Government of the District of Columbia
Public Employee Relations Board

Local 36, International Association of Firefighters,	)	
Petitioner,	)	PERB Case No. 08 -N-04
and	)	Opinion No. 964
District of Columbia Fire and Emergency Medical Services Department,	)	
Respondent.	)	

DECISION AND ORDER ON NEGOTIABILITY APPEAL

On March 21, 2008, Local 36, International Association of Firefighters ("Petitioner" or "Union") filed a Negotiability Appeal ("Appeal") in the above-captioned matter. The District of Columbia Department of Fire and Emergency Medical Services ("Respondent" or "Management") and the Petitioner previously entered into a collective bargaining agreement which expired on September 30, 2007. The parties have been engaged in negotiations for a successor agreement on working conditions. The Petitioner submitted its proposals on February 5,2008, including Article 45, Section B, "Hours of Work/ Schedule/ Leave". In its Response in Opposition to Union's Negotiability Appeal" ("Response"), the Respondent declared the proposal nonnegotiable in a February 5, 2008 letter. (See Response at p. 3). Also, the Respondent claims that the negotiability appeal was not timely filed. (See Response at p. 4).

In its Opposition, the Petitioner countered that the February 5, 2008 declaration of nonnegotiability contains a counterproposal. This caused confusion and the Petitioner wrote to the Respondent seeking clarification. The Respondent did not answer the Union's letter until March 13, 2008. The Petitioner asserts, therefore, that the 30-day filing period for initiating a negotiability appeal commenced on March 13, 2008.

On February 5, 2008 the Respondent communicated its counterproposal[1] to the Petitioner, concerning Article 45, Section B, as follows:

> **Article 45:** *Hours of Work/Schedule/Leave*
> **Section B - Tour of Duty:**
>
> (1) The tour of duty is nonnegotiable under District of Columbia law and the Fair Labor Standards Act (FLSA). It is identified here only for informational purposes. *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.*
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> (2) [the Respondent crossed out the language for subsection 2 and stated as follows:]
> *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.* (emphasis added). (brackets in the original).

(Appeal at p. 3).

Petitioner: The Petitioner asserts that although the Respondent states in its February 5th counterproposal that Article 45, Section B is nonnegotiable, the Respondent also included a proposal concerning subsection B(1) changing the hours of the basic work week from the current 42 hours to 53 hours. Furthermore, the Petitioner contends that, "Union negotiator Collins sent Mr. Aqui a letter [seeking clarification, noting that] Mr. Aqui's December 21 letter 'uses the terms *tour of duty* and *hours of work* interchangeably, despite the fact that these terms may have different meaning' . . . . [and] also pointed out that Mr. Aqui's [February 5th] letter 'fails to indicate the specific respects in which Article 45, Section B

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[1] During the course of bargaining, the Petitioner made the following proposal:

> **Article 45**
> **Section B - Tour of Duty:**
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> (1) The basic work week for members working in the Fire Fighting Division shall be 42 hours averaged over a 4-week period.
>
> (2) The work schedule for members working in the Fire Fighting Division shall be 24 hours on duty and 72 hours off duty.

(Response at p. 2).

restricts management in ways that the Department believes are objectionable under the Code.'" (Opposition at p. 2). The Petitioner received no response, Mr. Aqui did not answer these questions.

In response to the Respondent's February 5th counterproposal, the Petitioner wrote to the Respondent on February 8, 2008, asking among other things "whether the proposal would enable the Department to require firefighters to work more hours without receiving additional pay." (Appeal at pgs. 4-5). On March 13, 2008, the Respondent answered. The Union filed this Negotiability Appeal eight (8) days after Mr. Aqui's March 13 letter on March 21, 2008. (See Petitioner's Response in Opposition to Motion to Dismiss Negotiability Appeal at .p. 4). By this filing, the Petitioner infers that the 30-day time limitation for filing a negotiability appeal commenced on March 13, 2008, and the appeal was timely filed on March 21, 2008. (Appeal at pgs. 7, 9). Nonetheless, the Petitioner's position is that the Board should dismiss this appeal "(which Local 36 has been forced to file as a protective measure in view of Mr. Aqui's written communication asserting that a proposal is nonnnegotiable' such as to trigger the negotiability appeal process under Rule 532.3." (Appeal at p. 11,¶ 4).

