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

In the Matter of:	)	
	)	
National Association of	)	
Government Employees	)	
Local R3-06,	)	PERB Case No. 13-N-03
	)	
Petitioner,	)	Opinion No. 1389
	)	
and	)	
	)	
District of Columbia	)	
Water and Sewer Authority	)	
	)	
Respondent.	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On February 11, 2013, the National Association of Government Employees, Local R3-06 (“NAGE” or “Union”) filed a Negotiability Appeal (“Appeal”), pursuant to Board Rule 532. NAGE and the District of Columbia Water and Sewer Authority’s (“WASA” or “Agency” or “Authority”) are currently negotiating a successor Collective Bargaining Agreement (“CBA”) on working conditions. NAGE filed its Appeal in response to WASA’s written communication of non-negotiability, concerning two provisions in the proposed contract, which NAGE received on January 11, 2013. (Appeal at 2-3).

NAGE requests that the Board order WASA to commence negotiations on Article 57 “Discipline” and Article 59 “Expedited Grievance and Arbitration Procession,”<sup>1</sup> asserting that the topics found in the Articles “are subject to mandatory bargaining under the D.C. Code and

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<sup>1</sup> Article 57 and Article 59 will be referred to collectively as “the Articles.”

PERB precedent.” (Appeal at 1).

On February 26, 2013, WASA filed a Response to NAGE’s Appeal, asserting that it has no duty to bargain over disciplinary procedures for at-will employees. (Response at 2).

## II. Discussion

NAGE asserts that WASA “submitted its initial contract proposal on November 16, 2012, which merely stated ‘[i]n accordance with the Public Employees Relations Board opinion in case number 99-U-04, employees in the NAGE bargaining unit are designated as at-will employees, All disciplinary actions are at management’s discretion and are not subject to appeal.’” (Appeal at 3) (citing *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551 Slip Op. No. 635, PERB Case No. 99-U-04 (2000) (“*NAGE and D.C. WASA*”). In addition, as an exhibit to its Appeal, NAGE submitted communication from WASA that the Agency refused to bargain over Article 57 “Discipline” and Article 59 “Expedited Grievance and Arbitration Procession.” (Appeal at 3-4). NAGE asserts that, on January 11, 2013, WASA sent the following communication:

The Authority rejects the Union’s proposal on Article 57 Discipline that it received via electronic mail on January 10, 2013 and reiterates its position both Article 57 Discipline and Article 59 Expedited Grievance and Arbitration Procedures are non-negotiable in their entirety in accordance with PERB Opinion in 99-U-04.

(Exhibit E to Appeal). NAGE claims that, prior to January 11, 2013, WASA never asserted that the Articles were non-negotiable. (Appeal at 4-5).

WASA disputes that January 11, 2013, was the first time that it raised the issue that the Articles were non-negotiable. (Response at 4). WASA asserts that, on December 5, 2012, it presented to NAGE notice that WASA “considered both the disciplinary article and the expedited grievant arbitration article non-negotiable.” *Id.* WASA, notwithstanding, does not dispute that, on January 11, 2013, it “indicated the same upon receipt of the Union’s proposed disciplinary article.” *Id.*

### A. NAGE’s position:

In support of its position that the Articles are negotiable, NAGE argues that D.C. Code § 1-617.08(b) mandates that “any issue not specifically listed under management rights is deemed negotiable.” (Appeal at 2). NAGE asserts that WASA’s reliance on Slip Op. No. 635 in declaring the Articles at issue non-negotiable is improper. *Id.* (citing *NAGE and D.C. WASA*, PERB Case No. 99-U-04). NAGE argues that Slip Opinion No. 635 requires WASA to bargain over the Articles. (Appeal at 3). NAGE cites the Board’s ruling:

The WASA-CFO’s status as an at-will employer[,] did not relieve him of all bargaining obligations imposed under the Comprehensive Merit

Personnel Act (CMPA)...Specifically, the Hearing Examiner determined that, except for matters directly relating to the termination of financial employees, WASA remains subject to the bargaining obligations of the CMPA.

