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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
American Federation of State, County and Municipal Employees District Council 20, Local 2921)	PERB Case No. 18-N-02
Petitioner)	Opinion No. 1677
and)	
District of Columbia Public Schools, Office of the State Superintendent of Education, and Department of General Services)	
Respondents)	

DECISION AND ORDER

I. Statement of the Case

The American Federation of State, County and Municipal Employees, District Council 20, Local 2921 (“Union”) and the District of Columbia Public Schools, Office of the State Superintendent of Education, and the Department of General Services (“Agencies”) are engaged in bargaining concerning non-compensation matters. On October 13, 2017, the Union filed this Negotiability Appeal (“Appeal”). The Appeal concerns seven proposals made by the Union and declared nonnegotiable by the Agencies. The Agencies filed a timely Answer to the Appeal.

The Union’s Appeal and the Agencies’ Answer are before the Board for disposition. The proposals are quoted exactly as they were presented in the negotiability appeal. All language underlined in red is new language proposed by the Union. All language crossed out and in red is language deleted by the Union.

II. Standard of Review

Under sections 1-605.02(5) and 1-617.02(b)(5) of the D.C. Official Code, the Board is authorized to make determinations concerning 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 other party.¹

The Board applies the U.S. Supreme Court’s standard concerning subjects for bargaining established in *National Labor Relations Board v. Borg-Warner Corp.*² Under this standard, “the three categories of bargaining subjects are: (1) mandatory subjects, over which the parties must bargain; (2) permissive subjects, over which the parties may bargain; and (3) illegal subjects, over which the parties may not legally bargain.”³

Section 1-617.08(b) of the D.C. Official Code provides that “[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.⁴ The subjects of a negotiability appeal and the context in which their negotiability is appealed are determined by the petitioner, not the party declaring the matters nonnegotiable.⁵ The Board reviews the disputed proposals and addresses each in light of the statutory dictates and relevant case law.⁶

III. Analysis of Proposals

Article I: Recognition Coverage

The District of Columbia Public Schools (“DCPS”) recognizes the American Federation of State, County, and Municipal Employees, District Council 20, Local 2921 (“Union”) as the sole and exclusive collective bargaining representative for all paraprofessionals and support staff employees of DCPS at or below the Grade EG-6 level. DCPS further recognizes the Union as the sole and exclusive collective bargaining representative for all and for all Educational Schedule personnel classified up to and including grade EG-7, whose job responsibilities are primarily of a secretarial, clerical, or administrative nature. The unit shall include central office and field employees who work full-time, i.e., a forty (40) hour work week and fifty-two (52) weeks a year, in a temporary-indefinite, probationary, or permanent status. The unit does not include employees working in the Office of the Chancellor, Office of the Deputy Chancellor, Office of Teaching and Learning, Office of the General Counsel, and Office of Human Capital.

¹ See PERB Rule 532.1.

² 356 U.S. 3342 (1975).

³ *Univ. of D.C. Faculty Ass’n/NEA v. Univ. of D.C.*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982).

⁴ See *Int’l Ass’n of Firefighters, Local 36 v. D.C. Fire & Emergency Med. Servs. Dep’t*, 51 D.C. Reg. 4185, Slip Op. No. 742, PERB Case No. 04-N-02 (2004).

⁵ *Int’l Ass’n of Firefighters, Local 36 v. D.C. Fire and Emergency Med. Servs. Dep’t*, 45 D.C. Reg. 4760, Slip Op. No. 515, PERB Case No. 97-N-01 (1997).

⁶ *Fraternal Order of Police/Protective Servs. Police Dep’t Labor Comm. v. Dep’t of Gen. Servs.*, 62 D.C. Reg. 16505, Slip Op. No. 1551 at p. 2, PERB Case No. 15-N-04 (2015).

The DCPS of General Services (“DGS”) recognizes the Union as the sole and exclusive collective bargaining representative for all Customer Call Center Representatives employed by DGS.

The Office of the State Superintendent of Education (“OSSE”) recognizes the Union as the sole and exclusive collective bargaining representative for all clerical employees and administrative support professionals working in OSSE’s DCPS of Transportation.

