THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

District of Columbia Fire and Emergency Medical Services Department,	
Agency,	**PERB Case No. 06 -N-01**
and	**Opinion No. 874**
American Federation of Government Employees, Local 3721,	
Labor Organization.	

DECISION AND ORDER ON NEGOTIABILITY APPEAL

I. Background

Pursuant to Rule 532.1 of the Public Employees Relations Board ("Board"), the District of Columbia Fire and Emergency Medical Services Department ("FEMS" or "Agency"), through its representative, the Office of Labor Relations and Collective Bargaining ("OLRCB"), filed a Negotiability Appeal for negotiations concerning terms and conditions of employment other than compensation between FEMS and the American Federation of Government Employees, Local 3721 ("AFGE" or "Union").

On August 9, 2005, FEMS informed AFGE that it considered several articles contained in AFGE's proposals to be nonnegotiable.[1] At issue are seventeen (17) proposals contained in AFGE's Last Best Offer, which FEMS declared nonnegotiable.

[1]On May 5, 2006, the Board determined that the parties were at impasse. AFGE's proposals were contained in the "Last Best Final Offer," submitted on June 22, 2005.

Union's Position on the Amendment at D.C. Official Code § 1-617.08(a-1) (Supp. 2005)

The Union asserts that "[i]n drafting proposals for this current round of collective bargaining, the Union was guided by the subjects the parties had negotiated in their 1989 and 1992 negotiations. Also, the Union notes that it patterned several proposals based on subjects found in the International Association of Firefighters (IAFF) Local 36, 2004 collective bargaining agreement and that OLRCB represented the agency in negotiations for that agreement as well as the current agreement. (See Reply to Negotiability Appeal, "Reply" at p. 3).

The Union argues that the proposals which OLRCB finds objectionable are based on proposals that have been previously discussed and agreed to during previous negotiations. Therefore, the Union asserts that OLRCB's position that the proposals are illegal, is inconsistent with its prior conduct. In addition, the Union maintains that OLRCB's position is inconsistent with District law, which allows for permissive subjects of bargaining. (See Reply at p. 4).

The Union asserts that the Comprehensive Merit Personnel Act ("CMPA") has always contained the following language at D.C. Code § 1-617.08(b): "all matters shall be deemed negotiable except those that are proscribed by this subchapter". Further, the Board "has interpreted the CMPA as creating three distinct subjects of bargaining, 'mandatory', 'permissive' and 'illegal'. A mandatory subject is one over which the parties must bargain; permissive subjects are those over which the parties may bargain and illegal subjects are those over which the parties may not bargain. See *D.C. Public Schools and Teamsters Local 639 and 730*, 38 DCR 2487, PERB Case No. 91-N-01 (1991)". (Reply at p. 3). The Union further cites *Teamsters Local 639 v. District of Columbia et al.*, 631 A.2d 1205 at pgs. 1208, 1211 (D.C. 1993), noting that the D.C. Court of Appeals upheld the Board's finding that various bargaining proposals did not violate the CMPA and were permissive subjects of bargaining.[2] (See Reply at p. 4).

With regard to the amendment to the CMPA, the Union asserts that OLRCB's legislative agenda included "two distinct attacks on the rights on the rights of employees: . . . [1] eliminating permissive subjects of collective bargaining; and [2] expanding subjects of collective bargaining the are proscribed by statute." (Reply at p. 5). However, the City Council did not adopt the sweeping legislative proposals. . . ." (Reply at p.7). The Union contends, therefore, that "the very issues [OLRCB] now declares as nonnegotiable, [and over which] it has negotiated [in the past] . . .were not then and are not now proscribed. . . . Indeed, . . . the current

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[2] The Union states that "[t]he issues in dispute involved: (1) grievance procedures; (2) safety and health; (3) inclement weather work; (4) protection of rights; (5) work force changes; (6) hours of work for cafeteria managers; (7) hours of work for cafeteria workers; (8) hours of work for former eight-hour workers; and(9) holidays. 631 A.2d at 1208." (Reply at p. 4).

state of the law must be that any subject that is not proscribed, such as subjects the parties have bargained over in the past, must be mandatory." See § 1-617.08(b)" (Reply at p. 8)

The Union concludes that "in light of the City Council's refusal to adopt OLRCB's expansion of those subjects of bargaining that can be classified as 'proscribed', any argument for nonnegotiability premised upon the allegation that negotiation over an issue would 'interfere with the exercise of a management right' simply has no credence. Rather, [the Union contends that] the appropriate inquiry as to [the negotiability of] each subject matter in dispute is: when the OLRCB negotiated over the issue or subject matter in the past, was such an issue a mandatory or permissive subject of collective bargaining." (Reply at p. 8).

