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

In the Matter of:	)	
	)	
District of Columbia	)	
Department of Motor Vehicles	)	
Petitioner	)	PERB Case No. 18-A-19
	)	
v.	)	Opinion No. 1696
	)	
American Federation of Government Employees	)	
Local 1975	)	
Respondent	)	

**DECISION AND ORDER**

**I. Introduction**

On August 16, 2018, the District of Columbia Department of Motor Vehicles (“DMV”) filed an Arbitration Review Request pursuant to the Comprehensive Merit Personnel Act (“CMPA”), section 1-605.02(6) of the D.C. Official Code. DMV requests the review of an arbitration award (“Award”) issued on July 21, 2018. The Award sustained the grievance filed by the American Federation of Government Employees Local 1975 (“AFGE”). DMV argues that the Arbitrator exceeded his jurisdiction and that the Award is contrary to law and public policy on its face.

Pursuant to section 1-605.02(6) of the D.C. Official Code, the Board may modify, set aside, or remand a grievance arbitration award only when: (1) the arbitrator was without or exceeded his or her jurisdiction; (2) if the award on its face is contrary to law and public policy; or (3) if the award was procured by fraud, collusion, or other similar unlawful means. Upon consideration of the Arbitrator’s conclusions, applicable law, and the record presented by the parties, the request is denied, for the reasons stated herein.

## II. Statement of the Case

In August of 2015, DMV attempted to unilaterally change its unrestricted overtime policy to overtime eligibility contingent on production performance goals.<sup>1</sup> AFGE objected to the new policy and DMV postponed the change.

On November 15, 2015, DMV announced its intent to change the overtime policy. AFGE requested the opportunity to bargain and the DMV postponed the changes upon the request. On March 29, 2016, the parties met for an impact and effects (“I&E”) bargaining session.<sup>2</sup> During that session, the parties agreed to rescind a singular term in the proposed policy. The parties agreed to resume negotiations and AFGE made a request for more information. Thereafter, the parties did not meet for any additional negotiation sessions.

On April 14, 2016, DMV alerted AFGE that it would implement the policy. AFGE shared additional concerns on April 25, 2016, but the DMV decided to move forward with implementation without responding to the additional concerns. Ultimately, DMV implemented the policy in June 2016.<sup>3</sup> After the implementation of the new policy, at least two employees worked overtime despite their failure to meet the new production performance goals.<sup>4</sup> AFGE filed a grievance. On September 7, 2016, AFGE requested arbitration.

## III. Arbitration Award

On February 26, 2018, the parties met for arbitration. The Arbitrator addressed two issues<sup>5</sup>; (1) whether DMV violated the collective bargaining agreement (“CBA”) by implementing the new overtime policy and (2) what is the appropriate remedy if DMV violated the CBA.

AFGE argued that DMV unilaterally changed the terms and conditions of employment in violation of the CBA. AFGE asserted that the parties established a past practice of unrestricted overtime and DMV could not alter the past practice in the absence of an agreement or the declaration of an impasse following good faith negotiations.<sup>6</sup>

DMV argued that the implementation of the new policy was a management right consistent with Article 4 of the CBA and that it determined qualifications and distributed overtime to qualified employees consistent with Article 22 of the CBA.<sup>7</sup> Also, DMV contended that it provided notice of the change and bargained in good faith as required, though it was not required to reach agreement or impasse.<sup>8</sup>

The Arbitrator agreed that the establishment of production performance goals is a management right and consistent with the CBA.<sup>9</sup> However, the Arbitrator reasoned that the right

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<sup>1</sup> Award at 7.

<sup>2</sup> Award at 8.

<sup>3</sup> Award at 10.

<sup>4</sup> Award at 10.

<sup>5</sup> Award at 2. The issue statement also includes the question of whether the subsequent denial of official paid leave to the employees that participated in the grievance procedure violated the CBA.

<sup>6</sup> Award at 11.

<sup>7</sup> Award at 12.

