GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Committee of Interns and Residents,	
Petitioner,	PERB Case No. 92-N-01 Opinion No. 301
and	
D.C. General Hospital Commission,	
Respondent.	

DECISION AND ORDER ON NEGOTIABILITY APPEAL

On November 27, 1991, the Committee of Interns and Residents (CIR) filed a Negotiability Appeal (Appeal) with the District of Columbia Public Employee Relations Board (Board) pursuant to Board Rule 532.3. The Appeal concerned various matters which were declared nonnegotiable by D.C. General Hospital Commission (DCGH) during the negotiations with CIR for an initial collective bargaining agreement. [1]/

[1]/ CIR's Appeal initially contained negotiability issues concerning seven proposals. However, as a result of subsequent discussions between the parties and mediation efforts, the parties successfully resolved issues concerning four of the proposals entitled "Libraries", "Out-of-Title Assignment", "Appeal or Arbitral Review of Disciplinary Action", and "Successorship". CIR withdrew these matters from further consideration by the Board by letters filed January 31 and February 28, 1992. Issues are still outstanding on the three remaining proposals concerning pay level, allowance for books, journals and equipment, and holiday pay.

On February 6, 1992, CIR filed a Motion for Permission to Submit Additional Information. The additional information concerned CIR's successorship proposal. In view of the parties' resolution of that issue and CIR's withdrawal of the proposal, the motion has been rendered moot.

By letter dated December 2, 1991, the Executive Director of the Board advised DCGH of its right to file a response to the Appeal with the Board by December 20, 1991. Following a grant of DCGH's request for an extension of time, DCGH timely filed its Response on January 3, 1992. Based on various arguments and assertions addressed below, DCGH contends that CIR's proposals, concerning pay level, allowance for books, journals and equipment, and holiday pay are not mandatory subjects of bargaining. Rather, DCGH asserts that these subjects are permissive areas of bargaining and as such, DCGH does not "los[e] the right, at any time before agreement is reached, to take a firm position that the matter shall not be included in a contract between the parties. [citations omitted]." (Resp. at 5.) [2]/

We have reviewed the parties' pleadings and conclude for the following reasons that CIR's proposals concerning pay levels and allowances for books, journals and equipment are negotiable; its proposal concerning holiday pay, however, is nonnegotiable.

The Board has declined to assert jurisdiction over a negotiability appeal when the dispute is not over an issue concerning the negotiability of the proposal, but rather a contention (as we have here) that a party may elect not to negotiate. 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). The latter issue focuses on a parties' obligation to bargain over the subject matter under specific circumstances rather than the general negotiability of the subject matter itself under the CMPA.

---

[2]/ The term "permissive" subject of bargaining has developed as a term of art to distinguish mandatory subjects of bargaining under the National Labor Relations Act (NLRA) from those subjects not expressly authorized under the NLRA and therefore are considered issues over which the parties may bargain. The distinc-tion between mandatory, voluntary or "permissive" subjects of bargaining was first made by the Supreme Court in NLRB v. Wooster Division of the Borg-Warner Corporation, 356 U.S. 342 (1958). There the Court observed that the duty to bargain under the NLRA is limited to those subjects enumerated thereunder, i.e., "wages, hours and other terms and conditions of employment." Those subjects falling outside of this enumeration, that were not prohibited by the NLRA or illegal, were characterized as "permis-sive." Unlike the NLRA, however, the Comprehensive Merit Personnel Act (CMPA) expressly authorizes that "[a]ll matters shall be deemed negotiable except those that are proscribed by this subchapter, [i.e., the Labor-Management Relations section of the CMPA]."

Negotiability Appeals limited to duty or obligation-to-bargain questions are not properly resolvable under negotiability proceedings. Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and District of Columbia Public Schools, 38 DCR 1586, Slip Op. No. 263, Proposal No. 16, PERB Case Nos. 90-N-02, 03 and 04 (1990). Cf., Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, v. District of Columbia Public Schools, 38 DCR 6698, Slip Op. No. 267 at n.9, PERB Case No. 90-U-05 (1990) and Teamsters Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. D.C. Public Schools, 38 DCR 96, Slip Op. No. 249 at n.4, PERB Case No. 89-U-17 (1990). DCGH has employed the term "permissive", however, rather loosely to encompass arguments which give rise to questions concerning the negotiability of these proposals as well. We shall therefore proceed to address these arguments below. See, e.g., Fraternal Order of Police, MPD Labor Committee and Metropolitan Police Department, 38 DCR 847, Slip Op. No. 261, PERB Case No. 90-N-05 (1990).