The Agency's Position on the Amendment at D.C. Official Code § 1-617.08(a-1) (Supp. 2005)

The Agency counters in its Response to the Union's Reply to the Negotiability Appeal ("Opposition") that the Supreme Court in *Allied Chemical & Alkali Worker, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), settled the issue of whether parties are bound by past practice to continue to bargain over permissive subjects. The Court stated that, "[b]y once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining." The Agency concludes, therefore, that "a party cannot be forced to negotiate a permissive subject of bargaining. The fact that an entity has negotiated regarding a subject in a former round of bargaining is irrelevant. In new negotiations, the Agency can declare that it will not engage in negotiations regarding permissive subjects of bargaining." (Opposition at p. 4). Further, the Agency asserts that the Board's precedent supports this position. Citing *inter alia, International Association of Firefighters and D.C. Fire Department*, 35 DCR 118; Slip Op. No. 167; PERB Case No. 87-N - 01 (1987).

Regarding the amendment to the CMPA, the Agency notes that D.C. Code § 1-617.08(a-1) (Supp. 2005) renders any agreement that infringes on management rights void. As a result, the Agency claims that, regardless of past practice, it cannot bargain regarding the subjects proscribed by D.C. Code § 1-617.08(a). Further, the Agency notes that prior to the statute's amendment, an agency could choose to bargain regarding these subjects because, at the time, the Board recognized the doctrine of permissive bargaining. However, the Agency claims that the amendment has abolished the permissive category of bargaining subjects, concluding that "an agency cannot bargain away the management rights reserved [by statute] nor could any agreement in which it did so be enforced." (Opposition at p. 5).

The Agency contends that even before the statutory amendment to the CMPA, the Board and the courts had repeatedly ruled that various issues were nonnegotiable or not mandatory.[3]

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[3] Including, for example: (1) basic work week; (2) promotions; (3) voluntary and involuntary assignment and transfer of employees; (4) reductions in force; (5) agency's right to evaluate employee's

(See Opposition at p. 6) The Agency maintains that the amendment to the CMPA "abolished the permissive category of bargaining [and] this could only have affected management rights, since bargaining regarding all other subjects is mandatory by [statute]. . . . As a result, any subject of bargaining formerly held to be permissive is now prohibited by statute regardless of past practice [and] [t]he Agency cannot bargain regarding these issues." (Opposition at p. 7)

II. Discussion Re: 2005 Amendment to the CMPA: D.C. Code § 1-617.08(a-1)

This case represents one of the first negotiability appeals considered by the Board after the April 2005 amendment to the CMPA found at D.C. Code § 1-617.08(a-1) (Supp. 2005). Therefore, it is appropriate to review our prior holdings under the CMPA and consider what impact, if any, the 2005 amendment has on the instant negotiability appeal.

When considering a negotiability appeal, the Board has adopted certain principles concerning: (1) mandatory, (2) permissive; and (3) illegal subjects of bargaining. In *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N -01 (1982), the Board stated as follows:

> It is a critical question in collective bargaining whether particular contract proposals are to be considered (I) mandatory, (ii) permissive, or (iii) illegal subjects of bargaining. The U.S. Supreme Court established and defined in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342 (1975), these three categories of bargaining subjects as follows: mandatory subjects over which the parties must bargain; permissive subjects over which the parties may bargain; and illegal subjects over which the parties may not legally bargain. The court held further that mandatory subjects are those which are determined to be within the scope of wages, hours and terms and conditions of employment and that the parties may bargain on these subjects to the point of impasse. Bargaining on permissive subjects, however, was held to be discretionary and neither party is required to negotiate in good faith to agreement or impasse. . . ."

The CMPA at D.C. Code § 1-617.08(a) (*2001 ed.*), defines management rights as follows:

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performance; (6) decision to discipline; (7) establishment of drug testing programs; and (8) staffing. (See Opposition at p. 6).

(a) The respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations:

(1) To direct employees of the agencies;

(2) To hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause;

(3) To relieve employees of duties because of lack of work or other legitimate reasons;

(4 To maintain the efficiency of the district government operations entrusted to them;

(5) To determine:

(A) The mission of the agency, its budget, its organization, the number of employees,[4]

(B) The number, types, and grades of positions of employees assigned to an agency's organizational unit, work project, or tour of duty;

(C) The technology of performing the agency's work; and

(D) The agency's internal security practices; and

(6) To take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

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[4] ***And to establish the tour of duty*; [new language in 2005].**

Regarding the issue of negotiability, D.C. Code § 1-617.08(b) provides in pertinent part as follows:

> (b) All matters shall be deemed negotiable except those that are proscribed by this subchapter. . . .

