GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
	)	
Fraternal Order of Police/MPD Labor Committee,	)	
	)	PERB Case No. 90-N-05
Petitioner,	)	Opinion No. 261
	)	
and	)	
	)	
Metropolitan Police Department,	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

The Fraternal Order of Police/MPD Labor Committee (FOP) filed this appeal concerning the negotiability of certain items proposed during its negotiations with the Metropolitan Police Department (MPD) for a successor collective bargaining agreement. The Negotiability Appeal was filed on August 22, 1990, following MPD's written declaration on July 23, 1990, that proposals concerning the issuance of gun permits to retiring officers and the formulation of a joint management/labor committee to review the District's deferred compensation program were nonnegotiable, and that a third proposal concerning parking and transportation was a permissive subject of bargaining over which it declined to negotiate.

By letter dated August 24, 1990, the Executive Director of the Public Employee Relations Board (Board) advised MPD of its right to file a response to the Negotiability Appeal with the Board by September 11, 1990. MPD timely filed its Response [1]/ wherein it

[1]/ On October 1, 1990, the FOP filed "Appellant's Reply To Agency Response To Negotiability Appeal" asserting that it was responding to arguments made known to it for the first time as to why MPD declined to negotiate over the three proposals in dispute. MPD, on October 4, 1990, filed "Agency's Motion To Strike Appellant's Reply Brief" and FOP in turn timely filed a response to the Motion.

We deny MPD's motion for the following reasons. Although the Board Rules contain no provision for the submission of reply briefs in negotiability proceedings, the Board in certain instances has accepted for consideration supplemental and reply briefs addressing various matters pending before the Board. MPD's reliance upon the Board's decision in University of the District of Columbia and UDC Faculty Associations/NEA, 37 DCR 5666, Slip Op. No. 248, PERB Case No. 90-A-02 (1990) is misplaced. There, we declined to consider

contended that FOP's gun-permit proposal, if negotiable at all, is only permissibly negotiable. The same is true, MPD urged, as to FOP's parking and transportation proposals, for the reasons stated in District of Columbia Fire Department and American Federation of Government Employees, Local 37, 35 DCR 6361, Slip Op. No. 188, PERB Case No. 88-N-02 (1988). And finally, MPD contended that D.C. Code Section 47-3601(d) removes FOP's deferred compensation proposal from the scope of the collective bargaining provisions of the Comprehensive Merit Personnel Act (CMPA).

We have reviewed the parties' pleadings and conclude for the following reasons that all three of the FOP's proposals are mandatory subjects of bargaining.

Pursuant to D.C. Code Sections 1-605.2(5) and 1-618.2(b)(5) the Board is authorized to make determinations as to whether a matter is within the scope of bargaining. The Board's jurisdiction to decide such questions is invoked by the party presenting a proposal which has been declared nonnegotiable by the party responding to the proposal (See Board Rule 532.1). [2]/

(footnote 1 Cont'd)
briefs that were not authorized by our rules, but more importantly, were filed by non-parties to that proceeding, contrary to the present controversy before the Board.

We further note that FOP's reply brief contained only responses to arguments advanced by MPD in its response to the negotiability appeal and raised no new issues or proposals.

[2]/ MPD contended that adherence by the Board to its Decision and Order in District of Columbia Fire Department and American Federation of Government Employees, Local 3721, supra, requires it to dismiss FOP's parking and gun-permit proposals for lack of jurisdiction. MPD argued that the Board in that case restricted its jurisdiction to negotiability appeals wherein the subject matter is alleged to be "contrary to law, regulation or controlling agreement."

In District of Columbia Fire Department, the Board merely declined to assert jurisdiction over the negotiability appeal since the issue concerned the respondent union's duty to bargain. The respondent union in that case did not dispute the negotiability of the proposal, but rather contended that it could elect not to negotiate. Since such questions are not properly resolvable in a negotiability appeal, jurisdiction was declined and the case dismissed.

As acknowledged in many of our previous cases, D.C. Code Section 1-618.8(b) provides that the right to negotiate over terms and conditions of employment extends to "[a]ll matters . . . except those that are proscribed by the CMPA" (emphasis added).

We turn now to the proposals in dispute and separately address each in light of the statutory dictates and relevant caselaw.

Proposal No. 1:

Parking and Transportation

Section 1

Members of the Unit attending court will, at their option, be provided parking for their private vehicle within five blocks of the Superior Court Building or a permit which will authorize them to park at all Metro Parking Facilities and ride the trains to court without cost.

Section 2

Members of the Unit will be provided parking at the facility where they are assigned.

