Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Protective Services Police Department Labor Committee	
Petitioner	PERB Case No. 15-N-02
and	Opinion No. 1532
Department of General Services	
Respondent	

DECISION AND ORDER

I. Statement of the Case

This matter involves a Negotiability Appeal filed by the Fraternal Order of Police/Protective Services Police Department Labor Committee ("FOP" or "Union") in the above-captioned proceeding. FOP and the Department of General Services ("DGS" or "Agency") are engaged in bargaining concerning noncompensation matters. FOP's Appeal concerns the negotiability of several of FOP's counterproposals to DGS.

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, which has been declared nonnegotiable by the party responding to the proposal.[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

[1] *See* Board Rule 532.1

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."[2]

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.[3] The subject(s) of a negotiability appeal and the context in which its negotiability is appealed is determined by the petitioner, not the party declaring the matter nonnegotiable.[4] The Board reviews the proposals in dispute and separately addresses each in light of the statutory dictates and relevant case law.

III. Analysis of Proposals

FOP appealed the negotiability of the following four (4) proposals:

Proposal No.1:

Article 11 – Personnel Files[5]

> Section D
> The Employer shall keep sealed all material relating to an employee's background investigations, arrest records, fingerprint cards, and other confidential matters in a separate envelope within his personnel file, and it shall restrict access to that envelope to those with authorization from the Employer Director or the employee.

The Agency contests this proposal's negotiability based on D.C. Official Code § 1-631.05(2), which prohibits certain confidential information from being disclosed to the employee. The Agency argues that the plain language and effect of the Union's proposal permits prohibited disclosure of confidential information.[6]

The Union argues that information would continue to be confidential, unless there is express consent by the "Employer Director" and the employee. The Union asserts that confidentiality is protected by requiring dual party consent to the disclosure.[7]

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[2] *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).
[3] 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.
[4] *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).
[5] The Agency withdrew its nonnegotiability position for the Union's proposal for Article 11 – Personnel Files, Section C. The Board finds that the Article 11, Section C negotiability appeal is moot.
[6] Answer at 3-4.
[7] Appeal at 4.

The Board finds the proposal is nonnegotiable, because it circumvents the policy found in D.C. Official Code § 1-631.01. The Union's intent to require dual consent by the Employer Director and employee conflicts with the District of Columbia's policy found in D.C. Official Code § 1-631.01:

> All official records of the District government shall be established, maintained, and disposed of in a manner designed to ensure the greatest degree of applicant or employee privacy while providing adequate, necessary, and complete information for the District to carry out its responsibilities under this chapter. Such records shall be established, maintained, and disposed of in accordance with rules and regulations issued by the Mayor.

The Union's proposal would permit an employee prevent disclosure of information that is necessary to the District for carrying out its duties under § 1-631.01, *et seq*. For instance, sections 1-631.02 and 1-631.03 discuss disclosure of certain information to the Civil Service Commission, and personnel and law enforcement authorities, which may be prevented from disclosure by a lack of consent from an employee.

The Board finds that the Union's proposal prevents disclosure necessary for the District to carry out its responsibilities under § 1-631.01, *et seq*. Therefore, the Union's proposal is contrary to law and is nonnegotiable.[8]

Proposal No. 2:

> Article 16: Grievance Procedure
>
> Section C(1)(c)
> The fact that a grievance, regardless of its ultimate disposition, is raised by or on behalf of an employee shall not be recorded in the employee's personnel file or other record without the employee's written consent; nor such fact be used for any recommendation for job placement; nor shall an employee be placed in jeopardy or be subject to reprisal for having followed this Grievance Procedure.

The Agency argues that the proposal is nonnegotiable, because "D.C. Official Code §1-631.05 permits a record of official personnel action to be placed in the Official Personnel Folder (OPF) without the consent of the employee."[9] In addition, the Agency asserts that § 1-631.03 requires personnel information be available upon request by personnel or law enforcement officials.[10]

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[8] *AFGE and D.C. Dep't of Public Works and D.C. Office of Property Management*, Slip Op. No. 965, PERB Case No. 08-N-02 (2009).
[9] Answer at 4.
[10] *Id*.