Agencies: The Board has sole and exclusive jurisdiction under section 1-605.02(1) to resolve unit determination questions and other representation issues. The current recognition article references the specific PERB Certification 6R008 and PERB Opinion No. 338 for AFSCME 2921. The current PERB certification names only DCPS and does not reflect the effect of subsequent reorganizations that have resulted in OSSE and DGS as employer agencies for AFSCME 2921 bargaining unit members.⁷

Union: There is no support for the assertion that in order to be negotiable a recognition clause must mirror a PERB certification. The Union’s collective bargaining agreement has included a recognition clause that does not match or reference the PERB certification. It is negotiable for the parties’ to offer a modern description of the bargaining unit recognized by management. The determination of a bargaining unit or recognition of the unit covered by a collective bargaining agreement is not a management right. The wording of a recognition clause is negotiable.⁸

Board: This proposal is nonnegotiable. According to section 1-605.02 of the D.C. Official Code, the Board has the power to “resolve unit determination questions and other representation issues.” If there has been a change to the unit description then either the agency or the labor organization may file a unit clarification petition.⁹ Only the labor organization may submit a unit modification petition to add to an existing unit or delete classifications no longer in existence.¹⁰ All changes to the unit description should be reflected in an updated PERB certification.

Article VII: SCHEDULES

Section A: Full-Time Employees

1. The regular work day shall consist of eight (8) consecutive hours exclusive of an unpaid thirty (30) minute, duty-free lunch period and two fifteen (15) minute breaks. Eight (8) consecutive hours within the twenty-four (24) hour period beginning at midnight shall constitute a regular work day.
2. Consistent with D.C. law, the normal work week shall consist of five (5) consecutive eight (8) hour days, Monday through Friday inclusive. Any applicable changes in law regarding the normal work day shall be applicable to

⁷ Response at 3.

⁸ Appeal at 3.

⁹ PERB Rule 506

¹⁰ PERB Rule 504

the Union, providing that the Union and employees are given advanced notice of the effective date of such change.

3. Eight (8) consecutive hours shall constitute a work shift. All employees shall be scheduled to work on a regular work shift, and each shift has a regular beginning and ending time.
4. *
5. *
6. Any employee who is regularly scheduled to report for work, and who presents herself/himself for work as scheduled, except for scheduled overtime, shall be assigned to at least four (4) hours of work.
7. *
8. *
9. This article is intended to define the usual hours of work and shall not be construed to limit the flexibility of work schedules.

Section B: Part-Time Employees

1. The regular work day shall consist of not less than six (6) hours exclusive of an unpaid thirty (30) minute, duty-free lunch period and two breaks, prorated by the number of hours worked by the employee, i.e., 7/8 or .875 for 7 hour employees. Work hours will be consecutive and within a twenty-four (24) hour period beginning at midnight, which shall constitute the regular work day.
2. The normal work week shall consist of five (5) consecutive work days, Monday through Friday inclusive.
3. *
4. *
5. *
6. This Article is intended to define the usual hours of work and shall not be construed to limit the flexibility of the work schedules.
7. Any employee who is regularly scheduled to report for work, and who presents himself or herself for work as scheduled, except for scheduled overtime, shall be assigned to at least a half-day's work prorated by the employee's regular work day schedule (four (4) hours for full time, three hours thirty minutes (3:30) for seven (7) hour employees).

Agencies: Section 1-617.08(a)(5)(A) confers upon agencies the sole right to establish a tour of duty. Tour of duty is used to refer to the hours for which an employee works therefore agencies enjoy the sole statutory right to establish an employee's work hours.¹¹ The Board has also held and the Court of Appeals has affirmed that management has the right under the CMPA to determine an employee's hours of work.

¹¹ Response at 6.

Union: The proposal is negotiable and contains an assurance that management rights are not being infringed upon. Section A(9) and section B (6) state that the article shall not be construed to limit the flexibility of work schedules.¹²

Board: This proposal is nonnegotiable. Section 1-617.08(a)(5) states that management has the right to establish the tour of duty. Section A(9) and B(6) specifically state that the purpose of this article is to define the usual hours of work. The Court of Appeals has also upheld the Board's decision that "the basic work week, the basic non-overtime work day, the working hours within each work day, and the prohibition of split shifts" are not mandatory subjects of bargaining.¹³

Article VIII, Leave

- a. Full-time employees with less than three (3) years of creditable service shall be credited one hundred four (104) hours or thirteen (13) days of annual leave per year.
- b. Full-time employees with three (3) years or more years but less than ~~fifteen~~ ten (~~15~~10) years of credible service shall be credited one hundred sixty (160) hours or twenty (20) days of annual leave per year.
- c. Full-time employees with ~~fifteen~~ ten (~~15~~10) or more years of creditable service shall be credited two hundred eight (208) hours or twenty-six (26) days of annual leave per year.
- d. ~~Part-time employees with regular pre-scheduled tours of duty shall be credited annual leave at the rate of one (1) hour for each twenty (20) work hours per pay period a prorated amount based on the above full-time schedules, based on their years of creditable service.~~

