GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: Teamsters Local Union Nos. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Petitioner, and District of Columbia Public Schools, Respondent.	PERB Case No. 90-N-01 Opinion No. 299

DECISION AND ORDER

The background of this case is set forth by the Hearing Examiner in the attached Report and Recommendation (R&R). Briefly stated, however, the instant Negotiability Appeal (Appeal) was filed by Teamsters Local Union Nos. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (Teamsters or Union) on April 9, 1990, following protracted negotiations with the District of Columbia Public Schools (DCPS) for a new term agreement. Those negotiations resulted in an impasse and notice thereof being filed with the Public Employee Relations Board (Board) in PERB Case No. 88-I-05. Following an unsuccessful attempt at mediation, the impasse proceeding culminated in interest arbitration and an Award (without an opinion) was issued on September 30, 1988. An Opinion followed on October 14, 1988, which was later amended on November 7, 1988. [1]/ On January 9,

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[1]/ Page two of the October 14, 1988 Opinion contained the following passage:

> ...Several of the Union's proposals were declared by management to be non-negotiable (Attachment 5). With regard to these assertions of non-negotiability, the Executive Director of the Public Employee Relations Board (PERB) verbally informed the Impartial Chairman

(Footnote 1 Cont.)

1989, however, DCPS refused to implement those provisions of the Award which it claimed were nonnegotiable and that had been granted to the Union.

The Teamsters sought enforcement of the Award in D.C. Superior Court. The Court's Order, rendered on March 19, 1990, granted in part and denied in part the enforcement of the Award. With respect to the part of the Award that was denied, the Superior Court ruled it was "without jurisdiction absent PERB finding of negotiability to enforce items 13, 14, 15, 18, 24, 25, 28, 29, and 49", i.e., the nine items DCPS had declared nonnegotiable. The Court's Order resulted in the filing of this Appeal which contains only five of the nine provisions that DCPS declared nonnegotiable and that were awarded to the Union. DCPS opposed the Appeal on the basis of timeliness and on the merits. A hearing was directed by the Board on the issue of timeliness. The Hearing Examiner issued his Report and Recommendation on March 18, 1991, finding the Appeal timely; whereupon, exceptions were filed by DCPS.

> that decisions of negotiability are within the PERB's jurisdiction. Accordingly, the Union is free to press its position that the matters are negotiable by appealing Management's negotiability determinations to the PERB. For those items declared non-negotiable by Management and awarded to the Union by the Board, a Union final offer on an item shall be implemented upon a PERB decision that the item is negotiable.

Following a dispute between the parties over the Chairman's authority to include such a declaration in the Award, the Chairman sought clarification from the Executive Director concerning the PERB's jurisdiction to resolve negotiability claims following interest arbitration. In short, the Executive Director, in response to the Chairman's request, reaffirmed the PERB's jurisdiction to decide issues of negotiability but stated further that no such action had been initiated, and that the PERB does not retain jurisdiction over interest arbitration proceedings. As a result, the Chairman issued an amended Opinion on November 7, 1988, which deleted the above passage and substituted the following:

> Several of the Union's proposals were declared by management to be non-negotiable (Attachment 5). The Union disagreed with Management's determinations.

I. Findings and Conclusions of the Hearing Examiner

The Board's Interim Rule 106.2 provides that "[a] negotiability appeal shall not be accepted by the Board if it is filed more than forty-five (45) days after a party rejects a proposal as being not negotiable." (Emphasis added.) In determining the timeliness of the Appeal pursuant to Interim Rule 106.2, the Examiner reviewed the long transactional negotiation efforts of the parties. The Examiner found, as a general matter, that the material facts were not in dispute, but rather what differed were the inferences drawn from the facts by each party. He further concluded that "[n]either party can be found to [have] come to this negotiability appeal with 'clean hands' concerning their respective obligations under the CMPA...." (R&R at 26.)

With respect to DCPS, the Examiner found that while DCPS questioned many of the Union's proposals as illegal violations of management's rights, it "in fact, delayed or evaded Management's obligation to place the Union on notice of its objections to [or rejection of] such proposals in an unambiguous and unequivocal manner so that the Union would be aware that only through a negotiability appeal to PERB would there be a final resolution of whether there could be meaningful bargaining over these matters." (R&R at 26.) The Hearing Examiner further ruled that DCPS "failed or refused to issue an unambiguous and unequivocal declaration of non-negotiability until after the Award had been issued." (R&R at 26.) These rulings by the Hearing Examiner were largely based on his finding that DCPS continued to discuss, negotiate, and, in some instances, reach agreement on some of the initially disputed proposals.