The Union argues that the proposal is negotiable, because a grievance is not an "official personnel action" under D.C. Official Code § 1-631.05, as argued by the Agency.[11]

D.C. Official Code § 1-603.01(10) defines "grievance" as:

> any matter under the control of the District government which impairs or adversely affects the interest, concern, or welfare of employees, but does not include adverse actions resulting in removals, suspension of 10 days or more, or reductions in grade, reductions in force or classification matters. This definition applies to matters which are subject to procedures established pursuant to section § 1-616.53 and is not intended to restrict matters that may be subject to a negotiated grievance and arbitration procedure in a collective bargaining agreement between the District and a labor organization representing employees.

The definition of grievance categorically excludes adverse actions. The Agency argues that a grievance is the same as "[t]he official personnel action document effecting the corrective or adverse action…."[12] The Agency's definition of a grievance is contrary to D.C. Official Code § 1-603.10(10). The Board finds that a grievance and an "official personnel action" are not the same.

The Agency argues that it should be able to place a grievance in an employee's personnel file. There is no statutory requirement that a grievance must be placed in an employee's OPF. Further, D.C. Official Code §§ 1-631.05(b)[13] and (c)[14] permit the removal of "irrelevant," "immaterial," and "untimely" information from an employee's OPF. Therefore, the Agency has discretion over whether a grievance is placed in an employee's OPF.[15]

Notwithstanding the Union's argument and the Agency's discretion to place a grievance in an employee's OPF, the language of the proposal includes "or other record," which is overbroad. This language prevents any recordkeeping of a grievance without the consent of an employee. This language is contrary to law, as the proposal interferes with the policy that the

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[11] Appeal at 5.
[12] Answer at 4.
[13] D.C. Official Code § 1-631.05(b) states, "Each employee shall have the right to present information immediately germane to any information contained in his or her official personnel record and seek to have irrelevant, immaterial, or untimely information removed from the record."
[14] Subsection (c) states, "For the purpose of this subchapter, information other than a record of official personnel action is untimely if it concerns an event more than 3 years in the past upon which an action adverse to an employee may be based. Immaterial, irrelevant, or untimely information shall be removed from the official record upon the finding by the agency head that the information is such a nature. Prior to the removal of any information in the file, the employer shall notify the employee and give him or her an opportunity to be heard."
[15] The Board notes that filing a grievance is protected activity under the CMPA. *Rodriguez v. D.C. Metropolitan Police Department*, Slip Op. No. 906, PERB Case No. 06-U-38 (2008); *Teamsters Local Union No. 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 D.C. Reg. 5585, Slip Op. No. 375 at pgs. 3-4, PERB Case No. 93-U-11 (1996).

District maintain records to carry out its responsibilities. Therefore, the Board finds that the proposal is contrary to law and nonnegotiable.

Proposal No. 3:

> Article 30 – Reductions in Force and Furloughs.
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> Section A
> No later than 30 days prior to notifying employees, the Employer shall provide the Union with advanced notice of its intention to conduct a reduction in force.
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> Section B
> No later than 7 days prior to notifying affected employees, the Employer shall provide the Union with a final copy of the retention register as described in Chapter 24 of the District Personnel Manual.
>
> Section C
> Upon request, the Employer will engage the Union in impact and effects bargaining over a planned reduction in force prior to notifying affected employees.

The Agency argues that all three of these proposals are nonnegotiable, because they impose additional requirements on the Agency for implementing a reduction-in-force ("RIF").[16]

The Union argues that the proposals do not interfere with the Agency's procedures concerning a RIF, and that the proposals only address the Agency's duty to engage in impact and effects bargaining.[17]

The Omnibus Personnel Reform Amendment Act of 1997 ("Abolishment Act") codified in D.C. Official Code § 1-624.08(a), states, in pertinent part, 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." RIFs are a management right under D.C. Official Code § 1-617.08.[18] 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.[19] The Abolishment Act authorizes agency heads to

[16] Answer at 5-7.
[17] Appeal at 6-7.
[18] *Doctors' Council of D.C. v. D.C. 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).
[19] *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

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.[20] 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."[21] As a result, a proposal that would alter RIF procedures is nonnegotiable.[22]

All of the proposed provisions by the Union create conditions precedent on the Agency prior to the implementation of a RIF that affect the procedures of the Agency to impose a RIF. Even though the Union's purported intent is to exercise its right to impact and effects bargaining, the language of all three provisions places procedural restraints on the Agency to implement a RIF. Therefore, the Board finds the three sections concerning RIFs contrary to law and nonnegotiable.