In deciding whether the above proposal concerns matters that are terms and conditions of employment subject to negotiation under the CMPA, the Board turns to decisions of the National Labor Relations Board (NLRB) for guidance. In Weyerhauser Timber Co. and International Woodworkers of America, Local 6-12, CIO, 87 NLRB No. 123, at n.1 (1949), the NLRB observed:

> We have previously rejected, with approval of the Courts, the similar argument that "conditions of employment" has no broader meaning than that perhaps spontaneously

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(footnote 2 Cont'd)
In this case, however, MPD contended that the subject matters of FOP's parking and gun-permit proposals are not terms and conditions of employment and, consequently, are not mandatory subjects of bargaining. The issue presented is whether or not these subject matters are negotiable. Such determinations are within the intended scope of the Board's jurisdiction in a negotiability appeal proceeding.

> suggested by the term "working conditions," and that it therefore only refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn, Inland Steel Company, 77 NLRB [No.]1 [1948]; enforced, 170 F.2d 247 (C.A. 7); cert. denied, 336 U.S. 960. See also, Abbott Worsted Mills, Inc., 36 NLRB 545; enforced, 127 F.2d 438 (C.A.1), where we held that the lease of company-owned houses to employees, which apparently was done simply as a convenience for the employees, constituted a condition of their employment within the meaning of the Act.

In Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949), the U.S. Court of Appeals for the Seventh Circuit in upholding the NLRB stated that the "[NLRA] makes no distinction between 'tenure' of employment and 'conditions' of employment so far as subject matter of collective bargaining is concerned."

The unqualified use of "terms and conditions of employment" in the CMPA warrants a no less broad interpretation than that attributed to it by the NLRB and the courts. If a subject matter pertains to employment status, as we find that this proposal does, it is a term and condition of employment.

MPD does not undermine this conclusion by its argument based on a line of Federal Labor Relations Authority (FLRA) cases cited by FOP in support of finding the proposal negotiable. FLRA case law offers no guidance concerning the negotiability under the CMPA of subjects that affect employees outside the duration of the duty day or actual working conditions. Under Section 7102(2) of the Federal Service Labor-Management Relations Statute (FSLMRS), which is administered by the FLRA, federal employees have the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under [the FLSMRS]." Section 7103(a)(14) of the FSLMRS defines "conditions of employment" in relevant part as follows: "conditions of employment means personnel policies, practices and matters, where established by rule, regulation, or otherwise, affecting working conditions...[.]" The FLRA has established under this statutory framework that conditions of employment must have a "direct relationship or nexus with actual working conditions." Overseas Education Association, Inc. and Department of Defense Dependent Schools, 27 FLRA 4926 (1987). Unlike the FSLMRS, which qualifies and restricts matters subject to collective bargaining, the CMPA,

as previously noted, is expansive in its treatment of negotiable matters. Thus, FLRA caselaw provides no guidance for the determination of the negotiability of this proposal.

MPD asserts that part of FOP's proposal concerning "rid[ing] the trains to court" without cost "has nothing to do with court appearances" but rather pertains to commuting from home to work. The fact that employees while en route may not be in a duty status is not controlling in determining negotiability since traveling to work and parking while at work, as previously discussed, are clearly needs created by and thereby related to an employee's employment. Finally, MPD's argument that it "has no authority to issue permits to its employees to park at Metro parking lots and ride the trains without charge" is of no significance since the manifest intent of FOP's proposal is that MPD make the necessary expenditure. [3]/

Proposal No. 2:

> Gun Permits
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> Absent legal or medical reason to the contrary, the Chief of Police shall as a part of the clearance procedure issue retiring members of the Department a permit to carry a pistol while within the District of Columbia.

MPD does not contend that the issuance of gun permits is proscribed by the CMPA. Rather, MPD asserts that providing for a "license to carry a gun after retirement does not relate to their employment in the [metropolitan police department]" since it is not a "benefit[] that derive[s] from the employment relationship and [is not] a form of compensation for performing services for the employer." Such an interpretation ignores the CMPA's broad definition establishing the right to engage in collective bargaining over "terms and conditions of employment" as well as compensation. We find that FOP's proposed post-retirement benefit derives from and responds to the nature of these officers' duties, i.e., law enforcement, when they were employed. As such, it is

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[3]/ In the Case of Abbott Worsted Mills, cited in the quotation from the Weyerhauser Timber case, company-owned houses were leased to employees as "a privilege" which the NLRB observed "amount[ed] in effect to a part of [the employees'] wages and constitute[d] a term and condition of their employment within the meaning of Section 8(3) (sic) of the NLRA...[.]" Employer-provided parking and transit passes may similarly be viewed as compensation, bargainable under the CMPA.

included within the broad scope of those matters deemed negotiable under the CMPA. Furthermore, MPD acknowledges that (1) the Chief of Police has authority to issue such gun permits and (2) an applicant desiring such a permit must make a showing that he/she has good reason to fear injury or has any other proper reason for carrying a pistol. It is immaterial that, as MPD argues, it is not authorized to issue gun permits to all employees because "[the Chief of Police's] authority to issue licenses is limited to persons residing or hav[ing] a place of business in the District or possessing a pistol license issued by other jurisdictions," since FOP incorporates this restriction in the proposal's preface "[a]bsent legal or medical reason to the contrary[.]" (Emphasis added.) Therefore, the fact that some employees may be legally precluded from taking advantage of such a proposal is irrelevant to its negotiability.

