

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)	
)	
INTERNATIONAL ASSOCIATION OF)	
FIREFIGHTERS, LOCAL 36,)	PERB Case No. 04-N-02
)	
Petitioner,)	Opinion No. 742
)	
)	
)	
)	
)	
v.)	
)	
DISTRICT OF COLUMBIA)	
DEPARTMENT OF FIRE AND EMERGENCY)	
MEDICAL SERVICES,)	
)	
Respondent.)	
)	

DECISION AND ORDER

This matter involves a Negotiability Appeal (Appeal) filed by the International Association of Firefighters, Local 36¹ ("IAFF" or "Union") against the District of Columbia Department of Fire and Emergency Medical Services ("FEMS" or "Agency"). This Appeal concerns the negotiability of the Union's proposal concerning the composition of the Agency's Disciplinary Trial Board², a non-compensation matter.³ In a written response to IAFF's proposal, FEMS

¹The International Association of Firefighters, Local 36 represents all uniformed members of the Fire and Emergency Services Department in the ranks of Firefighter through Captain.

²The Disciplinary Trial Board is currently established through a Memorandum of Understanding between the parties that was executed in 1988 and attached to the Appeal as Exhibit 5. Under the Agreement, the Trial Board consists of two bargaining unit captains and a battalion chief, all chosen by the current Fire Chief. (Exhibit 5).

³IAFF and FEMS are engaged in negotiations for new collective bargaining agreements covering non-compensation and compensation matters.

declared the proposal non-negotiable.⁴ As a result, IAFF filed this Appeal. Instead of seeking a definitive ruling from the Board on whether the proposal is negotiable, as is customarily requested in these types of Appeals, the Petitioner is requesting that the Board allow the parties to brief the issue of whether the proposal is negotiable.⁵

Under the challenged provision of IAFF's proposal, Article 44-"Disciplinary Procedures", the Fire Chief would select a Trial Board composed of one uniformed officer and two captains. This three-member Trial Board would determine the appropriate disciplinary action to be taken in cases where the penalty would be termination, demotion, or a 120-hour or more suspension.⁶

FEMS asserts that §§ 6(a) and (b) of the Union's proposed Article 44, entitled

⁴FEMS made its declaration of non-negotiability, through its representative, the Office of Labor Relations and Collective Bargaining (OLRCB), in its Final Outstanding Working Conditions Proposals dated December 31, 2003.

⁵IAFF bases its request for briefing on Board Rule No. 532.4(b).

⁶ Article 44, §§6(a)(b)- Disciplinary Procedures

Section 6: Trial Board

All cases in which an employee is charged with an infraction for which the penalty that may be imposed is termination, demotion, or a 120-hour suspension or greater shall be submitted to a Trial Board. The previously established procedures applicable to Trial Boards shall continue to be followed, with the following amendments:

(a) Each Trial Board shall consist of one (1) uniformed member of the Department designated by the Fire Chief and two (2) Captains selected by the Fire Chief.

(b) Except as otherwise provided in this section, the Fire Chief shall have complete discretion in selecting the members of the Trial Board and in determining the length of time that appointees serve on Trial Boards, subject to the right of an affected employee to challenge any member of the Trial Board pursuant to Article VII, § 12 of the Department's Rules and Regulations.

(Appeal Exhibit 2)

“Disciplinary Procedures”⁷, are non-negotiable pursuant to D.C. Code §1-617.08 (a)(2), the management rights provision of the Comprehensive Merit Personnel Act (CMPA) which concerns discipline.⁸ In addition, FEMS argues that these sections of Article 44 should be deemed non-negotiable because of their effect. Namely, FEMS asserts that the Agency is restricted from imposing a higher level of discipline against a bargaining unit employees if the two bargaining unit employees (on the Trial Board) issue a lesser form of discipline. Furthermore, FEMS asserts that these sections should be deemed non-negotiable because the Agency is prevented from imposing any manner of discipline if the two (2) bargaining unit captains on the Trial Board recommend a dismissal of charges against the bargaining unit member. Finally, FEMS requests to brief the issue of negotiability in detail, only if the Board does not declare the proposal non-negotiable on its face.

In its appeal, IAFF does not state an official position on whether the challenged provision of the proposal is negotiable.⁹ Rather, it seeks to have the Board order the parties to brief the issue of negotiability.¹⁰

⁷The language in the current Memorandum of Understanding provides that the Trial Board “shall consist of one Battalion Fire Chief and two Captains.” (See Exhibit 5 at §6a). This language is slightly different than the language proposed in Article 44.

