Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
University of the District of Columbia Faculty Association/National Education Association,	)	
Complainant,	)	PERB Case No. 09-N-02
v.	)	Opinion No. 1104
University of the District of Columbia,	)	
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case

On March 3, 2009, the University of the District of Columbia Faculty Association ("Petitioner", "UDCFA" or Union") filed a Negotiability Appeal ("Appeal") in the captioned matter, in response to the University of the District of Columbia's ("Respondent" or "UDC") written communications of non-negotiability on January 13, 2009, and February 20, 2009. The Sixth Master Agreement between the parties expired on September 30, 2008. (See UDC's Response to Faculty Association's Negotiability Appeal ("Response")). UDCFA and UDC have been engaged in negotiations for a successor agreement, or Seventh Master Agreement. (See Appeal at p. 1). On July 3, 2008, the District of Columbia Public Employee Relations Board ("Board") declared an impasse on compensation and non-compensation matters and appointed a mediator to mediate the impasse between the parties. (See Response at p. 2). The last day of mediation between the parties was scheduled for January 14, 2009. (See Appeal at p. 2).

On January 13, 2009, UDC submitted a letter to the Union stating that it considered various unidentified issues in the Sixth Master Agreement non-negotiable, and would provide more detail in a later submission. (See Appeal - Attachment A). UDC's January 13, 2009 letter was followed by a letter to the Union dated February 20, 2009, specifying which articles of the

Sixth Master Agreement it considered non-negotiable pursuant to the District of Columbia Code. (See Appeal - Attachment B). Based on these submissions, the Union filed the instant Appeal. The Union contends that UDC's January 13 and February 20, 2009 declarations of non-negotiability are untimely. (See Appeal at p. 3). In addition, the Union asserts that the matters addressed in the February 20, 2009 letter are negotiable. (See Appeal at p. 5). UDC opposes the appeal, claiming that its declaration is timely and the Appeal should be dismissed. (See Response at p. 5).

Pursuant to a telephone conference the Board's Executive Director held with the parties, briefs were submitted by the parties addressing the substantive matters in the Appeal. In addition, at UDC's request, the parties were permitted to present oral argument before the Board, which took place on November 12, 2010. Following the presentation of oral arguments the parties submitted post-argument briefs in support of their positions. The Union's Appeal, UDC's Response, the briefs in support of the merits, the oral arguments and post-argument briefs are before the Board for disposition.

II. Background

UDCFA and UDC have been engaged in successor negotiations for a Seventh Master Agreement concerning compensation and non-compensation issues since September of 2007. (See Appeal at pgs. 2-3). "On or about May 6, 2008, [UDCFA] filed a Declaration of Impasse in Compensation and Non-Compensation Issues. [The Board] found that the parties were at impasse and appointed [a mediator] to mediate [a resolution of the disputed issues of the negotiations]. The parties met with [the mediator] several times, the last of which was January 14, 2009, at which time [the mediator] informed the parties that she did not believe that further mediation would resolve the remaining disputed issues. [UDCFA] has since filed [a request] for Interest Arbitration." (Appeal at p. 2).

On January 13, 2009, UDC provided UDCFA with a letter declaring that certain provisions "in the parties' Sixth Master Agreement, which remains in effect pending the negotiation of the Seventh Master Agreement, were either non-negotiable or permissive subjects of bargaining." (Appeal at p. 2). Then, "[o]n February 20, 2009, [UDC] submitted a letter declaring that specified 'provisions of the expired Sixth Master Agreement between the University and the Association [were] nonnegotiable pursuant to the applicable provisions of the District of Columbia Code.' " (Appeal at p. 2). UDC's written submissions of January 13 and February 20, 2009, are the basis of the present appeal.

