

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:	)	
	)	
Fraternal Order of Police/Protective Services	)	
Police Department Labor Committee,	)	
	)	PERB Case No. 15-N-04
Petitioner,	)	
	)	Opinion No. 1551
and	)	
	)	
Department of General Services,	)	
	)	
Respondent.	)	

---

**DECISION AND ORDER**

**I. Statement of the Case**

The Fraternal Order of Police/Protective Services Police Department Labor Committee (“Union” or “FOP”) filed a Negotiability Appeal (“Appeal”) of the Department of General Services’ (“Agency” or “DGS”) written declaration of non-negotiability of several of the Union’s counterproposals that it made during the parties’ negotiation of a noncompensation collective bargaining agreement. The Agency filed a timely Answer to the Union’s Appeal.

**II. Discussion**

Pursuant to D.C. Official Code §§ 1-605.02(5) and 1-617.02(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 that has been declared nonnegotiable by the party responding to the proposal.<sup>1</sup>

---

<sup>1</sup> See Board Rule 532.1

The Board applies 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."<sup>2</sup>

As acknowledged in many previous cases, D.C. Official Code § 1-617.08(b) provides, "[A]ll 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.<sup>3</sup> The subject(s) of a negotiability appeal and the context in which its negotiability is appealed are determined by the petitioner, not the party declaring the matter nonnegotiable.<sup>4</sup> The Board reviews the disputed proposals and separately addresses each in light of the statutory dictates and relevant case law.

### **III. Analysis of Proposals**

The Union's proposals are set forth below.<sup>5</sup> The proposals are followed by: (1) DGS's arguments in support of nonnegotiability; (2) FOP's arguments in support of negotiability; and (3) the findings of the Board. The Board considers each proposal as a whole, unless the Union has requested that only a particular portion of a proposal be considered.

#### **Union Proposal 1:**

Article 16 (Grievance Procedure), Section E, Paragraph 6

The parties agree that it is their intent that arbitration awards issued pursuant to this Agreement shall be final and binding on both parties. If either party requests review of a final award before the Public Employee Relations Board and the award is ultimately upheld, the party who unsuccessfully sought review will pay 2/3 of the other party's reasonable attorney fees incurred in any stage of defense of the award.

Agency: DGS argues that FOP's proposal is nonnegotiable, because PERB does not have original jurisdiction to award attorney's fees.<sup>6</sup>

Union: FOP argues that its proposal does not require PERB to order attorney's fees, but rather that the proposal is a negotiated settlement of attorney's fees.<sup>7</sup>

---

<sup>2</sup> *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).

<sup>3</sup> See *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), for a discussion on negotiability.

<sup>4</sup> *International Association of Fire Fighters, Local 36 and D.C. Fire & Emergency Medical Services Dep't*, Slip Op. No. 515, PERB Case No. 97-N-01 (1997).

<sup>5</sup> The Union withdrew its proposals of Article 18 (Training), Section C and Article 21 (Scheduling), Section C.

<sup>6</sup> Answer at 3.

<sup>7</sup> Petition at 3-4.

Board: The Union's proposal does not require PERB to award attorney's fees in contravention of its original jurisdiction under D.C. Official Code § 1-617.13.<sup>8</sup> The Union's proposal instead proposes a pre-negotiated settlement regarding attorney's fees. The Agency's argument that the Board is prevented from awarding attorney's fees does not address the actual language of the proposal. The Board has upheld an arbitrator's award of fees, where the collective bargaining agreement does not limit the equitable remedial powers of an arbitrator.<sup>9</sup> In the present case, the proposal is a negotiated settlement of fees prior to the disposition of an action, and not a requirement that the Board award fees. The Board does not find grounds that would prevent the Agency from negotiating a settlement of attorney's fees under a collective bargaining agreement.

The Board finds that the Union's proposal is negotiable.

### **Union Proposal 2:**

In earlier negotiations, the Union filed a negotiability appeal of several proposals (Sections A, B, and C) under its proposed Article 30 (Reductions-in-Force and Furloughs). These exact proposals were before the Board in Opinion No. 1532.<sup>10</sup> The Board found that the Union's proposals would interfere with the Agency's procedures for implementing a RIF in contravention of the Abolishment Act.<sup>11</sup>

The Court of Appeals has stated, "[W]hen applicable, collateral estoppel renders conclusive the determination of issues of fact or law previously decided in another proceeding."<sup>12</sup> The Board rendered a final decision on the negotiability of these proposals. Therefore, the Board continues to find Article 30, Sections A, B, and C nonnegotiable.<sup>13</sup>

---

<sup>8</sup> *AFGE, Local 2725 v. D.C. Dep't of Health*, 59 D.C. Reg. 6003, Slip Op. No. 1003 at p.6, PERB Case No. 09-U-65 (2012).

<sup>9</sup> *FOP/DOC Labor Committee and DOC*, Slip Op. No. 1303, PERB Case No. 10-A-02 (2012).

<sup>10</sup> *FOP/Protective Servs. Police Dep't Labor Committee and Dep't of General Servs.*, Slip Op. No. 1532, PERB Case No. 15-N-02 (July 31, 2015).

