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

In the Matter of:)	
)	
National Association of)	
Government Employees, Local R3-07,)	
)	PERB Case No. 14-N-01
Complainant,)	
)	Opinion No. 1467
v.)	
)	
District of Columbia)	
Office of Unified Communications,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

On October 24, 2013, the National Association of Government Employees, Local R3-07 (“NAGE”) filed a Negotiability Appeal (“Appeal”), pursuant to Board Rule 532. NAGE and the District of Columbia Office of Unified Communications (“OUC”) are currently negotiating a successor collective bargaining agreement (“CBA”) on working conditions. NAGE filed its Appeal in response to OUC’s written communication of nonnegotiability concerning two provisions in the proposed CBA: Article 2 (Management Rights and Responsibilities) and Article 23 (Reduction in Force). (Appeal at 1-2).

On November 8, 2013, OUC filed a Response to the Union’s Appeal (“Response”), asserting that Articles 2 and 23 involve nonnegotiable subjects of bargaining. (Response at 3-6).

II. Discussion

In *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982), the Board adopted the U.S. Supreme Court’s standard concerning subjects for bargaining established in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 3342 (1975): “Under this standard, the three categories of bargaining subjects are as follows: (1) mandatory

subjects, over which the parties must bargain; (2) permissive subjects, over which the parties may bargain; and (3) illegal subjects, over which the parties may not legally bargain.” D.C. Official Code § 1-617.08(b) provides that “all matters shall be deemed negotiable, except those that are proscribed by this subchapter.” The Board has held that this language creates a presumption of negotiability. *Int’l Ass’n of Firefighters, Local 36 v. D.C. Dep’t of Fire and Emergency Services*, 51 D.C. Reg. 4185, Slip Op. No. 742, PERB Case No. 04-N-02 (2004).

In April 2005, the Council of the District of Columbia amended D.C. Official Code § 1-617.08 to include subsection (a-1), which states: “An act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section.” In *District of Columbia Dep’t of Fire and Emergency Medical Services v. American Federation of Government Employees, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007), the Board considered one of the first negotiability appeals filed after the April 2005 amendment to D.C. Official Code § 1-617.08. In that case, the Board stated:

[A]t first glance, the above amendment could be interpreted to mean that the management rights found in D.C. Code § 1-617.08(a) may no longer be a subject of permissive bargaining. However, it could also be interpreted to mean that the rights found in D.C. Code § 1-617.08(a) may be subject to permissive bargaining, if such bargaining is not considered as a permanent waiver of that management right or any other management right. As a result, [the Board indicated] that the language contained in the statute is ambiguous and unclear.

Id. at 8. The Board reviewed the legislative history of the 2005 amendment to determine the intent of the Council of the District of Columbia. *Id.* The Board noted that analysis prepared by the Subcommittee on Public Interest stated:

Section 2(b) also protects management rights generally by providing that no “act, exercise, or agreement” by management will constitute a more general waiver of a management right. This new paragraph should not be construed as enabling management to repudiate any agreement it has, or chooses, to make. Rather, this paragraph recognizes that a right could be negotiated. However, if management chooses not to reserve a right when bargaining, that should not be construed as a waiver of all rights, or of any particular right at some other point when bargaining.

Id.

III. Proposals and Analysis

Article 2: Management Rights and Responsibilities

Section A

Management's rights shall be recognized in accordance with the Comprehensive Merit Personnel Act (CMPA) D.C. Official Code Section § 1-617.08 of CMPA established management's rights.

Section B

All matters shall be deemed negotiable except those that are proscribed by D.C. Official Code § 1-617.08.

Section C

This article shall not preclude the Union's rights to bargain over the Impact and Effect of decisions made pursuant to D.C. Official Code § 1-617.08.

OUC asserts that it has no duty to bargain with NAGE over management rights, which D.C. Official Code § 1-617.08 places within the sole discretion of management. (Response at 4). OUC contends that the Union's proposals would effectively create a contractual right to grieve and arbitrate alleged violations of management rights separate from those created by statute. *Id.* at fn. 3. Further, OUC alleges that simply because it negotiated over this portion of the CBA in previous contracts, Board precedent establishes that "a party's failure to challenge the negotiability of a proposal during the course of collective bargaining for one agreement does not foreclose a challenge in negotiations for successor agreements." (Response at 5; citing *Teamsters, Local Unions No. 639 and 730 v. District of Columbia Public Schools*, 43 D.C. Reg. 7014, Slip Op. No. 403, PERB Case No. 94-N-06 (1996)).