With respect to the Union, the Examiner concluded that the ambiguous nature of DCPS' assertions concerning the negotiability of the disputed proposals were insufficient to trigger the Union's 45-day filing requirement of a negotiability appeal under Interim Rule 106.2. The Examiner, however, further concluded that DCPS' "stated position ... must be found, at least, to have alerted the Union to the question of whether, and at what point, the Employer's assertions might have to be treated by the Union as a formal non-negotiability defense which had to be resolved by PERB." (R&R at 27.) On this basis, the Hearing Examiner found that "the Union formally was placed on notice of the Employer's non-negotiability demands as of the issuance of the Opinion with the attached list of non-negotiability declarations [, i.e., October 14, 1988]." Id. The Hearing Examiner further found that despite such notice "the Union ignored all suggestions by the Impartial Arbitrator and by the PERB's Executive Director that PERB was the appropriate forum to resolve negotiability disputes

even to the extent that such issues were raised during the interest arbitration phase" and notwithstanding the fact that "it fully was aware that the issue of non-negotiability had not been resolved by the Interest Arbitration Panel." Id.

However, the Examiner went on to conclude that by the time the Union received a clear declaration on nonnegotiability, the issue had changed from one of timeliness of the appeal to whether the issued Award (which awarded the five disputed provisions to the Union) "constituted a 'final and binding' [2/] resolution of the disputed issues despite Management's non-negotiability declarations." (R&R at 26.) The Examiner further concluded that "the Union did not act unreasonably in that, at that time,...the interest Arbitration Panel unanimously had awarded the disputed items to the Union such that, on its face, the Union had a 'final and binding award' despite Management's non-negotiability declarations...." (R&R at 30 - 31.)

The Hearing Examiner ruled that "the Union reasonably proceeded on the basis of its view that, after issuance of the Award, the Union had a final and binding award, review of which, it had been advised, was not within PERB's jurisdiction." (R&R at 33.) [3/] Finally, the Hearing Examiner concluded that "it was not until the Superior Court ruled in March 1990, that the disputed provisions could not be enforced by the Courts, that it became clear that the only way to resolve the dispute was to proceed to PERB, not to review or to enforce the purportedly 'final and binding' Award, but to determine what, in fact, had been awarded in that Award." (R&R at 33.) On that basis, the Hearing Examiner found the Union's Negotiability Appeal timely and properly before the Board for consideration.

[2/] Reference is made to D.C. Code Sec. 1-618.17: "Collective bargaining concerning compensation." The last sentence of Sec. 1-618.17(f)(1) states that "[t]he [interest arbitration] award shall be final and binding upon the parties in the dispute." The parties' groundrules provide that impassed non-compensation matters will be resolved utilizing the compensation impasse procedures under the CMPA.

[3/] Reference here is made to a November 4, 1988 letter by the Board's Executive Director in response to the Impartial Arbitrator's "request [for] clarification of the PERB's position with regard to negotiability determinations in the above [] dispute." (R&R at 13.)

II. Discussion and Analysis

DCPS filed nine exceptions to the findings made by the Hearing Examiner in the Report and Recommendation. The first four except to facts as found concerning the events in controversy. They are as follows:

1. That neither of the parties sought to give effect to the spirit or intent of the CMPA with regard to the mandated method for resolving negotiability disputes, i.e., through a proceeding before PERB. [Report and Recommendation (R&R) p.26]

2. That neither party can be found to come to this negotiability appeal with "clean hands" concerning their respective obligations under the CMPA. [R&R p. 26]

3. That management evaded its obligation to place union on notice of its objections in an unambiguous and unequivocal manner so that union would be aware that only through a negotiability appeal to PERB would there be a final resolution of whether there could be meaningful bargaining over these matters. [R&R p.26]

4. That management never refused to bargain about any item which it declared violative of management's rights or illegal and offered counter proposals on all issues. [R&R p. 26]

These exceptions merely disagree with the Hearing Examiner's assessment of and the weight and credibility he accorded to certain evidence. The Board has held on numerous occasions that the Hearing Examiner is authorized and in the best position to assess the veracity of testimony and other evidence presented during the hearing. See, e.g., Charles Bagenstose and Dr. Joseph Borowski v. District of Columbia Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991); American Federation of State, County and Municipal Employees, District Council 20, Local 2776, AFL-CIO v. Dept. of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245 at fn. 1, PERB Case No. 89-U-02 (1990); and American Federation of Government Employees, Local 872 v. Dept. of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Therefore DCPS has provided no legitimate basis for these exceptions.

