricted future leave, but it was not universally denied. Members were able to request and receive leave for events that were planned prior to the announcement of the new AHOD dates. Assistant Chief Durham cited several such examples. Mr. Baumann offered only anecdotal claims, not proof, of his contention that management officials received preferential leave treatment.

MPD contends that it did not violate Article 4 of the CBA. Section 2 provides that that MPD has the authority to determine the “. . .work project, tour of duty, methods and processes for which such work is performed . . .” (emphasis added) MPD says this means that it has the bargained-for and agreed-upon sole authority to determine whether and when certain work initiatives such as AHOD will be implemented.

The Union’s contention that MPD did not act in accordance with the provisions of Article 4 because it violated D.C. Code § 1-617.04(1) and (5) is incorrect, citing a D.C. PERB hearing examiner’s determination (U. Ex. 3) finding no violation about this same initiative. As for the Union’s reliance on *Dolan*, that case arose under a different CBA and prior to the Mayor’s delegation of authority in May 2000 under which the Chief of Police had the authority to implement initiatives such as AHOD when she believed that “the organization would be seriously handicapped in carrying out its functions or that cost would be substantially increased . . .” Mayor’s Order 2000-83, dated May 30, 2000, announced this delegation. (A. Ex. 1) There is no requirement that the seriously handicapped determination be in writing.

FOP presented the Mayor’s Order 2008-92, which rescinded the Chief’s statutory personnel authority in Mayor’s Order 2000-83, after the lunch break at the hearing. It was the first time the Union had ever mentioned or cited this Order in any capacity. The Union knew that the Chief of Police was relying, in part, on the statutory delegation of personnel authority under Mayor’s Order 2000-83. By not making any reference to Mayor’s Order 2008-92 at any time before the hearing, MPD argues that FOP was making an effort to obtain an advantage by unfair surprise. The manner of FOP’s introduction of the exhibit at the hearing, MPD argues, evinces a deliberate intent to create unfair surprise. Article 19, Part E, Section 5(2) of the CBA reads:

The parties to the grievance or appeal shall not be permitted to assert in such arbitration

proceedings any ground or to rely on any evidence not previously disclosed to the other party.

FOP deliberately withheld Mayor's Order 2008-92. The CBA expressly prohibits such tactics. Union Exhibit 20 should be struck and not considered in this case.

If U. Ex. 20 is considered as evidence in this case, then judicial notice of Mayor's Order 2009-117 should be taken without the necessity of formal proof. This Mayor's Order ensures that the Chief of Police's personnel authority remains intact, retroactive to the original delegation in May of 2000. MPD argues that since the Chief of Police exercised both her contractually provided management right authority and her delegated statutory authority in changing members' tours of duty for the specified 2009 AHODs, there was no violation of Article 4 of the CBA.

MPD argues that there was no violation of Article 24 as the Department acted within the parameters established by the CBA. MPD complied with the provisions of Article 24, particularly the 14-day notice requirement of Section 1 as in fact 126 days' notice of scheduling changes was provided. The alleged Groomes "decision" was actually the settlement of a grievance prior to arbitration and under the CBA cannot serve as precedent. But even if it is taken into account, MPD says, the issue that was resolved in that case, non-consecutive days off, is not at issue in this case which involves tours of duty.

MPD avers that Special Order 99-20 was rescinded on May 15, 2008, and is inapplicable in this case. Although Chairman Baumann testified that MPD still uses the Special Order, he was unable to provide any evidence in support of this contention.

The plain language of Article 49 reveals that it is inapplicable to this case. It only applies, MPD says, to "terms and conditions of employment *not* covered by the terms of the Agreement. (emphasis added) The scheduling of members' tours of duty is explicitly and expressly covered by the terms of the CBA. Article 4 gives the Chief of Police authority to determine members' tours of duty. Article 24 provides the notice required to change members' schedules. MPD argues that since Article 49 applies to terms and conditions of employment not included in the CBA, AHOD scheduling changes could not violate Article 49. Announcement of schedules for the 2009 AHODs did not represent a new initiative but a continuation implemented in 2007 and continued in 2008. MPD argues that the proper time for the FOP to have demanded bargaining would have been in 2007.

In conclusion, MPD states that the scheduling changes that were necessary for members working the AHOD initiatives were ordered in accordance with the provisions of the CBA and the

applicable statute. The Chief of Police properly exercised her delegated authority, determining that the organization would be seriously handicapped in carrying out its functions or that its costs would be substantially increased without alteration to members' tours of duty for short periods of time. The Department did not violate the CBA. MPD states that the AHOD crime-fighting initiative is not just legally and contractually authorized, it has proven to have been an unqualified success for both citizens of the District of Columbia and the Department's membership.

Reflecting members' complaints about past crime emergencies, the Chief determined that she would not declare crime emergencies in the future. The AHOD crime-fighting initiative has proven to be a successful method of addressing crime, while balancing the members' personal needs and concerns. MPD says that the Chief accomplished this by working within the parameters of the law and Articles 4 and 24 of the CBA. The Department has not violated any law, rule or regulations, MPD says, nor has it violated any of the provisions of the CBA. MPD requests that the Class Grievance be denied.

