GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
American Federation of Government Employees, Local No. 3721,	
Petitioner,	
	PERB Case No. 94-N-04
	Opinion No. 390
v.	
District of Columbia Fire and Emergency Medical Services Department,	
Respondent.	

DECISION AND ORDER ON NEGOTIABILITY APPEAL

On March 8, 1994, the American Federation of Government Employees, Local No. 3721 (AFGE) filed a Negotiability Appeal with the Public Employee Relations Board (Board). The Appeal concerns the negotiability of items proposed by AFGE concerning contracting out and substance abuse testing. The Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of the D.C. Fire and Emergency Medical Services Department (DCFD), declared AFGE's proposals on these matters nonnegotiable following a Request for Impasse Resolution filed by AFGE. The Request for assistance stemmed from the parties' negotiations for (1) a successor collective bargaining agreement on noncompensation terms and conditions of employment and (2) a memorandum of understanding revising DCFD's drug-testing policy for its Emergency Ambulance Bureau. [1]/

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[1]/ On January 14, 1994, Petitioner, pursuant to Board Rule 527.1, filed a Request for Impasse Resolution (PERB Case No. 94-I-01) regarding the same proposals that are the subject of this Negotiability Appeal. The Board's Executive Director, as required by Board Rule 527.2, sent a letter to the parties on January 25, 1994, initiating an informal inquiry to determine whether or not there was an impasse in their negotiations. In this Negotiability Appeal, AFGE states that it understood the Executive Director's letter as the Board's determination that the parties had reached an

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impasse. Based on this understanding AFGE requests, pursuant to Board Rule 532.1, that DCFD's declaration of nonnegotiability, made on January 26, 1994, be ruled untimely and dismissed. Board Rule 532.1 provides:

> If the Board determines that an impasse has occurred regarding noncompensation matters, and an issue of negotiability exists at the time of such impasse determination, the negotiability issue must be withdrawn or a negotiability appeal filed with the Board within five (5) days of the Board's determination as to the existence of an impasse.

AFGE asserts that "an issue of negotiability was not raised and did not exist at the time that the impasse determination was made by the PERB Director". (App. at 5.) AFGE further asserts that, "in accordance with Board Rule 532.1, the issue of negotiability had to exist at the time of such impasse determination by the Board's Director to invoke the requirement of withdrawal of the negotiability issue of filing of an appeal." Id. Therefore, AFGE argues, "the Agency's raising the issue of negotiability on January 26, 1994 must be considered untimely." Id.

Notwithstanding AFGE's assertion that its January 14, 1994 Request for Impasse Resolution was based upon a "jointly agreed upon impasse statement", the existence of an impasse under Board Rule 532.1 is determined by the Board, not the parties, following the Board's informal inquiry of the request for impasse resolution. The Executive Director's January 25, 1994 letter to the parties merely initiated this process and is not considered a confirmation of impasse. See, District of Columbia Public Schools and Teamsters Local Unions No. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 38 DCR 2483, Slip Op. No. 273, PERB Case 91-N-01 (1991). Therefore, DCFD's January 26, 1994 letter to AFGE and January 27, 1994 letter to the Board, informing both that "an issue of negotiability" existed, occurred during the period of the Board's inquiry, prior to any determination that an impasse existed.

The requirements under Board Rule 532.1, that a issue of negotiability must be withdrawn or a negotiability appeal filed within 5 days, is not triggered until the issue of negotiability is raised and the Board has made a determination that an impasse exists. The only requirement under this rule with respect to when an "issue of negotiability" must be raised to preserve the Board's jurisdiction to make a negotiability determination, is the implied requirement that the issue must be raised prior to the matter advancing to impasse resolution proceedings. See, Teamsters Local Unions No. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools, 39 DCR 5992, Slip Op. No. 299, PERB Case 90-N-01 (1991). In view of the above, we deny AFGE's request that the issues of negotiability raised by DCFD be dismissed as untimely.

On March 23, 1994, OLRCB filed a Response to the Negotiability Appeal. OLRCB states that AFGE's proposal on substance abuse contained in its Appeal "was never submitted to the Department nor shared upon the declaration of impasse." (Resp. at 4.) OLRCB contends, in alternative arguments, that AFGE's proposals on both substance abuse and contracting out are either illegal subjects of bargaining, over which the parties may not negotiate, or permissive subjects, over which DCFD has discretion to negotiate.[2/]

SUBSTANCE ABUSE TESTING

> **The employees of bargaining unit (Local 3721) will not be subjected to drug testing until the District of Columbia Government establishes a uniformed (sic) policy and the Local has the opportunity to negotiate the procedures**

The above proposal appears as amended, according to AFGE, at the parties' last bargaining session on January 11, 1994, by adding the underlined proviso to the last proposal previously declared nonnegotiable by OLRCB. (Neg. App. at 4.) OLRCB states that it had not seen the amended proposal until the filing of this Appeal.

