Government of the District of Columbia
Public Employer Relations Board

In the matter of:	)	
	)	
Local 36, International Association of Firefighters	)	PERB Case No. 08-N-04
	)	
Petitioner,	)	Opinion No. 1010
	)	
and	)	**Negotiability Appeal**
	)	
District of Columbia Fire and Emergency Emergency Medical Services,	)	
	)	
Respondent.	)	
	)	

Decision and Order

I. Statement of the Case

Local 36, International Association of Firefighters ("Petitioner " or "Union" or "Local 36") filed a Negotiability Appeal in the above-captioned case. The appeal concerns the negotiability of its proposal pertaining to Section B (1) and (2) of Article 45, "Hours of Work/ Schedule/ Leave". The proposal was declared nonnegotiable by the Office of Labor Relations and Collective Bargaining ("OLRCB") on behalf of the District of Columbia Department of Fire and Emergency Medical Services ("Respondent" or "Management" or "FEMS"). Furthermore, OLRCB claimed that the Union's negotiability appeal was not timely filed.

In the initial appeal, the Union stated that "[w]hen Council amended the Comprehensive Merit Personnel Act ("MPA ") in 2004 to provide that management has the right to 'establish the tour of duty', D.C. Code § 1-617.08(5)(A), the Council refused to adopt a provision proposed by OLRCB that would have provided that the Fire/EMS Chief would have the right to set 'the basic workweek [and] hours of work'. Bill 15-913 (as introduced June 29, 2004). (Negotiability Appeal at p. 9). Also, in their initial pleadings, both parties relied on *IAFF and DCFEMSD*, 45 DCR 8080, Slip Op. No. 505, PERB Case No. 97- N-01 (1997), reconsideration denied, Slip Op. No. 515. (In the negotiability appeal filed in *IAFF and DCFEMSD*, Slip Op No. 505, the Union contended that a proposal concerning 42 hours in a work week established the starting point when a bargaining unit member was entitled to overtime pay. The Board found that compensation issues are negotiable.)

The Union argued that Slip Op. No. 505 supports that its proposal in the present case is negotiable as "a pure matter of compensation". (Negotiability Appeal at p. 10).

FEMS countered that Slip Op. No. 505 supports its position that management has the right to establish the tour of duty. Relying on D.C. Code § 5-405(a), FEMS also argued that the Mayor of the District of Columbia is authorized and directed to "establish a workweek for officers and members of the Firefighting Division of the Fire Department of the District of Columbia which will result in an average workweek of not to exceed 48 hours during an administratively established workweek cycle which the Mayor is hereby authorized to establish from time to time." (Response to Negotiability Appeal at pgs. 5-6).

On September 30, 2009, the Board issued a Decision and Order in this matter in Slip Op. No. 964. The Board found that the negotiability appeal was timely filed, however there was insufficient information to make a determination on the issues raised by the Petitioner's proposal. Therefore, the Board instructed the Petitioner to clearly frame the issue raised in its negotiability appeal and ordered both parties to file briefs stating their positions concerning the negotiability of Article 45, Section B(1) and (2) in light of D.C. Code §1-617.08 (a) (5) (A) and D.C. Code § 5-405 (a).

In addition, the Board noted that the Petitioner made reference to the fact that "the Task Force on Emergency Medical Services has recommended (and the Mayor has adopted the recommendation) that any changes in the Department's work shifts are to be presented to the Council for action." (Parenthesis in the original). Therefore, the Board ordered the parties to: (1) cite any action taken by the City Council which impacts on the Union's proposal; (2) explain what stage of this process has been reached; and (3) state their position on how the Council's action will impact on the negotiability of the Union's proposal on Article 45 Section B (1) and (2).

II. Discussion

The following proposals by the Union were declared nonnegotiable by OLRCB:

Article 45, Section B

(1) The basic work week for members working in the Firefighting Division shall be 42 hours averaged over a 4-week period."
(FEMS added: "The tour of duty is non-negotiable under District of Columbia law and the Fair Labor Standards Act (FLSA). It is identified here only for informational purposes." Also, FEMS inserted the following language: "The basic workweek for members working in the Fire Fighting Division shall be set by management and will not exceed 53 hours averaged over a 4-week period.")