Discussion

It should be noted that on July 17, 2009, one month after the close of the hearing, MPD filed a request to reconvene the hearing for one day. MPD stated that the Union had, at the beginning of the June 17 hearing, offered without objection by MPD, exhibits 1 through 16. After a lunch break, FOP offered, during cross-examination of Assistant Chief Durham, exhibits 18 through 25, one of which was U. Ex. 20, Mayor's Order 2008-92, which appears to rescind Chief Lanier's personnel authority. MPD said that it was not part of the original record nor was it offered as an exhibit at the beginning of the hearing. MPD said that it had an opportunity for only a cursory review of the document, and no opportunity to authenticate or rebut its contents. MPD did not object to its acceptance into the record.

MPD argued in its July 17 submission that it had since learned that the information in Mayor's Order 2008-92 was published in error, which was corrected by the publication of Mayor's Order 2009-117 on June 19, 2009, effective *nunc pro tunc* to June 5, 2008. MPD requested that the hearing be reconvened for one day for the sole purpose of offering rebuttal evidence and testimony concerning Mayor's Order 2008-92. MPD did not attach Mayor's Order 2009-117 to its request. On July 24, 2009, the Union opposed MPD's request, noting that Mayor's Order 2009-117 was signed by the Mayor on June 19, 2009, two days after the June 17 hearing in this case. FOP argued that MPD was put on notice that the Chief's authority was an issue in this case. MPD did not object to introduction of Mayor's Order 2009-117, the Union said, and could not now, one month after the

hearing, be permitted to reopen a closed hearing. On August 4, 2009, MPD responded by contending that FOP withheld introduction of Mayor's Order 2009-117 in order to unfairly surprise Assistant Chief Durham with it during cross-examination. Assistant Chief Durham testified, MPD said, that neither he nor Chief Lanier knew of the existence of Mayor's Order 2008-92. MPD argued that the CBA provides that any party cannot rely on any evidence not previously disclosed to the other party.

On August 10, 2009, I issued an order denying MPD's request on the ground that the case must be decided on the basis of the facts as they existed and appeared on the record at the time of the hearing. I now adhere to that ruling. As indicated above, Mayor's Order 2009-117 was not attached to MPD's post-hearing request. Reviewing it now for the first time, I note that it purports to amend Mayor's Order 2008-81, said to have been dated June 5, 2008, which itself is not in the record. Mayor's Order 2008-92 was dated June 26, 2008. A Legal Sufficiency Review stated that "The primary purpose of the Order is to rescind the personnel and rulemaking authority delegated to the Chief of the Metropolitan Police Department (MPD) over MPD in Mayor's Order 2000-83 (May 30 2000)." Given this language, it cannot be said that Mayor's Order 2008-92 was published in error. In addition, the alleged *nunc pro tunc* aspect of Mayor's Order 2009-117 was allegedly to June 5, 2008, which would seem to mean that it would not have survived the explicit June 26, 2008 rescission in Mayor's Order 2008-92. In any event, there is no evidence on the record that FOP had previous knowledge of Mayor's Order 2008-92 and deliberately withheld it. Indeed, it would seem that if anyone knew or should have known of this order it would be the Chief of Police. Finally, MPD could have objected to its introduction at the hearing, but did not, and could have sought time to respond to its introduction but did not, instead seeking to reopen the hearing 30 days after it closed and 28 days after Mayor's Order 2009-117 was purportedly signed. In all the circumstances, I adhere to my August 10, 2009 ruling.

Turning now to the issues before me, it should be noted that they do not include any question concerning the success or not of the AHOD initiative, which according to the record before me was apparently well received in the District of Columbia. Nor is it within my jurisdiction to decide whether any unfair labor practice has occurred. I am strictly limited to determine whether there has been any violation of the CBA.

The only issue before me is whether Chief Lanier's 2009 AHOD initiative violates Articles 1, 4, 24, and 49 of the parties' CBA (U. Ex. 1).

Article 1, Preamble, provides that the Parties to the CBA “agree to honor and support the commitments contained herein.”

When it entered into the current CBA with FOP, MPD retained management rights in Article 4 “when exercised in accordance with applicable laws, rules and regulations,” including the right to determine “tour of duty.” No rules and regulations were introduced into the record before me, but D.C. Official Code § 1-612.01 (b) Hours of work (U. Ex. 6) 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.”

Article 24, Section 1, of the CBA provides

“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”

Article 24, Section 2, of the CBA provides that

“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.”

Article 49, Section 5, provides that

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.

In denying a previous grievance⁶ on January 11, 2008, as being untimely filed (U. Ex. 18), Assistant Chief of Police Groomes stated that D.C. Official Code §1-612.01 requires a five day workweek, with two consecutive days off outside of the workweek but that D.C. Official Code § 1-612.01 (b) permits an exception to this requirement when the Mayor determines that “. . . an organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased. . . .” This authority was delegated to the Chief of Police, she wrote, through Mayor’s Order 2000-83.