III. Discussion and Analysis

A. The Union's Procedural Objection to UDC's Declaration of Non-Negotiability.

UDCFA's Appeal contends that UDC's declaration of non-negotiability is untimely. In support of this contention, UDCFA argues that Board Rule 532.1 "suggests that a party should make its non-negotiability declarations before the declaration of impasse on non-compensation

matters. Rule 532.1 states the general rule that impasse proceedings should not be suspended pending resolution of the negotiability appeal. But interest arbitration cannot proceed under the circumstances presented by the University's actions." (Appeal at p. 4).

In addition, UDCFA argues that:

> In *Teamsters Locals 639 and 730 v. District of Columbia*, 631 A.2d 1205 (D.C. 1993); *on remand*, Misc. 419-89 (Super. Ct. 2000), the Court of Appeals and the Superior Court held that an employer could waive its right to make a non-negotiability declaration by delaying until the completion of the interest arbitration process. And in *AFGE Local 631 and District of Columbia Water and Sewer Authority*, PERB Case No. 05-N-02, Opinion No. 877, 54 DCR 3210 (2007), [the Board] held that a declaration of non-negotiability did not affect language in an existing collective bargaining agreement.

(Appeal at p. 4).

UDCFA also maintains that:

> [UDC's] February 20 declaration severely disrupts the bargaining process. Most of the items belatedly declared non-negotiable were not subjects of negotiation. Neither party had submitted a "last best offer" which is the basis for interest arbitration pursuant to D.C. Code, Section 1-617.17(f)(2) and Section 1-617.17(f)(3). Now, assuming that the University is correct that the listed provisions are non-negotiable, the Association will have to submit proposals to correct the alleged deficiencies in the language, the University will have to respond, all while the parties are engaging in interest arbitration and are not supposed to amend their "last best" offers.

(Appeal at p. 4).

Furthermore, UDCFA requests that the Board "conclude that a party . . . waives the right to make a non-negotiability declaration after the conclusion of the mediation process, especially where, as here, the allegedly non-negotiable items were in the existing contract and were not discussed in the bargaining or mediation sessions." (Appeal at pgs. 4-5). UDCFA asserts that PERB has issued such an Order. See *id.* (citing *Doctors Council of the District of Columbia and District of Columbia Department of Mental Health*, _ DCR _, Slip Op. No. 921, PERB Case No. 07-N-01 (2007)).

B. UDC's Procedural Position on its Declaration of Non-Negotiability

In its opposition to the Appeal, UDC argues that its declarations be considered timely. In support of its position, UDC argues that:

> [The Board's] rules set no time limit when a declaration of non-negotiability must be made. *Teamsters Local Unions Nos. 639 and 730 v. District of Columbia Public School,* [43 DCR 7014, Slip Op. No. 403 at 2-3, PERB Case No. 94-N-06 (1994)]. Such declarations are timely "as long as it is made prior to the conclusion of collective bargaining." *Id.*

UDC further argues that collective bargaining should be defined as negotiations that take place at any time before the dispute is submitted to the arbitrator in the interest arbitration phase of the negotiations.[1] (See Response at p. 3). In addition, UDC contends that its "[d]eclaration of [n]on-negotiability occurred before the commencement of interest arbitration . . . [and] an interest arbitrator had not been selected and mediation had not even formally concluded when the University conveyed its position of non-negotiability to the Union." (Response at p. 3).

UDC asserts that:

> [t]he present case is substantively identical to *Teamsters Local Union Nos. 639 and 730*, PERB Case No. 94-N-06, *supra,* where the employer's "declaration of non-negotiability was made 'during the last mediation session.' " The [Board] concluded: "In our view mediation is a process that is part of collective bargaining, and DCPS' challenge to the negotiability of the Union's proposal during mediation, albeit some ten months after it was proposed, was timely." *Id* at p. 3.

(Response at p. 4).

