

<p>IN THE MATTER OF:</p> <p>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3721</p> <p style="text-align: center;">GRIEVANTS</p> <p>v.</p> <p>DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT AGENCY</p>	<p>DENNIS RUBIN DIRECTOR</p> <p>GRIEVANCE OFFICIAL</p>
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STEP 3 GROUP GRIEVANCE

Comes now, American Federation of Government Employees, Local 3721 (hereinafter, "Union"), by and through its undersigned representative, to file this step 3 group grievance.

This grievance is filed pursuant to Article 31, Sections B(2)(b) and B(3)(c) of the Collective Bargaining Agreement (hereinafter, "Contract" or "CBA") currently in effect between the District of Columbia Fire and Emergency Medical Services Department (hereinafter, "Agency" or "Department") and the Union.

The group, for the purposes of this grievance, shall be all employees of the Agency in the bargaining unit represented by the Union who wear a uniform.

STATEMENT OF FACTS

On February 16th 2010, DFC Kenneth Jackson, the labor liaison for the Department, sent the following email to the Union (emphasis added):

President Lyons:

First, just as a point of clarity, I spoke with Ms. Hill today and she stated that she did not contact your Local regarding this issue as you have indicated in your e-mail. She was in fact, contacted by your Executive Vice President Jasper Sterling seeking information on this. With respect to pay for members of your Local on Wednesday, February 10, 2010 and Thursday, February 11, 2010, the Agency based its decision regarding pay on the information contained in E-DPM Bulletin No.11B-63 & 12-249 Hazardous Weather Emergency and Implementation of Shut-Down Policy ordered by the Mayor and issued by the D.C. Department of Human Resources on February 12, 2010.

In the bulletin, specifically number 4 Applicability **there's an exception to the bulletin for uniformed members of the Fire and Emergency Medical Services Department which we have interpreted to mean that these members should be treated as normal on the days in question.** For further clarification see the attached bulletin and sections 1123.1 and 1201.2 of Chapters 11 and 12 of the regulations. That said members of your Local will receive regular pay for any regular duty hours worked on either day. Additionally, they will receive overtime pay for any hours worked above their regular duty hours on either day.

As always, please feel free to contact me if you have additional questions or concerns.

The above email was in reply to a request by the Union for clarification of whether the employees represented by the Union would be receiving administrative closing premium pay for the days when the DC Government was closed, and said employees were required to work.

Additionally, on multiple re-occurring occasions, beginning in approximately 2009, the Agency has been referring to many of the employees represented by the Union as "uniformed members", "uniformed employees", "non-sworn uniformed employees" and other, various combinations thereof, always including the word "uniformed". Prior to the email above, the most recent instance of this specious claim was during AFC Brian Lee's testimony in *Lesane v. DCFEMS*, FMCS No. 091028-50858-A, where he stated, *inter alia*, "...we refer to the single role EMS providers as uniformed members"

ISSUE

The issue out of which this grievance arises is the Agency's attempted designation of the grievants as "uniformed" employees in violation of the Agency's Rules and Regulations and the Comprehensive Merit Personnel Act.

AGENCY'S EXISTING RULES AND REGULATIONS WERE CARRIED FORWARD UPON THE IMPLEMENTATION OF THE COMPREHENSIVE MERIT PERSONNEL ACT

DC Code § 5-402(a) (2001 ed) states (emphasis added):

The Mayor of the District of Columbia shall appoint, assign to such duty or duties as he may prescribe, promote, reduce, fine, suspend, with or without pay, and remove all officers and members of the Fire Department of the District of Columbia, according to such rules and regulations as the Council of the District of Columbia, in its exclusive jurisdiction and judgment (except as herein otherwise provided), may from time to time make, alter, or amend; **provided, that the rules and regulations of the Fire Department heretofore promulgated are hereby ratified (except as herein otherwise provided) and shall remain in force until changed by said Council;** provided further, that all officers, members, and civilian employees of such Department, except the Fire Chief and Deputy Fire Chiefs, shall be appointed and promoted in accordance with the provisions of §§ 1101 to 1103, 1105, 1301 to 1303, 1307, 1308, 2102,