A reading of the CMPA prior to 2005, reveals nothing in the statute that specifically proscribes or prohibits bargaining over the management rights listed in D.C. Code § 1-617.08(a) (2001 ed). Therefore, the Board has held that:

> D.C. Code § 1-61[7].08(b), which provides that "[a]ll matters shall be deemed negotiable except those that are proscribed by this subchapter", establishes a presumption of negotiability.[5] While [the Board] start[s] with this presumption, we have stated that in view of specific rights reserved solely to management under this same provision, i.e., D.C. Code § 1-617.08(a), 'the Board must be careful in assessing proffered broad interpretations of either subsection (a) or (b)'.[6] Notwithstanding the rights reserved to management, a limited right to bargain nevertheless exists with respect to matters concerning the exercise of management rights, i.e., its impact and effect on terms and conditions of employment, and procedures concerning how these right are implemented.[7] (Citation omitted) We are mindful of these competing statutory rights and interests as we consider the negotiability of the proposals that are the subject of this appeal." (emphasis added) *Washington Teachers' Union and District of Columbia Public Schools,* Slip Op. No 450 at p. 4, PERB Case No. 94-N-01 (1995).

Further, the Board has acknowledged that by electing to bargain over the management rights listed in the statute, management was making these subjects *permissive* subjects of bargaining. See *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982).

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[5] *International Association of Firefighters, Local 36 and D.C. Fire Department*, 35 DCR 118, Slip Op. No. 167, PERB Case No. 87--01 (1988).

[6] *Teamsters Local Union. No. 639 and 730, a/w IBTCWHA, AFL-CIO and D.C. Public Schools*, 38 DCR 1586, Slip Op. No. 263, at 2-3, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1991).

[7] *Id.*

When bargaining over a successor agreement in cases where management had previously bargained over a management right, labor organizations have argued that a matter which is designated a management right was rendered negotiable because the parties had previously bargained over it. We have routinely rejected this argument and found that although the parties had previously bargained over a management right, the management right reverted back to management after the collective bargaining agreement expired.[8] Nonetheless, in *Washington Teachers' Union and District of Columbia Public Schools,*[9] and *International Brotherhood of Police Officers, Local No. 445, AFL-CIO v. District of Columbia Department of Administrative Services,*[10] the Board also held that when "there is a close question of whether or not a particular matter is a proper subject of bargaining, 'it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures'."[11] However, the new amendment to the CMPA impacts on this finding.

On April 13, 2005, the CMPA was amended at D.C. Code § 1-617.08(a-1) (Supp. 2005). The following language was added at subsection (a-1):

> *(a-1) An act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner*

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[8] See *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 8, PERB Case No. 95-N-01 (1995).

[9] *Id.*, at p. 9.

[10] 43 DCR 1484, Slip Op. No. 401 n.3, PERB Case No. 94-U-13 (1994).

[11] Citing, *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 2977, Slip Op. No. 43 at 3, PERB Case No. 82-N-01 (1982), where the Board considered "the close relationship of whatever is meant by 'workload' to *'hours of work'* and *'work scheduling'* in light of the D.C. Code § 1-613.1(a)(2) (1981), and found that "where there is a close question regarding a particular issue and the statutory dictate is unclear, it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures". Therefore, the Board looked at the prior bargaining history of the parties and found that the 'workload' concerned 'basic work scheduling' (not 'basic work week'), and was therefore negotiable.

Also, in *IBPO, Local 445 and D.C. Dept. of Administrative Services*, 43 DCR 1484, Slip Op. No. 401 at p. 3, PERB Case No. 94-U-13 (1994), the Board stated at p. 3 that "when there is a close question of whether or not a particular matter is a proper subject of bargaining, 'it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures'." Citing *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 2977, Slip Op. No. 43 at 3, PERB Case No. 82-N-01 (1982) and *International Association of Firefighters, Local 6 and D.C. Fire Department*, 35 DCR 118, Slip Op. 167, PERB Case No. 87-N-01 (1988).

> *as a waiver of the sole management rights contained in subsection (a) of this section.* (emphasis added)

The Board will now consider the impact of the 2005 Amendment. The Board notes that at first glance, the above amendment could mean that the management rights found in D.C. Code § 1-617.08(a) may no longer be a subject of permissive bargaining. However, it could also be interpreted to mean that the rights found in § 1-617.08(a) may be subject to permissive bargaining, if such bargaining is not considered as a permanent waiver of that management right or any other management right. As a result, we believe that the language contained in the statute is ambiguous and unclear. Therefore, in order to determine the intent of the City Council, the Board reviewed the legislative history of the 2005 amendment.

The Board notes that the section-by-section analysis prepared by the Subcommittee on Public Interest, chaired by Councilmember Mendelson, states as follows:

> Section 2(b) also protects management rights generally by providing that no "act, exercise, or agreement" by management will constitute a more general waiver of a management right. *This new paragraph should not be construed as enabling management to repudiate any agreement it has, or chooses, to make. Rather, this paragraph recognizes that a right could be negotiated. However, if management chooses not to reserve a right when bargaining, that should not be construed as a waiver of all rights, or of any particular right at some other point when bargaining.* (emphasis added).