<sup>8</sup> Award at 12.

<sup>9</sup> Award at 13.

to establish production performance goals does not compel the conclusion that “application of such criteria to restrict access to overtime work complied with the CBA.”<sup>10</sup> The Arbitrator determined that Article 22 of the CBA simply required the equal distribution of overtime among qualified volunteers from the work unit and that the term “qualified” did not correlate to a performance standard established by management.<sup>11</sup>

To determine the proper meaning of “qualified” under Article 22 of the CBA the Arbitrator looked to the past practice of the parties.<sup>12</sup> The Arbitrator held that the parties established a long-standing uncontested past practice regarding the qualifications for overtime. The past practice made overtime available to any employee that volunteered.<sup>13</sup> Next, the Arbitrator considered whether the measures DMV used to deviate from the parties past practice comported with contractual and legal requirements.<sup>14</sup>

The Arbitrator held that “an established past practice may not be altered by either party in the absence of agreement or impasse following good faith bargaining.”<sup>15</sup> The Arbitrator reviewed the record and determined that DMV did not fulfill its obligation to negotiate to agreement or impasse.<sup>16</sup>

AFGE’s request for impact and effects bargaining triggered DMV’s duty to bargain. The parties held a single impact and effects bargaining meeting. The Arbitrator found that the parties shared their respective positions and agreed to strike at least one term in the policy.<sup>17</sup> Also, the Arbitrator found that the dispute remained active and unresolved at the end of the meeting.<sup>18</sup> The Arbitrator concluded that the agency made minimal modifications to the policy after the meeting. DMV communicated the changes in the overtime policy to AFGE on April 14, 2016, and preemptively notified AFGE that the policy would be implemented on May 2, 2016.<sup>19</sup> Soon after, AFGE communicated that it had additional concerns, to which DMV requested them as soon as possible for management’s consideration before implementation.<sup>20</sup> On April 25, 2016, AFGE provided additional concerns but the DMV communicated that it definitely would move forward with implementation.<sup>21</sup>

The Arbitrator held that it would be “rash to conclude that the parties engaged in bona fide bargaining” because DMV unilaterally determined negotiations were over during the 11 days between April 14, 2016 and April 25, 2016.<sup>22</sup>

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<sup>10</sup> Award at 14.

<sup>11</sup> Award at 14.

<sup>12</sup> Award at 14.

<sup>13</sup> Award at 15.

<sup>14</sup> Award at 16.

<sup>15</sup> Award at 16.

<sup>16</sup> Award at 16.

<sup>17</sup> Award at 17.

<sup>18</sup> Award at 17.

<sup>19</sup> Award at 17.

<sup>20</sup> Award at 17.

<sup>21</sup> Award at 18.

<sup>22</sup> Award at 18.

The Arbitrator found that the parties failed to engage in a sufficiently reasonable period of good faith negotiations over the terms and conditions of the overtime policy.<sup>23</sup> The Arbitrator determined the record showed only a few sparse emails, one formal I&E bargaining meeting, less than a month between the articulation of changes to policy and formal implementation, and a failure to conclude that further negotiations would be unproductive.<sup>24</sup> The Arbitrator held that DMV provided notice of the pending change in policy, but failed to fulfill its obligation to negotiate to agreement or impasse regarding the policy.<sup>25</sup>

The Arbitrator found in favor of AFGE and ordered DMV to rescind the overtime policy and cease and desist further violations of the CBA.<sup>26</sup> The Arbitrator also determined that the group aggrieved by the violation included all impacted employees, not simply those named as a party to the grievance.<sup>27</sup>

#### **IV. Position of Parties**

##### **A. DMV's Position**

DMV contends that the Award exceeds the Arbitrator's jurisdiction and is contrary to law and public policy. DMV argues that the Arbitrator misinterpreted PERB precedent regarding the duty to bargain and incorrectly determined that DMV violated the parties collective bargaining agreement.<sup>28</sup>

