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

In the Matter of:)	
)	
University of the District of Columbia Faculty Association,)	
)	
Petitioner,)	PERB Case No. 16-N-01
)	
v.)	Opinion No. 1617
)	
University of the District of Columbia,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

On February 23, 2016, the University of the District of Columbia Faculty Association (“the Association”) filed this Negotiability Appeal. The Association and the University of the District of Columbia (“the University” or “UDC”) are negotiating their Eighth Master Agreement. In accordance with D.C. Official Code § 1-617.16(a), they are negotiating both compensation and noncompensation issues.

The Association transmitted to the University a proposed Eighth Master Agreement on December 12, 2015. On February 11, 2016, counsel for the University sent the Association a letter stating:

[T]he University declares that it is exercising its management right not to negotiate the following subjects contained in the Seventh Master Agreement and in your proposal as those subjects are nonnegotiable. I have referenced the Seventh Master Agreement simply to put you on notice that even to the extent the Union would withdraw any of its new language, the University would

alternatively contend that any similar language in the Seventh Master Agreement is nonnegotiable.¹

The letter then discusses fifteen subjects dealt with in the Eighth Master Agreement. With regard to each of the fifteen subjects, the letter states that language in the Association's proposal, the existing agreement, or both is nonnegotiable.

The Association timely filed the instant Negotiability Appeal, asserting that all fifteen subjects were negotiable. The Association argued that the Board should either find that the fifteen subjects are mandatory subjects of bargaining or direct the parties to file briefs. The University filed an Answer reasserting the nonnegotiability of the subjects and responding to arguments made by the Association in its Negotiability Appeal.

Pursuant to Rules 532.5(a), 532.6, and 532.7(b), the Executive Director instructed the parties to file briefs within fourteen days. Motions of the parties to extend the time for filing briefs, to increase the page limit, and to allow the filing of reply briefs were granted. Each party filed an original brief and a reply brief. In its original brief, the Association amended three of its proposals.

II. Discussion

A. General Principles

There are three categories of collective bargaining subjects: (1) mandatory subjects over which parties must bargain, (2) permissive subjects over which the parties may bargain, and (3) illegal subjects over which the parties may not legally bargain.² A permissive subject of bargaining is nonnegotiable if either party declines to bargain on the subject.

Management rights are permissive subjects of bargaining.³ Management rights are set forth in D.C. Official Code § 1-617.08(a) and in certain other provisions of chapter 6 of title 1 of the D.C. Official Code, the Comprehensive Merit Personnel Act ("CMPA"). Section 1-617.08(a) provides that management "shall retain the sole right" to undertake the actions and make the determinations listed in that section.

Matters that do not contravene section 1-617.08(a) or another provision of the CMPA are negotiable. Section 1-617.08(b) provides, "All matters shall be deemed negotiable except those that are proscribed by this subchapter." Section 1-605.02(5) of the D.C. Official Code empowers the Board to "[m]ake a determination in disputed cases as to whether a matter is within the scope of collective bargaining." Accordingly, in this Decision and Order, the Board will separately determine the negotiability of each of the matters that is in dispute, as has been its longstanding

¹ Negotiability Appeal, Attach. 1.

² *D.C. Nurses Ass'n v. D.C. Dep't of Pub. Health*, 59 D.C. Reg. 10,776, Slip Op. No. 1285 at p. 4, PERB Case No. 12-N-01 (2012) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1975)).

