

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**

)	
In the Matter of:)	
)	
Board of Trustees of the University of the District of Columbia)	
)	
Petitioner)	PERB Case No. 18-N-05
)	
v.)	Opinion No. 1713
)	
University of the District of Columbia Faculty Association)	
)	
Respondent)	

DECISION AND ORDER

On June 6, 2018, the University of the District of Columbia Faculty Association (Faculty Association) filed the instant negotiability appeal (Appeal). The Faculty Association and the Board of Trustees of the University of the District of Columbia (UDC) are negotiating their Eighth Master Agreement.¹ In accordance with section 1-617.16(a) of the D.C. Official Code, they are negotiating both compensation and noncompensation issues. The instant Appeal concerns one (1) UDC compensation proposal that the Faculty Association has declared nonnegotiable.² For reasons stated herein, the Board concludes that UDC’s proposed section A(4) “Market Adjustments” is negotiable.

I. Statement of the Case

The pertinent facts are undisputed. On May 23, 2018, UDC presented to the Faculty Association a proposed Article XXI(A) of the agreement.³ Article XXI is entitled “Compensation,” and paragraph A of Article XXI is entitled “Salary.” In a June 1, 2018, letter to

¹ Appeal at 1.

² UDC’s negotiability appeal concerned two proposals, section A(4) “Market Adjustments” and section A(5)(b) “Individual Adjustments and Retention.” UDC subsequently withdrew proposed section A(5)(b) in its Brief filed on February 1, 2019. Therefore, the Board will only address the parties’ arguments concerning proposed section A(4).

³ Appeal at 2.

UDC, the Faculty Association declared UDC's proposed section A(4) of Article XXI was nonnegotiable.⁴

Proposed section A(4) provides as follows:

4. Market Adjustments

In addition and subsequent to the adjustment referenced in paragraph A.3, in fiscal year 2019, Bargaining Unit members will be placed on the Salary Structures set forth in paragraph A.1 based on rank and discipline in accordance with the following provisions:

(a) To the extent a Bargaining Unit member's base salary, including fiscal year 2019 COLA, is not equal to or greater than eighty-five percent (85%) of the national median salary for public institutions in that rank and discipline as evaluated by the College and University Professional Association for Human Resources (CUPA-HR), the Bargaining Unit member will receive a market adjustment which will bring their salary to eighty-five percent (85%) of the national median salary for public institutions in that rank and discipline as evaluated by CUPA-HR.

(b) All market adjustments set forth in this paragraph A.4 will be paid out over two fiscal years, with forty percent (40%) of the market adjustment paid to the Bargaining Unit member in fiscal year 2019 and the remaining sixty percent (60%) of the market adjustment paid to the Bargaining Unit member in fiscal year 2020.⁵

Citing section 1-611.03(a)(1) of the D.C. Official Code, the Faculty Association declared nonnegotiable "Section 4, to the extent it mandates consistency with the College and University Professional Association for Human Resources (CUPA-HR) national studies."⁶

On July 6, 2018, UDC filed the instant negotiability appeal. UDC contends that section 1-611.03(a)(1) permits the type of market adjustment in proposed section A(4) by providing "that compensation levels may be examined for public and/or private employees outside the area and/or for federal government employees when necessary to establish a reasonably representative statistical basis for compensation comparisons, or when conditions in the local labor market require a larger sampling of prevailing compensation levels."⁷

⁴ Appeal, Exhibit 2.

⁵ Appeal, Exhibit 1.

⁶ Appeal Exhibit 2.

⁷ Appeal at 2.

On July 13, 2018, the Faculty Association filed an answer to the Appeal (Answer). In its Answer the Faculty Association contends that proposed section A(4) is inconsistent with section 1-611.03(a)(1)'s requirement that salaries of employees in the Educational Service be competitive with those of other public sector employees and that "compensation shall be deemed to be competitive if it falls reasonably within the range of compensation prevailing in the Washington, D.C., Standard Metropolitan Statistical Area (SMSA)."⁸ The Faculty Association noted that, in an interest arbitration concerning the Seventh Master Agreement, the arbitrator found that under that statute using comparison data from outside the Washington, D.C. SMSA was neither necessary nor appropriate.⁹

On January 8, 2019, PERB directed the parties to file briefs discussing whether the proposal in question was an illegal subject of bargaining. On February 1, 2019, the parties filed supplemental briefs.

Faculty Association Brief

The Faculty Association contends that UDC's proposal that faculty salaries be based on the CUPA-HR survey is either an illegal subject of bargaining or a nonnegotiable permissive subject of bargaining. The Faculty Association notes that section 1-611.03(a) of the D.C. Official Code states, in pertinent part, that compensation must be "competitive with that provided to other public sector employees having comparable duties, responsibilities, qualifications, and working conditions by occupational groups." "Competitive" is defined as "reasonably within the range of compensation prevailing in the Washington, D.C. [SMSA]."¹⁰ When necessary to establish a representative comparison or when conditions in the local labor market require a larger sampling, "compensation levels may be examined from public and/or private employees outside the area and/or for federal government employees."¹¹ The Faculty Association contends that a nationwide CUPA study is not "necessary." The Faculty Association notes that the participating institutions in the survey, of which the University is not a participating member, are not similar to the University.¹² Additionally, the Faculty Association argues that in 2014 Arbitrator Sean Rogers found that the Washington, D.C. SMSA included over twenty (20) counties, including two public universities and several community colleges.¹³ Further, the Faculty Association states that UDC's proposal seeks to eliminate as comparators faculty members from the District of Columbia Public Schools (DCPS), who are more highly paid.¹⁴

⁸ Answer at 4.

