

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**

_____)	
Local 36, International Association)	
of Firefighters,)	
)	PERB Case No. 08-N-03
Petitioner,)	
)	
and)	Opinion No. 947
)	
District of Columbia Fire and Emergency)	
Medical Services Department,)	
)	
Respondent.)	
_____)	

ORDER ON NEGOTIABILITY APPEAL

On February 7, 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 “Agency”) and the Petitioner have been engaged in negotiations for a successor agreement on working conditions. The Petitioner claims that it submitted a proposal for Article 8, Section C.5 - “Polygraph Examinations”, which the Respondent declared nonnegotiable by letter dated January 28, 2008. The Petitioner is requesting that the Board “order the submission of briefs . . . order a hearing . . . or mediation or a conference . . . to ensure proper resolution of the issue.” (Appeal at p. 3). On March 13, 2008, the Respondent filed an Opposition to the Appeal.

Article 8, Section C.5 of the Union’s proposal provides as follows:

Article 8: *Investigations and Supervisory Questioning*

* * *

Section C.5 - Polygraph Examinations:

- (a) Polygraph tests shall be administered only with the consent of the employee, except where in the context

of an investigation, the Department reasonably believes the test is necessary to discover or alleviate an immediate threat to the integrity of government operations or an immediate hazard to the Agency, to other District employees or to the employee himself or herself or to public health, safety or welfare. The Department shall promptly notify the Union whenever a polygraph test is administered without employee consent.

- (b) Except in those limited exigent circumstances identified in Section (a) where a polygraph examination may be necessary, any person who refuses to submit to a polygraph test shall not be subject to discipline or to other adverse action as a result of that refusal.

The Petitioner states that the issue presented by this Appeal is whether the D.C. Code makes language in the parties' existing contract nonnegotiable for a successor agreement. (See Appeal at p. 2). The Union is requesting that the Board "order the submission of briefs pursuant to [Board] Rule 532.4(b), order a hearing pursuant to [Board] Rule 532.4(c), or mediation or a conference pursuant to [Board] Rule 532.4(d), to ensure proper resolution of the issue." (Appeal at p. 3).

The Respondent counters that the Union's proposal is nonnegotiable because it violates D.C. Code § 32-902(b), which specifically allows the Agency to use polygraphs in criminal investigations, internal disciplinary investigations and in pre-employment screening. (See Opposition at p. 3). The Respondent claims that "[t]here is no requirement that an employee has to consent to such testing as proposed by the Union." (Opposition at p. 3). Furthermore, the Respondent argues that "to allow [the Union's proposal] in the contract would violate D.C. Code § 32-902(b). Such a violation is prohibited by D.C. Code § 32-903(b)." (Opposition at p. 3).

Finally, the Respondent opposes the Union's request for mediation or briefing and request that the Board rule that the proposal is nonnegotiable because "[t]he clear language of the statute requires that result." (Opposition at p. 4).

D.C. Code §§ 32-902(a) and (b) and 32-903(b) provide as follows:

§§ 32-902 (a) and (b):

- (a) No employer or prospective employer shall administer, accept or use the results of any lie detector test in connection with the

employment, application or consideration of an individual, or have administered, inside the District of Columbia, any lie detector test to any employee, or, in or during any hiring procedure, to any person whose employment, as contemplated at the time of administration of the test, would take place in whole or in part in the District of Columbia.

(b) The provisions of this section shall not apply to any criminal or internal disciplinary investigation, or pre-employment investigation conducted by the Metropolitan Police Department, the Fire Department, and the Department of Corrections; provided that any information received from a lie detector test which renders an applicant ineligible for employment shall be verified through other information and no person may be denied employment based solely on the results of a pre-employment lie detector test. (emphasis added).

§ 32-903 (b):

No contract or arbitration decision shall contain any provision in violation of § 32-902. (emphasis added).

When considering negotiability appeals, the Board relies on 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.

* * *

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:

- (a) Issue a written decision on the appeal and the answer, if any;
- (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;

- (c) Order a hearing, which may include briefs and arguments; or
- (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.

Pursuant to Board Rule 532.4(b) we are requesting that the parties submit briefs concerning whether Article 8, Section C.5 of the Union's proposal is nonnegotiable. After reviewing the parties' briefs we will issue a decision concerning whether the Union's proposal is nonnegotiable. (See Board Rule 532.4(b)).

ORDER

IT IS HEREBY ORDERED THAT:

1. Pursuant to Board Rule 532.4(b) the parties shall submit briefs addressing the negotiability of Article 8, Section C.5 of the Union's proposal. The parties' briefs shall be filed within fifteen (15) days from the service of this Order.
2. Pursuant to Board Rule 559.1, this Order is final upon issuance.

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

June 2, 2008

CERTIFICATE OF SERVICE

This is to certify that the attached Remand Order in PERB Case No. 08-N-03 was transmitted via U.S. Mail to the following parties on this the 2nd day of June, 2008.

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