The proposal, as presented in the Appeal, is significantly different from the proposal without the proviso. DCFD never expressed during the parties' negotiations --nor does it now in its Response to the Appeal-- that this proposal is nonnegotiable. Since there is no "written communication" from DCFD asserting that the amended proposal is nonnegotiable, as required by Board Rules 532.1 and 532.3, the appeal of this proposal is not properly before the Board.[3/]

[2/] To the extent that OLRCB contends that these proposals are permissive, i.e., that DCFD may elect not to negotiate over them, no issue of negotiability is raised, but rather an issue concerning DCFD's obligation to bargain. See, Committee of Interns and Residents and D.C. General Hospital Commission, Slip Op. No. 301, PERB Case No. 92-N-01 (1992). Therefore, we have no occasion, in this negotiability appeal proceeding, to address the arguments in support of this contention. See, District of Columbia Fire Department and American Federation of Government Employees, Local 3721, 35 DCR 6361, Slip Op. No. 185, PERB Case No. 88-N-02 (1988).

[3/] This disposition is made without prejudice to a determination on the merits should AFGE refile its appeal of this proposal in accordance with Board Rule 532.3.

CONTRACTING OUT

> **During the term of this Agreement the Employer shall not contract out work performed by employees covered by this agreement.**
>
> **Except under emergency circumstances.**
>
> **When lack of personnel or equipment is unavailable (sic).**

The Board has addressed only once before the negotiability of a proposal concerning this subject matter. We ruled that a proposal that, without exception, prohibited the agency from subcontracting out bargaining unit employees' work was nonnegotiable because it "violates the proscriptions of D.C. Code Sec. 1-618.8(a)(6)." **Teamsters, Local Union No. 639 and D.C. Public Schools**, 38 DCR 1586, Slip Op. No. 263, supra at p. 20-21 (Proposal 20). We observed that "not all proposals with respect to subcontracting are nonnegotiable under the CMPA"; however, "the presumption of negotiability under D.C. Code Section 1-618.8(b) does not override express proscriptions under other provisions of the CMPA." Id.

OLRCB states that the proposal prohibits DCFD from contracting out bargaining unit employees' work except under the following situations: (1) emergency circumstances; (2) when bargaining unit personnel was unavailable; and (3) when the necessary equipment was unavailable. In the absence of any guidance from AFGE, we find OLRCB's understanding to be a fair interpretation of the proposal.

OLRCB argues that AFGE's proposal violates management's rights under the CMPA, D.C. Code Sec. 1-618.8(a)(4) which provides that "management shall retain the sole right, in accordance with applicable laws and rules and regulations...[t]o maintain the efficiency of the District government operations entrusted to them...."[4]/ It contends that the restrictions placed on DCFD's authority to contract out would prohibit management from obtaining a better product, faster method, or more cost effective means to maintain the efficiency of DCFD's operation.[5]/

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[4]/ D.C. Code Sec. 1-618.8(a)(3), which makes it a management right to "relieve employees of duties because of lack of work or other legitimate reasons", is also implicated. (emphasis added.)

[5]/ OLRCB also argued in support of its position that AFGE's proposal would restrain "District policy" and "public policy (continued...)

The Board has not previously addressed the impact of D.C. Code Sec. 1-618.8(a)(4) on the negotiability of a proposal. A general claim, as OLRCB has argued, that the objective of a management decision is "[t]o maintain the efficiency of the District government operations", which has no basis in an applicable law, rule or regulations, is not sufficient to support a finding that a proposal contravenes this management right. Any determination of whether or not a disputed proposal contravenes this management right requires a careful examination of the specific "applicable laws and rules and regulations" that this management right is exercised "in accordance with."

OLRCB avers that Mayor's Order 93-92, 40 DCR 5362 (July 1993), entitled Privatization in the District of Columbia Government, is such a law. It is in accordance with Mayor's Order 93-92 that OLRCB contends DCFD's management-right "to maintain the efficiency of the District government operations entrusted to it" can be achieved by contracting out. We agree.