NAGE contends that its proposal "merely provides a citation to management rights as outlined in the D.C. Code, and clarifies the extent of these rights vis-à-vis the Union's right to negotiate over all issues not identified in the Code." (Appeal at 4). Additionally, NAGE alleges that its proposal seeks to incorporate the "clearly established principle that a labor union has a right to bargain over the Impact and Effects of the exercise of management rights that are not *de minimis*." *Id.* In support of its proposal, NAGE states that the D.C. Official Code does not prohibit negotiations over whether to cite or list management rights in a contract, but instead defines the personnel actions that management has the exclusive right to exercise. *Id.*

The Board finds that the proposal is negotiable.

D.C. Official Code § 1-617.08(a) protects management's sole right, in accordance with applicable laws, rules, and regulations, to:

- (1) Direct employees of the agencies;

- (2) Hire, promote, transfer, assign, and retain employees in positions within the agency , and to suspend, demote, discharge, or take other disciplinary action against employees for cause;
- (3) Relieve employees of duties because of lack of work or other legitimate reasons;
- (4) Maintain the efficiency of the District government operations entrusted to them;
- (5) Determine:
 - a. The mission of the agency, its budget, its organization, the number of employees, and to establish the tour of duty;
 - b. The number, types, and grades of positions of employees assigned to an agency's organization unit, work project, or tour of duty;
 - c. The technology of performing the agency's work; and
 - d. The agency's internal security practices; and
- (6) Take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

NAGE's proposal does not impact OUC's sole right to perform any of the activities listed above, nor to seek redress from the Board when it believes its management rights have been violated. *See* D.C. Official Code § 1-605.02(3). Instead, Sections A and B it merely restate the rights guaranteed by D.C. Official Code § 1-617.08(a) and (b), and Section C recognizes longstanding Board precedent that an exercise of management rights does not relieve the employer of its obligation to bargain over impact and effect of, and procedures concerning, the implementation of those rights. *See Int'l Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994); *see also American Federation of Government Employees, Local 383 v. D.C. Dep't of Disability Services*, 59 D.C. Reg. 10771, Slip Op. No. 1284, PERB Case No. 09-U-56 (2012).

Article 23: Reductions in Force

Section A

The term reduction-in-force, as used in the agreement, means the separation of a permanent employee, his/her reduction in grade, pay or rank because of a reorganization, abolishment of his/her position, lack of work, lack of funds, new equipment, job consolidation or displacement by an employee with greater retention rights who was displaced because of the aforementioned.

Section B

The Agency agrees to consult in advance with the Union prior to reaching decisions that might lead to a reduction-in-force in the bargaining unit. The Agency further agrees to minimize the effect of such reduction-in-force on employees and to consult with the Union toward this end.

Section C

A reduction in force will be conducted in accordance with the provision set forth in the D.C. Code § 1-624.02.

Section D

In the event of a reduction-in-force, the agency shall notify the union (30) days in advance and upon request, provide the Union with appropriate information to insure that the Union can engage in impact and effects bargaining over the reduction-in-force.

OUC contends that it is not required to negotiate over a reduction in force ("RIF") or to include language on RIF in the CBA that merely restates the law. (Response at 3). In support of its contention, OUC cites to the Omnibus Personnel Reform Amendment Act of 1997 ("Abolishment Act") codified in D.C. Official Code § 1-624.08(a), which in pertinent part states that "notwithstanding any other provision of law, regulation, or collective bargaining agreement, either in effect or to be negotiated while this legislation is in effect...each agency head is authorized, within the agency head's discretion, to identify positions for abolishment." (Response at 3). OUC states that the purpose of the Abolishment Act was to "eliminate the provision allowing RIF policies and procedures to be appropriate matters for collective bargaining," thus allowing DC Government agencies to avoid legal and contractual restrictions on terminations when seeking to abolish a position. (Response at 3; Response Ex. 1). Further, OUC points out that D.C. Official Code § 1-624.08(j) states: "Notwithstanding the provisions of § 1-617.08 or § 1-624.02(d), the provisions of this chapter shall not be deemed negotiable." (Request at 3). OUC contends that it cannot "bypass the laws of the District of Columbia to meet its own ends or the ends of the Union," and that the Board has previously ruled a proposal nonnegotiable based upon violation of the D.C. Code. (Request at 3; citing *American Federation of Government Employees, Local 3721 v. D.C. Fire and Emergency Medical Services Dep't*, 46 D.C. Reg. 7613, Slip Op. No. 390, PERB Case No. 94-N-04 (1999)).