In view of the above, the Board makes the following observations regarding management rights under the 2005 amendment:

(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.

The Board finds that D.C. Code § 1-617.08(a-1) (Supp. 2005), as clarified by the legislative history, does nothing more than codify the Board's prior holdings with respect to management rights being permissive subjects of bargaining.

However, under D.C. Code § 1-617.08(a-1) (Supp. 2005), the Board may no longer rely on the bargaining history of the parties in determining the negotiability of an issue "when there is a close question of whether or not a particular matter is a proper subject of bargaining". (See n. 11, above). This is based on the fact that the 2005 amendment provides that "an 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". D.C. Code § 1-617.08(a-1) (Supp. 2005).

The Union's proposals in the Last Best Final Offer are set forth below. The proposals are followed by the: (1) Agency's arguments in support of nonnegotiability; (2) Union's argument in support of negotiability; and (3) Board's determination. Some of the text in the Union's proposals has been highlighted in order to provide more clarity as to the exact language at issue.

ARTICLE V

> **Section D.** *When a bargaining unit employee's excessive absenteeism or performance deficiencies are suspected to be due to alcoholism, drug abuse or an emotional disorder, the Department shall refer the employee, in writing, to a counseling or treatment program. If the employee accepts the Department's referral and participates in the counseling or treatment program, the Department **WILL** give the employee a reasonable period of time after completion of the treatment program to recover and to improve his or her performance and/or attendance.*

District of Columbia Fire and Emergency Medical Services Department: The Agency asserts that this proposal is nonnegotiable arguing that it is contrary to the provisions of D.C. Code § 1-617.08(a) and (a-1) of the CMPA. Specifically, this proposal violates § 1-617.08(a)(2); § 1-617.08(a)(5)(C); § 1-617.08(a)(5)(D); and § 1-617.08(a-1). The Agency argues that the Union's proposal requires the Agency to provide an employee "a reasonable period of time after completion of the treatment program to recover and to improve his or her performance and/or attendance" in all circumstances. There is no exception made for egregious conduct warranting summary discipline, including termination. As a result, the Agency

maintains that the language would interfere with the Agency's ability to determine discipline and establish and maintain its own security practices as required by § 1.617.08(a).

Further, the Agency further contends that the Union seeks to bind the Agency regarding the technology employed in performing its work by requiring that the notices be either "written" or "in writing." Section 1-617.05(a)(5)(C) grants management the sole right to determine the technology of performing its work. The Agency contends that management has the authority to determine the technology employed to carry out its human resource functions such as providing employees notice via telephone, e-mail, in person, or in writing. (See Appeal at p. 4).

American Federation of Government Employees, Local 3721: The Union argues that the language of this proposal that OLRCB finds objectionable comes from language that was discussed and agreed upon by the parties during their 1992 negotiations. Therefore, the Union asserts that OLRCB's position that the proposal is illegal - is inconsistent with its prior conduct. In addition, the Union claims that the OLRCB's position is inconsistent with District law, which allows for permissive subjects of bargaining. (See Reply at pgs. 5-9) Therefore, the Union maintains that its proposal is negotiable.

The Board: The Board finds that this proposal is **non-negotiable** because it requires the Agency to allow an insulated "period of time . . . to recover and improve performance and attendance" without safeguards allowing management to exercise its right to discipline employees for cause. Regarding the Union's argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an 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". Thus, Article V, Section D is nonnegotiable.

ARTICLE V

> **Section E.** *If the employee refuses to seek counseling and/or there is not an adequate improvement in work performance and/or attendance, as determined by the supervisor, disciplinary action or appropriate administrative action shall be initiated as warranted. Employees accepting direct referral in appropriate circumstances **WILL** be provided reasonable time prior to adverse action being taken to improve work performance and/or complete the requirements of the employee consultation and counseling service.*

District of Columbia Fire and Emergency Medical Services Department: The Agency argues that the Union seeks to bind the Agency, in all circumstances, to "provide reasonable time prior to adverse action being taken to improve work performance and/or complete the requirements of the employee consultation and counseling service," for all "[e]mployees accepting direct referral in appropriate circumstances." Such language provides

no exceptions for egregious conduct that warrants summary discipline including termination. As a result, the language would interfere with the Agency's ability to determine discipline and establish and maintain its own security practices as required by D.C. Code § 1-617.08(a). (See Appeal at p.4)

American Federation of Government Employees, Local 3721: The Union counters that the language of the proposals that OLRCB finds objectionable comes from language that was discussed and agreed upon during their 1992 negotiations. Therefore, the Union asserts that OLRCB's position that the proposals are illegal - is inconsistent with its prior conduct. In addition, the Union claims that the OLRCB's position is inconsistent with District law, which allows for permissive subjects of bargaining. (See "Reply" at pgs. 5-9). Therefore, the Union maintains that its proposal is negotiable.