Since we have found that the Union's parking and gun permit proposals are mandatorily negotiable under the CMPA, there is no occasion to discuss MPD's alternative contention that they are permissive subjects of bargaining. [4]/

Proposal No. 3:

Deferred Compensation

> The Employer and the FOP agree to create a Joint Committee consisting of two representa-

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[4]/ The Board has only once made a finding that a bargaining party may, though it is not required to, voluntarily negotiate over a subject. University of the District of Columbia Faculty Association/National Education Association and the University of the District of Columbia, 29 DCR 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982). There, the proposal concerned the union's participation in electing faculty members to management positions, i.e., department chairpersons. The Board concluded that there was no statutory mandate or basis for giving labor organizations the right to negotiate over a subject concerning employees who are not part of the bargaining unit.

The distinction between mandatory and voluntary or "permissive" subjects of bargaining was first made by the Supreme Court in NLRB v. Wooster Division of the Borg-Warner Corporation, 356 U.S. 342 (1958). There the Court observed that the duty to bargain under the NLRA is limited to those subjects enumerated thereunder, i.e., "wages, hours, and other terms and conditions of employment." For the reasons we have set forth in the text, we cannot find that parking and post-retirement gun permits are not "compensation" or "terms and conditions of employment."

> tives of the Employer and two representatives of the FOP to review the investment performance of the Funds selected by the present contractor and adequacy of its discharge of its administrative duties. The Employer shall provide all information reasonably available to it and/or to the present contractor that is requested by either party through the Joint Committee. The parties agree to engage a nationally recognized firm to study the Funds' investment performance. The Joint Committee shall prepare and transmit a report of its study to the bargaining parties within one year of the effective date of this Agreement. This Agreement shall be reopened following receipt of the Report to enable the parties to agree upon a contract provision responding to the Report. If no agreement is reached within ninety days (or such shorter period as the parties shall agree upon), the disagreement shall be presented to an impasse neutral selected in accordance with PERB impasse rules. The neutral's decision shall be final and binding.

The District of Columbia's Employee Deferred Compensation Program is statutorily provided for under Title 47, Chapter 36 of the D.C. Code. Section 47-3601(d) removes elements of the District's deferred compensation program from those terms and conditions of employment otherwise subject to collective bargaining under the CMPA. FOP does not dispute that Section 47-3601(d) limits the extent to which the District's deferred compensation program may be determined through collective bargaining. FOP notes, however, that Section 47-3601(d) refers only to provisions set forth in that section, i.e., Section 47-3601(a),(b) and (c). These subsections establish the nature and purpose of and eligibility to participate in the deferred compensation program. In contrast, Sections 47-3602, 3603, and 3604, entitled "Regulations", "Contracts for service", and "Annual report", respectively, do not provide for the removal of subjects thereunder from the collective bargaining process.

We agree with FOP's interpretation that Section 47-3601(d)'s express removal of provisions of the District's deferred compensation program refers only to those provisions contained in that section, i.e., Section 47-3601. We therefore reject MPD's overly broad interpretation of this provision as contrary to the plain meaning of the statutory provision.

MPD further contends that FOP's proposal providing for the reopening of the parties' agreement to negotiate "a contract provision responding to the Report...would allow for bargaining on a deferred compensation program which [D.C. Code Section 47-3601] intended to be non-negotiable." MPD is correct in noting that FOP's proposal does not contain any language restricting the type of contractual provisions that would be subject to negotiations under the reopener provision. However, it is clear from FOP's pleadings that the purpose of this provision of the proposal is to negotiate over subjects addressed under Section 47-3602 and 3603, subjects which, as we have pointed out, have not been statutorily removed from the collective bargaining process. Moreover, prospective proposals of a disputed nature that might be generated in such reopener negotiations are not before the Board at this time. The parties will not be foreclosed from bringing any such dispute to the Board should one arise hereafter. [5]/

Finally, MPD's argument that this proposal duplicates the functions of an existing deferred compensation review committee concerns the merits of the proposal, and so is irrelevant to the determination whether or not the subject matter may be negotiated.

We conclude that the provisions of FOP's deferred compensation proposal have not been removed from the collective bargaining process and that the proposal is negotiable, i.e., a mandatory subject of bargaining. [6]/

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent MPD is required to bargain upon request concerning employment-related parking and transportation.

2. The Respondent MPD is required to bargain upon request concerning the issuance of post-retirement gun permits.

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[5]/ MPD argues that Sections 47-3602 and 3603 "provide[] that the Mayor is to issue regulations and select contractors," but these provisions do not expressly authorize the Mayor to act unilaterally.

[6]/ In finding the above proposals negotiable, the Board of course makes no determination with respect to their merits.

3. The Respondent MPD is required to bargain upon request with respect to FOP's proposal concerning the creation of a Joint Committee to review and report on the District of Columbia Employee Deferred Compensation Program.

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

November 29, 1990