Agencies: The Union's proposal contravenes the preemptory statutory criteria set forth in section 1-612.03 of the D.C. Official Code. Leave is fixed by law and the Board has held that if an aspect of a subject matter, otherwise generally negotiable in other respects, is fixed by law then it is nonnegotiable.¹⁴ The Agencies also notes the historical context of the leave statute, stating that the Council's intent was purposefully to remove the union's right to bargain over leave entitlement, and restore to management that sole and executive right.¹⁵

Union: Leave accrual is not a subject removed from negotiations by section 1-617.08(a), therefore it is negotiable. Section 1-612.03 sets a floor for the accrual of leave by public employees but it does not preclude negotiation of a more generous benefit. Other provisions of the Code that preclude negotiation of a more generous benefit are explicit in stating that the employees may receive no more than the statutory benefit.¹⁶

Board: This proposal is partially negotiable. Section 1-612.03(a) of the D.C. Official Code outlines employee annual and sick leave for employees hired before September 30, 1987. Section 1-612.03(a)(6) states that all employees hired after September 30, 1987 are exempt from that

¹² Appeal at 5.

¹³ *Teamsters Local Union Nos 639 and 730 v. Public Employee Relations Board*, 631 A. 2d 1205, (D.C. 1993).

¹⁴ Answer at 9-10.

¹⁵ Answer at 10.

¹⁶ Appeal at 6.

section. In PERB Case No. 17-N-04, the Board found a leave proposal to be negotiable since there is no explicit statutory restriction on employee leave for all employees.¹⁷ The Board also found that employees hired after September 30, 1987 are not under a statutory restriction regarding employee leave.¹⁸ The Board now finds, after considering section 1-612.03(a)(6) of the D.C. Official Code, that this proposal is negotiable as it relates to employees hired after September 30, 1987.

Article VIII, Leave

Section M: Holidays Recognized and Observed

Day after Thanksgiving Day

One Personal Day as requested in accordance with the annual leave policy described in Article VIII, Section A, ¶ 3.

Agencies: The Union’s proposal to establish the day after Thanksgiving as a recognized holiday for all Education Aides and other employees in the bargaining unit would override the exclusive authority of Congress, the D.C. Council and the Mayor to establish legal public holidays.¹⁹ The designation of this particular duty day as a “holiday” for this bargaining unit would have system-wide consequences that could have a significant policy impact on the Agencies.²⁰ The Union’s proposal for one additional personal leave day is nonnegotiable because it alters and contravenes the preemptory statutory criteria for leave set forth in section 1-612.03.²¹

Union: Section 1-612.02 establishes a list of legal public holidays, but it does not foreclose negotiation of a better benefit for employees represented by a labor organization. Furthermore, section 1-612.02(a) addresses unspecified legal private holidays that may exist beyond those authorized as legal public holidays. This is not a subject removed from negotiations by section 1-617.08(a) and it is therefore negotiable pursuant to section 1-617.08(b).²²

Board: This proposal is partially negotiable. The Agencies relies on *Washington Teachers Union, Local 6 and District of Columbia Public Schools*²³ which stated that the designation of a particular duty day as a holiday was nonnegotiable because it would have system-wide consequences. Since that Opinion, the Board has distinguished that case by stating that it was “not a pronouncement on all negotiability issues in which a date figures.”²⁴ Instead the Board looks to the practical effect of the proposal and whether it would have a system-wide

¹⁷ *AFSCME, District Council 20, Local 1959 v. OSSE*, 65 D.C. Reg. 7657, Slip Op. No. 1659 at 9, PERB Case No. 17-N-04 (2018).

¹⁸ *Id.*

¹⁹ Answer at 11.

²⁰ Answer at 11.

²¹ Appeal at 11.

²² Appeal at 7.

²³ 48 D.C. Reg. 6555, Slip Op. No. 144, PERB Case No. 85-U-28 (1986)

²⁴ *Teamsters Local Union No. 639 and District of Columbia Public Schools*, 38 D.C. Reg. 6693, Slip Op. No. 263 at p. 18, PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04 (1990).

consequence.²⁵ In this case the effect of designating the day after Thanksgiving as a holiday would have a significant impact system-wide. All paraprofessionals and support staff employees at or below Grade EG-6 would be on leave on the same day possibly resulting in a system-wide closure. Allowing each employee one personal day would not have such a significant impact because it does not require the Agencies to be without all employees in the bargaining unit on one specific day. Therefore the proposal is partially negotiable. Allowing the day after Thanksgiving to be a holiday is nonnegotiable but allowing one personal day as requested is negotiable.