The Board: The Board finds that this proposal is **nonnegotiable** because it *requires* management to allow an insulated "period of time . . . to recover and improve performance and attendance" and contains no safeguards allowing management to exercise its right to discipline employees for cause at all times. Regarding the Union's argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an 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". Thus, Article V, Section D is nonnegotiable. Thus, Article V, Section E is nonnegotiable.

ARTICLE V

> **Section H.** *The Department shall give written referrals to the D.C. Employee Assistance Program to an employee who is experiencing personal problems which are causing an adverse affect on his/her job performance and/or attendance when such a referral is requested.*
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> *If the employee accepts the Department's referral and participates in the Program, the Department **WILL** give the employee a reasonable opportunity to improve his/her performance and/or attendance. The Department may initiate disciplinary action against the employee for cause in accordance with Article [intentionally left blank] of this Agreement and applicable D.C. laws and regulations.*

District of Columbia Fire and Emergency Medical Services Department: The Agency asserts that the Union seeks to require that the Agency, in all circumstances, "give the employee a reasonable opportunity to improve his/her performance and/or attendance" if "the employee accepts the Department's referral and participates in the [treatment] Program." Such language provides no exceptions for egregious conduct that warrants summary discipline including termination. As a result, the language would interfere with the Agency's ability to

determine discipline and establish and maintain its own security practices as required by D.C. Code § 1-617.08(a).

The Agency further asserts that the Union seeks to bind the Agency regarding the technology employed in performing its work by requiring that the notices be either "written" or "in writing." D.C. Code § 1-617.05(a) (5) (C) grants management the sole right to determine the technology of performing its work. Management claims that it has the statutory authority to determine the technology employed to carry out its human resource functions, such as providing notice to employees via telephone, e-mail, in person, or in writing. (See Appeal at pgs. 4-5).

American Federation of Government Employees, Local 3721: The Union argues that the language of the proposals that OLRCB finds objectionable on this topic comes from language that was discussed and agreed to by the parties during prior negotiations (1992). Therefore, the Union asserts that OLRCB's position that the proposal is illegal - is inconsistent with its conduct in prior negotiations. In addition, the Union claims that OLRCB's position is inconsistent with District law, which allows for permissive subjects of bargaining. (See Reply at pgs. 5-9). Therefore, the Union maintains that the above proposal is negotiable.

The Board: The Board finds that this proposal is **negotiable** because it addresses a procedure for referring employees to a treatment program allowing for a recovery period. It does not infringe on management's right to discipline for cause within the described period of time. While the proposal allows for "a reasonable opportunity to improve", it clearly states that management may discipline the employee for cause.

Management's argument that it has the sole right to determine its technology stretches the meaning of that right. The statute reserves to management the right to determine the "technology of performing the agency's work". Here, the parties are merely negotiating a procedure for giving a notice to an employee.

ARTICLE VI

> ***Section C – Annual Leave.*** *To contribute to overall work efficiency and to enable approval of leave to the employee's convenience, annual leave shall be requested at least twenty-four (24) hours in advance by employees on form SF-71, "Application for Leave", from their immediate supervisor. The Employer agrees to provide each employee in the bargaining unit an opportunity to use all accrued annual leave. Denial of the use of annual leave will be based on factors which are reasonable and equitable. The supervisor will notify the employee of the disposition of his/her request as soon as possible.* ***The supervisor will not cancel or reschedule leave previously approved except for emergency reasons.*** *The reasons for such action will be explained to the employee.*

District of Columbia Fire and Emergency Medical Services Department: The Agency asserts that Section C is nonnegotiable because this section interferes with management's rights under D.C. Official Code § 1-617.08 (2001 ed.). D.C. Code § 1-617.08(a)(1) gives the agency the right to *direct* employees of the Agency. Section 1-617.08(a)(2) gives management the right to *assign* employees of the Agency. Section 1-617.08(a)(4) gives management the right "to maintain the efficiency of the District Government operations entrusted to [it]." (Appeal at p. 5) Each of these provisions indicates that management has the right to refuse to approve, or cancel approved leave, depending on the demands of the Agency. The Union, however, seeks to bind the Agency to a provision that insures that such leave will be granted in all cases barring emergency.

American Federation of Government Employees, Local 3721: The Union maintains that in crafting this proposal it was guided by what subjects OLRCB has negotiated in the past with the Union itself as well as other unions. The proposal at issue is word for word from a proposal that was discussed and agreed to by OLRCB in the 1992 negotiations. Furthermore, the Union claims that "the statutory language describing what subjects of bargaining were proscribed in 1992 is no different today, after the amendment to D.C. Code § 1-617.08 (Supp. 2005)". (Reply at pgs. 10-11) The Union asserts that these subjects are not proscribed by statute and there can be no interference with management rights. Therefore, the Union concludes that this proposal is negotiable.

