

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

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In the Matter of: )
  
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Office of the Attorney General for the )
  
District of Columbia )
  
) PER B Case No. 24-N-01
  
Petitioner )
  
) Opinion No. 1856
  
and )
  
)
  
American Federation of Government )
  
Employees, Local 1403 )
  
)
  
Respondent )
  
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**DECISION AND ORDER**

**I. Statement of the Case**

On November 16, 2023, the Office of the Attorney General for the District of Columbia (OAG) filed the instant negotiability appeal (Appeal). The Appeal concerns OAG’s proposal, titled “Probationary Employment for Attorneys in the Office of the Attorney General,” which seeks to modify the parties’ Collective Bargaining Agreement (CBA) to establish a probationary period for newly hired attorneys and a process for the termination of probationary employees.<sup>1</sup> On October 16, 2023, the American Federation of Government Employees, Local 1403 (AFGE) declared OAG’s proposal nonnegotiable.<sup>2</sup> OAG subsequently filed the present Appeal, requesting that the Board find the proposal negotiable and order AFGE to commence negotiations.<sup>3</sup> AFGE filed an Answer to the Appeal on December 4, 2023, asking the Board to deny OAG’s request.<sup>4</sup> OAG filed a Response to the Answer on December 18, 2023.

For the reasons stated herein, the Appeal is denied.

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<sup>1</sup> Appeal at 1, 4.

<sup>2</sup> Appeal at 1; Answer at 1.

<sup>3</sup> Appeal at 12.

<sup>4</sup> Answer at 5.

## II. OAG Proposal

The proposal OAG submitted to AFGE reads as follows:

### Section 1 – General Provisions

- A. An attorney in the Office of the Attorney General hired in the Legal Service shall be required to serve a probationary period of one (1) year.
- B. Satisfactory completion of the probationary period is a prerequisite to continued employment in the Legal Service.

### Section 2 – Process and Procedure for Termination During Probationary Period

- A. Termination during an attorney's probationary period shall not be considered discipline, a disciplinary action, or termination for cause.
- B. An employee being terminated during the probationary period shall be notified in writing of the termination and its effective date.
- C. A termination during a probationary period is not appealable or grievable. However, a probationer alleging that their termination resulted from a violation of public policy, the whistleblower protection law, or District of Columbia or federal anti-discrimination laws, may file an action outside the collective bargaining agreement's grievance and arbitration process, under any such laws as appropriate.
- D. The parties do not provide their consent to an arbitrator to decide any issues arising from the termination of an attorney in their probationary period.

## III. Discussion

AFGE asserts that OAG's proposal concerns a management right and therefore constitutes a permissive subject of bargaining.<sup>5</sup> AFGE argues that permissive subjects of bargaining become nonnegotiable if either party declines to bargain over the subject.<sup>6</sup> AFGE contends that OAG's proposal is nonnegotiable because AFGE declined to bargain over it.<sup>7</sup> Additionally, AFGE argues that the proposal is nonnegotiable because it violates D.C. Official Code § 1-608.56(a) and (b) of the Legal Services Act (Act).<sup>8</sup> Section 1-608.56(a) of the Act provides that Legal Service attorneys

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<sup>5</sup> Answer at 2 (citing *NAGE Local R3-06 v. WASA*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at 4, 13-N-03 (2013); *FEMS and AFGE, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at 9, PERB Case No. 06-N-01 (2007)).

<sup>6</sup> Answer at 1 (citing *UDCFA v. UDC*, 64 D.C. Reg. 5132, Slip Op. No. 1617 at 2, PERB Case No. 16-N-01 (2017)).

<sup>7</sup> Answer at 1 (citing *AFGE, Local 631 v. OLR CB*, 64 D.C. Reg. 43, Slip Op. 1796 at 2, PERB Case No. 21-N-04 (2021)).

<sup>8</sup> Answer at 3-5.

shall be subject to disciplinary action “for unacceptable performance or for any reason that is not arbitrary and capricious.” Section 1-608.56(b) provides that “[a]ny disciplinary action” against a Legal Service attorney is appealable to the Mayor or the Attorney General, who will render a final decision. AFG E asserts that the proposal violates § 1-608.56(b) because the proposal states that “[a] termination during a probationary period is not appealable ... .”<sup>9</sup>

Like AFG E, OA G contends that its proposal concerns a management right and therefore constitutes a permissive subject of bargaining.<sup>10</sup> However, OA G argues that, where a proposal implicates a management right, the agency may choose either to declare the proposal nonnegotiable, or waive its management right and bargain over the proposal.<sup>11</sup> OA G asserts that management alone has the right to “declare a proposal nonnegotiable on the grounds that the proposal involves a management right.”<sup>12</sup> OA G argues that by providing AFG E with its proposal, OA G waived its right to declare the instant proposal nonnegotiable, and chose to bargain with AFG E in the hopes of “reach[ing] a harmonious resolution on implementation of a probationary period.”<sup>13</sup> Thus, OA G asserts that the proposal is negotiable.<sup>14</sup>

