



## II. Background

On May 6, 2010, CFSA announced that it would conduct a Reduction-in-Force (“RIF”) of approximately 57 employees represented by AFSCME. Specifically, CFSA stated it would eliminate 57 Social Service Assistant (“SSA”) positions, and create 35 new Family Support Worker (“FSW”) positions<sup>1</sup>, which would require a Bachelor’s degree.<sup>2</sup> At the request of the Union, the parties engaged in I&E bargaining and met three (3) times in May 2010.<sup>3</sup>

During negotiations, AFSCME proposed that CFSA retain the SSA’s and give them four (4) years to meet the new degree requirement. CFSA counter-proposed with an offer to give the SSA’s until the end of the calendar year (approximately seven (7) months) to meet the requirement.<sup>4</sup> AFSCME’s final offer proposed that CFSA give the employees seven (7) semesters (or approximately three and a half (3.5) years) to obtain the degree.<sup>5</sup> CFSA rejected AFSCME’s final proposal and stated it would not deviate from its final offer to give the employees until the end of the calendar year to obtain the degree.<sup>6</sup> On May 27, 2010, AFSCME filed the instant Declaration of Impasse and Request for Impasse Resolution.

On September 9-10, 2010, the Board’s former Executive Director, Blanca Torres, found the parties were at impasse, assigned the matter to FMCS for mediation, and appointed Commissioner Sylvester to serve as the mediator. The parties met with Commissioner Sylvester on October 21, 2010, but were unable to reach a resolution.

In addition to the instant Impasse case, AFSCME also filed: (1) a Negotiability Appeal (PERB Case No. 10-N-03) seeking an order on whether its final proposal to give SSA’s 3.5 years to obtain a degree was nonnegotiable<sup>7</sup>; and (2) an Unfair Labor Practice Complaint (PERB Case 10-U-37) alleging that CFSA’s acted in bad faith when it declared AFSCME’s proposal to be nonnegotiable.<sup>8</sup>

In April 2014, the Board found in PERB Case 10-N-03 that AFSCME’s final proposal during I&E bargaining was nonnegotiable pursuant to the Abolishment Act, D.C. Official Code § 1-624.08(j), and the Omnibus Personnel Reform Amendment Act, 1998 D.C. Law 12-124 (Act 12-326).<sup>9</sup> Furthermore, in PERB Case No. 10-U-37, the Board found that CFSA did not act in

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<sup>1</sup> SSAs were positions in Grades 6, 7, and 8, whereas FSWs are Grade 9.

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

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 2-3.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</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, Op. No. 1462 at ps. 2-3, PERB Case No. 10-N-03 (2014).

<sup>8</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. 5608, Op. No. 1463 at p. 1, PERB Case No. 10-U-37 (2014).

<sup>9</sup> *AFSCME and CFSA*, *supra*, Op. No. 1462 at ps. 4-5, PERB Case No. 10-N-03.

bad faith when it declared AFSCME's final proposal nonnegotiable, and accordingly dismissed AFSCME's unfair labor practice complaint.<sup>10</sup> AFSCME did not appeal either decision.

### 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" indicates that the Board has discretion in determining whether or not to advance an impasse to fact-finding or arbitration.<sup>11</sup> While PERB has contemplated scenarios in which impasses reached during I&E bargaining should be advanced to interest arbitration,<sup>12</sup> for the following reasons the Board finds that this case is not one of those instances.

CFSA unquestionably had a duty to engage in good faith I&E bargaining when it announced its intention to conduct the RIF,<sup>13</sup> but that duty did not require the parties to reach an ultimate agreement when I&E negotiations reached impasse. Under Board caselaw, when I&E bargaining has been requested by the exclusive representative, the agency fulfills its duty to bargain in good faith by going beyond "simply discussing" its proposal with the union, and by doing more than merely requesting the union's input.<sup>14</sup> Furthermore, 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.<sup>15</sup> Rather, there must be a give and take, with the negotiations entailing full and unbridged opportunities by both parties to advance, exchange, and reject specific proposals.<sup>16</sup> Even so, because the matter being bargained is a management right, I&E bargaining cannot be expected to continue in 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>17</sup>

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<sup>10</sup> *AFSCME v. CFSA*, *supra*, Op. No. 1463 at ps. 9-13, PERB Case No. 10-U-37.

<sup>11</sup> *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> *See 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).

<sup>13</sup> *See AFSCME v. CFSA*, *supra*, Op. No. 1463 at p. 9, PERB Case No. 10-U-37.

<sup>14</sup> *American Federation of Government Employees, Local 383 v. District of Columbia Department of Health*, 52 D.C. Reg. 2527, Op. No. 753 at f. 6, PERB Case No. 02-U-16 (2004).

<sup>15</sup> *American Federation of Government Employees, Local 383 v. District of Columbia Department of Disability Services*, 59 D.C. Reg. 10771, Op. No. 1284 at p. 3, PERB Case No. 09-U-56 (2012).

<sup>16</sup> *District Council 20, American Federation of State, County and Municipal Employees, Local 709, et al. v. Government of the District of Columbia, et al.*, 43 D.C. Reg. 1148, Op. No. 343 at p. 8, PERB Case No. 92-U-24 (1993).

<sup>17</sup> *See AFGE, Local 383 v. DDS*, *supra*, Op. No. 1284 at p. 4, PERB Case No. 09-U-56 (holding that the agency did not violate its duty to bargain in good faith just because the parties did not reach an agreement).

In this case, all of above stated factors were met. The parties engaged in negotiations on at least four (4) occasions,<sup>18</sup> wherein they exhausted an exchange of various proposals and counter-proposals. Those negotiations eventually reached impasse when both parties declared that they were unwilling to deviate from their respective last best offers. However, AFSCME's last best offer to give SSA's 3.5 years to obtain a degree was determined by the Board to be nonnegotiable in PERB Case No. 10-N-03. CFSA's last best offer to give the SSA's until December 31, 2010 to meet the degree requirement is now effectively moot because the RIF was executed in 2010 and the seven (7) months CFSA was offering have long since passed. As a result, the parties' last best offers cannot be arbitrated because neither offer is still on the table. Accordingly, the Board finds that CFSA's good faith I&E obligations have been exhausted and fulfilled and that it is consequently not necessary to advance this case to fact-finding or arbitration.<sup>19</sup> AFSCME's Declaration of Impasse is therefore dismissed.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. AFSCME's Declaration of Impasse 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 and Keith Washington

November 20, 2014

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<sup>18</sup> Three (3) times in May 2010, and once in October 2010 with Commissioner Sylvester.

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

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 10-I-06, Slip Op. No. 1462, was transmitted via U.S. Mail and e-mail to the following parties on this the 24<sup>th</sup> day of November, 2014.

Brenda C. Zwack, Esq.  
Murphy Anderson PLLC  
1701 K Street, N.W.  
Suite 210  
Washington, DC 20006  
BZwack@murphyllc.com

**VIA U.S. MAIL AND EMAIL**

Dean Aqui, Esq.  
D.C. Office of Labor Relations and  
Collective Bargaining  
441 4<sup>th</sup> St, N.W.  
Suite 820 North  
Washington, DC 20001  
Dean.Aqui@dc.gov

**VIA U.S. MAIL AND EMAIL**

/s/ Sheryl Harrington

PERB