The Board: The Board finds that Article VI, Section C is **nonnegotiable**. The CMPA reserves to management the right to assign employees and to direct the workforce. The highlighted language in the above proposal - *"[t]he supervisor will not cancel or reschedule leave previously approved except for emergency reasons"* - prevents management from canceling or rescheduling leave, except for a specified reason. Therefore, the proposal places a restriction on management's right to assign employees and direct the workforce. The fact that the parties previously negotiated language whereby management waived this management right "shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a)." D.C. Code § 1-617.08(a-1) (Supp. 2005). Thus, Article VI, Section C is nonnegotiable.

ARTICLE VI

> ***Section H – Union Business*** *It is agreed that all duly authorized delegates or alternate delegates (maximum of seven (7)), to the AFGE Convention* ***will be granted administrative leave to whatever extent necessary*** *for their travel to, attendance at, and return from the site of the Convention. The Union shall provide the Employer with reasonable notice of the participants requiring leave to attend.*

District of Columbia Fire and Emergency Medical Services Department: The Agency declares Section H of Union's proposed Article VI nonnegotiable because this section

interferes with management's rights under D.C. Code§ 1-617.08 (2001 ed.) insofar as it implies that the Union determines how much leave is necessary to attend the AFGE Convention. As stated above, determination of necessary leave and whether such leave may be granted in accordance with the requirements of the Agency, are issues of management right and cannot be bargained away pursuant to D.C. Code § 1-617.08(a-1). In addition, the Agency contends that D.C. Code § 1-617.04 prohibits the District from assisting in the formation, existence or administration of a labor union and further prohibits it from financially supporting a union. To pay employees to attend internal union activities, including the union's national convention, would be to contribute financial support to the union and provide assistance in the performance of union-only activities. Should the District assist the labor organization and/or financially support it, the District would be committing an unfair labor practice. (See Appeal at p. 6).

In this regard, the Agency cites Federal Labor Relations Authority ("FLRA") caselaw at *Dept. of Health & Human Services, SSA and AFGE, SSA General Committee*, 46 FLRA No. 101 (January 8, 1993), for the premise that an agency is prohibited from funding union members' attendance at convention functions that do not involve general labor relations or representational matters. Management notes that it is not uncommon for unions to pay "lost time" for employees to engage in union activities when employees opt not to use their personal leave. The Agency maintains that "lost time" payments are the same as paying the employees the amount they would have earned in wages had the employees worked on those days. The Agency claims that the statute clearly distinguishes: (1) granting financial support to the union by subsidizing its activities and (2) granting official time for representational duties. Specifically, D.C. Code § 1-617.04 states that "the District may permit employees to negotiate or confer with it during work hours without loss of pay" and this distinction is further highlighted in of D.C. Code §1-612.03.[12] The Agency argues that, clearly, official time was not intended to be used for purely internal union activities. Accordingly, the Agency claims that it is prohibited from funding internal union affairs, including attendance at the union's national convention. (See Appeal at pgs. 6-7).

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12 D.C. Code §1-612.03 provides as follows:

> In units where exclusive recognition has been granted, the Mayor or appropriate personnel authority may enter into agreements with the exclusive bargaining agent to continue employee coverage under the provisions of this chapter while an employee(s) serves in a full-time or regular part-time capacity with a labor organization at no loss in benefits to the individual employee(s): Provided, however, that the cost to the District shall be paid by the labor organization while the employee(s) is so engaged, and ... Provided, however, that this provision shall not limit the negotiability or use of official time by unit employees "for the purposes of investigation, processing, and resolving grievances, complaints or any and all other similar disputes."

American Federation of Government Employees, Local 3721: The Union argues that the language in this proposal is lifted almost verbatim from the Fire Fighters' 2004-2007 agreement. The Union claims that the only difference is that the Fire Fighters' contract states that such leave is to be 'annual leave' while the above proposal is for administrative leave. The Union further argues that management has in 50 percent of the cases granted administrative leave, rather than annual leave, in response to requests for union members to attend a National Union meeting. Therefore, the above proposal is negotiable. (See Reply at pgs. 10-11).

In addition, the Union argues that OLRCB's reliance on 46 FLRA No. 101 (1993) is misplaced. That case involved an arbitrator's interpretation of 5 U.S.C. § 713(b), a provision of federal law for which there is no comparable provision in the D.C. Code. Furthermore, the arbitrator determined that the federal law in question did not prohibit the federal agency from providing administrative leave to attend a union convention, only that administrative leave could not be used for the entire period of the convention. The Union argues that while this subject lends itself to compromise, it is negotiable. (See Reply at p. 12)

The Board: **We request that the parties brief Article VI, Section H.** Specifically: (1) brief the issue of whether management can grant administrative leave to union representatives for travel, attendance and return from the site of the union convention; and (2) provide any law, rule, regulation or Board precedent in support of your respective position; (3) note the statutory provision at D.C. Code §1-612.03(p).[13] Describe whether this provision impacts on your position; and if so, how.