Additionally, OA G argues that its proposal is consistent with the Legal Services Act.<sup>15</sup> OA G asserts that D.C. Official Code § 1-608.54 gives OA G and its subordinate agency heads the authority to hire attorneys.<sup>16</sup> OA G also asserts that the Act entrusts OA G and its subordinate agency heads with the “direction, supervision, and control” of the attorneys it employs.<sup>17</sup> OA G argues that § 1-608.61 provides OA G with authority to implement those codified rights through unilateral rulemaking, including rulemaking over the direction, supervision, and control of employees (probationary and otherwise).<sup>18</sup>

Under D.C. Official Code § 1-617.08(a)(2) of the Comprehensive Merit Personnel Act (CM PA), agencies have the management right to hire, promote, transfer, assign, retain, suspend, demote, and discipline employees for cause. The Board has previously held that, although § 1-617.08(a)(2) does not expressly discuss probationary employees, the management rights established therein pertain to both probationary and non-probationary employees.<sup>19</sup> Pursuant to § 1-617.08(5)(B) of the CM PA, determination of the number, types, and position grades for

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<sup>9</sup> Answer at 3-4.

<sup>10</sup> Appeal at 1-4 (citing *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435 at 6, PER B Case No. 13-N-05 (2013)).

<sup>11</sup> Appeal at 5 (citing *Local 36, Int'l Ass'n of Firefighters v. FEMS*, 60 D.C. Reg. 17359, Slip Op. No. 1445, PER B Case No. 13-N-04 (2013)).

<sup>12</sup> Appeal at 5 (citing *AFSCME v. OSSE*, 68 D.C. Reg. 1349, Slip Op. No. 1766, PER B Case No. 21-N-01 (2021); *SEIU, Local 500 v. UDC*, 62 D.C. Reg. 14633, Slip Op. No. 1539, PER B Case No. 15-N-01 (2015)).

<sup>13</sup> Appeal at 9.

<sup>14</sup> Appeal at 5-6.

<sup>15</sup> Appeal at 9-11.

<sup>16</sup> Appeal at 9.

<sup>17</sup> See Appeal at 9. Section 1-608.55(a-1) of the Act provides that “[a]ttorneys employed by subordinate agencies shall act under the direction, supervision, and control of the head of the subordinate agency.”

<sup>18</sup> Appeal at 9-10.

<sup>19</sup> See *WTU, Local 6 v. DCPS*, 46 D.C. Reg. 8090, Slip Op. No. 450 at 11-12, PER B Case No. 95-N-01 (1999). At the time the Board issued its decision in Slip Op. No. 450, D.C. Official Code § 1-617.08(a)(2) was designated as D.C. Official Code § 1-618.8(a)(2).

“employees assigned to an agency’s organizational unit, work project, or tour of duty...” also constitutes a management right.

The Board finds that the establishment of probationary periods for newly hired employees constitutes a permissive subject of bargaining over which management has the option to bargain.<sup>20</sup> Where management offers to bargain over a permissive subject and the union refuses, management is entitled to proceed by exercising its management right.<sup>21</sup> The Board has previously held that an agency’s past decision to waive a management right (by bargaining over that right) does not equate to a waiver of that right (or any other management right) in subsequent negotiations.<sup>22</sup> Thus, OAG’s waiver of its management right in one instance does not prospectively oblige OAG to bargain. OAG voluntarily approached AFGE with its proposal. When AFGE declined to negotiate, OAG retained its management right.

Nonetheless, the Legal Services Act limits OAG’s management right to terminate probationary employees. OAG’s proposal states that “[t]ermination during an attorney’s probationary period shall not be considered discipline, a disciplinary action, or termination for cause.” However, D.C. Official Code § 1-608.54(a) of the Act categorizes the removal of any Legal Service attorney as discipline and prohibits management from disciplining Legal Service attorneys for arbitrary or capricious reasons. Additionally, although the proposal states that “termination during a probationary period is not appealable...,” section 1-608.56(b) of the Act provides that “[a]ny disciplinary action” against a Legal Service attorney is appealable. Thus, the Board finds that the proposal is nonnegotiable because it violates the Legal Services Act.

For the reasons stated, the Board finds OAG’s proposal nonnegotiable and denies the Appeal.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Appeal 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**

January 18, 2024

**Washington, D.C.**

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<sup>20</sup> See *AFGE, Locals 383 v. RHC*, 68 D.C. Reg. 40, Slip Op. No. 1798 at 2, PER B Case No. 21-N-03 (2021) (holding that management rights are permissive subjects of bargaining over which management has the option to bargain).

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

**APPEAL RIGHTS**

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.