Further, DMV argues that the Arbitrator exceeded his jurisdiction by awarding relief to all employees impacted rather than limiting relief to five employees named as parties to the grievance.<sup>29</sup>

##### **B. AFGE's Position**

AFGE argues that the Arbitrator properly found that DMV was required to bargain in good faith until agreement or impasse. Additionally, AFGE argues that even if DMV was not required to bargain until impasse, the Award is valid because the Arbitrator found that DMV failed to bargain in good faith.<sup>30</sup>

Finally, AFGE argues that the plain reading of the CBA provides the Arbitrator with the authority to grant the relief provided and that DMV's argument is a mere disagreement with the Arbitrator's decision.<sup>31</sup>

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<sup>23</sup> Award at 18.

<sup>24</sup> Award at 18.

<sup>25</sup> Award at 18.

<sup>26</sup> Award at 18.

<sup>27</sup> Award at 19.

<sup>28</sup> Request at 4.

<sup>29</sup> Request at 5-6.

<sup>30</sup> Opposition at 2.

<sup>31</sup> Opposition at 8.

## V. Discussion

### A. Law and Public Policy

The law and public policy exception is “extremely narrow” and designed to limit potentially intrusive judicial reviews under the guise of public policy.<sup>32</sup> DMV has the burden to show that the Award itself violates established law or seeks to compel some unlawful action.<sup>33</sup>

We disagree with AFGE’s argument that the Arbitrator properly found that DMV was required to bargain until agreement or impasse. The Arbitrator misinterpreted the law when he determined that the obligation for I&E bargaining extended until parties reached an agreement or impasse. Parties may engage in I&E bargaining when there is a proposed change to a subject within the purview of management rights.<sup>34</sup> During I&E negotiations, there is no obligation to reach an agreement and the negotiations can never reach impasse as defined by PERB Rule 599.1.<sup>35</sup> “I&E negotiations cannot be expected to continue into perpetuity until an agreement is reached in every case. In some matters, depending on the circumstances, it must be concluded that the agency’s duty has been fulfilled and that additional bargaining is not required.”<sup>36</sup> Thus the Arbitrator’s holding that the parties had an obligation to bargain until agreement or impasse is contrary to law and public policy.

Nevertheless, there is an obligation to engage in good faith negotiations upon notice of a change.<sup>37</sup> The Board has defined good faith negotiations in the context of I&E bargaining as

“ . . . going beyond simply discussing the proposal with the union and doing more than merely requesting the union’s input . . . the agency’s participation cannot constitute mere surface bargaining, and the agency cannot engage in conduct at or away from the table that intentionally frustrates or avoids mutual agreement. Rather, there must be give and take, with the negotiations entailing full and unabridged opportunities by both parties to advance, exchange, and reject specific proposals.”<sup>38</sup>

Here, the Arbitrator found that it would be unreasonable to conclude that parties engaged in bona fide bargaining.<sup>39</sup> The Arbitrator determined that the record showed a unilateral cessation of negotiations, a few sparse emails between varying representatives, one formal I&E bargaining

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<sup>32</sup> *MPD v. FOP/MPD Labor Comm. ex rel. Pair*, 61 D.C. Reg. 11609, Slip Op. 1487 at 8, PERB Case No. 9-A-05 (2014). See *MPD v. FOP/MPD Labor Comm. ex rel. Johnson*, 59 D.C. Reg. 3959, Slip Op. 925 at 11-12, PERB Case No. 08-A-01 (2012).

<sup>33</sup> *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986).

<sup>34</sup> *AFGE Local 1000 v. D.C. Dept. of Emp. Serv.*, 63 D.C. Reg. 9800, Slip Op. 1578 at 11, PERB Case No. 13-U-07 (2016).

<sup>35</sup> *Id.* at n.7 PERB Rule 599.1: “Impasse – The point in collective bargaining negotiations at which no further progress can be made by the parties without the intervention of a neutral third party, except as otherwise defined by the CMPA for compensation bargaining.”