C. Analysis and Conclusion Regarding the Sufficiency and Timeliness of UDC's Declaration of Non-Negotiability.

The CMPA is designed to provide "for a positive policy of labor-management relations including collective bargaining between the District of Columbia government and its employees." D.C. Code § 1-601.02(a)(6). In this spirit, the Board requires District agencies "to give proper notice to the opposing party that the issue is non-negotiable, and thereby avoid unnecessarily undermining the bargaining process." *Doctors' Council of the District of*

[1] UDC cites the following cases in support of its argument: *Teamsters Local Union Nos. 639 and 730 and D.C. Public Schs.,* 39 DCR 5992, Slip Op. No. 299, PERB Case No. 90-N-01 (1992); *Doctors' Council of the District of Columbia and District of Columbia Dep't of Mental Health,* _ DCR _, Slip Op. No. 921, PERB Case No. 07-N-01 (2007).

Columbia v. District of Columbia Department of Mental Health, Slip Op. No. 921 at p. 4. The Board's Rules do not provide for a specific deadline for a District agency's declaration of non-negotiability. See *Teamsters Local Unions No. 639 and 730 v. District of Columbia Public Schools*, Slip Op. No. 403. The Board, however, has consistently held that an unequivocal declaration of non-negotiability must be made "in connection with collective bargaining," while there is still a meaningful opportunity for give-and-take between the parties. *Doctors' Council*, Slip Op. No. 921 at p. 5.

In the present case, the questions for the Board's resolution are whether: (1) UDC's January 13, 2009 and/or February 20, 2009 letters provided "clear and unambiguous" notice of its objections to UDCFA's proposals; and (2) any such objections were made "in connection with collective bargaining." *Id.*

1. UDC's January 13, 2009 letter did not, with "clear and unambiguous" notice, provide sufficient objections to UDCFA's proposals.

The Board finds that UDC's declaration of non-negotiability, made on January 13, 2009, to be insufficient to place UDCFA on clear and unambiguous notice of which proposals UDC objected. The parties began bargaining for a successor Seventh Master Agreement in September of 2007. (See Appeal at p. 2). UDCFA declared and notified the Board that the parties were at impasse on May 6, 2008. The Board's Executive Director determined the parties were at impasse on July 3, 2008, and selected a mediator to assist in resolving the impasse between the parties. (See Response at p. 2). Mediation sessions to resolve the disputed issues between the parties were held until January 14, 2009, when the mediator informed the parties that further mediation would not resolve any remaining disputed issues. (See Appeal at p. 2). One day prior to the cessation of mediation (January 13, 2009), UDC submitted a letter to the Union stating, in pertinent part, as follows:

> The Administration recognizes that we have, in the past, collectively bargained and maintained practices (formal or informal) which related to what are now prohibited or permissive subjects. However, now that we are involved in negotiations for a successor agreement (to the 6th Master Agreement), we are providing you with notice that we will no longer engage in negotiations related to these subjects in the future. As such, prohibited and permissive subjects of bargaining will be treated as if they have been removed from the 6th Master Agreement. A comprehensive list of those subjects we believe to be prohibited or permissive will be provided next week. In the meantime we suggest that we suspend Mediation pending your opportunity to review that list. We will maintain the status quo on all Mandatory Subjects until such time as our continued good faith efforts result in a successor agreement. Please note that the items removed from

> the 6th Master Agreement (prohibited or permissive) will no longer be subject to grievance or arbitration.
>
> This letter is also intended to serve as our notice of willingness to engage in negotiations only on Mandatory Subjects. We will, however, not bargain on prohibited or permissive subjects themselves. In addition, the University will defend its right to avoid impasse proceedings on prohibited or permissive subjects.

(Appeal - Attachment A).

When considering negotiability appeals, the Board is guided by Board Rule 532, which provides, in pertinent, as follows:

> **532.1 – Impasses and Negotiability Issues**
>
> If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board. 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. . . .
>
> **532.2 - Negotiability Appeal – Contents**
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> A negotiability appeal shall meet the requirements of Section 501 of these rules and shall include, in addition, the following:
>
> **(a)** The name, title, address and telephone number of the chief negotiator for each party; and
>
> **(b)** A statement of the negotiability issue(s), including a copy of the proposal(s) at issue and specific reference to any applicable statute, regulation(s) or collective bargaining agreement provisions.
>
> **(c)** Any written communication from the other party to the negotiation asserting that **a proposal is nonnegotiable**.