ARTICLE VII

> ***Section A – Ambulance Units***: *Ambulance units, including Basic Life Support Units and Advanced Life Support Units,* ***shall only be staffed by*** *certified civilian emergency services personnel.*

District of Columbia Fire and Emergency Medical Services Department: The Agency contends that this issue is nonnegotiable because D.C. Code § 1-617.08(a-1) forbids surrendering management rights. The Agency asserts that Article VII, Section A interferes with management rights under D.C. Code § 1-617.08(a)(2) to assign employees in positions within

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[13] D.C. Code § 1-612.03(p) provides as follows: "In units where exclusive recognition has been granted, the Mayor or an appropriate personnel authority may enter into agreements with the exclusive bargaining agent to continue employee coverage under the provisions of this chapter while an employee(s) serves in a full-time or regular part-time capacity with a labor organization at no loss in benefits to the individual employee(s): Provided, however, that the cost to the District shall be paid by the labor organization while the employee(s) is so engaged, and: Provided, further, that this provision shall not limit the negotiability or use of official time by unit employees for the purposes of investigation, processing, and resolving grievances, complaints or any and all other similar disputes."

the agency. The Agency argues that the Union is attempting to bind the Agency to assign only certain personnel to certain positions. Management claims the right under D.C. Code § 1-617.08 (a)(5)(B-C) to determine the number, types, grades and positions of employees assigned to an agency's organizational unit, work project or tour of duty and the technology employed in performing said work. Should management wish to assign different types of positions to an ambulance, it has the sole right to do so. (See Appeal at p. 8).

American Federation of Government Employees, Local 3721: The Union claims that the parties have negotiated over the assignment of certain personnel to certain positions and have done so as recently as in the 2004 Firefighter/Paramedic collective bargaining agreement. Also, management has agreed to limit the individuals who may participate in a training program as well as the required content of the training program. The Union maintains that "[t]he same management rights OLRCB suggests are impacted by the Union's [current] proposal were equally impacted by the agreement made with the [Fire Fighters in the past]. [The Union claims that] [i]f those rights were not inviolate under the statute in 2004, and they were not, then they are not inviolate now." (Reply at pgs. 12-13).

The Board: We find that Article VII, Section A is **nonnegotiable**. D.C. Code § 1-617.08(a)(2) reserves to management the right to assign employees in positions within the agency and § 1-617.08(a)(5)(B) reserves to management the right to determine the "number, types and grades of positions assigned to an agency's organizational unit, work project or tour of duty". The phrase "*[s]hall only be staffed by*" is mandatory language. Therefore, it has the effect of restricting the agency in assigning employees to ambulance units. This interferes with management's sole right to *assign*.

The Union argues that the parties have previously negotiated over this issue. However, the amendment to the CMPA at D.C. Code§ 1-617.08(a-1) (Supp. 2005), provides as follows: "[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." Thus, a prior agreement between the parties concerning a statutory management right cannot be interpreted as a waiver of that right.[14] Therefore, Article VII, Section A is nonnegotiable.

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[14] The Board made a similar finding before the amendment was passed. In *International Association of Firefighters, Local 36 and District of Columbia Fire Department,* 35 DCR 118, Slip Op. No. 167 at p. 4, PERB Case No. 87-N-01 (1987), this Board found that "the parties' previous practice is not relevant to the Board's consideration of whether Article 18 [the proposed article pertaining to the number of employees assigned to a tour of duty] is a bargainable subject under the CMPA. [Stating that] [i]t is our view that the Union's proposal to maintain the requirements set out in Article 18, directly interferes with DCFD's right to determine the numbers of its employees assigned to a particular organizational unit; hence, it is nonnegotiable."

ARTICLE IX

> ***Section C – Drug Testing****: The Department shall determine the component of its workforce that shall be required to participate in a mandatory drug testing program.* ***The parties recognize that any new or modified procedures shall be the subject of mutual agreement between the parties.*** *It is jointly understood that involvement of any on-duty member of the Department in an accident while operating any Department vehicle shall provide sufficient cause for immediate drug screening in accordance with Federal Department of Transportation guidelines.*

District of Columbia Fire and Emergency Medical Services Department: The Agency declares Section C nonnegotiable because it interferes with management's rights under D.C. Code § 1-617.08. Management claims the right to establish internal procedures, such as a drug testing program, to insure security and efficiency in the workforce. Aspects of this program, such as randomness and timing, are not properly subjects of working condition negotiations. The parties must bargain regarding implementation and effect of such a procedure if one party requests it, but the substantive nature of such procedures is not subject to negotiation. (Appeal at p. 8)

