Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Local 36, International Association of Fire Fighters, AFL-CIO Petitioner	PERB Case No. 24-N-14
v.	Opinion No. 1910
District of Columbia Department of Fire and Emergency Medical Services Respondent	

DECISION AND ORDER

I. Statement of the Case

On September 23, 2024, Local 36, International Association of Fire Fighters (Union) filed a Negotiability Appeal (Appeal) concerning the negotiability of two issues declared nonnegotiable by the Department of Fire and Emergency Medical Services (Agency): (1) provisions of Article 6 of the parties' current collective bargaining agreement (CBA); and (2) the Union's proposals to revise Articles 25 and 28 of the CBA. The Union and the Agency are negotiating a successor collective bargaining agreement (CBA) concerning non-compensation terms and conditions of employment.

In its Response to the Appeal, the Agency withdrew its non-negotiability declarations as to Articles 25 and 28 with respect to the successor CBA.[1] The Agency reasserted the non-negotiability of Article 6 and responded to arguments made by the Union in its Appeal.

For reasons stated herein, the Board concludes that Article 6 of the parties' existing CBA is negotiable.

[1] Agency's Response at 2.

II. Standard of Review

There are three categories of collective bargaining subjects: (1) mandatory subjects, over which the parties must bargain if either party requests it; (2) permissive subjects, over which the parties may bargain; and (3) illegal subjects, over which the parties may not bargain.[2] A permissive subject of bargaining is nonnegotiable if either party declines to bargain on the subject.[3] Management rights are permissive subjects of bargaining.[4] Section 1-617.08(a) of the D.C. Official Code sets forth management rights giving management the "sole rights" to undertake actions listed therein.[5]

Matters that do not contravene section 1-617.08(a) or other provisions of the Comprehensive Merit Personnel Act (CMPA) are negotiable.[6] Section 1-617.08(b) of the D.C. Official Code provides that the right to negotiate over terms and conditions of employment extends to all matters except those that are proscribed by the CMPA.[7]

Pursuant to § 1-605.02(5) of D.C. Official Code, the Board is authorized to make a determination in disputed cases as to whether a matter is within the scope of collective bargaining.[8] The Board's jurisdiction to decide such questions is invoked by the party presenting a proposal that has been declared nonnegotiable by the party responding to the proposal.[9] The Board will separately consider the negotiability of each of the matters in a dispute.[10]

III. Analysis

At issue is Article 6 of the parties' current CBA, creating a third-party impasse resolution procedure for impacts and effects bargaining. The Agency has identified Article 6 as a nonnegotiable subject of bargaining. Article 6 is set forth below:

ARTICLE 6

EXISTING RIGHTS AND BENEFITS

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[2] *D.C. Nurses Ass'n v. D.C. Dep't of Mental Health*, 59 D.C. Reg. 10776, Slip Op. No. 1285 at 4, PERB Case No. 12-N-01 (2012) (citing *NLRB v. Wooster Div. of Borg-Warner Corp*., 356 U.S. 342 (1975)).
[3] *UDC Faculty Ass'n v. UDC*, 64 D.C. Reg. 5132, Slip Op. No. 1617 at 2, PERB Case No. 16-N-01 (2017).
[4] *NAGE Local R3-06 v. WASA*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at 4, 13-N-03 (2013); *FEMS and AFGE, Local 3721*, 54 D.C. Reg. 3167, Slip Op. 874 at 9, PERB Case No. 06-N-01 (2007).
[5] D.C. Official Code § 1-617.08(a).
[6] *UDC Faculty Ass'n*, Slip Op. No. 1617 at 4.
[7] D.C. Official Code § 1-617.08(b).
[8] *See WTU v. DCPS*, Slip Op. No. 1884, PERB Case Nos. 24-N-04, *et al.* (2024).
[9] *FOP/Protective Serv. Police Dep't Labor Comm. v. DGS*, 62 D.C. Reg. 16505, Slip Op. 1551 at 1, PERB Case No. 15-N-04 (2015).
[10] *UDC Faculty Ass'n*, Slip Op. No. 1617 at 2-3.

> 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; provided, however, that if the Employer desires to institute a change that impacts upon a term(s) or condition(s) of employment of the entire bargaining unit or any group of employees, the following procedure shall apply:
>
> (1) The Employer shall provide the Union advance notice if possible;
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> (2) Upon request of the Union, the parties shall promptly negotiate about the impact of such change;
>
> (3) If the parties reach impasse, the parties may jointly request the assistance of a third-party to resolve the impasse, through mediation, fact-finding or other mutually agreeable process. Either party may invoke "last best offer" item by item interest arbitration within a reasonable period after reaching impasse.
>
> (4) Should an arbitrator's award issue pursuant to the terms of this Article, the arbitrator's award shall be final and binding on both parties, and, at the arbitrator's direction, may be retroactive.

Agency's Position

The Agency argues that "the vague and amorphous language" contained in Article 6 "includes, among other things, nonnegotiable management rights like assignment of duties and, explicitly, tour of duty."[11] The Agency argues that Article 6 directly interferes with management's exclusive right to direct and assign work pursuant to Section 1-617.08(a)(1) and (2).