Proposal No. 1

Pay Level

Section 1 - Starting Pay Level

A housestaff officer who has not completed at least one year of service in an ACGME/ADA/AOA approved program shall be paid at the PGY-1 level.

Section 2 - Pay Credit for Prior Training

A. Pay level credit shall be granted for years of prior service satisfactorily completed in another ACGME/ADA/AOA approved program below:

a. For up to two (2) years in the HSO's same specialty area;
b. for up to one (1) year in another specialty area; and/or
c. for all years where such service was a prerequisite.

(e.g. A HSO who is given two years of credit for prior service shall be paid at the PGY-3 level)

B. Pay credit may be granted at the Department Chair's sole discretion for prior service in a non-approved program.

Section 3 - Pay Level Advancement

Following initial placement (as in Sections 1-2 above), a housestaff officer who successfully completes his/her service for a year and is reappointed to serve for an additional year shall be advanced to the next higher PGY level.

This proposal is referred to in the parties' pleadings as "Payroll Credit for Previous Training and Experience." Notwithstanding DCGH's characterization of this proposal as a "permissive" subject of bargaining, its only contention is that it has no obligation to bargain over it in accordance with a provision of an October 23, 1989 Memorandum of Understanding (MOU) between the parties. In relevant part, the MOU provides: "[s]pecifically excluded from collective bargaining are the following, in addition to those matters specifically prohibited by the CMPA: ...(f) [s]election, evaluation, advancement, reappointment and determination of the appropriate post-graduate year of Housestaff officers[.]" DCGH further asserts that although the proposal appears to address pay levels, CIR indirectly attempts to negotiate matters excluded by the MOU by requiring DCGH "to credit previous educational training the affiliate schools may have chosen not to credit." (Resp. at 3.)

DCGH's contention, however, is misplaced. CIR's proposal does not attempt to establish credit or the criteria for determining credit for educational or training experiences. Rather, the proposal merely assigns pay levels to certain educational and training experiences; the establishment of which is left unaddressed by the proposal. Moreover, no provision in the proposal either directly or indirectly attempts to inject into the collective bargaining process, the "[s]election, evaluation, advancement, reappointment and determination of the appropriate post-graduate year of Housestaff Officers[.]" The proposal addresses issues concerning compensation, a subject neither party disputes, and we have clearly found, is within the scope of collective bargaining. We therefore, find it

negotiable. [3]/

Proposal No. 2

Book, Journal and Equipment

Each HSO [House Staff Officers] shall receive a cash allowance to purchase medical books, journals, and equipment at the following rates:

$250 - 1990-91 residency year
$350 - 1991-92 residency year
$500 - 1992-93 residency year

The hospital shall provide this allowance within thirty (30) days of the HSO's effective date of hire.

DCGH does not contend that this proposal is preempted by the CMPA or other law. Rather it contends that the subject matters addressed by this proposal "do not come under the purview of wages, hours, and working conditions, do not affect the employment relationship and are therefore permissive subjects of negotiations." (Agency Resp., First Negot. Appeal at 2.) [4]/ DCGH concedes that while it recognizes that compensation is a negotiable subject of bargaining, it contends that setting aside or allocating "specific monies for medical books, journals, and equipment" are expenditures that "directly relate[] to the education and training component of the housestaff officer's appointment." Id. Implicit in this contention is that these "housestaff officers" do not fully possess the status and attending rights of employees under the CMPA. Therefore, DCGH would argue that they are not entitled, in all respects, to the

---

[3]/ We find any suggestion by DCGH that the parties' MOU relieves it of its obligation to bargain over an otherwise negotiable subject at this time, evokes issues concerning the duty to bargain over which we lack jurisdiction to rule in a negotiability appeal. See, Teamsters Local Union 639 a/w IBTCWH, AFL-CIO and DCPS, supra and District of Columbia Fire Department and American Federation of Government Employees, Local 3721, 35 DCR 6361, Slip Op. No. 188, PERB Case No. 88-N-02 (1988).

[4]/ CIR had filed an earlier negotiability appeal, PERB Case No. 91-N-02, which it subsequently withdrew. That negotiability appeal addressed essentially the same proposals and issues contained in the instant Appeal. DCGH incorporated by reference in its instant Response the contentions and arguments it made in response to that negotiability appeal which we cite above.

rights associated with and conferred upon employees by the CMPA.