³ *Local 36, Int'l Ass'n of Firefighters v. D.C. Dep't of Fire & Emergency Med. Servs.*, 61 D.C. Reg. 5632, Slip Op. No. 1466 at 5, PERB Case No. 13-N-04 (2014).

practice.⁴ To the extent that they are inconsistent with this approach, we overrule those portions of two of our prior cases in which we stated that “[t]he Board considers each proposal as a whole, unless the Union has requested that only a particular portion of a proposal be considered.”⁵

Certain matters discussed by the Association are not ripe for determination by the Board, however. In several instances the Association suggests what it will propose as an alternative if the Board were to accept the University’s interpretation and find a proposal nonnegotiable. Those contingent alternatives have neither been proposed by the Association nor rejected by the University. Thus, they do not present “disputed cases” and no issue has arisen concerning their negotiability.⁶ Rendering an advisory opinion on the negotiability of the alternatives is not within the Board’s authority under section 1-605.02(5) to make a determination in disputed cases.⁷ Accordingly, this opinion will not discuss the alternatives that the Union mentions in its briefs.

B. Proposals Alleged by the University to be Nonnegotiable

The Association’s amendment to a proposal resolved the parties’ dispute over one of the fifteen subjects. In light of the D.C. Court of Appeals’ recent decision that the University’s educational employees are subject to the Abolishment Act,⁸ the Association presented in its original brief an amended proposal on reductions in force.⁹ The University replied that “[t]his revision effectively removes this issue from the list of non-negotiable issues.”¹⁰ As a result, there remain fourteen subjects concerning which the Association has allegedly made nonnegotiable proposals.

Those fourteen subjects, which are discussed below, are (1) Executive Sessions of the Board of Trustees, (2) Access to Offices and Laboratories, (3) Polling, (4) Discipline for Cause, (5) Peer Assessment and Evaluation, (6) Academic Rank and Promotions, (7) Tenure, (8) Workload, (9) Intellectual Property, (10) Annual Notice to Faculty Members, (11) Sabbatical Leave, (12) Transfers, (13) Support Systems, and (14) Faculty Handbook.

⁴ See *NAGE, Local R3-08 v. D.C. Homeland Security & Emergency Mgmt. Agency*, Slip Op. No. 1468 at 5-6, PERB Case No. 14-N-02 (2014); *AFGE, Local 631 v. D.C. Water & Sewer Auth.*, 60 D.C. Reg. 16462, Slip Op. No. 1435 at 9, PERB Case No. 13-N-05 (2013); *AFGE, Local and D.C. Office of the Corporate Counsel*, Slip Op. No. 709 at 6, PERB Case No. 03-N-02 (July 25, 2003); *Teamsters Local Union No. 639 and DCPS*, 38 D.C. Reg. 6693, Slip Op. No. 263 at 12, 25-26, Case No. 90-N-02 (1990).

⁵ *F.O.P./Protective Servs. Police Dep’t Labor Comm. and Dep’t of Gen. Servs.*, 62 D.C. Reg. 16505, Slip Op. No. 1551 at 2, PERB Case No. 15-N-04 (2015); *SEIU, Local 500 and Univ. of D.C.*, 62 D.C. Reg. 14633, Slip Op. No. 1539 at 3, PERB Case No. 15-N-01 (2015).

⁶ Board Rule 532.1 provides, “If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board.”

⁷ *D.C. Fire Dep’t and AFGE, Local 3721*, 35 D.C. Reg. 6361, PERB Case No. 188, PERB Case No. 88-N-02 (1988).

⁸ *Bd. of Trustees of the Univ. of D.C. v. AFSCME, Dist. Council 20, Local 2087*, 130 A.3d 355 (D.C. 2016).

⁹ Union’s Original Br. 3-4.

¹⁰ University’s Reply Br. 2.

Beneath the title of each subject, the pertinent text of the Association's proposed Eighth Master Agreement is quoted. Underlined text is new language proposed by the Association for the Eighth Master Agreement. The remainder of the text is existing language from the Seventh Master Agreement that the Association proposes to retain in the Eighth Master Agreement. In many cases, the University contends that both new and existing language is nonnegotiable.