The Agency notes that, in Opinion No. 1884, the Board found that "there is no obligation to reach an agreement during impact and effects bargaining, and thus impact and effects bargaining can never reach impasse as defined in PERB Rule 599.1."[12] The Agency argues that Opinion No. 1884 has refined the Board's earlier decision in Opinion No. 1658 (finding negotiable a proposal similar to the instant case that sought to create impasse resolution procedures in the parties' collective bargaining agreement independent of those outlined in PERB Rule 527).[13] The Agency contends that, while the provisions in Opinion No. 1884 "created impermissible impasse procedures for specifically non-negotiable management rights," the provisions in Opinion No. 1658 are "vague and amorphous and don't expressly or specifically subject nonnegotiable

[11] Agency's Response at 3.
[12] Agency's Response at 2 (citing *WTU*, Slip Op. No. 1884).
[13] Agency's Response at 2-3; *AFGE, Local 3721 v. FEMS*, 65 D.C. Reg. 7650, Slip Op. No. 1658, PERB Case No. 17-N-03 (2018).

management rights to impermissible impasse procedures."[14] The Agency argues that "such vague language is no longer acceptable as negotiable."[15]

Union's Position

The Union argues that, in Opinion No. 1658, the Board found a proposal to add language identical to that in Article 6 to be a negotiable.[16] The Union notes that the Board has found that whether to use a third party impasse resolution process is a mandatory subject of bargaining because nothing prevents parties from seeking impasse resolution outside of the Board for impacts and effects disputes.[17] The Union contends that Opinion No. 1884 did not "silently overrule" Opinion No. 1658.[18]

Board's Conclusion

The Board has distinguished between rules-based impasse procedures and contractual third-party impasse procedures for impacts and effects bargaining.[19] While the Board's impasse procedures are inappropriate for parties engaged solely in impacts and effects bargaining, the Board has held that neither Board Rule 527 nor D.C. Official Code § 1- 617.08 prevents parties from seeking impasse resolution outside of PERB for impact and effects bargaining cases.[20] D.C. Official Code § 1-617.08(b) provides that "[a]ll matters shall be deemed negotiable, except those that are proscribed by this subchapter." The Board has held that this language creates a presumption of negotiability.[21]

Third-party impasse procedures are negotiable when involving mandatory subjects of bargaining and nonnegotiable when addressing permissive subjects of bargaining. The Agency's argument that "the vague umbrella created by Article 6 undoubtedly includes management as well as non-management rights" is unfounded. The proposal concerns impact and effects. Any interpretation of Article 6 that would encroach upon management rights would be non-negotiable. The proposal in Opinion No. 1884 prevented the agency from implementing changes to job duty assignment, which is enumerated in 1-617.08(a)(2) as a management right, without first engaging

[14] Agency's Response at 3.
[15] Agency's Response at 6.
[16] Union's Appeal at 4-5 (citing *AFGE, Local 372*, Slip Op. No. 1658 at 4-5).
[17] Union's Appeal at 5 (citing *AFGE, Local 372*, Slip Op. No. 1658 at 4-5).
[18] Union's Appeal at 5; *see WTU*, Slip Op. No. 1884; *AFGE, Local 372*, Slip Op. No. 1658.
[19] *See D.C. Nurses Ass'n v. DHS, et al.,* 64 D.C. Reg. 723, Slip Op. 1602 at 1, PERB Case No. 16-I-07 (2016); *AFGE, Local 1000, et al. v. DHS, et al.,* 64 D.C. Reg. 4889, Slip Op. No. 1612 at 2- 3, PERB Case No. 17-I-03 (2017); *but see AFGE, Local 3721 v. FEMS*, 65 D.C. Reg. 7650, Slip Op. No. 1658 at 4-5, PERB Case No. 17-N-03 (2018).
[20] *AFGE, Local 3721 v. FEMS*, 65 D.C. Reg. 7650, Slip Op. No. 1658 at 4-5, PERB Case No. 17-N-03 (2018).
[21] *FOP/DYRS Labor Comm. v. DYRS*, D.C. Reg. 10133, Slip Op. No. 1636 at 2, PERB Case No. 17-N-02 (2017).

in impacts and effects bargaining with the union.[22] However, the proposals in Opinion No. 1658 and the instant case involve mandatory third-party impasse provisions over terms and conditions of employment that are not proscribed by management rights[23] and the CMPA, and do not curtail management's right to make changes.[24]

Therefore, the proposed article is negotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department of Fire and Emergency Medical Services is required to bargain upon request with Local 36, International Association of Fire Fighters, AFL-CIO, concerning Article 6 of the parties' existing CBA; and

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

March 20, 2025

Washington, D.C.

[22] *WTU*, Slip Op. No. 1884 at 7-8. While management is required to bargain over the impacts and effects of its decisions upon request, impact and effects bargaining cannot serve to frustrate management in the exercise of its rights. *See WTU*, Slip Op. No. 1884 at 7; D.C. Official Code § 1-617.08(a)(1) and (2).

[23] *See AFGE, Local 372*, Slip Op. No. 1658 at 4-5.

[24] *C.f. AFGE Locals 383, 1000, 1975, 2725, 2741, and 2978 v. RHC*, 68 D.C. Reg. 40, Slip Op. No. 1798 at 18, PERB Case No. 21-N-03 (2021).

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.