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

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In the Matter of:	)	
	)	
	)	
Compensation Unit 31: American	)	
Federation of Government Employees,	)	
Locals 631, 872, 2553, American Federation	)	PERB Case No. 17-I-01
Of State, County and Municipal Employees	)	
Local 2091, and National Association of	)	Opinion No.: 1622
Government Employees R3-06,	)	<b>Motion for Reconsideration</b>
	)	
Petitioner,	)	
	)	
and	)	
	)	
	)	
District of Columbia Water and	)	
Sewer Authority,	)	
	)	
Respondent.	)	

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**DECISION AND ORDER**

**I. Introduction**

Before the Board is a Motion for Reconsideration<sup>1</sup> filed by the D.C. Water and Sewer Authority (“WASA” or “Petitioner”). WASA requests the Board to review the Executive Director’s decisions declaring impasse and appointing an arbitrator.

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<sup>1</sup> On March 31, 2017, WASA filed “DC Water’s Petition for Leave to File an Appeal” pursuant to PERB Rule 553.1. In the petition, WASA stated that in the normal course, “DC Water could wait to obtain review of such rulings until the conclusion of the proceedings. However, with an arbitrator appointed for interest arbitration, the Executive Director has closed the case. As a result, this is the only administrative avenue to review the Executive Director’s declaration of impasse and the resulting appointment of an arbitrator.” Petition at 1. On April 4, 2017, the Executive Director informed the parties that there would be no interlocutory review because there is no mechanism in the PERB rules or governing statutes that allow for an interlocutory appeal at any stage in a PERB proceeding. Also, there is no corresponding petition for leave to file an appeal as WASA has filed in this matter. However, based on WASA’s assertion that it seeks a review of the Executive Director’s declaration of impasse, this petition will be treated as a Motion for Reconsideration that has been filed for the full Board to review.

On April 11, 2016 the parties commenced compensation negotiations. On October 14, 2016, the Union filed a pleading styled Invocation of Automatic Impasse for Compensation Negotiations Between Compensation Unit 31 and the District of Columbia Water and Sewer Authority following the failure of the parties to reach an agreement within 180 days, pursuant to D.C. Official Code § 1-617.17(f)(2).<sup>2</sup> On October 17, 2016, after confirming that 180 days had passed since the parties commenced bargaining and that the parties were at impasse, pursuant to D.C. Official Code § 1-617(f)(2), PERB appointed Commissioner LaTwana Williams of the Federal Mediation and Conciliation Service as mediator. On October 31, 2016, WASA filed an unfair labor practice complaint against Compensation Unit 31.

By letter dated November 2, 2016<sup>3</sup>, WASA requested that the Board rescind the appointment of the mediator, stating that PERB Rules 526.2<sup>4</sup> and 526.3<sup>5</sup>, require the Executive Director to verify that the parties are at impasse and appoint a mediator if the parties are unable to agree on their choice of mediator. WASA also alleged that Compensation Unit 31's declaration of automatic impasse violated Section X of the parties' Memorandum of Understanding ("MOU"). On November 14, 2016, PERB denied the request, noting that D.C. Official Code § 1-617.17(f)(2) required the appointment of a mediator if automatic impasse had been reached. Therefore, the mediation was properly before Commissioner Williams.

The parties failed to schedule mediation with Commissioner Williams. Following the lapse of at least 30 days, on January 26, 2017, Compensation Unit 31 requested the appointment of a Board of Arbitration. On January 27, 2017, the Executive Director appointed an impartial Board of Arbitration, pursuant to D.C. Official Code § 1-617.17(f)(3).<sup>6</sup> The parties were directed to select three names from the list of approved arbitrators no later than February 3, 2017. WASA failed to reply, respond, or select any names from the list by the deadline. On February 6, 2017, the Executive Director appointed Dr. Andree McKissick as the arbitrator, pursuant to PERB Rule 626.4<sup>7</sup> and D.C. Official Code § 1-617.17(f)(3).

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<sup>2</sup> D.C. Official Code § 1-617.17(f)(2) in pertinent part, states: If the parties have failed...to reach settlement on any issues 180 days after negotiations have commenced, then an automatic impasse may be declared by any party. The declaring party shall promptly notify the Executive Director...in writing of an impasse. The Executive Director shall assist in the resolution of this declared automatic impasse by selecting an impartial person experienced in public sector disputes to serve as a mediator.

<sup>3</sup> The letter was filed on November 9, 2016.

<sup>4</sup> PERB Rule 526.2: Upon Receipt of a notice of impasse concerning compensation negotiations, **other than an automatic impasse as prescribed under D.C. Official Code § 1-177.17(f)** (2001 ed.), the Executive Director shall verify with the other party...that the parties are at impasse. Upon verification...the Executive Director shall consult with the parties regarding their choice of mediator, if any. (Emphasis added).

