

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

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In the Matter of:)	
)	
District of Columbia)	
Fire Department,)	
)	
Petitioner,)	PERB Case No. 88-N-02
)	Opinion No. 188
and)	
)	
American Federation of)	
Government Employees, Local 3721,)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

On April 13, 1988 the District of Columbia Fire Department (DCFD) filed a Negotiability Appeal with the District of Columbia Public Employee Relations Board (Board) pursuant to Board Interim Rule 106. The Negotiability Appeal concerns a portion of the proposed language in a Duration and Finality Article, included in the negotiation of a successor collective bargaining agreement between DCFD and the American Federation of Government Employees, Local 3721 (AFGE).

By letter dated April 14, 1988 from the Executive Director of the Board, the Union was advised of the Negotiability Appeal and of its right to file a Response with the Board by April 26, 1988. The Union filed its Response on April 29, 1988, citing the illness of the Union's counsel as the reason for the late filing.

On April 15, 1988 DCFD filed a "Supplement to Negotiability Appeal" citing several additional cases. AFGE filed a "Supplementary Response to Negotiability Appeal" with the Board on June 13, 1988, setting forth its position more extensively and including copies of decisions it deems relevant. DCFD submitted a letter to the Board on June 16, 1988 asserting that the Supplementary Response of AFGE should not be considered by the Board because the initial Union Response to the Negotiability Appeal was untimely and thus the Union Supplementary Response cannot relate back to the original submission. Also, DCFD claims that since the Board's Interim Rules do not allow for supplemental responses after the initial time period to respond has expired, the Union's Supplementary Response should not be considered by the Board.

AFGE represents all civilian employees of DCFD, excluding employees of the Communications Division, supervisors and those employees excluded by the Comprehensive Merit Personnel Act of 1978 (CMPA). (See Certification of Representative, Board of Labor Relations Case No. 7R012.) On February 1, 1988 AFGE filed a Request for Impasse Resolution with the Board (PERB Case No. 88-I-03) asserting that matters which remained unresolved through direct negotiations included, inter alia, Article 38, Duration and Finality of Agreement. The Article was therefore included as one of the items to be resolved through mediation. During a mediation session, however, AFGE and DCFD differed over the issue of whether a zipper clause proposed by management in the Duration and Finality Article was a mandatory or permissive subject of bargaining. The instant Negotiability Appeal resulted from this dispute.

DCFD asserts that the proposed language, which contains the zipper clause, is a mandatory subject of bargaining. 1/ DCFD states "[I]t is mandatory that the Union bargain over the entire Article on Duration and Finality of the Agreement and therefore it cannot assert that portions of the Article are permissive subjects of bargaining." (Negotiability Appeal, paragraph d) Management's proposal, as set out in the appeal, is as follows:

Management Proposal - Article 38

Section B:

The parties acknowledge that this contract represents the complete Agreement arrived at as a result of negotiations during which both had the unlimited right and opportunity to make demands and proposals with respect to any negotiable subject or matter. The Employer and the Union agree to waive the right to negotiate with respect to any subject or matter referred to or covered

1/ While DCFD did not set forth in its appeal the specific provisions of Article 38 which are in dispute, the record in this matter and the parties' bargaining history affirms that the language in dispute is the zipper clause. The purpose of a zipper clause is "to close out bargaining during the contract term and to make the written contract the exclusive statement of the parties' rights and obligations." NLRB v. Tomco Communications, Inc. 567 F.2d 871, 97 LRRM 2660, 2664 (9th Cir. 1978).

or not specifically referred to or covered
in this Agreement for the duration of this
contract unless by mutual consent.

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Section D:

All terms-and-conditions of employment
not covered by the terms of this Agreement
shall continue to be subject to the Employer's
direction and control, however, when a Depart
mental Order of [sic] regulation directly
impacts on the conditions of employment of
unit members, such impact shall be a proper
subject of negotiation.

The relevant statutory authority in this proceeding is D.C.
Code Section 1-605.2(5), which states that the Board is empowered
to "[m]ake a determination in disputed cases as to whether a
matter is within the scope of collective bargaining."

PERB Interim Rule 106.1, which implements D.C. Code Section
1-605.2(5), states the following:

"If, in connection with a collective bargaining
negotiation, an issue arises as to whether a
proposal is contrary to law, regulation or
controlling agreement and therefore is not within
the scope of collective bargaining, the party that
proposed the matter that is in question may file a
negotiability appeal with the Board."

The threshold issue is whether there exists a cognizable
claim in this appeal under the CMPA and the rules over which the
Board may assert jurisdiction, when there is no dispute as to
whether an underlying proposal is contrary to law, regulation
or controlling agreement.

The Board finds no such cognizable claim in the instant
appeal. In reaching this conclusion, we note that under the
provisions of D.C. Code Section 1-605.2(5) and 106.1 of the
Board's Interim Rules, a negotiability appeal may be presented
to the Board when there is a claim that the proposal in question
is contrary to law, regulation or controlling agreement. There
is nothing contained in this record indicating that AFGE has
asserted that the proposed language is contrary to law, regula-
tion or controlling agreement, with regard to the proposed
zipper clause.

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Therefore, the Board concludes on the basis of the record presented and the foregoing discussion, that there is no claim presented by this appeal over which the Board may assert jurisdiction.

ORDER

IT IS HEREBY ORDERED:

The Negotiability Appeal is dismissed.

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

August 2, 1988