532.3 - Negotiability Appeal – Filing

> Except as provided in Subsection 532.1 of these rules a negotiability appeal shall be filed within thirty (30) days after a written communication from the other party to the negotiations asserting that a proposal is nonnegotiable or otherwise not within the scope of collective bargaining under the CMPA. A response to the negotiability appeal may be filed within fifteen (15) days after the date of service of the appeal.

Board Rule 532 (emphasis added).

In Slip Op. No. 299, the Board held that an agency's failure to establish a clear and unambiguous rejection of the disputed proposals as non-negotiable precluded the establishment of the required basis for filing a negotiability appeal. See Teamsters *Local Union Nos. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools*, Slip Op. No. 299 at p. 7. In the *Teamsters* case, the Board found that the District of Columbia Public Schools ("DCPS") made ambiguous statements concerning the negotiability of certain proposals prior to finally making clear, unequivocal declarations of non-negotiability. See *id.* at p. 3. DCPS contended that it had put the union on notice that it disputed the negotiability of certain proposals and that it, for the purpose of determining if its declarations of non-negotiability were timely, should have the benefit of that earlier date. See *id.* The Board rejected this argument, and held that a declaration of non-negotiability was not made until the Agency "unequivocally communicated to the Union that it rejected the disputed proposals as non-negotiable." *Id.* at 7.

In the present case, the Board finds that UDC's January 13, 2009 letter to the Union did not provide a "clear and unambiguous" rejection of the Union's proposals. Instead, the January 13 letter only references the expired Sixth Master Agreement, and does not specify any of the Union's proposals that had been at issue since September of 2007, or the issues in dispute during mediation it considered to be non-negotiable. Therefore, UDC failed to clearly reject any of UDCFA's proposals as of January 13, 2009, and UDC did not make a sufficient declaration of non-negotiability on that date. See *id.*

Furthermore, no "comprehensive list" was provided within the week, as promised in UDC's January 13 letter. Absent a clear rule concerning the precise time period for making a declaration of non-negotiability, the Board declines to reach the issue of whether UDC's January 13, 2009 letter was timely. See *Teamsters Local Union No's 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools*, Slip Op. 403.

Nevertheless, under the circumstances of this case, particularly where the parties were presumably in the final stages of collective bargaining, UDC's January 13, 2009 letter is too ambiguous to have provided notice to the Union of the particular proposals to which UDC objected, or whether any of the objections had been made "in connection with collective

bargaining." Furthermore, because UDC failed to put the Union on clear and unequivocal notice of which particular proposals it regarded as non-negotiable, UDC's January 13, 2009 letter is, therefore, insufficient, as there was "no basis for a negotiability appeal by the Union (or forfeiture of its right to have this negotiability appeal resolved)" at that time. *Id.* at pgs. 8-9. Therefore, the Board finds that UDC's declaration of non-negotiability made on January 13, 2009 was insufficient as a declaration of non-negotiability.

2. UDC's February 20, 2009 declaration of non-negotiability was untimely because it was not made "in connection with collective bargaining."

UDC submitted another letter to the Union on February 20, 2009, stating that, "[c]onsistent with the Notice provided to the Association and Faculty on January 13, 2009, the University of the District of Columbia declares the following provisions of the expired Sixth Master Agreement between the University and the Association nonnegotiable pursuant to the applicable provisions of the District of Columbia Code." (Appeal - Attachment B).). Although the February 20, 2009 letter appears to be a sufficient declaration of non-negotiability, the question is whether, under the circumstances of this case, the February 20, 2009 letter provided a timely objection to UDCFA's proposals.