ARTICLE XVIII

Any and all contracting out of bargaining unit work shall be done in accordance with D.C. Official Code § 2-352.05.

When contracting out of bargaining unit work is being considered, ~~DCPS~~ the Agencies shall withhold taking such action to provide the Union a reasonable opportunity for discussion of the matter, except in cases of emergency. In any such discussion, ~~DCPS~~ the Agencies shall explain the reason why it is necessary to take the proposed action and the Union shall respond on the merits, including the suggestion of any alternative action, and ~~DCPS~~ Agencies will give due consideration to such suggestion before making a final decision. ~~After considering the Union's alternative suggestions, if any, DCPS may proceed to contract out work.~~

Agencies: The Union's proposal goes beyond the statutory criteria set forth in section 2-352.05 of the D.C. Official Code. The proposed language is nonnegotiable as it specifically prohibits contracting out unless the Union is afforded discussions with the Agencies during which the Agencies must explain the reasons for contracting out and the Union is entitled to present suggestions that must be given due consideration. The proposal infringes on management's right to maintain the efficiency of government operations.²⁶

Union: Section 2-352.05 addresses certain procedures that must take place prior to the Agencies making a decision to contract out bargaining unit work. This proposal requires the Agencies to engage in dialogue with the union representing employees affected by contracting out bargaining unit work. This is not a subject removed from negotiation by section 2-352.05.²⁷

Board: This proposal is nonnegotiable. Section 1-617.08 reserves to management the right to "maintain the efficiency of the District government operations." This proposal is nonnegotiable as it limits management's ability to make decisions to contract out services. The Board has

²⁵ *Id.*

²⁶ Answer at 13.

²⁷ Appeal at 7-8.

previously stated that requiring an agency to conduct analysis and share it with the Union before contracting out requires actions by management not required by the statute.²⁸

ARTICLE [] TRANSFERS AND WORKFORCE CHANGES

Section A: Involuntary Transfers

3. Involuntary transfers shall not be made for disciplinary reasons.
4. An employee who is involuntarily transferred shall carry forward his/her system-wide seniority upon transfer.
5. All decisions regarding the involuntary transfer of bargaining unit members, including all excessing decisions will be based on system-wide seniority. In the event DCPS finds it necessary to excess any bargaining unit position from any school, preference will be given to employees with the greatest amount of system-wide seniority.
6. All excessed employees not placed by July 15 shall be assigned by DCPS to remaining vacancies according to their classification.
7. "System-wide" seniority for the purposes of this Agreement will be determined by comparing the employees' earliest dates of employment with DCPS subsequent to which there was no break in service of one day or more. In the event of a tie between two employees with the same system-wide seniority date, DCPS will break the tie by affording preference to the employee with the greater building-wide seniority.
8. For the purpose of this Agreement, "building-wide seniority" will be determined by comparing the employees' earliest dates of employment in the particular DCPS school building from which the employees are being considered for excessing. If a tie persists, DCPS will compare the last four digits of the employees' Social Security numbers and the employees with the lower number will be considered junior to the employee with the higher number.
9. DCPS and the Union further agree that, notwithstanding the name DCPS or a particular school uses for an individual employee's position, excessing decisions will be made by a seniority competition among employees whose positions share the same official position description. DCPS agrees to take immediate efforts to conform employees' official titles to the titles used in their most recent position descriptions.

Section B: Voluntary Transfers

1. The parties agree that employees may not transfer from school to school without written consent of the principal of the receiving school. Otherwise, the parties agree that employees must submit an application for each vacant position and participate in the interview process.
2. Employees who voluntarily transfer to another school shall maintain their system-wide seniority upon transfer.

²⁸ *AFGE, Local 631 v. District of Columbia DCPS of Public Works*, 59 D.C. Reg. 4968, Slip Op. No. 965 at 15, PERB Case No. 08-N-02 (2009).