This bargaining unit was determined to be an appropriate unit of employees for purposes of collective bargaining within the meaning of D.C. Code Sec. 1-618.9(a) in Committee of Interns and Residents and D.C. General Hospital, 37 DCR 740, Slip Op. No. 237, PERB Case No. 89-R-02 (1990). This fact having been established, DCGH's contention ignores the broad definition accorded the scope of collective bargaining under the CMPA with respect to employees' right to bargain collectively. See D.C. Code Sec. 1-618.6(a)(3). As previously noted, supra at n.2, D.C. Code Sec. 1-618.8(b) provides that "[a]ll matters shall be deemed negotiable except those that are proscribed by this subchapter, [i.e., the Labor-Management Relations section of the CMPA]." It further provides that "[n]egotiations concerning compensation are authorized to the extent provided in Section 1-618.16."

CIR states that its proposal provides for "cash allowances" to purchase medical books, journals and equipment is directly related to these employees' work. DCGH's only response to this averment merely addresses the merits and practicality of the proposal, which is irrelevant to determining its negotiability. As such, we find the subject matter of the proposal "derives from and responds to the nature of these officers' duties" in the context in which they are employed by DCGH. See, Fraternal Order of Police/MPD Labor Committee and Metropolitan Police Department, supra, Slip Op. No. 261 at 5. The rights of these employees under the CMPA are not restricted or extinguished simply because training and education is an integral part of their employer-employee relationship. [5]/ We therefore find that CIR's proposal is within the scope of collective bargaining.

---

[5]/ DCGH, once again, cites to a provision contained in the parties' MOU as a basis for preempting its obligation to bargain over this proposal. The provision states: "Specifically excluded from collective bargaining are the following, in addition to those matters specifically prohibited by the CMPA: (a) The content and structure of house staff training programs and changes therein, within applicable standards and guidelines[.]" As we noted, previously, supra at n.3, such arguments concern the duty to bargain and not the negotiability of the proposal, which is the focus of this proceeding. It appears, however, that the contractual provision addresses a noncompensation matter while CIR's proposal concerns a compensation matter.

Proposal No. 3

Holidays

Section 1

Housestaff shall receive the same paid holidays off as outlined per the CMPA.

Section 2

Housestaff who are required to work any part of the holiday designated by the CMPA shall, at the HSO's choice, be provided with either an alternate day off (alternate day must be mutually agreed upon by the HSO and the department) or compensation at double time the number of hours worked based upon the HSO's hourly rate of pay calculated on a forty (40) hour work week.

In the main, DCGH contends that pursuant to D.C. Code Sec. 1-613.2(e) "[t]he Mayor shall prescribe rules regulating governing the pay and leave of employees in connection with legal public holidays and other designated nonworkdays." In this regard, DCGH cites Chapter 12, subpart 3.4 A. 3. of the District Personnel Manual (DPM), which specifically excludes "employees paid by stipend" (as are these employees) from being entitled to legal holidays.

While CIR correctly observes, in support of the negotiability of its holiday-pay proposal, that compensation is clearly included within the scope of collective bargaining under the CMPA (See D.C. Code Sec. 1-618.8(b), Sec. 1-618.18, and Sec. 1-618.17), CIR fails to recognize the distinction between holiday pay and compensation. While both involve the receipt of pay, compensation by its very definition is remuneration for time worked. Pay received for holidays, as D.C. Code Sec. 1-613.3(e) provides, is for "legal public holidays and other designated nonworkdays." (Emphasis added.) Even remuneration for leave is earned compensation based on the amount of time an employee actually worked.

On the other hand, legal public holidays and holiday pay are not earned but rather legislatively established and mayorally provided, respectively. CIR's characterization of legal holiday pay as compensation and its arguments premised upon this characterization are therefore misplaced. As a proposal concerning holiday pay, DCGH correctly observed that legal public holiday pay is determined by the Mayor as provided under D.C.

Code Sec. 1-613.3(e). Pursuant to this statutory provision, the Mayor's exclusion of "employees paid by stipend" from entitlement to legal public holiday pay is controlling with respect to these employees. Chapter 12, subpart 3.4 A. 3 of the DPM. We therefore find this proposal nonnegotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Committee of Interns and Residents' (CIR) proposals concerning:

   a. Pay Level and
   b. Allowance for Books, Journals and Equipment

   are within the scope of collective bargaining and therefore negotiable. [6]/

2. CIR's proposal concerning holiday pay is not within the scope of collective bargaining with respect to these employees and is therefore nonnegotiable.

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

March 12, 1992

---

[6]/ In finding these proposals negotiable the Board expresses no opinion concerning their merit.