<sup>5</sup> PERB Rule 526.3: If the parties are unable to agree upon a mediator, the Executive Director shall appoint one or request that the Federal Mediation and Conciliation Service provide one.

<sup>6</sup> D.C. Official Code § 1-617.17(f)(3) in pertinent part, states: If the mediator does not resolve the impasse within 30 days... the Executive Director, upon he request of any party, shall appoint an impartial Board of Arbitrators to investigate the labor-management issues involved in the dispute....

<sup>7</sup> PERB Rule 526.4: If mediation does not resolve an impasse within thirty (30) days or any shorter period designated by the mediator, the Executive Director shall appoint a Board od Arbitration as required by D.C. Official Code § 1-617.17 (2001 ed.); provided, however, that the appointment of a Board of Arbitration under D.C. Official Code §§ 1-617.17(f)(2) and (3), shall only be upon the request of a party.

On February 6, 2017, WASA filed a letter contending that the Executive Director's appointment of a mediator was premature because it was "contrary to the terms of the Memorandum of Understanding ('MOU') on Ground Rules between the parties," which allowed seven working days to select an arbitrator. On February 8, 2017, the Executive Director denied WASA's objections and again noted that PERB was not a party to the referenced MOU, and therefore must process this case according to PERB rules. Further, the Executive Director stated that PERB Rule 526.4 does not contain a provision that the parties have seven working days to mutually select an arbitrator.

On February 24, 2017, WASA filed a Motion for Reconsideration of the Executive Director's Appointment of Board of Arbitration. WASA again stated that PERB's appointment of an arbitrator was premature because the parties were not at impasse based on the assertion that the parties were still negotiating, and that Compensation Unit 31 did not bargain in good faith as it related to the terms of the MOU. On March 6, 2017, the Executive Director granted the motion in part and denied it in part. The Executive Director reaffirmed that the parties are at automatic impasse based on PERB's adherence to its rules and D.C. Official Code § 1-617.17. However, the Executive Director rescinded her appointment of Dr. McKissick and allowed the parties to resubmit their preferences for an arbitrator. On March 13, 2017, WASA filed D.C. Water's Statement and Continuing Objection to the Declaration of Impasse, reiterating its objections to the Executive Director's finding that the parties are at automatic impasse and submitting its choice for an arbitrator. Based on the parties' submissions, on March 16, 2017, the Executive Director appointed Lawrence Evans, Esq. as arbitrator and closed the case.

On March 31, 2017, WASA filed the instant Motion for Reconsideration. On April 4, 2017, Compensation Unit 31 filed Notice of Entry of Appearance and Response in Opposition to DC Water's Petition for Leave to File an Appeal ("Opposition"), requesting that WASA's Motion for Reconsideration be denied and dismissed.<sup>8</sup> Compensation Unit 31 contends that "[WASA's] continued filings of petitions and motions with the Board does not seem to be based upon any actual legal authority and appears to be an effort to avoid its obligations under the statute."<sup>9</sup> Compensation Unit 31 requests that the Board order WASA to comply with the order of the Executive Director to proceed with interest arbitration.<sup>10</sup> On April 7, 2017, WASA filed DC Water's Reply Brief in Support of Its Petition for Leave to File an Appeal ("Reply Brief"). Therein, WASA reiterates its argument that Compensation Unit 31 did not bargain in good faith as it related to the terms of the MOU.

The Petitioner's Motion for Reconsideration and Reply Brief, and Compensation Unit 31's Opposition are before the Board for consideration.

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<sup>8</sup> Opposition at 3.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 3.

## II. Analysis

It is well settled that a mere disagreement with the Executive Director's decision is not a valid basis for the Board to grant a motion for reconsideration.<sup>11</sup> Moreover, the Board will not grant a motion for reconsideration that does not assert any legal grounds that would compel overturning an Executive Director's dismissal.<sup>12</sup> The Board will uphold an Executive Director's dismissal where the decision is reasonable and supported by PERB precedent.<sup>13</sup>

WASA argues that the parties are not at impasse due to the unresolved negotiability appeal and unfair labor practice complaint that are currently pending before the Board.<sup>14</sup> Specifically, WASA argues that its unfair labor practice complaint "required PERB to determine whether the Union failed to engage in good faith bargaining, a long recognized legal prerequisite to impasse."<sup>15</sup> For support, WASA cites to *United Packinghouse, Food and Allied Workers International Union, AFL-CIO v. NLRB*, 416 F.2d 1126, 1130-31 (D.C. Cir. 1969). In that case, the court upheld the National Labor Relations Board's finding that the impasse caused by the company's failure to bargain in good faith constituted an unfair labor practice.<sup>16</sup> WASA asserts that PERB's delay in processing Compensation Unit 31's negotiability appeal and WASA's unfair labor practice complaint essentially prevented the parties from reaching an agreement within 180 days.<sup>17</sup>