<sup>11</sup> Slip Op. No. 1532 at p.6. 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). 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).

<sup>12</sup> *Modiri v. 1342 Rest. Group, Inc.*, 904 A.2d 391, 394 (D.C.2006) (citing *Davis v. Davis*, 663 A.2d 499, 501 (D.C.1995)).

<sup>13</sup> According to the D.C. Court of Appeals, collateral estoppel, or issue preclusion, "prohibits 'the relitigation of factual or legal issues decided in a previous proceeding and essential to the prior judgment.'" *Elwell v. Elwell*, 947 A.2d 1136, 1140 (D.C.2008) (quoting *Borger Mgmt., Inc. v. Sindram*, 886 A.2d 52, 59 (D.C.2005)). Thus, when applicable, collateral estoppel renders conclusive the determination of issues of fact or law previously decided in another proceeding. *Modiri v. 1342 Rest. Group, Inc.*, 904 A.2d 391, 394 (D.C.2006) (citing *Davis v. Davis*, 663 A.2d 499, 501 (D.C.1995)).

**Union Proposals 3:**

Article 32 (Licenses)

Section B

The Employer is responsible for all costs incurred in obtaining required commissions, fingerprints and photographs for employment with PSPD.

Section C

If the Employer fails to provide secured lockers for storage of service weapons at the worksite, the Employer will pay any costs associated with employees obtaining requisite permits to carry their service weapon in their home state or the District of Columbia.

Agency: DGS does not contend that FOP's proposal is substantively nonnegotiable, but asserts that the proposals should be addressed in compensation negotiations, because they concern wages.<sup>14</sup>

Union: FOP asserts that DGS is barred as a matter of equity from raising the defense that the proposals should be negotiated during compensation bargaining, because DGS has negotiated similar provisions during noncompensation bargaining.<sup>15</sup>

Board: The Board determined that Section C is negotiable in Opinion No. 1532.<sup>16</sup> The Board found that the Agency's argument that Section C should be reserved for compensation bargaining did not comport with D.C. Official Code § 1-617.17(b), where compensation bargaining was meant for a broad range of occupational groups and not for a specific reimbursement for a specific group of employees.<sup>17</sup> The Board concluded that Section C is negotiable, because Section C concerned a specific reimbursement that affected only a specific group of employees. Therefore, based on collateral estoppel, the Board continues to find Section C negotiable, as the Board already determined that Section C is negotiable in Opinion No. 1532.

As for Section B, DGS raises the same defense that Section B should be negotiated during compensation bargaining as it did for FOP's negotiability appeal of Section C in Opinion No. 1532. In the Board's prior decision, the Board relied upon D.C. Official Code § 1-617.17(b) to find that the Union's Section C proposal did not "concern total compensation for a broad range of occupational groups, as envisioned under the CMPA."<sup>18</sup>

Compensation bargaining is governed by D.C. Official Code § 1-617.17(b), which provides that management and labor organizations "negotiate in good faith with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential,

---

<sup>14</sup> Answer at 8-9.

<sup>15</sup> Appeal at 6-7.

<sup>16</sup> *FOP/Protective Servs. Police Dep't Labor Committee and Dep't of General Servs.*, PERB Case No 15-N-02.

<sup>17</sup> *FOP/Protective Servs. Police Dep't Labor Committee*, Slip Op. No. 1532 at p.7.

<sup>18</sup> *Id.*

premium pay, hours, and any other compensation matters.” The Board finds the reasoning in Opinion No. 1532 for Section C is applicable to Section B. Section B would govern a specific apportioning of cost for a small group of employees and does not concern compensation bargaining envisioned by D.C. Official Code § 1-617.17(b), which involves bargaining for broad occupational groups.<sup>19</sup>

DGS does not dispute the substantive negotiability of Section B. Therefore, based on the reasoning above, the Board finds that Section B is negotiable.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. Article 16 (Grievance Procedure), Section E, Paragraph 6 is negotiable.
2. Article 30 (Reductions-in-Force and Furloughs) Sections A, B, and C are nonnegotiable.
3. Article 32 (Licenses), Section B and C are negotiable.
4. 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 Board Chairperson Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, and Member Keith Washington.

Washington, D.C.

October 29, 2015

---

<sup>19</sup> *Id.*

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-N-04 was served to the following parties via File & ServeXpress on this the 30th day of October 2015:

Herman R. Brown, Jr.  
Michael D. Levy  
Office of Labor Relations and Collective Bargaining  
441 4th Street, NW, Suite 820  
North Washington, D.C. 20001

Brenda C. Zwack  
Divya Vasudevan  
Murphy Anderson PLLC  
1300 L Street, NW, Suite 1210  
Washington, D.C, 20005

/s/Sheryl Harrington  
Sheryl Harrington  
Public Employee Relations Board  
1100 4th Street, SW  
Suite E630  
Washington, D.C. 20024  
Telephone: (202) 727-1822  
Facsimile: (202) 727-9116