The Petitioner asserts that "the threshold issue is whether the Department has properly raised an issue of negotiability that can trigger an appeal. If the Board finds that a negotiability issue was properly raised, the Union requests that the Board direct further briefing in this matter." (Appeal at p. 2). The Petitioner maintains that the proposal submitted by Management on February 5, "cannot fairly be construed as an assertion of nonnegotiability within the purview of Rule 532.3 . . . . the proposal contains a sentence declaring that 'the tour of duty is nonnegotiable.' But the proposal goes on to state that '[t]he basis workweek . . . shall be set by management and *will not exceed 53 hours averaged over a 4-week period.*' . . . (emphasis added). [Thus,] . . . the Department's February 5 proposal, which made a substantive proposal on the very subject that the Department characterizes as 'nonnegotiable,' did not provide the Union with fair notice that the Department was *refusing to negotiate* over this subject." (Opposition at p. 4).

Regarding the issue of nonnegotiability, the Petitioner states that this is a case of first impression and requests that the Board order the submission of briefs (see PERB Rule 532.4(b)), order a hearing (see PERB Rule 532.4(c)), or schedule a mediation or a conference (see PERB Rule 532.4(d)), to ensure proper resolution of the issue. (See Appeal at p. 3).

Respondent: The Respondent contends that "the Union was properly put on notice that . . . Section B language was the language at issue" in prior negotiations where the Respondent had countered with a proposal that deleted Section B in its entirety. (Response at p. 3). The Respondent notes that in a December 21, 2007 letter from the Union, the Union's representative, Mr. Collins, made reference to the Respondent's declaration of nonnegotiability. Therefore, the Respondent maintains that once the Union received the February 5th letter declaring that "the tour of duty is nonnegotiable under District of Columbia law", the message was clear and the negotiability appeal was due on or about March 7, 2008, i.e., 30 days after February 5th. (Response at p. 4). The Respondent states that the appeal was not filed until March

27, 2008, outside the 30-day window period and should be dismissed. (See Response at p. 4).

Regarding the declaration of nonnegotiability, the Respondent cites the Board's holding that "management is authorized to set the 'basic hours of work' and once those hours are set, the Union is then free to negotiate the compensation to be paid for hours in excess of the basic hours of work . . . . consistent with the statutory management right to set the tour of duty [in D.C. Official Code § 1-617.08 (a) (5) (A)]."[2] Citing *International Association of Fire Fighters, Local 36 and District of Columbia Fire and Emergency Medical Services Department*, Slip Op. No. 505 at p. 4, PERB Case No. 97-N-01 (1997). (Response at pgs. 5-6). The Respondent asserts that "the tour of duty is a sole management right pursuant to D.C. Official Code § 1-617.08(a)." (Response at p. 7).

The Respondent also notes that D.C. Code § 5-405 allows the Mayor to establish the work week and provides as follows:

> (a) . . . 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 at p. 6).

In view of the above, the Respondent claims that the issue of how many hours constitute the work week is nonnegotiable.[3]

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[2] D.C. Official Code § 1-617.08 (a) provides in pertinent part that the respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations:

> (5) To determine:
>
> > (A) The mission of the agency, its budget, its organization, the number of employees, and to establish the tour of duty.

[3] The Respondent purports that the issue of when overtime pay will commence, raised in the Union's February 8, 2008 letter, was previously addressed by the Petitioner in its December 12, 2007 proposal on Article 18 which provides as follows: "Members whose duties include fire suppression shall be paid overtime for all hours worked in excess of 42 hours averaged over a four-week period. Overtime hours that are not paid at a rate of 1 ½ times the regular rate shall be paid at the employee's regular hourly rate." The Respondent claims, therefore, that the issue of overtime has been addressed by the parties. (Response at p. 7).

The Board: When considering negotiability appeals, the Board relies on Board Rule 532.[4] Board Rule 532.3 provides as follows: ". . . a negotiability appeal shall be filed within thirty (30) days after a written communication from the other party to the negotiations asserting that a proposal is nonnegotiable or otherwise not within the scope of collective bargaining under the CMPA."

In the present case, the Respondent declared Article 45, Section B nonnegotiable and also made changes to the existing language in Section B(1) on February 5, 2008. (Appeal, Exh. 2).

