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

In the Matter of:	)	
District of Columbia Nurses Association,	)	PERB Case No. 15-I-06
Petitioner,	)	Opinion No. 1522
and	)	
District of Columbia Department of Health,	)	Decision and Order
Respondent.	)	

**DECISION AND ORDER**

**I. Statement of the Case**

The District of Columbia Nurses Association (“DCNA”) filed a request for impasse resolution procedures (“Request”) pursuant to PERB Rule 527 *et seq.* for impact and effects (“I&E”) bargaining with the District of Columbia Department of Health (“DOH”) involving a reduction in force (“RIF”). Specifically, DCNA requests that PERB find that the parties are at impasse and appoint a mediator.

Based on the circumstances of this case, the Board finds that it is inappropriate to advance this matter through the impasse resolution procedures outlined in PERB Rule 527 *et seq.* Accordingly, DCNA’s Request is denied and the matter is dismissed.

**II. Background**

On December 26, 2014, DOH conducted a reduction-in-force (“RIF”) of five nonsupervisory clinical nurses in the Community Health Administration, Prenatal and Infant Health Bureau.<sup>1</sup> Previously, on December 23, 2014, DCNA and DOH had met to bargain over the implementation and effects of the RIF. During the meeting the parties were unable to reach an agreement on two of DCNA’s proposals:

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<sup>1</sup> (Request at 1-2).

Proposal 1 – The Nurses will be given the Right of First Refusal for any additional Clinical Nurse positions that are added to the Healthy Start 3.0 Program or any similar positions in the Department of Health.

Proposal 2 – Providers that are granted funding to provide direct services through Healthy Start Program 3.0 are required to give the nurses the Right of First Refusal for clinical nurse openings for [prenatal] care.<sup>2</sup>

On January 6, 2015, DCNA emailed DOH to reiterate its proposals.<sup>3</sup> On January 23, 2015, DOH responded to DCNA stating that according to Article 19, Section A of the parties' collective bargaining agreement, RIFs "shall be implemented under the provisions of Title 1, Chapter 6, Subchapter XXIV, D.C. Official Code § 1-624.01 (2001) and applicable D.C. regulations."<sup>4</sup> DOH noted that the applicable District regulation the collective bargaining agreement referred to is "Chapter 24 of the District Personnel Manual" ("DPM Chap. 24"), and that under that provision, "employees who have been affected by a RIF are eligible for both the Agency Reemployment Priority Program, and the Displaced Priority Program." DOH asserted that, under those programs, RIF'd employees "will be given priority consideration over new appointees, transfers, [and] reemployment of a person not on either [of the two] program lists." DOH further noted, however, that even under those programs, "placement and job offers are made according to either an employee's standing within their competitive level, or to which tenure group they belong to." Accordingly, DOH rejected DCNA's request to grant the RIF'd employees a "Right of First Refusal" for future positions within DOH. DOH similarly rejected DCNA's proposal to give the employees a similar "Right of First Refusal" among DOH's contract providers.<sup>5</sup>

On February 2, 2015, DCNA emailed DOH arguing that DPM Chap. 24 does not preclude DOH from giving the employees a "Right of First Refusal" for positions within DOH, and additionally that DPM Chap. 24 does not apply to DOH's contract providers and therefore cannot be used as a reason to reject DCNA's Proposal 2.<sup>6</sup> On February 13, 2015, DOH responded that it had carefully considered the Union's recommendations but decided to exercise its management right "to follow and adhere to [DPM Chap. 24] and the Agency reemployment Priority Program and the Displaced Priority Program."<sup>7</sup> Further, DOH stated that it had concluded that the "grant funded Providers will be in the best position to determine which nurses it wants to hire to perform this work" and that DOH would therefore "not interfere" with the Providers' hiring processes.<sup>8</sup>

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

<sup>3</sup> *Id.*, Attachment 1.

<sup>4</sup> *Id.*, Attachment 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*, Attachment 3.

<sup>7</sup> *Id.*, Attachment 4.

<sup>8</sup> *Id.*, Attachment 5.

On February 20, 2015, DCNA filed the instant Notice of Impasse, requesting that PERB assign the matter to a FMCS mediator.<sup>9</sup> On March 24, 2015, DOH filed a Motion to Dismiss DCNA's Request, alleging that DCNA's proposals "attempt... to alter, or expand upon the RIF procedures established in [DPM Chap. 24]", and are therefore nonnegotiable under PERB case law.<sup>10</sup>

### III. Analysis

PERB Rule 527 *et seq.* states that when a party has declared an impasse in non-compensation bargaining, the Board "may" direct that mediation, fact-finding, and/or interest arbitration be utilized to help resolve the impasse. The use of the word "may" demonstrates that the Board has discretion to determine if it is appropriate to advance an impasse petition through the impasse resolution procedures outlined in the Rule.<sup>11</sup>

Additionally, even though an agency is undoubtedly obligated to engage in good faith I&E bargaining<sup>12</sup> over a RIF when requested by the exclusive representative, that duty does not require the parties to bargain in perpetuity or to reach an ultimate agreement.<sup>13</sup> Further, the Abolishment Act<sup>14</sup> and the Omnibus Personnel Reform Amendment Act<sup>15</sup> narrow the scope of I&E bargaining over RIFs in such a way that any "proposal that attempts to affect or alter RIF procedures is not within the scope of impact and effects bargaining and is therefore nonnegotiable."<sup>16</sup> When a union files an impasse case related to I&E bargaining, the Board can

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<sup>9</sup> *Id.* at 3.