When FEMS indicated its unwillingness to accept the Union’s Proposal for Article 44, the Appeal suggests that the Union then decided to propose that the language embodied in the current Memorandum and its Proposal of August 14, 2003, be accepted. (See, Appeal at pg. 3).

⁸Specifically, FEMS contends that the Union’s proposal interferes with management’s exclusive right to discipline employees because two members of the Trial Board are bargaining unit captains and only one is a management official.

⁹Despite the fact that IAFF does not make a specific claim that the proposal is negotiable, the Board can infer that this is their position based on the fact that it urges the Board not to adopt the Department’s view on this issue.

¹⁰The Union also contends that historically, the Trial Board has been made up of two captains and a battalion chief and should remain that way. In addition, IAFF asserts that if the Board finds that this proposal is non-negotiable, and agrees with the Department’s new position that the Fire Chief is free to place whomever he wants on the Board, the Trial Board would become an instrumentality of the Fire Chief. Furthermore, IAFF points to the fact that FEMS’s proposed composition of the Trial Board would affect the morale of the uniformed members. Furthermore, IAFF notes that FEMS has not cited any case law in support of its position of non-negotiability. As a result, IAFF recommends that the Board order the parties to brief the issues concerning their position on negotiability.

The Board has the authority to consider the negotiability of proposals pursuant to Board Rules 532.1 and 532.4.¹¹

The specific issue presented in this Negotiability Appeal concerns whether the Petitioner's proposal, which sets forth the composition of a Disciplinary Trial Board, is negotiable.

As the Board considers this issue, it is guided by the following Board precedent:

D.C. Code §1-617.08(b)(2001 ed.) provides that "all matters shall be deemed negotiable, except those that are proscribed by this subchapter." As a result, there is a presumption of negotiability. However, the Board has stated that "in 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)." Washington Teachers' Union v. District of Columbia Public Schools, 46 DCR 8090, Slip Op. No. 450 at p.4, PERB Case No. 95-N-01 (1999).

The Board has also 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." Washington Teacher's Union and D.C. Public Schools, 46 DCR 8090, Slip Op. No. 450 at pg. 11, PERB Case No. 95-N-01 (1995). However, the Board has also held that *procedural* matters concerning *discipline* are negotiable. See, Washington Teacher's Union and D.C. Public Schools, 46 DCR 8090, Slip Op. No. 450 at pg. 12, PERB Case No. 95-N-01 (1995).

Given the Board precedent noted above, and the state of the pleadings submitted by the parties, we believe that there is still insufficient information upon which to make a ruling as a

¹¹Board Rule 532.4 outlines the Board's options for resolving a Negotiability Appeal once it is filed. This rule provides, in pertinent part, that the Board may: (1) issue a decision on the Appeal; (2) order the submission of written briefs and/or oral arguments; (3) order a hearing, which may include briefs and arguments; or (4) direct the parties to an informal mediation or conference concerning the issue.

matter of law.¹² Therefore, pursuant to Board Rule 532.4 (b), we are requesting that the parties submit briefs¹³ in support of their respective positions on the narrowly tailored issue that follows:

In light of the parties' past practice concerning Disciplinary Trial Boards and the Board's precedent that procedural matters concerning discipline are negotiable, should this proposal be treated as non-negotiable? We are asking that you cite specific authority to support your position and explain your position on this issue thoroughly.

The parties' briefs should satisfy the requirements of Board Rule 532.

The briefs will provide both parties with an equal opportunity to present their views on the issue. Moreover, it will provide the Board with sufficient information upon which to make a determination.

¹²On February 23, 2004, the Board met and considered this Appeal at its regular meeting.

¹³ In the present case, both parties requested to submit briefs concerning the negotiability issue in their initial pleadings. We note for the record that Board Rule 532.4(b) does not convey an automatic right to brief an issue raised in a negotiability appeal before the Board rules on it, simply because a party requests briefing. Therefore, in the future, the Board strongly urges the parties to thoroughly brief all issues that they consider relevant in their initial pleadings. This will expedite the resolution of these Negotiability Appeals.

ORDER

IT IS HEREBY ORDERED THAT:

1. The parties shall submit briefs concerning this matter on an expedited basis. The briefs shall be filed seven (7) days from the service of this Decision and Order.
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.
March 2, 2004

CERTIFICATION OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 04-N-02 was served via Fax and U.S. Mail to the following parties on this 2nd day of March 2004.

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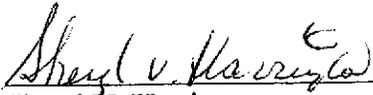
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