*NAGE and D.C. WASA*, Slip Op. No. 635 at 4 (adopting the Hearing Examiner's report).

Additionally, NAGE argues that WASA has waived its ability to raise non-negotiability over the Articles. (Appeal at 4-5). NAGE asserts that WASA waived non-negotiability over Article 57 "Discipline" when it did not strike the provision all together in its November 16, 2012, substantive proposal. (Appeal at 4). As for Article 59 "Expedited Grievance and Arbitration Procession," NAGE argues that WASA continues to bargain over the Grievance and Arbitration Procedures Article, "which is inextricably linked to the expedited grievance and procedures issues." (Appeal at 5). Therefore, NAGE concludes that WASA has waived any argument of non-negotiability regarding that Article. *Id.*

#### **B. WASA's position**

WASA argues that the District of Columbia Court of Appeals ("DCCA") held that Section 152 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA") converted employees reporting to the District of Columbia's Chief Financial Officer's to that of "at-will." (Response at 3)(citing *Leonard v. District of Columbia*, 794 A.2d 618 (D.C. 2002)). WASA claims, "Since the 1997 Memorandum of Understanding between the Authority and the District of Columbia's Chief Financial Officer transferred some of these same positions to the Authority, the union members assigned to the 'financial cluster' of positions at the Authority have likewise been removed from the protection of the CMPA with regard to disciplinary matters." (Response at 3). WASA concludes that the "at-will" status of the employees precludes any negotiations over disciplinary or termination procedures. (Response at 3-4). WASA argues that *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551 Slip Op. No. 635, PERB Case No. 99-U-04 (2000), supports its position that the Agency "only has a duty to bargain with the Union over working conditions that are unrelated to the discipline/termination of these employees." (Response at 4). WASA concedes "the possibility that procedural issues that do not impact the Authority's right to manage at-will employees according to their status could be subject to negotiation." (Response at 5). Notwithstanding, WASA, argues that "[t]he Union's proposed discipline article goes far beyond negotiating over procedural matters," and that the Union's proposal conflicts with the DCCA's ruling in *Leonard v. District of Columbia*, 794 A.2d 618 (D.C. 2002). *Id.*

As for Article 59 "Expedited Grievance and Arbitration Procedures," WASA argues that it is only used for discipline taken pursuant to Article 57. (Response at 6). WASA claims the at-will status of the employees allows WASA to terminate employees in the "financial cluster" "for cause or no cause. *Id.* WASA argues that "[a]ny grievance/arbitration procedure imposed upon the Authority impermissibly limits its ability to exercise that right and renders the at-will status moot." *Id.*

In response to NAGE's waiver argument, WASA argues that it is "not barred from asserting its management right to terminate at-will employees despite having held prior negotiations with the Union over disciplinary procedures for at-will employees." *Id.* In support of its argument, WASA asserts that D.C. Code § 1-617.08(a-1), as amended in April 2005, negates NAGE's waiver argument. *Id.* WASA argues that the Board's ruling in *AFGE, Local 631 v. D.C. Water and Sewer*, Slip Opinion No. 877, bars NAGE's waiver argument in the instant case. (Response at 7).

### III. Analysis

The Board has the authority to consider the negotiability of the proposals pursuant to Board Rules 532.1 and 532.4.

#### A. Waiver issue

Regarding NAGE's waiver argument, the Board has found that D.C. Code § 1-617.08(a-1)(Supp. 2005) "does nothing more than codify the Board's prior holding that management rights are permissive subjects of bargaining." *See District of Columbia Fire and Emergency Medical Services Department and American Federation of Government Employees, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at p. 9, PERB Case No. 06-N-01 (2007) ("*FEMS and AFGE*"). Specifically, the Board has interpreted the amendment as follows:

- (1) if management has waived a management right in the *past* (by bargaining over that right) this does not mean that it has waived that right (or any other management right) in any subsequent negotiations;
- (2) management may not repudiate any previous agreement concerning management rights during the term of the agreement;
- (3) nothing in the statute prevents management from bargaining over management rights listed in the statute if it so chooses; and
- (4) if management waives a management right *currently* by bargaining over it, this does not mean that it has waived that right (or any other management right) in future negotiations.