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Award at 17.

session, and the brief time lapse between DMV's articulation of changes to the policy and its formal implementation.<sup>40</sup> The Arbitrator found that the parties failure to engage in bargaining for a reasonable period of time was not indicative of good faith negotiations.<sup>41</sup>

Although the Arbitrator mistakenly stated that the duty during I&E negotiations is to reach impasse or agreement, he found that the parties did not engage in good faith bargaining as required by the CIPA and PERB precedent.<sup>42</sup> Therefore, the award is not contrary to the law and public policy.

#### B. Arbitrator's Authority

DMV also argues that the Arbitrator exceeded his authority by applying the remedy to "all impacted employees" rather than the five employees that signed the group grievance.

DMV argues that Article 9 Section C(2)(c) of the CBA requires all individuals sign the grievance and that providing a remedy to individuals that did not sign the grievance is beyond the scope of the CBA. AFGE argues that Article 9 Section C(2)(c) of the CBA is a filing requirement that imposes no limit on who may receive a remedy at the end of a dispute and simply requires signatures of the members of the group at the initial step of a grievance.

When determining if an arbitrator exceeded his authority in rendering an award the Board analyzes whether the award "draws its essence from the parties collective bargaining agreement."<sup>43</sup> The relevant questions in this analysis are whether the arbitrator acted outside his authority by resolving a dispute not committed to arbitration and whether the arbitrator was arguably construing or applying the contract in resolving legal and factual disputes.<sup>44</sup>

Here, neither party disputes whether the question was committed to arbitration. The application of the remedy to all impacted employees and not just the signatories to the initial step is a construal of Article 9 Section C(2)(c) of the CBA. By submitting a grievance to arbitration, parties agree to be bound by the arbitrator's interpretation of their contract, rules, and regulations; and agree to accept the arbitrator's evidentiary findings and conclusions.<sup>45</sup> Herein the remedy draws its essence from the parties collective bargaining agreement. Therefore, the Board finds the Award within the Arbitrator's jurisdiction.

### VI. Conclusion

The Board rejects the Arbitrator's rationale concerning the obligation to bargain to agreement or to impasse during impacts and effects negotiations. The Board sustains the Award based on the Arbitrator's finding that the parties failed to engage in good faith negotiations. Accordingly, the Board denies DMV's request, and the award is enforceable as written.

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<sup>40</sup> Award at 18.

<sup>41</sup> Award at 18.

<sup>42</sup> *AFGE Local 383 v. D.C. Dept. of Youth Rehab. Serv.*, 61 D.C. Reg. 1544, Slip Op. 1449 at 7, PERB Case No. 13-U-06 (2014).

<sup>43</sup> *AFGE Local 2725 v. D.C. Housing Auth.*, 61 D.C. Reg. 9062, Slip Op. 1480 at 5, PERB Case No. 14-A-01 (2014).

<sup>44</sup> *Mich. Family Resources, Inc. v. Serv. Emp' Int'l Union, Local 517M*, 475 F.3d 746, 753 (2007), quoted in *FOP/DOC Labor Comm. v. DOC*, 59 D.C. Reg. 9798, Slip Op. 1271 at 7, PERB Case No. 10-A-20 (2012), and *D.C. Fire & Emergency Med. Servs. v. AFGE Local 3721*, 59 D.C. Reg. 9757, Slip Op. 1258 at 4, PERB Case No. 10-A-09 (2012).

<sup>45</sup> *MPD v. FOP/MPD Labor Comm. ex rel. Sims*, Slip Op. 633 at 3, PERB Case No. 00-A-04 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. DMV's Arbitration Review Request is hereby denied.
2. Pursuant to Board Rule 559, 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 Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

Washington, D.C.

January 17, 2019

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 18-A-19, Op. No. 1696 was sent by File and ServeXpress to the following parties on this the 25nd day of January 2019.

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