Mayor's Order 93-32 states as its purpose the following: "The primary objective of the privatization process in the District is to provide better service at equal or lower cost to taxpayers and at the same time maximize revenues to the District." (Order at p. 2.) One of four stated objectives of the Order is "to provide needed services in the most efficient manner". Id. "Contracting out" is specifically stated as one of "two basic models that will serve as the basis of the District's privatization program." Id.[6]/

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[5](...continued)
dictate[] that the work be performed by the private rather than public sector" as well as "any other rational basis for contracting out[.]" (Resp. at 23 and 39.) To the extent that OLRCB attempts to advance bases of determining matters within the scope of collective bargaining not proscribed by the CMPA, we reject such arguments as contrary to the CMPA's presumption of negotiability under D.C. Code Sec. 1-618.8(b).

[6]/ The Order defines contracting out as "an agreement between the government and the private sector where the government provides the financing and the private sector performs the function." The second model for achieving the objectives of the Mayor's Order provides that the "government may transfer all or part of a government function enterprise to the private sector" and the "private sector then runs the service without direct government financing or involvement." (Order at 2.) Under the second model, "[i]f an asset can be operated by private business, and if government can realize a net revenue gain by selling or leasing the
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The stated objectives of contracting out "are 1) to save money and 2) to improve service." Id. Finally, the Order expressly provides that a "**decision** to privatize can be made if" among other things "a savings to the government or improved services at the same or lower cost will result" or "**efficiency of operation** and quality of service can be measured." Id. at 3.

Under the CMPA, D.C. Code Sec. 1-618.1(b)(2), employees are afforded the right to "engage in collective bargaining concerning **terms and conditions of employment**, as may be appropriate under this law and rule and regulations ... ." While contracting out clearly has an impact or effect on employees' terms and conditions of employment, the decision, itself, to contract out is a managerial matter concerning the operation of the agency or personnel authority.[7]/ Consequently, we find AFGE's proposal on contracting out bargaining unit employees' work contravenes management's sole right, under the CMPA, D.C. Code Sec. 1-618.8(a)(4), "[t]o maintain the efficiency of the District government operations... ." It is therefore nonnegotiable.[8]/

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[6](...continued)
asset and divesting itself of responsibility for direct service delivery, the asset and functions involved should be considered for privatization." Id. AFGE's proposal does not distinguish between these two methods of privatization. The second condition, in AFGE's proposal, placed on DCFD's ability to contract out would directly conflict with this second form of contracting out.

[7]/ OLRCB correctly notes that a determination that AFGE's proposal on contracting out contravenes a management right does not extend to matters concerning the impact, effects and procedures for exercising a management right under D.C. Code Sec. 1-618.8(a). See, Univ. of the District of Columbia Faculty Assoc. and Univ. of the District of Columbia, 29 DCR 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982) and Teamsters, Local Union Nos. 639 and 730 v. D.C. Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990). AFGE's proposal, however, prohibits, with certain exceptions, the actual exercise of this management right.

[8]/ Notwithstanding our determination of nonnegotiability of this proposal, the Mayor's Order imposes certain obligations on the District government before making decisions to privatize that is worth reiterating. The section, entitled Employee Protection, provides:

> Even when a service or function meets the criteria for privatization, the government retains responsibility for

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ORDER

IT IS HEREBY ORDERED THAT:

1. The proposal concerning Substance Abuse Testing, as presented by AFGE in its Negotiability Appeal and set forth in this Opinion, is dismissed since it presents no issue for the Board's determination.

2. The proposal concerning Contracting Out is not within the scope of collective bargaining and therefore is nonnegotiable.

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

April 20, 1994

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ensuring protection for District employees and employment opportunities for District residents. Although numerous collective bargaining agreements set forth the government's responsibilities prior to a decision to privatize or contract out for services, after a decision to privatize has been made the government will do the following:

> consult with employee union representatives to ensure that reasonable efforts have been made to ensure employment and benefits to District employees affected by the decision to privatize;
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> . . . .
>
> (Order at p. 4.)

In view of our disposition, we do not reach OLRCB's contention that AFGE's proposal also contravenes D.C. Code Sec. 1-618.8(a)(4) based on the Privatization Procurement and Contract Procedures Amendment Act of 1993, 40 DCR 8696, amending the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85; D.C. Code Sec 1-1181.1 et seq.).