DCPS' fifth exception objects to the finding that "[the] overall context of Management's bargaining tactics during the negotiation phase [] cannot be found ... to have placed on the Union the obligation to proceed to PERB for a resolution of negotiability issues." (R&R at 28.) DCPS argues that "the issue of notice was immaterial to the [Union]." (Emphasis provided.) Furthermore, the Union "willfully and deliberately chose not to file a negotiability appeal during either negotiations, mediation, or the interest arbitration proceeding...." DCPS contends that (1) "it was not within the [Union's] authority to 'elect' to proceed to PERB and (2) [b]ased on management's non-negotiability assertions during negotiations, the [Union] was required to proceed to PERB for a negotiability determination." (Exceptions at 7 and 8.)

Again, this exception presents no more than issues of fact fully considered and rejected by the Hearing Examiner in reaching his conclusion. The Hearing Examiner found that DCPS had "failed or refused to issue an unambiguous and unequivocal declaration" with respect to the nonnegotiability of the disputed proposals "until after the Award had issued." He therefore concluded that DCPS' declarations did not constitute the necessary "reject[ion]" of the proposals required under Interim Rule 106.2 to trigger the 45-day time limit within which a negotiability appeal must be filed. [4]/ The Hearing Examiner is authorized to make such findings, which are fully supported by the record and set forth in his Report and Recommendation. Therefore, again, DCPS presents no legitimate basis for the exception.

Next DCPS objects to the Hearing Examiner's conclusion that the Union did not "forfeit[] its right to have this negotiability

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[4]/ See, City Roofing Co., et al. and Roofers, Local 189, AFL-CIO, 222 NLRB 786 (1976). In that case the National Labor Relations Board (NLRB) determined whether an unfair labor practice charge was timely filed in accordance with Section 10(b) of the National Labor Relations Act (NLRA). Section 10(b) of the NLRA bars the issuance of a complaint in an unfair labor practice occurring more than 6 months prior to the filing of the charge. Based upon an administrative law judge's findings of fact and credibility resolutions, the NLRB held that the employer in that case did not "unequivocally" engage in the conduct which would have triggered the 10(b) period at the time asserted by the employer. Under current Board Rule 532.3, an assertion of nonnegotiability must be communicated in writing. Hopefully, this will eliminate the recurrence of ambiguities of this nature caused by verbal exchanges at the bargaining table.

appeal resolved because it failed to proceed to PERB for such resolution either during or after the interest arbitration phase." The merits of this exception necessarily turns on whether the prerequisite factors existed which would give rise to the Union's right to file a negotiability appeal.

The relevant provision of the Board's rules setting forth the criteria for making such a determination was correctly cited by the Examiner as provided under Interim Rule 106. As previously discussed, the Hearing Examiner found that DCPS' declarations did not unequivocally "reject" the Union's proposals during the negotiation, mediation and arbitration phases. Based on these findings, the Hearing Examiner concluded that during these phases the Union was not effectively placed on notice as to DCPS' position regarding nonnegotiability in order to comply with Interim Rule 106.2 for initiating a negotiability appeal. As previously noted, these findings were clearly supported by the record. The Hearing Examiner also concluded, however, that "[t]he Union formally was placed on notice of the Employer's non-negotiability demands as of the issuance of the Opinion with the attached list of non-negotiability declarations." (R&R at 27.) This finding established when DCPS unequivocally communicated to the Union that it rejected the disputed proposals as non-negotiable, i.e., "after the Award had been issued." (R&R at 26.)

The Hearing Examiner then proceeds to observe that "the question had changed from, whether and to what extent, additional bargaining properly could take place with respect to the objected-to items, to whether the Award, in fact, constituted a 'final and binding' resolution of the disputed issues, despite Management's nonnegotiability declarations." (R&R at 26.) The Hearing Examiner's shift in focus, however, misses the issue of whether a viable basis for initiating a negotiability appeal remained.

In accordance with Interim Rule 106.1, the assertion that a proposal "is not within the scope of collective bargaining, i.e., nonnegotiable, and the initiation of a negotiability appeal necessarily contemplates that such appeals would arise "in connection with a collective bargaining negotiation[.]" A "final and binding" interest arbitration award expressly and by its very nature presupposes the completion of all phases of collective bargaining negotiations. Clearly, all phases of collective bargaining had ceased upon the issuance of the final and binding interest arbitration award. Once the Award was issued, DCPS was foreclosed from raising "an issue [] as to whether a proposal is contrary to law, regulation or controlling agreement and

therefore not within the scope of collective bargaining [, i.e., nonnegotiable,]" in accordance with Interim Rule 106.1. [5]/