Agencies: This proposal is contrary to section 1-617.08, specifically regarding management's right to assign, transfer, RIF and discipline employees. The Board has previously found nonnegotiable a proposal that required involuntary transfers based on seniority.²⁹

Union: The Board has held that seniority is negotiable and that procedures for using seniority to transfer employees to vacant positions for which they are qualified are negotiable.³⁰ There is substantively no difference between this proposal and one to allow employees to bid on available routes based on seniority. Furthermore, in the federal sector the subject of bidding procedures based on seniority are treated as a mandatory subject of bargaining that may ultimately be resolved through impasse.³¹

Board: This proposal is partially nonnegotiable. Section A(3) and A(5) are nonnegotiable. The decision to transfer employees is reserved for management; however, the Board has held that management's decision to exercise its sole right to transfer employees is not compromised when the proposal is limited to procedures for implementing transfers, including those which are voluntary, and for handling the impacts and effects of such transfers.³² Section A(3) is nonnegotiable because it infringes on management's right to transfer employees, as it specifically states that the Agencies cannot transfer employees for disciplinary reasons. This is a management right and nonnegotiable. Section A(5) states that all decisions regarding involuntary transfers will be based on seniority. The Board has previously found limiting management's right to transfer to seniority places an improper restraint on management.³³ Although the principle of seniority is not expressly preempted by section 1-617.2, limiting management's right to transfer to the criteria of seniority places an improper restraint on management.³⁴ Decision to transfer employees is reserved for management, section A(5) places limitations on that management decision. As to the remaining sections of the proposal, the Board concludes that the Union's proposal regarding voluntary and involuntary transfer procedures are distinguishable from the Agencies' ultimate decision to transfer employees, a matter reserved to management. In this respect, the proposal is negotiable.

ARTICLE []: LIGHT DUTY

There are no permanent light duty assignment positions within the Agency. However, from time to time, an opportunity may arise for a temporary light duty assignment of limited duration. Assignments to light duty may not be available for every employee who desires it, nor is there any assurance such an assignment will continue as long as the employee's limited circumstances persist. The

²⁹ Answer at 15.

³⁰ Appeal at 9.

³¹ Appeal at 9.

³² *UDCFA v. UDC*, PERB Case No. 16-N-01, Slip Op. No. 1617 (2017).

³³ *WTU, Local 6 and D.C. Public Schools*, 46 D.C. Reg. 8090, Slip Op. No. 450 at 9, PERB Case No. 95-N-01 (1995).

³⁴ *Id.*

Employer will make every effort to provide light duty assignments which are temporary in nature as follows:

1. To be eligible for light duty, the employee's limitations must be certified by the employee's attending physician. The certification must identify the employee's impairment(s); the type of work he or she is capable of performing and; the duration of the impairment.
2. When there are more requests for light duty than there are light duty assignments available, assignments shall be made in order of the dates the requests were made by employees determined by management to be equally qualified for the assignment.
3. Light duty assignments shall not be considered to be detail assignments.

Agencies: The last sentence of the first paragraph mandates that light duty assignments shall be temporary in nature. This infringes on management's sole right under section 1-617.08(a)(5)(A) to determine the "number, types and grades of positions of employees assigned to an agency's organization, unit, work project or tour of duty." Paragraph 1 infringes on management's right to prescribe the standards and qualifications for eligibility for light duty assignments. Paragraph 2 mandates how assignments shall be made on the basis of when requests are made. Paragraph 3 precludes light duty assignments as details, even though the proposal envisions light duty assignments as temporary.

Union: The proposal merely outlines a process for fairly distributing light duty opportunities if the employer is able to make light duty assignments available. The proposal does not mandate that management do anything.³⁵

Board: This proposal is nonnegotiable. The proposal dictates actions to be taken by the Agencies when utilizing light duty, and therefore impacts the Agencies' sole right to assign employees under section 1-618(a)(2).³⁶ The Board has previously stated that a proposal that mandates that under certain circumstances management must assign light duty is nonnegotiable.³⁷ This proposal states the agencies must make "every effort" to provide light duty assignments. The proposal is nonnegotiable because it contravenes management's sole right to assign employees.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Union's proposal Article 1: Recognition Coverage is nonnegotiable.
2. The Union's proposal Article VII: Schedules is nonnegotiable.
3. The Union's proposal Article VIII: Leave is partially negotiable.
4. The Union's proposal Article VIII: Leave Section M is partially negotiable.
5. The Union's proposal Article XVIII is nonnegotiable.

³⁵ Appeal at 11.

³⁶ *IBPO, Local 446 v. DC General Hospital*. 42 D.C. Reg. 5482, Slip Op. No. 336, PERB Case No. 92-N-05, (1992).

³⁷ *Id.* at 2.

6. The Union's proposal concerning "transfer and workforce changes" is partially negotiable. Section A(3) and (5) are nonnegotiable.
7. The Union's proposal concerning "Light Duty" is nonnegotiable.
8. 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 Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

Washington, D.C.

August 16, 2018

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-N-02, Op. No. 1677 was transmitted to the following parties on this the 22nd day of August, 2018.

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