2951, 3302 to 3306, 3318, 3319, 3321, 3361, 7202, 7321, 7322, and 7352 of Title 5, United States Code, and the rules and regulations made in pursuance thereof, in the same manner as members of the classified civil service of the United States, except as herein otherwise provided; provided further, that the Deputy Fire Chiefs shall be selected from among the battalion fire chiefs, the Fire Marshal, and the superintendent of machinery; provided further, that all original appointments of privates shall be made to class 1, privates who have served 1 year in class 1 shall, if found efficient, be transferred to class 2, and privates who have served 2 years in class 2 shall, if found efficient, be transferred to class 3. Such transfers shall not be subject to the provisions of said sections of Title 5, United States Code, and the rules and regulations made in pursuance thereof. Whenever vacancies occur in class 2 or 3 which cannot be filled by such transfers, the Mayor may appoint additional privates in class 1 equal in number to the positions vacant in class 2 or 3; and any moneys appropriated for the payment of the salaries for such vacant positions shall be available to pay to such additional privates of class 1 the salaries of their grade.

The portion emphasized, *supra*, carried forth the existing rules and regulations upon the implementation of the Comprehensive Merit Personnel Act.

RULES AND REGULATIONS

The Agency's rules and regulations first arose during the 1800's. Because of the specialization of the duties and the police and fire departments, during the time of the commissioners of the District of Columbia, both departments were allowed to have their own personnel rules and regulations that differed (or, in some cases mirrored) the personnel rules in effect for other District Government employees (the Federal Office of Personnel Management regulations, particularly Title 5 of the Code of Federal Regulations.). Between 1974 and 1975, Congress granted to the District of Columbia "Home Rule", which established the Mayor and City Council, and granted various authorities to each, respectively. Among the authority granted by Home Rule was the District's ability to establish its own personnel regulations for its employees. The personnel regulations were codified as the Comprehensive Merit Personnel Act ("CMPA"). Along with the CMPA, D.C. Code §5-402(a) (2001 ed.), *supra*, passed which provided that the rules and regulations of the (then) Fire Department were carried forward and essentially placed at the same "level" as the CMPA.

1. UNIFORMED MEMBER

Article I, Section 1(a) of the Agency's Rules and Regulations, adopted in 1965, states (emphasis added):

The uniformed force of the fire department **shall** consist of the Fire Chief, Assistant Fire Chief, Deputy Fire Chiefs, Battalion Fire Chiefs, Captains, Lieutenants, Sergeants, Fire Inspectors, Privates, Pilots, Assistant Pilots, Marine Engineers, Assistant Marine Engineers and Technicians.

The common factor in the definition of the uniform members (synonymous with uniform force) is that they are firefighters. All of the positions defined by Section 1(a) of Article I

are fully trained as firefighters, and engaged, inter alia, in the provision of fire protection/suppression activities.

2. CIVILIAN EMPLOYEES

Article I, Section 2 of the Rules and Regulations (also adopted in 1965) states (emphasis added):

The civilian force of the Fire Department **shall** consist of fire alarm operator, fire alarm radio and telephone dispatchers, fire alarm and radio repairmen, electricians, laborers, clerks, stenographers, mechanics **and other employees of such designations and numbers as may be authorized from time to time.**

It is therefore, with utmost clarity, by the plain language of the existing rules and regulations which provide the definition of civilian and uniform, how each of the respective employees are classified. Firefighters, within the DC Fire and EMS Department are uniformed members, and all other employees, whether they wear a uniform or not, are considered civilians.