WASA does not dispute that when the Executive Director declared automatic impasse, more than 180 days had passed since the parties' initial bargaining session.<sup>18</sup> Rather, WASA contends that PERB should have resolved the complaints and allegations in its related unfair labor practice complaint (filed October 31, 2016) and negotiability appeal (filed August 12, 2016) before determining whether the parties were at impasse.<sup>19</sup> WASA alleges that Compensation Unit 31 was engaged in surface bargaining as a strategy to reach impasse.<sup>20</sup> WASA contends that PERB's impasse procedures could allow a party to engage in surface bargaining until 180 days have passed in order to proceed to interest arbitration: "At that point, regardless of the parties' conduct or negotiations, automatic impasse may be declared."<sup>21</sup>

Finally, WASA argues that as the parties are not at impasse, the Executive Director's appointment of an arbitrator should be rescinded.<sup>22</sup>

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<sup>11</sup> *Marcus Steele v. AFGE Local 383*, 61 D.C. Reg. 12373 (2014), Slip Op. No. 1492, PERB Case No. 14-U-16 (2014).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Motion for Reconsideration at 7.

<sup>15</sup> *Id.*

<sup>16</sup> *United Packinghouse, Food and Allied Workers International Union, AFL-CIO v. NLRB*, 416 F.2d 1126, 1130-31 (D.C. Cir. 1969).

<sup>17</sup> Motion for Reconsideration at 8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 8-9.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.* at 10.

The Board notes that these arguments were previously considered and addressed by the Executive Director by letter of March 6, 2017. After reviewing the Motion for Reconsideration and Reply Brief, the Board finds that WASA's basis for seeking review of the Executive Director's decisions amounts to nothing more than a disagreement with the Executive Director's findings. The flaw in WASA's argument is that PERB is bound by the statute, not the parties' MOU, when automatic impasse is declared. Additionally, WASA cites no provisions of law, PERB rule, or precedent that requires the resolution of an arguably related unfair labor practice complaint or negotiability appeal prior to the processing of an impasse petition. Moreover, the Board finds that the Executive Director's decisions concerning impasse were supported by Board Rules and District of Columbia law.<sup>23</sup>

As PERB has repeatedly stated in correspondence with the parties, the Board's authority to appoint a mediator to resolve an impasse in a collective bargaining dispute concerning compensation is derived from D.C. Official Code § 1-617.17(f)(2), which states, in pertinent part:

If the parties have failed... to reach settlement on any issues 180 days after negotiations have commenced, then an automatic impasse may be declared by any party. The declaring party shall promptly notify the Executive Director... in writing of an impasse. The Executive Director shall assist in the resolution of this declared automatic impasse by selecting an impartial person experienced in public sector disputes to serve as a mediator.

Here, it is undisputed that the parties commenced negotiations on April 11, 2016. Impasse was invoked 175 days after negotiations commenced. The parties did not reach an agreement by October 10, 2016, which is 180 days from the start of negotiations. Compensation Unit 31 invoked automatic impasse by letter filed on October 14, 2016. Pursuant to D.C. Official Code § 1-617.17(f)(2), the Board appointed Commissioner Williams of the Federal Mediation and Conciliation Service on October 17, 2016. After the Executive Director appointed Commissioner Williams, the parties failed to schedule mediation. As the mediator did not resolve the automatic impasse within 30 days, the Executive Director appointed an impartial Board of Arbitration, pursuant to D.C. Official Code § 1-617.17(f)(3). The Executive Director directed the parties to select three names from the list of approved arbitrators. On March 16, 2017, the Executive Director appointed Arbitrator Evans, pursuant to PERB Rule 526.4 and D.C. Official Code § 1-617.17(f)(3).

In view of the above, the Board finds that the parties are at automatic impasse pursuant to D.C. Official Code § 1-617.17(f)(2) and that the appointment of Arbitrator Evans is proper, pursuant to PERB Rule 526.4 and D.C. Official Code § 1-617.17(f)(3). WASA's disagreement with the Executive Director's decisions to declare automatic impasse and appoint an arbitrator is not a sufficient basis for reversing those decisions. Accordingly, the Board finds that the Motion for Reconsideration lacks merit and is denied.

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<sup>23</sup> See, D.C. Official Code § 1-617.17(f)(2) and (3); See also, PERB Rules 526.2, 526.3, and 526.4.

As stated by the Executive Director in her letter of March 6, 2017, any further concerns should be addressed to the appointed arbitrator.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. WASA's Motion for Reconsideration is denied.
2. Both Parties are ordered to contact Arbitrator Evans within seven (7) days of the issuance of this order to expeditiously engage in arbitration as required by D.C. Official Code § 1-617.17(f)(2) and to notify PERB of its compliance within fourteen (14) days of the issuance of this Decision and Order.
3. 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 Chairperson Charles Murphy, and Members Ann Hoffman and Douglas Warshof.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 17-I-01, Op. No. 1622 was sent by File and ServeXpress to the following parties on this the 18th day of April, 2017.

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PERB