Proposal No. 4:

> Article 32 – Licenses
>
> 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.

DGS asserts that the proposal concerns wages and benefits, and is "presumptively objectionable and should not be negotiated" during noncompensation bargaining.[23] DGS relies upon the Board's decision in *D.C. Fire and Emergency Medical Services Department v. American Federation of Government Employees, Local 3721* (*AFGE).*[24] In that case, AFGE proposed the following: "The Employer agrees that it will not discriminate on any basis and that the compensation provided to unit employees shall be no different than for any other employee performing the same work." The Board held that the proposal was "nonnegotiable as a working condition and should be addressed in compensation negotiations because it concerns wages."[25] Based on this language, DGS argues that reimbursement of licensing fees should be negotiated during compensation bargaining.

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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).

[20] D.C. Official Code § 1-624.08(a)-(i), (k).

[21] D.C. Official Code § 1-624.08(j).

[22] *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).

[23] Answer at 7.

[24] Slip Op. No. 874, PERB Case No. 06-N-01 (2007).

[25] *AFGE* at 23-24.

FOP asserts that "coverage of licensing fees for weapons is neither a wage nor a benefit under Board precedent."[26] FOP argues that "a protective officer would be unable to carry out her duties to the Employer in the absence of either 1) a secured place to store her weapon at work; or 2) a safe and lawful means to transport and store that weapon at home."[27]

DGS relies upon *AFGE*, as discussed above in support of its position that the proposal is nonnegotiable. The Board can differentiate the union's proposal in *AFGE*, from the present case. In *AFGE*, the Board found a proposal was nonnegotiable because it concerned "wages."[28] The *AFGE* case addressed total compensation for employees. FOP's licensing proposal concerns reimbursement for licensing fees for a small subset of employees, contingent upon the availability of secured lockers. D.C. Official Code § 1-617.17(b) dictates 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, premium pay, hours and any other compensation matters." FOP's proposal does not concern total compensation for a broad range of occupational groups, as envisioned under the CMPA.

Additionally, the Board found in *AFGE* that the proposal's language prohibiting discrimination, if separated from the compensation language, would have been negotiable during noncompensation bargaining. The Board finds that the proposal in the preset matter cannot be as easily cleaved into compensation and noncompensation proposals, because the compensation proposal is activated only if the Agency fails to provide secured lockers. In contrast, the *AFGE* proposal concerning equal compensation failed to depend upon the nondiscrimination clause.

DGS does not dispute that both the lockers and the reimbursement are negotiable. Further, DGS does not dispute that the terms of FOP's licensing proposal are contingent upon DGS providing a secured locker for weapon storage for a small group of employees, and the terms cannot be separated into compensation and noncompensation proposals. DGS disputes the timing of the negotiations over the reimbursement.[29] As noted above, D.C. Official Code § 1-617.08(b) provides, "[A]ll matters shall be deemed negotiable, except those that are proscribed by this subchapter," which the Board has held creates a presumption of negotiability. Based on the presumption of negotiability and the absence of any contrary case law, the Board finds that FOP's proposal is negotiable.

[26] Appeal at 7-8.
[27] Appeal at 8.
[28] *AFGE* at 24.
[29] In a negotiability appeal, language in a proposal contained "the Agency shall supply and pay for the training of employees for whom such licensing or certification is required as part of their job requirements." Although the Board ordered further briefing on other grounds, it did not dismiss the appeal on the grounds that it contained compensation bargaining. *AFGE and D.C. Dep't of Public Works and D.C. Office of Property Management*, Slip Op. No. 965 at p. 24, PERB Case No. 08-N-02 (2009).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Article 11, Section C proposal is moot.
2. The following proposals are nonnegotiable:
    a. Article 11, Section D
    b. Article 16, Section C(1)(c)
    c. Article 30, Section A
    d. Article 30, Section B
    e. Article 30, Section C
3. Article 32, Section C is 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.

June 25, 2015

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-N-02 was served to the following parties via File & ServeXpress on this the 31st day of July 2015:

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