Regarding Article 45, Section B(2), the Respondent stated on the face of its February 5, 2008 submission to the Union that "[a]s agreed upon [November 5, 2007 letter from J. Collins to D. Aqui], scheduling will be revisited after the District's Council acts on it . . . as contemplated in the Report of the

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[4] Board Rule 532. Board Rules 532.1 and 532.4 provide in relevant part as follows:

> 532.1 If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board.
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> * * *
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> 532.4 Upon the expiration of the period for filing the appeal . . . the Executive Director shall refer the matter to the Board which shall expeditiously:
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> (a) Issue a written decision on the appeal and the answer, if any;
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> (b) Order the submission of written briefs and/or oral argument within no more than fifteen (15) days and promptly thereafter issue a written decision;
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> (c) Order a hearing, which may include briefs and arguments; or
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> (d) Direct the parties to informal mediation or conference with the Executive Director or any staff members or agents empowered to conduct informal mediation on the Board's behalf.

Mayor's Task Force on Emergency Medical Services. (Appeal at p. 4; also see p.4, n. 2). Opposition at p. 3). This February 5, 2008 communication caused the Union to ask for clarification as to whether the change in the existing language was an actual proposal. The Union ,through Mr. Collins, wrote to Mr. Aqui on February 8, 2008, asking for clarification and noting that the proposal "does not constitute an assertion of nonnegotiability that could trigger a negotiability appeal." (Appeal, Exh. 4 at p.2, last ¶).

The Board finds that the Union's letter of February 8, 2008 and the Respondent's March 9, 2008 reply are indications that the parties continued to communicate and negotiate over their understanding of Article 45, Section B. We believe that the Union reasonably waited for a response to its February 8th letter. The Respondent's inaction upon receiving the Union's February 8 letter caused prejudice to the Union, who waited for a response before filing a negotiability appeal. The response arrived after the expiration of the 30-day filing period. Thus, under the circumstances presented in this case, we conclude that the 30-day filing period for filing a negotiability appeal commenced on March 13, 2008 and the Union's negotiability appeal in this matter was timely filed on March 21, 2008.

Having found that the appeal was timely filed, the Board finds that there is insufficient information to make a determination on the issue raised by this proposal. Therefore, pursuant to Board Rule 532.4(b) we are requesting that the parties brief their position concerning Article 45, Section B (1) and (2), so that the Board may make a determination on the negotiability issue.

In its brief, the Petitioner must clearly frame the issue raised in this appeal.[5] Both parties shall state 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 Petitioner makes 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). (Appeal at p. 4, n.2; see also Appeal, Exh. 3, pgs. 1-2, "Letter from Collins to Aqui on November 5, 2007"). The parties shall cite any action taken by the City Council which impacts on the Union's proposal, explain what stage of this process has been reached and 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). After reviewing the parties' briefs, the Board will issue a decision concerning whether the proposal is negotiable. (See Board Rule 532.4(b).

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[5] In *International Association of Fire Fighters, Local 36 and District of Columbia Fire and Emergency Medical Services Department*, 45 DCR 4760, Slip Op. No 515, PERB Case No. 97-N-01 (1997), on Motion for Reconsideration, the Respondent stated that it declared a proposal nonnegotiable only "to the extent it established the number of hours in the basic workweek." (*Id.* at p. 1). The Board held that "[t]he subject(s) of a negotiability appeal, and the context in which its negotiability is appealed is determined by the petitioner, not the party declaring the matter nonnegotiable." (*Id.* at p. 2). See also, IAFF, Local 36 and DCFEMSD, 45 DCR 8080, Slip Op. No. 505, PERB Case No. 97-N-01 (1997).

ORDER[6]

IT IS HEREBY ORDERED THAT:

1. Pursuant to Board Rule 532.4(b) the parties shall submit briefs addressing the negotiability of Article 45, Section B (1) and (2), as set forth above. Specifically, the parties shall state 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 parties shall cite any action taken by the City Council which impacts on their proposals, explain what stage of this process has been reached and state their position on how and why the Council's action will impact on the negotiability of their proposals for Article 45, Section B (1) and (2).[7]

2. The parties' briefs shall be filed within fifteen (15) days from the service of this Order. Oppositions may be filed within fifteen days after the filing of the briefs.

3. Pursuant to Board Rule 559.1, this Order is final upon issuance.

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

September 30, 2009

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[6] This Decision and Order implements the decision and order reached by the Board on May 20, 2008 and ratified on July 13, 2009.

[7] This pertains to the Petitioner's statement 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). (Appeal at p. 4, n.2; see also Appeal, Exh. 3, pgs. 1-2, "Letter from Collins to Aqui on November 5, 2007").

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 30th day of September 2009.

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