American Federation of Government Employees, Local 3721: The Union opposes management's argument that this proposal interferes with the Agency's right to "establish internal procedures" arguing that management bargained over this same language in the past. (Reply at p. 13)

The Board: Article IX, Section C is **negotiable**. This proposal addresses the procedural aspect of management's drug testing program. Implicit in any change in the stated procedure is management's duty to give notice to the Union in order to provide the Union with the opportunity to bargain over the change in procedure. The Board has held that management need not bargain over the *decision* to establish a drug testing program. See *Teamsters Local Union 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 38 DCR 3313, Slip Op. No. 274 at p. 2, PERB Case No. 90-N-02 (1991), where the Board held that the decision to adopt drug testing was management's right. Here, Article IX, Section C pertains to drug testing procedures and does not prevent management from establishing a drug testing program. Therefore, it is negotiable.

Regarding the Union's argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an 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".

ARTICLE X

Section A – Shift Assignments: *Shift assignments shall be made on a volunteer basis. In the event there are not enough volunteers to staff the shifts, or if there are too many volunteers for a given shift, shift assignments shall be determined on a seniority basis. Seniority is defined as time served in the EAB. The employee with the highest seniority will be offered the choice of the possible slots and the employee with the next highest seniority will be offered the choice of the remaining slots. This procedure will be continued until all employees have been assigned shifts.*

Section B – Shifts: *Unit Employees, except those assigned to Fleet Maintenance, Clerical or Warehouse duties, shall work twelve hour shifts as their normal scheduled daily tour of duty.*

Section C – Modifications: *Except in cases of emergencies or unforeseen staffing needs, modifications to this schedule may only be made provided the following criteria are met:*

(a) At any hour of the day, the likelihood of unit availability increased by five percent (5%) or more over the preceding six month period; and

(b) At any hour of the day, unit response time increased by five percent (5%) or more over the preceding six month period.

If any modifications are made to the schedule, the Agency will post, no less than 30 days prior to implementation of any schedule modification, except in the event of an emergency or unforeseen staffing workload change, the new schedule so as to give sufficient notification to the affected employees. The posted schedule will include shift starting and quitting times, the days of the week each employee will work and any other related or pertinent information.

Section D – Tour of Duty: Tour of Duty will be as follows:

2 on, 2 off
3 on, 2 off
2 on, 3 off

Shift Starting and Quitting Times:

7:00 AM to 7:00 PM
7:00 PM to 7:00 AM

District of Columbia Fire and Emergency Medical Services Department: The Agency declares the Union's proposed Article X nonnegotiable in its entirety because its provisions interfere with management's rights under D. C. Code § 1-617.08(a)(1) and (2) and D.C. Code § 1-617.08(a)(5)(A). These sections of the statute grant the Agency sole right to direct and assign employees and to establish the tour of duty. Each provision of Union's proposed Article seeks to improperly restrict the Agency's rights. In Section A, for example, the Union proposes that "shift assignments shall be made on a volunteer basis." Section B would dictate the "normal tour of duty" in complete contravention of §§ 1-617.08(a)(5)(A) and (B). The Agency asserts that Section C of Article X would restrict management from changing tours of duty and Section D would "establish" the tour of duty. Were the Agency to agree to such language, it could no longer freely exercise its ability to assign employees. The Agency maintains that the statute forbids the agency to enter into such an agreement and is unequivocal in its reservation of these rights "solely" to management. As a result, all of the provisions proposed in this article are nonnegotiable. The statute is absolutely clear, and such a proposal by the Union clearly raises the question of whether the Union is bargaining in good faith.

American Federation of Government Employees, Local 3721: The Union argues that Section A of this proposal was awarded in interest arbitration during the last round of negotiations, claiming that interest arbitration can only occur over subjects that are deemed negotiable. The Union cites *Teamsters, Local 639,*[15] for the proposition that "bargaining over the subjects contained in the Union's proposal was not proscribed". The Union asserts that in light of the recent legislative amendment, it is not only negotiable, "it is now mandatory". (Reply at p. 14).

The Board: We request that the parties brief Article VI, Section H. The Board finds that there is insufficient information to make a determination on the issues raised in this proposal. Therefore, the parties shall brief Sections A, B, C and D of Article X. Specifically, the parties shall define the following items: "*scheduling*", "*hours of work*", "*tours of duty*". In addition, the parties shall state their positions on the negotiability of each term. In addition, the parties shall explain which term applies to Section A, Section B, Section C and Section D. Also, the parties shall show how the terms apply to every portion of each section. We request that the parties be specific concerning Board case law supporting your position. Specifically, cite any law, rule, or regulation that supports your position.

ARTICLE XI

Section A – Promotional Process: *The Promotional Process shall be as follows:*

(1) To be eligible for promotion to the position of Sergeant employees shall complete the following:

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[15] 631 A.2d 1205, p.1208, 1211 (1993).