*American Federation of Government Employees, Local 631 and D.C. Department of Public Works and D.C. Office of Property Management*, Slip Op. No. 965, PERB Case No. 08-N-02 (2009)(citing *FEMS and AFGE*, Slip Op. No. 874 at pgs. 8-9). The Board finds that the pleadings do not contain sufficient information to determine whether WASA has waived a management right by currently bargaining over the disputed Articles. The Board orders the Parties to brief this issue, including any relevant case law and PERB precedent.

#### B. Substantive negotiability

As for the substantive negotiability of the Articles, in *UDCFA/NEA v. UDC*, the Board adopted the Supreme Court standard concerning subjects for bargaining that was established and

defined in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342 (1975). 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982). "Under this standard, the three categories of bargaining subjects are as follows: (1) mandatory subjects-over which the parties must bargain; (2) permissive subjects, over which the parties may bargain; and (3) illegal subjects, over which the parties may not legally bargain." *D.C. Nurses Association v. D.C. Department of Mental Health*, 59 D.C. Reg. 10776, Slip Op. No. 1285 at p. 4, PERB Case No. 12-N-01 (2012).

D.C. Code § 1-617.08(b) provides that "all 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. *International Association of Firefighters, Local 36 v. D.C. Department of Fire and Emergency Medical Services*, 51 D.C. Reg. 4185, Slip Op. No. 742, PERB Case No. 04-N-02 (2004). In *Washington Teachers' Union v. District of Columbia Public Schools*, the Board stated, "[I]n view of specific rights reserved solely to management under this same provision, i.e. D.C. Code § 1-617.08(a), the Board must be careful in assessing proffered broad interpretations of either subsection (a) or (b)." 46 D.C. Reg. 8090, Slip Op. No. 450 at p.4, PERB Case No. 95-N-01 (1999). The Board held that D.C. Code § 1-617.08 (a)(2) provides as a sole management prerogative the right to "suspend, demote, discharge, or take other disciplinary action against employees for cause." *Id.* at 11. However, the Board also held that *procedural* matters concerning discipline are negotiable. *See id.* at 12.

Pursuant to the Board's precedent in *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551 Slip Op. No. 635, PERB Case No. 99-U-04 (2000), procedures regarding termination that would negate the "at-will" status of employees would not be negotiable, while other procedural issues for discipline of "at-will" employees may be negotiable.

Given the Board precedent noted above, and the state of the pleadings submitted by the parties, there is insufficient information upon which to make a ruling as a matter of law. Therefore, pursuant to Board Rule 532.4 (b), the Board requests that the Parties submit briefs in support of their respective positions on the negotiability of the Articles. In their briefs, the Parties should state their position and provide any legal authority, including any relevant case law and Board precedent in support of their position. They should address the issue of whether the proposed disciplinary procedures and expedited grievance and arbitration procedures would affect disciplinary actions other than termination, as well as affect any other non-disciplinary issue. Further, the parties will address the issue of whether the at-will status of the employees precludes negotiations of all issues affecting such employees by the Articles; and if not, which issues may be negotiated.

As the Parties assert that they are in the midst of negotiations, the Board orders the Parties to attend mediation prior to submission of their briefs.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Parties will be first submitted to the Board's mediation program to allow the Parties the opportunity to reach a settlement by negotiating with one another with the assistance of a Board appointed mediator.
2. The Parties will be contacted to schedule the mandatory mediation within seven (7) days of the issuance of this Decision and Order.
3. Should the Parties not reach a settlement agreement during mediation, the Parties will be required to submit their briefs within fifteen (15) days of the conclusion of mediation.
4. 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.

May 28, 2013

**CERTIFICATE OF SERVICE**

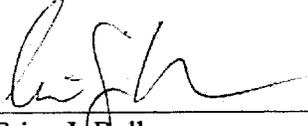
This is to certify that the attached Decision and Order in PERB Case 13-N-03 was transmitted via LexisNexis File & Serve to the following parties on this the 29<sup>th</sup> day of May, 2013.

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