> (2) The work schedule for members working in the Fire Fighting Division shall be 24 hours on and 72 hours off duty.
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> (FEMS deleted this language and added: "as agreed upon [November 5, 2007 letter from J. Collins to D. Aqui] scheduling will be revisited after the District's Council acts on it").

The parties submitted briefs on October 15 and 16, respectively. On October 30, 2009, the Petitioner filed "Petitioner's Opposition to Respondent's Brief" ("Petitioner's Opposition") and on November 4, 2009, FEMS filed a submission entitled "Opposition to Petitioner's Brief" ("Respondent's Opposition").

The Union asserts that the issues have been resolved and the appeal is moot.[1] In support of its position that the appeal is moot, the Union states the following reasons:

> (1) an MOA has been signed by the parties wherein the work schedule for firefighters continues to be 24 hours on duty and 72 hours off duty over a four-week cycle, except that firefighters detailed to the ambulances may choose a schedule consisting of two twelve-hours days and two twelve-hour nights, followed by four days off;
>
> (2) based on the MOA, the Fire Chief notified City Council that the parties had resolved the subject of shift assignment;
>
> (3) the FEMS website references the Transport Unit Staffing Plan developed with Local 36, IAFF.

(See Petitioner's Brief at pgs. 1-2; Petitioner's Opposition at p. 12).

In the event the Board finds that the appeal is not moot, the Union argues that "its proposal with respect to Section B(1) is intended to establish "when a member is entitled to overtime pay. *International Association of Firefighters, Local 36 and District of Columbia Fire and Emergency Medical Services Department*, Slip Op. No 505 at p. 2, PERB Case No. 97 N 01 (1997)." [The Union] seeks a narrow determination of whether 'management retains the nonnegotiable prerogative to determine the number of hours an employee may be required to work before he or she is entitled to extra pay beyond the regular pay'." (Petitioner's Opposition at p. 2).

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[1]The Union notes in its Opposition that the Respondent, in its October 16, 2009 Brief, "agrees that no issue regarding Article 45, Section B(2) is before the Board for decision at this time. . .but the Department asks the Board to address the negotiability of Section B(1)." (Petitioner's Opposition at pgs. 1-2).

In its October 16, 2009 Opposition, FEMS countered that "tour of duty" and "workweek" are nonnegotiable. In its Opposition, FEMS through OLRCB, disputed the Union's assertion that the negotiability appeal in this matter is now moot. FEMS contends that management has the right to determine the hours of work. Furthermore, FEMS argued that the work shifts in the MOA must be presented to Council for action before they can become final. (See Opposition at p. 2). FEMS maintained that the issues in this case have not been resolved because:

> (1) there is no viable MOA in existence because the Fire Chief is not the authorized negotiator, but rather it is OLRCB;[2]
>
> (2) the MOA only addresses only the Transport Units (i.e., Ambulance Units) and does not address all of the employees represented by the Union;[3]
>
> (3) Council has not acted on the issue of the work shifts which have been submitted in the MOA;
>
> (4) the issues of hours of work /tour of duty have not been presented to Council.

(See Opposition at pgs. 2-4).

Finally, FEMS cited the following two-pronged standard for determining when a matter is moot:

> (1) it can be said with assurance that "there is not [a] reasonable expectation . . ." that the alleged violation will recur, and

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[2]Office of Labor Relations and Collective Bargaining ("OLRCB") asserts that "the Fire Chief has no authority to commit the Department on bargainable issues. . . . [B]y Mayor's Order 2001-168 (November 14, 2001) the Office of Labor Relations and Collective Bargaining is responsible for 'representing the Mayor and all District agencies under the direct personnel authority of the Mayor in collective bargaining over compensation and working conditions'. . . . The MOA is null and void. Therefore, [OLRCB maintains that] the Council has not been presented with anything on which it may validly act, and, consequently the issue cannot be moot." (Opposition at p.5).

[3]According to OLRCB, the MOA was made in response to a recommendation in Section 4(c) in the Final Report and Recommendation of the Task Force on Emergency Medical Services, which mandates at p. 31, that: "The Chief shall establish no later than March 31, 2008, and as available staff allows, a practice for assignment to transport duty in which employees are permanently assigned to ambulance service for periods of not less than 90 days, rather than intermittently with fire apparatus duty." Therefore, FEMS argued that the MOA only addresses only the Transport Units (i.e., Ambulance Units) and does not address all of the employees represented by the Union. (Opposition at p. 4).

> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

County of Los Angeles v. Davis, 440 U.S. 625 at p. 631 (1979).

According to FEMS, this standard has not been met because the hours of work or tour of duty have not been presented to City Council. Also, the shifts in the MOA have been presented but have not been acted on by Council. In view of this, FEMS asserted that no interim relief or events have settled the issue raised in the negotiability appeal concerning hours of work and tour of duty and the shifts described in the MOA are without force and effect. Therefore, FEMS claimed that the Board must conclude that this negotiability appeal is *not* moot. (See Opposition at p. 3).

In response to FEMS's Opposition, the Union made a submission on November 18, 2009, giving the Board notice that it submitted a new proposal to FEMS/ OLRCB. Article 45, Section B(1) remains the same:

> (1) The basic work week for members working in the Firefighting Division shall be 42 hours averaged over a 4-week period.

The second portion, Article 45, Section B(2) of the proposal contains new language, as follows:

> (2) The work schedule for members working in the Fire Fighting Division shall be 24 hours on and 72 hours off duty, *unless the Council of the District of Columbia takes action requiring a different schedule.* [new language in italics].

The Union reiterated its arguments that "as to both proposals, this case has been mooted by the parties' Memorandum of Agreement on Transport Union Staffing. (See Union's November 18, 2009 submission at pgs. 1-2). The Union claimed that it submitted the new proposal "in an effort to avoid such fencing over what Local 36 firmly believes is a non-issue." (Union's November 18, 2009 submission at p. 2). According to the Union, OLRCB has advised that it would regard the new proposal as nonnegotiable, but "no written assertion of nonnegotiability has yet been made within the provisions of Rule 532.3." As such, it is the Union's position that Proposal No. 2 is no longer before the Board for consideration.

In light of the parties' recent submissions, the Board finds that there is an issue of whether this negotiability appeal is properly before the Board for consideration. The Board notes that it is the

Petitioner who defines the negotiability appeal. More recently, the Union revised Section B of its proposal, stating that "[t]he work schedule for members working in the Fire Fighting Division shall be 24 hours on and 72 hours off duty, *unless the Council of the District of Columbia takes action requiring a different schedule.*" Furthermore, the Petitioner claims on the one hand that the issues in the negotiability appeal have been resolved, stating that: (1) there is an MOA in effect; (2) City Council has been notified of the MOA by the Fire Chief. Thus, the Petitioner has submitted a new proposal to FEMS, but has not withdrawn its negotiabilty appeal of the initial proposal in this case.

The Respondent, through OLRCB, asserts that the appeal is not moot, contending that the issues in this case have not been resolved based on the following: (1) there is no viable MOA in existence because the Fire Chief is not the authorized negotiator, but rather the Mayor has designated OLRCB as the negotiator; (2) the MOA pertains only to FEMS employees and not to the entire bargaining unit; (3) Council has not acted on the issue of the work shifts submitted in the MOA; and (4) the issues of hours of work /tour of duty have not been presented to Council. Therefore, the Respondent submits that none of the issues in this appeal are resolved until the City Council acts on them and that this would leave no issues for the Board's determination.

A review of the parties' recent submissions reveals that they cannot agree on whether negotiability is still an issue. Specifically, the parties disagree on: (1) the role of the City Council pertaining to the finality of the work scheduling for bargaining unit members performing transport duty; (2) the procedure that would accomplish this role; (3) whether this procedure has been accomplished or what stage of the procedure has been reached. Also, the parties disagree on whether the MOA between the parties resolved the issues raised by this negotiability appeal and whether the MOA was valid. Therefore, there are factual disputes concerning this appeal and the Board hereby refers this matter to a Hearing Examiner so that a hearing may be held in order to develop a full record in this case.

ORDER

IT IS HEREBY ORDERED THAT:

1. This matter is referred to a Hearing Examiner and a hearing shall be held in order to develop a record in this case. The hearing shall be held pursuant to the Board's expedited procedures.

2. This Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 31, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-N-04 was transmitted via Fax & U.S. Mail to the following parties on this the 31st day of December 2009.

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