⁶ This is not the Welsh case. I have not relied on the Welsh case in reaching my decision in the instant matter.

In denying a different previous grievance on February 6, 2008, as being untimely filed (U. Ex. 19), Chief Lanier stated that Chairman Baumann was correct in stating that D.C. Official Code §1-612.01 requires a five-day workweek, with two consecutive days off outside of the workweek, and she then cited the “seriously handicapped” exception of D.C. Code 1-612.01 (b), the Mayor’s delegation through Mayor’s Order 2000-83, and that she had made the handicapped determination. She also cited Special Order 99-20.

In denying the instant Class Grievance and demand for bargaining on February 23, 2009 (U. Ex. 9), Chief Lanier stated that in scheduling the AHODs she was exercising the Mayoral delegation of authority consistent with the 14-day notice requirement of Article 24 in the CBA. Notwithstanding Commander Groomes’ decision to grant Officer Walsh’s⁷ grievance in 2007, she wrote, she said she had been consistent in her authority to exercise the Mayoral delegation of authority. She wrote that the exercise of her authority under D.C. Official Code § 1-612.01 was not a change to an established and bargainable term and condition of employment, but rather was the exercise of a management right.

On May 15, 2008, Chief Lanier issued a teletype rescinding Special Order 99-20, which stated that “Commanding Officers shall schedule their members in accordance with the Collective Bargaining Agreement.” Chairman Baumann testified that 99-20 was in effect when the CBA was entered into, and that notwithstanding its rescission, the Districts continue to follow its procedures. No evidence introduced to rebut this assertion.

The only AHOD initiatives before me are those announced by Chief Lanier on January 7, 2009. The record is clear that at that time her delegated personnel and rule-making authority had been rescinded by Mayor’s Order 2008-92. On January 7, 2009, the *Mayor* had made no express finding of a crime emergency or any unanticipated event, nor had he made an express determination that MPD would be seriously handicapped in carrying out its functions or that its costs would be substantially increased if AHODs were not scheduled.

MPD contends that the Chief of Police acted in good faith in believing that she did have delegated mayoral authority. If that contention were to be accepted, the record shows she had made no express finding of a crime emergency or any seriously handicapped determination before issuing the Teletype. Indeed, according to the record, she specifically and deliberately did not make a finding of a crime emergency. There is no seriously handicapped reference in the January 7 teletype, nor any

⁷ See footnote 3, above.

reference to delegated mayoral authority. The teletypes of March 30 and May 12 do state “as authorized by the Mayor,” but in fact that authority had not been granted. That she was said to have acted in good faith is not a sufficient basis to cure the legal deficiency that in fact her delegated authority had been rescinded.

I find that the AHOD initiatives did constitute a change to an established and bargainable term and condition of employment, namely, the scheduling provisions of Article 24, Section 1. Article 4 recognizes management’s right to determine tour of duty, but only when exercised in accordance with applicable laws, rules and regulations. In this case it was not so exercised because neither the Mayor nor the Chief of Police had made a crime emergency finding or a seriously handicapped determination, nor had there been an unanticipated event, any of which would have allowed suspension of Article 24’s scheduling provisions. Although MPD argues that there is no requirement under §1-612.01 that the seriously handicapped/costs-increased determination be in writing, the very definition of the word determination - the act of coming to a decision, as in judicial determination – strongly indicates that just having an unexpressed, unpublished thought is not enough.

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. The fact that some individual requests for leave were granted does not cure the original problem.

As for the Union’s contention that non-union members of the MPD were provided notice of AHOD restrictions prior to issuance of the Teletype, no evidence was adduced to that effect, or only “anecdotal” references to management officials being given an opportunity to apply for leave outside the time frames granted to members of the bargaining unit. Accordingly, I do not sustain this aspect of the grievance.

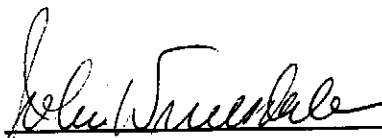
Although there is much testimony in the record as to why certain weekends were selected or not selected for AHODs, it is not within my jurisdiction to decide such matters as whether more crimes were committed on days of the week other than weekend days, or in this neighborhood instead of that neighborhood.

In a case of this nature, involving contract interpretation, the Union bears the burden of proof. 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 4 by changing the tour of duty not in accordance with applicable laws, rules and regulations; 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 negotiating with the Union when a Department order directly impacted on the conditions of employment of unit members. Accordingly, I sustain the Union's grievance in major part and shall provide for an appropriate remedy.

AWARD

Upon consideration of the entire record of this case, including evidence adduced at the hearing, the exhibits, and the briefs of the Parties, the grievance is sustained. 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. I will retain jurisdiction for sixty days for the sole purpose of clarifying the remedy, if needed, upon request of the Parties.

September 9, 2009


John C. Truesdale
Arbitrator