Whereas Board Rule 532 provides guidance concerning the substance, issues and contents of an appropriate declaration of non-negotiability, it does not precisely answer the question of whether here UDC's declaration of non-negotiability was timely. *Doctors' Council*, PERB Case No. 07-N-01, Slip Op. No. 921 provides the Board's most recent statement of when a party is required to make its declaration of non-negotiability. In that case, the Board held that the District was required to make the declaration before "the period envisioned for meaningful bargaining between the parties had expired." *Doctors' Council*, PERB Case No. 07-N-01, Slip Op. No. 921, at 5. Put another way, the District had to have declared non-negotiability while "the potential for the ongoing and meaningful give-and-take of bargaining still existed." *Id.*

It is clear from *Teamsters Local Unions No. 639 and 730 v. District of Columbia Public Schools*, PERB Case No. 94-N-06, Slip Op. No. 403 (1994) that the "give-and-take" lasts at least until that last day of mediation. It is equally clear that this "give-and-take" period has expired by the time the parties submit their "last best offers" in interest arbitration. *Doctors' Council*, PERB Case No. 07-N-01, Slip Op. No. 921.

In this instance, the mediation between the parties ended on January 14, 2009, (before UDC made its February 20, 2009 declaration of non-negotiability), the next step in the process would be to proceed to interest arbitration pursuant to D.C. Code §§ 1-617.17(f)(2), (3), and PERB Rule 527.5.[2] "The last best offer of each party shall be the basis for such automatic impasse arbitration." *Id.* The Board recognizes that, unlike the factual scenario in *Doctors' Council*, Slip Op. No. 921, the parties had not submitted their "last best offers," and that the

[2] In an interest arbitration proceeding, the PERB Executive Director appoints a Board of Arbitration "to investigate the labor-management issues involved in the dispute, conduct whatever hearing it deems necessary, and issue a written award to the parties with the object of achieving a prompt and fair settlement of the dispute." *Id.*

parties' interest arbitration positions were not yet fixed. See *id.* However, under the totality of circumstances in this case, where impasse had been declared and mediation failed, and only the mere opportunity for additional negotiations continued to exist hypothetically after UDC's declaration of non-negotiability, the Board cannot consider such a declaration timely. In *Doctors' Council*, PERB Case No. 07-N-01, Slip Op. No. 921, for instance, a declaration of non-negotiability was deemed untimely after the last best offers had been made even though the parties could still have agreed to alter their offers in the arbitration process with mutual consent. See *id.* Although there may have been some slight opportunity for give-and-take negotiations between the parties, under the totality of the circumstances, the Board determined that collective bargaining had, in fact, ended. Here, there may have been further opportunity for bargaining (if only because neither party finalized their positions through a last best offer). Still, no forum or obligation was present for either party to engage in the give-and-take that is the hallmark of collective bargaining, after mediation closed. Collective bargaining effectively ceased at the end of mediation.

Any other holding would undermine the salutary purposes of the CMPA by permitting an agency to subvert the collective bargaining process:

> In the present case, as in the prior case [Slip Op. No. 299], a contrary holding could undermine the process of good faith give-and-take that constitutes collective bargaining negotiation since it would allow one party to secretly reserve to itself the unilateral ability to remove aspects of the other party's proposals from the process only after the other party's opportunity to modify its positions had ceased.

Doctors' Council, PERB Case No. 07-N-01, Slip Op. No. 921, at 5-6.

As in *Doctors' Council*, Slip Op. No. 921, the Board will not permit UDC, or any other District Agency, to conceal its objections to the Union's proposals throughout negotiations, and wait until after the last opportunity for meaningful give-and-take had passed to make its objections known. To do so would allow UDC to change the course of interest arbitration without permitting the Union the opportunity to adequately adjust to the new landscape. Such action only serves to undercut the purpose of creating "an effective collective bargaining process" which "will improve the morale of public employees and the quality of service to the public." D.C. Code § 1-617.01(a).