In short, no issue of negotiability was established by DCPS during the required period, i.e, "in connection with collective bargaining negotiation;" therefore, the period during which an issue of negotiability could have been raised has elapsed. [6]/ DCPS' failure to establish a clear and unambiguous rejection of the disputed proposals as nonnegotiable, until after the Award was issued, precludes the establishment of the required basis for filing a negotiability appeal. Consequently, since no cognizable issue of negotiability in accordance with Interim Rule 106.1 exists, no basis for a negotiability appeal by the Union (or

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[5]/ We have held, and the District of Columbia Court of Appeals has affirmed, that our rules requiring actions before the Board be initiated within a certain period of time are jurisdictional and mandatory. District of Columbia Metropolitan Police Department and Fraternal Order of Police, MPD Labor Committee, ___ DCR_____, Slip Op. No. 282, PERB Case No. 87-A-04 (1991) and Public Employee Relations Board v. D.C. Metropolitan Police Department, _____A.2d_____, Slip Op. No. 88-868 (June 25, 1991).

[6]/ The Ninth Circuit Court of Appeals affirmed a decision by the Federal Labor Relations Authority (FLRA) which held that an agency was foreclosed from declaring proposals nonnegotiable (prerequisite to the filing of a negotiability appeal) after voluntarily agreeing to submit the provisions at impasse to final and binding arbitration pursuant to an analogous provision of the Federal Service Labor-Management Relations Act. See, Department of Agriculture, Food and Nutrition Service v. FLRA, 879 F.2d 655 (9th Cir. 1989). The FLRA dismissed the ensuing negotiability appeal filed by the union stating that "the declaration that provisions were outside the duty to bargain did not serve as an allegation of nonnegotiability from which the Union could file a petition for review." Id. at 658. The Court found persuasive the FLRA's reasoning that "where the agency has agreed to interest arbitration..., the agency is precluded from subsequently reviewing the disapproving terms imposed by the resulting arbitration award." Id. at 661. However, the FSLMRA, unlike the CMPA, provides a vehicle for filing exceptions to interest arbitration awards with the administrative agency, i.e, FLRA, if the award is contrary to any law, rule or regulation. In the cited case, neither party had filed exceptions to the interest arbitration award. Thus, the award, including those provisions the agency had attempted to declare nonnegotiable, remained binding on the parties for the term of the agreement.

"forfeiture of its right to have this negotiability appeal resolved") can properly lie. 7/

Finally, DCPS' exceptions seven through nine all object to findings by the Hearing Examiner which concluded that the Teamsters acted reasonably by proceeding on the basis that the interest arbitration award was final and binding as to the five disputed proposals which became the subject of the instant negotiability appeal. In this regard, the Hearing Examiner found that the Union's inaction was due to its reliance on the Board's statement to the parties that it does not retain jurisdiction over interest arbitration proceedings (R&R at 31) and, thus, no vehicle existed for the Union to appeal the disputed proposals (which had become part of the award) to the Board. These exceptions by DCPS merely disagree with findings of fact clearly supported by the record and, for the reasons discussed, the applicable law, rules and regulations. We conclude, therefore, that DCPS' exceptions are without merit.

Accordingly, we dismiss DCPS' exceptions to the Hearing Examiner's Report and adopt the findings and conclusions of the Hearing Examiner to the extent consistent with the analysis, reasoning and conclusions set forth in this Decision and Order. In view of our discussion above, however, we must reject the recommendation of the Hearing Examiner to accept the Teamsters' appeal as properly and timely raised before the Board. Therefore, the negotiability appeal is dismissed since, for the reasons stated, no cognizable basis for considering the Appeal

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7/ It should also be noted that the decision of the Interest Arbitration Panel was unanimous. There was no dissent by the DCPS representative on the Panel and the attempt to attach a list of items DCPS viewed as nonnegotiable cannot be considered, as previously discussed, as a viable challenge to the items that it nevertheless continued to discuss with the Union throughout collective bargaining negotiations.

As noted, infra at n.6, there exists no provision under the CMPA conferring jurisdiction on the Board to review interest arbitration awards. See, District Council 20, Local 709, American Federation of State, County and Municipal Employees, AFL-CIO and District of Columbia Metropolitan Police Department, 37 DCR 4140, Slip Op. No. 225, PERB Case No. 90-A-03 (1990). Therefore, determination of the status of these disputed proposals remains in the D.C. Court of Appeals, where the Order of the Superior Court has been appealed and jurisdiction retained pending our determina-tion on issues of negotiability.

exist.

ORDER

IT IS HEREBY ORDERED THAT:

The Negotiability Appeal is dismissed; no issue of negotiability having been established under the Comprehensive Merit Personnel Act as implemented by the Rules of the Public Employee Relations Board.

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

February 28, 1992