⁹ Answer 4.

¹⁰ Association Brief at 8.

¹¹ Association Brief at 8.

¹² Association Brief a 9.

¹³ Association Brief at 10-11.

¹⁴ Association Brief at 11.

UDC Brief

UDC argues that its proposal is negotiable and consistent with the CMPA. UDC contends that CUPA-HR is necessary as “there is no comparability across duties, responsibilities, qualifications, and working conditions between the University and any other D.C. instrumentality.”¹⁵ UDC explains that DCPS is not comparable to UDC because its teachers teach more complex material and because “the funding accorded to DCPS and the University is vastly different.”¹⁶ Further, UDC argues that the other institutions within the Washington, D.C. SMSA are not “aligned with the University” because the private institutions have more revenue and none of the public institutions are “public masters, urban-land grant, [historically black colleges and universities] with a community college.”¹⁷ For comparison, UDC argues that the University of Maryland at College Park and George Mason University have “very high research activity” and more selective admissions than the University.¹⁸

Finally, UDC argues that the CUPA-HR is necessary to create competitive salary structures. UDC alleges that a search of the CUPA-HR yielded seventeen (17) public institutions in Virginia and Maryland, which “did not produce sufficient data for the University to conduct an analysis of compensation by rank and discipline for all of the disciplines at the University. . . .”¹⁹ By using the exception in section 1-611.03(a)(1) of the D.C. Official Code and expanding its search in CUPA-HR, UDC states that it was “able to analyze comprehensive salary data by rank and discipline for almost all faculty positions in the bargaining unit.”²⁰ Based on this data, UDC asserts that it was able to create the proposed salary structure set forth in the May 23, 2018 proposal.²¹ UDC states that it then adjusted that proposed salary structures by eight percent (8%) to recognize the higher pay structures within the SMSA.²² UDC contends that its approach in creating the proposed salary structures “clearly” complies with section 1-611.03(a)(1) of the D.C. Official Code as it is competitive with other public sector employees and “aligned with higher pay practices in the SMSA”²³ Therefore, UDC asserts that its proposed section A(4) is negotiable.²⁴

II. Discussion

A. General Principles

The Board is authorized to make a determination in disputed cases as to whether a matter is within the scope of collective bargaining.²⁵ Section 1-617.08(b) of the D.C. Official Code

¹⁵ UDC Brief at 2-3.

¹⁶ UDC Brief at 5.

¹⁷ UDC Brief at 6-7.

¹⁸ UDC Brief at 7.

¹⁹ UDC Brief at 8.

²⁰ UDC Brief at 8.

²¹ UDC Brief at 8.

²² UDC Brief at 9.

²³ UDC Brief at 9-10.

²⁴ UDC Brief at 10.

²⁵ D.C. Official Code § 1-605.02(5).

states that “all matters shall be deemed negotiable” with the exception of certain “management rights” as to which the District and its agencies are not required to negotiate.²⁶ The Board has adopted the three-category approach articulated by the Supreme Court in *National Labor Relations Board vs. Wooster Division of Borg-Warner Corporation*,²⁷ which held that there are mandatory subjects over which parties must bargain, permissive subjects over which the parties may bargain, and illegal subjects over which the parties may not legally bargain.²⁸

The Board finds that the proposed section A(4) is negotiable. The Board has long held that matters of compensation are negotiable subjects of bargaining. Under § 1-617.17(b) of the D.C. Official Code, salary is a mandatory subject of collective bargaining concerning compensation. Contrary to the Faculty Association’s argument, the Board finds that the proposed section A(4) does not contravene section 1-611.03 of the D.C. Official Code. The Board finds that the statute does not prohibit the parties from examining compensation outside of the Washington, D.C. SMSA in order to determine the appropriate compensation package. Section 1-611.03 of the D.C. Official Code authorizes the examination of public and/or private employees outside of the area “when necessary to establish a reasonable representative statistical basis for compensation comparisons, or when conditions in the local labor market require a larger sampling of prevailing compensation levels.” Therefore, the Board finds that UDC’s proposed section A(4) is negotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. UDC’s proposed section A(4) is negotiable.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Chairperson Charles Murphy and Board Members Mary Anne Gibbons, Ann Hoffman, and Douglas Warshof.

June 20, 2019

Washington, D.C.

²⁶ D.C. Official Code § 1-617.08(b).

²⁷ 356 U.S. 342 (1975).

²⁸ *D.C. Nurses Ass’n v. D.C. Dep’t of Pub. Health*, 59 D.C. Reg. 10,776, Slip Op. No. 1285 at p. 4, PERB Case No. 12-N-01 (2012) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1975)).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-N-05, Slip Op. No. 1713 was sent by File & ServeXpress to the following parties on this the 21st day of June 2019.

Jonathan G. Axelrod, Esq.
Beins, Axelrod, P.C.
1717 K Street, N.W., Suite 1120
Washington, D.C. 20006

Anessa Abrams, Esq.
Ford Harrison LLP
1300 19th Street, N.W., Suite 420
Washington, D.C. 20036

/s/ Sheryl Harrington
Administrative Assistant