Moreover, the fact that the parties later returned to the bargaining table, at the behest of the Board's Executive Director, does not alter this analysis. By that stage in the proceedings, there was no obligation by either party to continue negotiations. Even though the possibility remained that the parties *might* resume talks (and later did so), the parties were at an impasse and mediation had ended as of January 14, 2009. The *possibility* of future negotiation and settlement always exists—even if the parties are in interest arbitration and have made their last best offers-the parties could voluntarily choose settlement. That possibility does not mean that UDC made its declaration while there was the opportunity for good faith give-and-take, which is the

hallmark of collective bargaining. In the instant matter, the February 20, 2009 letter came after mediation ended, and, because there was no platform for negotiations, it did not come "in connection with collective bargaining." *Doctors' Council*, Slip Op. No. 921 at p. 5.

The Board also rejects UDC's implication that the 2005 amendment to the management rights provisions of the D.C. Code at § 1-617.08(a-1) allows the District to assert management rights after bargaining has ended so long as the declaration of non-negotiability came before the parties made their last best offers. Rather, the Board finds that D.C. Code § 1-617.08(a-1) does not impact the Board's conclusion that UDC's declaration of non-negotiability was untimely, nor does it provide the District free rein to declare proposals non-negotiable after collective bargaining has ended. Doing so would undermine the collective bargaining process. Instead, D.C. Code § 1-617.08(a-1) simply provides that: "[a]n 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." *Id.*[3] Here, UDC did not issue its February 20, 2009 letter "when bargaining" and waited until after bargaining closed to declare terms non-negotiable. UDC may not, therefore, undermine the bargaining process by raising issues of negotiability after bargaining ended.

In view of the above, clearly, all phases of collective bargaining had ceased prior to the non-negotiability assertions in the February 20, 2009 letter. Thus, under the circumstances of this case, UDC's February 20, 2009 declaration of non-negotiability is untimely, occurring for the first time after bargaining had ceased. As a result, we make no finding concerning the sufficiency or merits of UDC's objections to the Union's proposals. On this procedural basis, and without reaching any determination as to the substantive merits of the Respondent's non-negotiability assertions, the Board grants the Union's appeal. In the present case, "a contrary holding could undermine the process of good faith give-and-take that constitutes collective bargaining negotiation since it would allow one party to secretly reserve to itself the unilateral ability to remove aspects of the other party's proposals from the process only after the other

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[3] In *District of Columbia Fire and Emergency Services v. American Federation of Government Employees, Local 3721*, PERB Case No. 06-N-01, Slip Op. No. 874 (2007), the Board held that the amendment to the management rights provision of the CMPA confirms the Board's precedent that:

> (1) if management has waived a management right in the past (by bargaining over that right) this does not mean that it has waived that right (or any other management right) in any subsequent negotiations;
>
> (2) management may not repudiate any previous agreement concerning management rights during the term of the agreement;
>
> (3) nothing in the statute prevents management from bargaining over management rights listed in the statute if it so chooses; and
>
> (4) if management waives a management right currently by bargaining over it, this does not mean that it has waived that right (or any other management right) in future negotiations.

party's opportunity to modify its positions had ceased." *Doctors Council*, Slip Op. No 921 at pgs. 5-6.

Thus, we find no merit to UDC's argument. UDC's January 13, 2009 letter did not provide a declaration of non-negotiability to the Union that: (1) would trigger an appeal; and (2) was consistent with the requirements set forth in the Board Rules and Board precedent that requires a declaration of non-negotiability to put a party on notice that its proposals had been clearly and unambiguously rejected. In addition, the February 20, 2009 letter, which only addressed UDC's objections to certain provisions of the Sixth Master Agreement, is untimely because it was not provided to the Union until after collective bargaining ended. As a result, the Board finds it need not address the merits of negotiability of the issues addressed in the Union's Appeal.

Although the appeal is granted, the Board declines to proceed on the merits of the appeal because the basis for the appeal, UDC's declarations of non-negotiability, were initially insufficient, and its subsequent submission was untimely.

ORDER

IT IS HEREBY ORDERED THAT:

1. The University of the District of Columbia Faculty Association's Negotiability Appeal is granted for the reasons set forth above.

2. 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.

June 9, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 09-N-02 was served via FAX and U.S. Mail to the following parties on this the 9th day of June, 2011.

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