To the contrary, NAGE asserts that its proposal does not interfere with OUC's right to conduct a RIF. (Appeal at 6). Instead, the proposal identifies ways NAGE and OUC can "negotiate and collaborate" on the implementation of RIFs. *Id.* Additionally, NAGE alleges that impact and effects bargaining is a clearly recognized legal right and is not prohibited by statute. *Id.*

The Board finds that sections B and D of the proposal are nonnegotiable. RIFs are a management right under D.C. Official Code § 1-617.08. *Doctors' Council of DC v. DC Dep't of Youth and Rehabilitation Services*, 60 D.C. Reg. 16255, Slip Op. No. 1432 at p. 8, PERB Case No. 11-U-22 (2013). Generally, a management right does not relieve management of the duty to bargain over the impact and effects of, and procedures concerning, the exercise of management rights decisions. *American Federation of Government Employees, Local 1403 v. D.C. Office of the Corporation Counsel*, Slip Op. No. 709 at p. 6, PERB Case No. 03-N-02 (July 25, 2003); *Int'l Brotherhood of Police Officers v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312 at p. 3, PERB Case No. 91-U-06 (1992); *University of the District of Columbia Faculty Ass'n/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 4, PERB Case No. 82-N-01 (1982) (holding that procedures for implementing the decision to conduct a RIF and its impact and effects are negotiable). However, the Abolishment Act narrowed this duty as it relates to RIFs. *Washington Teachers' Union, Local 6 v. D.C. Public Schools*, 61 D.C. Reg. 1537, Slip Op. No. 1448 at p. 2, PERB Case No. 04-U-25 (2014). The

Abolishment Act authorizes agency heads to identify positions for abolishment, establishes the rights of existing employees affected by the abolishment of a position, and establishes procedures for implementing and contesting an abolishment. D.C. Official Code § 1-624.08(a)-(i), (k). Further, the Abolishment Act provides: "Notwithstanding the provisions of § 1-617.08 or § 1-624.02(d), the provisions of this chapter shall not be deemed negotiable." D.C. Official Code § 1-624.08(j). As a result, a proposal that would alter RIF procedures is nonnegotiable. *American Federation of Government Employees v. D.C. Water and Sewer Authority*, 59 D.C. Reg. 5411, Slip Op. No. 982 at p. 6, PERB Case No. 08-N-05 (2009); *Fraternal Order of Police/Dep't of Corrections Labor Committee v. D.C. Dep't of Corrections*, 49 D.C. Reg. 11141, Slip Op. No. 692 at p. 5, PERB Case No. 01-N-01 (2002).¹

In the instant case, Article 23, Sections B and D of NAGE's proposal impose additional requirements on the Agency, beyond those required by the Abolishment Act. Section B requires the Agency to consult in advance with the Union prior to reaching decisions that may lead to a RIF, to minimize the effect of the RIF on employees, and to consult with the Union about the efforts to minimize the effect of a RIF on bargaining unit members. Section D requires the Union be given 30 days' advance notice before a RIF is carried out. *In American Federation of Government Employees, Local 631 and D.C. Water and Sewer Authority*, 59 D.C. Reg. 5411, Slip Op. No. 982 at p. 2, PERB Case No. 08-N-05 (2009), the Board considered the negotiability of a proposal by a union that would require the agency to first attempt "furloughs, reassignment, retaining or restricting recruitment" and/or "utilize attrition and other cost saving measures to avoid or minimize the impact on employees of a RIF." The Board found that the unions' proposal constituted an attempt to alter the agency's RIF procedures and was therefore nonnegotiable pursuant to the Abolishment Act. *Id.* at 6. Here, NAGE's proposal similarly attempts to minimize the effects of a RIF on bargaining unit employees by asking OUC to consult with the Union "prior to reaching decisions" that may lead to a RIF, to consult with the Union to minimize the effects of a RIF, and to provide additional advanced notice to the Union that is not required by the Abolishment Act. The Board finds that NAGE's proposal constitutes an attempt to alter or affect OUC's RIF procedures. *AFGE and WASA, supra*, Slip Op. No. 982. Additionally, the Board finds the proposal constitutes an attempt to frustrate OUC's purposes for conducting the RIF, as well as an attempt to interfere with OUC's rights to direct and assign employees, establish work priorities, and establish job requirements that fulfill the Agency's mission and functions. *American Federation of Government Employees, Local 1403 and D.C. Office of the Corporation Counsel*, Slip Op. No. 709, PERB Case No. 03-N-02 (July 25, 2003).