The Rules and Regulations pre-date the hiring of the first civilian EMS providers within the Fire Department by approximately ten years. The first civilian EMS providers were hired in approximately 1975, during and following the implementation of the CMPA. They were hired specifically to provide Emergency Medical Services within the Fire Department and have had no training in either fire suppression or fire protection activities, nor was there any intention of the Fire Department to utilize them in fire suppression activities. The employees hired to perform only EMS duties clearly fit the definition of civilian employees provided for by the rules and regulations. They were clearly, **other employees of such designations and numbers as may be authorized from time to time**, even though they wore a “uniform”.

3. AUTHORITY TO CHANGE THE AGENCY’S RULES AND REGULATIONS

It is also readily apparent and clear on its face, that pursuant to D.C. Code §5-402(a), the authority to change the Agency's Rules and Regulations is granted to the D.C. Council, and not to the Mayor or the Agency itself. The Agency can provide no evidence that such a change occurred. In fact, had a change taken place, the Rules and Regulations would have been updated to represent such. The Agency has now repeatedly stated that they consider the civilian EMS employees to be uniformed, yet articulate no relevant legal basis for such a designation. Most assuredly, the Agency's failure to state a basis for its determination is that there is no basis under law that justifies their position. At the Lesane hearing, *supra*, AFC Lee further testified that members of the Fleet Maintenance Division [Mechanics] are not uniformed members, even though they wear a uniform, because it is a different color. Article I of the Rules and Regulations does not provide a definition of uniform members based upon the color of a uniform, but rather, a definition based upon their training and their jobs. Uniformed members are firefighters, and all other employees are civilians.

The Agency, in the Lesane hearing, testified that it considers the Uniform Members to include civilian EMS employees, terming them "non-sworn uniform members". The Agency could refer to the civilian EMS providers as pink puffins if they wished, but that does not change the legal definition of those employees.

The relevant statute expressly delegates the authority to the DC Council to make changes to the pre-existing rules and regulations, and not to the Agency nor the Mayor. The Council has made no such change in the definition of uniformed member and the Agency can not articulate any legal basis to support its contention that the grievants are uniform members. The Agency's claim is specious. The civilian EMS employees are just that, civilians.

PERB UNIT CERTIFICATIONS

In further support of the Union's position regarding the definition of the grievants, we turn to the PERB unit certifications for the Union and for Local 36 of the International Association of Firefighters. The unit certification provide the legal authority for which employees are exclusively represented by what union.

The certification for the Union states (emphasis added)¹:

All **civilian employees** of the Fire Department excluding employees of the Communications Division, management executives confidential employees, supervisors or any employee engaged in personnel work in other than a purely clerical capacity.

The certification for IAFF Local 36 states (emphasis added)²:

All **uniformed members** of the D.C. Fire and Emergency Medical Services Department in the ranks of Firefighter through Captain; excluding all other uniformed members of the D.C. Fire and Emergency Medical Services Department, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978.

Both of the PERB unit certifications track properly the definitions of uniformed member and civilian employees contained within Article I of the Agency's Rules and Regulations. Again, further evidence that the Agency's contention regarding the grievants is in error.

SUMMARY

The Agency's Rules and Regulations specifically define both uniformed members and civilian members of the Fire and EMS Department. DC Code § 5-402(a) specifies which entity within the District of Columbia Government who can make changes to said Rules and Regulations. The Agency is not authorized to do so. Rather, the right to change the

¹ PERB Case No. 7R012

² PERB Certification No. 92

Rules and Regulations is reserved to the Council of the District of Columbia. Finally, the PERB unit certifications for both the Union and for IAFF Local 36 further define the two groups of employees within the Agency, and directly correspond to the definition provided within the Rules and Regulations. As a matter of law, the Agency cannot designate the grievants as “uniform” employees.

RESOLUTION

As resolution of this grievance, it is respectfully demanded that:

1. The Agency immediately cease and desist its efforts to designate the grievants as “uniformed employees” or “uniformed members”.
2. The Agency retrospectively change all relevant documents (Order Book, Bulletins, Special Orders, Memoranda, etc.) to refer to the grievants as “civilian employees”

DATED: FEBRUARY 17th 2010
WASHINGTON, DC

Respectfully submitted,

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