Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Department of Youth Rehabilitation Services,	
Petitioner,	PERB Case No. 17-N-01
v.	Opinion No. 1623
Fraternal Order of Police/Protective Services Police Department Labor Committee,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The Department of Youth Rehabilitation Services ("DYRS" or "Agency") filed a Negotiability Appeal ("Appeal") of the Fraternal Order of Police/Protective Services Police Department Labor Committee's ("FOP" or "Union") written declaration of non-negotiability of DYRS's proposal regarding the procedure by which employees may request leave. FOP filed a timely Answer to the Appeal. For the reasons stated below, the Board finds the proposal at issue in this case negotiable.

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.[1]

[1] *See* Board Rule 532.1

There are three categories of collective bargaining subjects: (1) mandatory subjects over which parties must bargain; (2) permissive subjects over which parties may bargain; and (3) illegal subjects over which 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 are determined by the petitioner, not the party declaring the matter nonnegotiable.[4]

DYRS appealed the negotiability of the following proposal: "Any request for a leave of absence shall be submitted in accordance with the applicable Agency policy."[5] DYRS argues that this proposal is negotiable based on the presumption of negotiability because D.C. Official Code § 1-617.01 et seq. does not expressly proscribe negotiations regarding the procedure to request leave.[6]

FOP does not dispute that the procedure for requesting leave is negotiable.[7] In fact, both FOP and DYRS agree there is no prohibition on negotiations regarding the procedure to request leave. FOP contested this proposal's negotiability on the ground that it would give the employer "unfettered discretion" over a mandatory subject of bargaining.[8] To support this claim FOP looks to a D.C. Circuit case, *McClatchy Newspapers, Inc. v. National Labor Relations Board*,[9] which states that management may not insist upon negotiating over a proposal pertaining to a mandatory subject of bargaining that would be destructive of collective bargaining and would require the Union to waive its right to bargain over such an important subject.[10]

The Board finds that this proposal is negotiable. 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." The language of the statute is clear that all matters are presumed negotiable unless proscribed by law. FOP claims that the proposal requires the Union to waive its right to bargain over a mandatory subject of bargaining. FOP is misstating the meaning of negotiability. The parties must negotiate over DYRS's proposal; FOP need not agree to it. By claiming that the proposal is nonnegotiable, FOP is in fact refusing to bargain over what they acknowledge is a mandatory subject of bargaining.

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[2] *D.C. Nurses Ass'n v. D.C. Dep't of Pub. Health*, 59 D.C. Reg. 10,776, Slip Op. No. 1285 at p. 4, PERB Case No. 12-N-01 (2012) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1975)).
[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).
[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] Appeal at 3.
[6] *Id.* at 5.
[7] Opposition at 3.
[8] *Id.*
[9] 131 F.3d 1026 (D.C. Cir. 1997).
[10] Opposition at 3.

The *McClatchy* decision, relied on by FOP, refers to a general rule permitting an employer to unilaterally impose its last offer after reaching impasse with a union.[11] The District of Columbia imposes no such rule on unions, as FOP noted in its Opposition.[12] *McClatchy's* conclusion that this type of rule can be destructive of collective bargaining is not relevant in the absence of such a rule.

Rather than impose the employer's last offer, D.C. agencies and unions have the option to submit to impasse procedures. If after a reasonable period of negotiations, further negotiations appear to be unproductive then the parties may submit a request for impasse resolution under PERB Rule 527.1. District agencies and unions are under no obligation to accept any proposal made by the other party. If FOP believes that DYRS is refusing to bargain in good faith and has committed an unfair labor practice by violating the provisions of § 1-617.04, FOP may file an unfair labor practice complaint. Based on the presumption of negotiability and the absence of any contrary case law, the Board finds that DYRS's proposal is negotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The proposal of the Department of Youth Rehabilitation Service is negotiable.

2. 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, and Members Ann Hoffman and Douglas Warshof.

April 13, 2017
Washington, D.C.

[11] *McClatchy Newspapers, Inc. v. N.L.R.B.*, 131 F.3d 1026, 1029–30 (D.C. Cir. 1997).
[12] Opposition at 3.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 17-N-01, Op. No. 1623 was sent by File and ServeXpress to the following parties on this the 16th day of May, 2017.

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