Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Local 36, International Association of Firefighters, AFL-CIO, Union,	PERB Case No. 13-I-01
and	Opinion No. 1453
District of Columbia Department of Fire and Emergency Medical Services, Agency.	**Motion to Suspend Impasse Proceedings**

DECISION AND ORDER

The D.C. Department of Fire and Emergency Medical Services ("Agency") has filed in the above-captioned matter a motion styled "Motion to Stay Impasse Proceedings as to Proposal 13 (Hours of Work, Schedule, and Leave) and as to Submission by January 17, 2014 of Post-Arbitration Briefs" ("Motion"). The Motion involves the interplay between proceedings in cases numbered 13-I-01 and 13-N-04. Local 36, International Association Firefighters, AFL-CIO ("Union") filed a response, opposing the Motion.

Background

On November 8, 2012, the Union filed a notice of impasse averring that the Union and the Agency had reached an impasse concerning compensation and non-compensation negotiations for a successor collective bargaining agreement. This matter was assigned case number 13-I-01. On November 13, 2012, the Director determined that the parties had reached an impasse and appointed a mediator. On March 5, 2013, the negotiator for the Agency sent the Union a letter asserting the nonnegotiability of proposals made by the Union. On April 3, 2013, the mediator informed the Director that mediation had not completely resolved the impasse. The next day the Union filed a negotiability appeal, PERB Case No. 13-N-04, seeking a determination of the negotiability of thirteen proposals that the Agency had asserted were nonnegotiable. On May 17, 2013, the Director appointed an arbitrator for Case No. 13-I-01 pursuant to D.C. Code section 1-617.17(f). The arbitrator held hearings in November 2013.

The Board issued a decision and order in Case No. 13-N-04, finding all proposals except Proposal 12 and Proposal 13 to be negotiable. *Local 36, Int'l Ass'n of Firefighters v. D.C. Dep't of Fire & Emergency Med. Servs.*, 60 D.C. Reg. 17359, Slip Op. No. 1445, PERB Case No. 13-N-04 (2013). The Union filed a motion for reconsideration with respect to the proposals found nonnegotiable.

In a conference call with the arbitrator, counsel for the Agency asserted that the Board's decision deprived the arbitrator of jurisdiction to address Proposal 13, a proposal regarding the work week and work schedule of firefighters. The Union disagreed and pointed out that its motion for reconsideration meant that the Board's decision was not final. Subsequent conference calls failed to resolve the dispute. On December 27, 2013, the arbitrator sent an e-mail summarizing a conference call that day and stating,

> I noted my strong preference for the LBFOs to include a proposal on the "platooning" issue [Proposal 13] that was in the format of an "asterisked" proposal. By doing so, all of the possible eventualities will be covered. If the subject matter is ultimately found after all appeals have been exhausted to be non-negotiable, then any language on the subject will lapse by its terms since by agreeing to the asterisked approach the District has not waived its non-negotiability position.

(Motion Ex. C. at 1). The e-mail states that the date for briefing is January 17, 2014.

The Agency filed the Motion in question on January 7, 2014. The Agency maintains that the procedure contemplated by the arbitrator to issue a provisional ruling on an "asterisked" proposal that the Board already held nonnegotiable usurps the Board's jurisdiction and would result in confusion and needless litigation. (Motion 7, 8). For example, the Agency suggests that an unfair labor practice case will likely arise if the interest award includes Proposal 13 and the Agency fails to comply with that portion of the award. (Motion 7).

In response, the Union asserts that the request is unprecedented and should be denied. The Union denies that the arbitrator is usurping the Board's jurisdiction as the arbitrator is not deciding the negotiability question. To the Agency's claim that a stay would prevent neeedless litigation, the Union replies that such litigation is theoretical and speculative. The Union proposes a speculative harm of its own: "a 'do-over' if, in the future, PERB's negotiability determination is reversed." (Response 8-9).

In surrebuttal to the Union's claim that the request is unprecedented, the Agency filed a reply in which it argues that the present case is "wholly analogous" to *Patent Office Professional Association v. Federal Labor Relations Authority*, 26 F.3d 1148 (D.C. Cir. 1994). In that case the court held that an interest arbitrator did not have jurisdiction to consider proposals which the parties had neither negotiated nor reached an impasse. *Id.* at 1153-54. The Agency contends

that there is no impasse over Proposal 13 because the Agency refused to bargain over it and, as a result, the arbitrator has no jurisdiction to consider Proposal 13, provisionally or otherwise.

Discussion

Board Rule 532.1 states: "Except when otherwise ordered by the Board in it[s] discretion, impasse proceedings shall not be suspended pending the Board's determination of a negotiability appeal." The circumstances of this case do not present sufficient grounds for the Board to exercise its discretion to suspend impasse proceedings pending the Board's determination of the Union's negotiability appeal. The arbitrator's stated preference for arbitrating the issue provisionally, without claiming to decide the negotiability issue, is not an unreasonable approach. An award regarding Proposal 13 can be excised or lapse by its own terms if it conflicts with the final determination of the negotiability appeal.

The Agency's jurisdictional argument does not necessitate exercise of the Board's discretion to suspend the impasse proceedings. The case of *Patent Office Professional Association v. Federal Labor Relations Authority*, 26 F.3d 1148 (D.C. Cir. 1994), is distinguishable. In that case, an interest arbitrator issued an award on all disputed proposals before him except those related to performance appraisal. The union then submitted new proposals on performance appraisal. The arbitrator, over the objections of the agency, proceeded to consider the new proposals and issued an award that included several of them. *Id.* at 1150-51. The court held that before an interest arbitrator can exercise any power there must first be an impasse. The requisite impasse on the new proposals was absent because the parties had never bargained over them. *Id.* at 1153. In contrast, the parties to the present case bargained over all of the Union's proposals including Proposal 13. The notice of impasse stated that the parties had failed to reach settlement on "hours of work/schedule/leave." (Notice of Impasse ¶ 2). The Union's proposals attached to the notice of impasse included Proposal 13. (Notice of Impasse Ex. 1). The Agency did not assert the nonnegotiability of the Union's proposals, including Proposal 13, until after the impasse was declared and a mediator appointed.

In connection with the lack of jurisdiction, *Patent Office* does refer to the agency's claim of nonnegotiability in that case but only as the cause of the failure to negotiate. The court stated, "So long as these negotiability issues remained unresolved, coupled with the parties' resulting failure to negotiate over the merits of the proposals, there could be no impasse on the merits." 26 F.3d at 1153 n.2. In the present case, the negotiability issues are not coupled with a resulting failure to negotiate over the merits of the proposal. Accordingly, the arbitrator has not lost the jurisdiction conferred on him when he was appointed.

For the foregoing reasons, the Motion is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The D.C. Department of Fire and Emergency Medical Services' Motion is denied.

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

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

February 25, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-I-01 was transmitted via File & ServeXpress to the following parties on this the 25th day of February, 2014.

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