Therefore, based on the foregoing, and in accordance with Board Rule 532.7, the Board finds that Sections B and D of NAGE's proposal are nonnegotiable.

¹ While the decision to implement a RIF and the procedures for implementation are nonnegotiable, it should be noted that an employer violates its duty to bargain in good faith by refusing a request to bargain over the impact and effects of a RIF. *Doctors' Council of D.C.*, Slip Op. No. 1432 at p. 8; see also *AFSCME Council 20, Local 2921 v. D.C. Dep't of General Services*, 59 D.C. Reg. 12682, Slip Op. No. 1320 at p. 2, PERB Case No. 09-U-63 (2012); *Fraternal Order of Police/Dep't of Corrections Labor Committee v. D.C. Dep't of Corrections*, 52 D.C. Reg. 245, Slip Op. No. 722 at p. 5, PERB Case Nos. 01-U-21, 01-U-28, 01-U-21 (2003).

Article 23, Section A of NAGE's proposal is nonnegotiable. D.C. Official Code § 1-624.08(a) provides as follows:

Notwithstanding any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect for the fiscal year ending September 30, 2000, and each subsequent fiscal year, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment. (emphasis added).

In the instant case, the Union's proposal attempts to limit the agency head's discretionary authority to implement a RIF by defining what constitutes a RIF. The District Personnel Manual ("DPM"), which implements the CMPA, provides: "Each personnel authority shall follow these [RIF] regulations when releasing a competing employee from his or her competitive level when the release is required by any of the following: (a) Lack of work; (b) Shortage of funds; (c) Reorganization or realignment; or (d) The exercise of restoration rights as provided in 38 U.S.C. § 2021 *et seq.*" The proposed definition in Article 23, Section A is inconsistent with the definition of a RIF found in the DPM. The statutory provision expressly authorizes each agency head to identify positions for abolishment "notwithstanding any other provision of law, regulation, or collective bargaining agreement." D.C. Official Code § 1-624.08(a). Further, "when one aspect of a subject matter, otherwise generally negotiable in other respects, is fixed by law, e.g., the CMPA, that aspect is nonnegotiable." *Teamsters Local Unions No. 639 and 730 v. D.C. Public Schools*, 43 D.C. Reg. 7014, Slip Op. No. 403 at p. 4, PERB Case No. 94-N-06 (1994). Therefore, this portion of the proposal is nonnegotiable. *See American Federation of Government Employees, Local 631 v. D.C. Office of Property Management*, 59 D.C. Reg. 4968, Slip Op. No. 965 at p. 8-9, PERB Case No. 08-N-02 (2009) (finding union's proposal attempting to define "RIF" nonnegotiable).

Article 23, Section C is negotiable. NAGE's proposal merely states that RIFs will be conducted in accordance with the law. The proposal does not impact OUC's management rights pursuant to D.C. Official Code § 1-617.08, nor does it attempt to add to or detract from the procedures laid out in D.C. Official Code § 1-624.02. Restating provisions of law in a CBA is not prohibited by the CMPA. Therefore, this portion of the proposal is negotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following proposals are negotiable:
 - a. Article 2, Sections A, B, and C
 - b. Article 23, Section C

2. The following proposal is nonnegotiable:
 - a. Article 23, Sections A, B, and D

3. 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.

May 13, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-N-01 was transmitted via File & ServeXpress to the following parties on this the 13th day of May, 2014.

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