<sup>10</sup> (Motion to Dismiss at 2-3) (internal citations omitted).

<sup>11</sup> *AFSCME, District Council 20, Local 2401, AFL-CIO and District of Columbia Child and Family Services Agency*, 61 D.C. Reg. 12586, Slip Op. No. 1497 at p. 3, PERB Case No. 10-I-06 (2014); *see also Lo Shippers Action Committee v. Interstate Commerce Commission, et al.*, 857 F.2d 802, 806 (D.C. Cir. 1988) (holding that just as the use of the word "shall" indicates the absence of discretion, the use of "may" indicates its presence unless there is some modifying context to suggest the construction of the word "may" is mandatory).

<sup>12</sup> *Id.* (defining good faith I&E bargaining as: going beyond "simply discussing" the matter with the union; not engaging in mere "surface bargaining"; not engaging in conduct "at or away from the table that intentionally frustrates or avoids mutual agreement"; consisting of a give a take between the parties; and consisting of a "full and unabridged opportunities by both parties to advance, exchange, and reject specific proposals").

<sup>13</sup> *Id.* (holding that notwithstanding an agency's obligation to engage in good faith I&E bargaining when requested by the union, "I&E bargaining cannot be expected to continue in perpetuity until an agreement is reached in every case").

<sup>14</sup> D.C. Official Code § 1-624.08 *et seq.*

<sup>15</sup> 1998 D.C. Law 12-124 (Act 12-326) ("An Act To . . . eliminate the provision allowing RIF policies and procedures to be appropriate matters for collective bargaining ...").

<sup>16</sup> *See American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO and District of Columbia Child and Family Services Agency*, 61 D.C. Reg. 5602, Slip Op. No. 1462 at p. 3-4, PERB Case No. 10-N-03 (2014); *see also American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO and District of Columbia Child and Family Services Agency*, 61 D.C. Reg. 5608, Op. No. 1463 at p. 9, PERB Case No. 10-U-37 (2014).

determine whether or not the agency has fulfilled its duty to bargain in good faith.<sup>17</sup> Although PERB has previously contemplated scenarios in which I&E bargaining over a RIF might qualify for the impasse resolution procedures outlined in PERB Rule 527 *et seq.*,<sup>18</sup> the Board finds that this is not one of those cases.

It is without question that DOH had a duty to engage in good faith bargaining with DCNA over the impact and effects of its RIF, but that duty did not require DOH to agree to DCNA's proposals.<sup>19</sup> DOH met with DCNA in December 2014. Thereafter, the parties exchanged several emails. The negotiations reached the point of exhaustion when DOH rejected DCNA's final proposals. Since the parties were not required to reach a final agreement, and since the subject being bargained was a RIF (which, as stated above, has a very narrow scope of bargaining), and since DCNA has not alleged here or in an unfair labor practice complaint that DOH's rejection of its proposals constituted bad faith bargaining, the Board finds, in accordance with its discretion under PERB Rule 527 *et seq.*, that it is inappropriate to advance this case through PERB's impasse resolution procedures.<sup>20</sup> DCNA's Request for impasse is therefore denied and the matter is dismissed.<sup>21</sup>

## ORDER

### IT IS HEREBY ORDERED THAT:

1. DCNA's Request for impasse is denied and the case is dismissed.
2. 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 Donald Wasserman, Keith Washington, Yvonne Dixon, and Ann Hoffman.

May 21, 2015

Washington, D.C.

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<sup>17</sup> See *AFSCME Local 2401 and CFSA, supra*, Slip Op. No. 1497 at p. 3-4, PERB Case No. 10-I-06 (holding that in certain cases, when an agency and union have demonstrated that they have bargained in good faith, the Board may conclude that "the agency's duty has been fulfilled and that additional bargaining is not required").

<sup>18</sup> *Id.* at 1; see also *American Federation of Government Employees, Locals 872, 1975 and 2553 v. District of Columbia Department of Public Works*, 49 D.C. Reg. 1145, Op. No. 439 at p. 4, PERB Case Nos. 94-U-02 and 94-U-08 (1995); and *Unions in Compensation Unit 21 v. District of Columbia Department of Health*, 49 D.C. Reg. 7756, Slip Op. No. 674 at f. 2, PERB Case No. 674 (2002).

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.* at 3-4.

<sup>21</sup> As a result of the Board's finding, DOH's Motion to Dismiss is moot and does not need to be addressed.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 15-I-06, Op. No. 1522, was transmitted by File & ServeXpress to the following parties on this the 26<sup>th</sup> day of May, 2015.

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/s/ Felice Robinson  
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