1. Article VII(A) Executive Sessions of the Board of Trustees

Article VII(A) as proposed by the Association is as follows:

ARTICLE VII - ASSOCIATION RIGHTS

A. Rights of the Association President

1. The President of the Association or designee shall have the right to speak at the Board meeting on any issue relating to terms and conditions of employment that is pending before the Board provided a one (1) day notice is given to the Board. If the meeting is not open to the public or is an Executive Session, the Association representative shall attend only ~~be present~~ to make the presentation and answer questions, ~~if any~~.
2. ~~Not less than ten (10) days prior to a scheduled meeting of the Board of Trustees, the Association may in writing, addressed to the Chair of the Board, propose for inclusion on the agenda of the forthcoming meeting, items affecting the terms and conditions of employment of members of the Bargaining Unit, and the Board will make a good faith effort to include such items on the agenda. Notwithstanding the foregoing, the parties acknowledge that the inclusion of any item on the agenda of the Board is solely at the discretion of the Board, and the failure of the Board to include any item proposed by the Association, or to take up such item at a meeting, shall not be grievable or arbitrable.~~ The Faculty Association shall be placed on the agenda for every Board meeting, but may waive the right to speak.
3. The Faculty Association shall be sent two (2) copies of the agenda packet (including documents, proposed resolutions, and committee reports) of all ~~public~~ Board of Trustees meetings at the same time they are sent to Board members. One copy shall be sent to the Faculty Association office, and the other shall be sent to the office of the Association's representative to the Board of Trustees. The Faculty Association shall be sent two (2) copies of the official minutes and attachments of all ~~public~~ Board meetings and all resolutions referenced in those minutes.

a. University's Position

The University objects that the proposal to permit (or require) the Association's president to attend executive sessions of the Board of Trustees conflicts with its regulations on executive sessions of the Board of Trustees and would interfere with the University's right "[t]o maintain the efficiency of the District government operations entrusted" to it¹¹ and to determine "[t]he

¹¹ D.C. Official Code § 1-617.08(a)(4).

mission of the agency.”¹² Executive sessions are not public fora, and the Association has no constitutional right to attend them.

b. Association’s Position

Citing *Lex Tex Ltd. v. Skillman*,¹³ the Association contends that the First Amendment right “to petition the Government for a redress of grievances” includes a right to appear personally before a governmental body.¹⁴ The Association asserts that PERB has never found a proposal to talk to management or to obtain documents available to the public to be nonnegotiable. Citing *Washington Teachers’ Union v. D.C. Public Schools*,¹⁵ the Association argues that the Board has held proposals that merely permit speech but require no action by management to be negotiable.

c. Analysis

The D.C. Court of Appeals in *Lex Tex Ltd. v. Skillman* held that the First Amendment protects a citizen’s right to petition the federal government without fear of becoming subject to personal jurisdiction in the District of Columbia when the citizen’s contacts with the District of Columbia are limited to exercising that constitutional right.¹⁶ Contrary to the Association’s assertion, the court did not hold that the First Amendment right to petition the government includes a right to appear personally before a governmental body. The Supreme Court has held that it does not. In *Minnesota State Board of Community Colleges v. Knight*,¹⁷ the Court rejected the claim of faculty members to attend meetings with administrators that a Minnesota law reserved to union representatives. The Court said that the Constitution does not grant to members of the public a right to be heard by public bodies as they make decisions.¹⁸ The Court held that the faculty members had no constitutional right to compel the government to listen to their views: “They have no such right as members of the public, as government employees, or as instructors in an institution of higher learning.”¹⁹

While the Constitution does not require the University to accept the Association’s proposal, the CMPA requires the University to negotiate over the proposal unless it infringes upon management rights under D.C. Official Code § 1-617.08(a) or is an illegal subject of bargaining.²⁰ A consideration of the nature of the proposal discloses that it does infringe upon management rights. The proposal does not merely give employees an unspecified opportunity to express their preferences to committees, as was the case in *Washington Teachers’ Union v. D.C.*

¹² D.C. Official Code § 1-617.08(a)(5)(A).

¹³ 579 A.2d 244, 248 (D.C. 1998).

¹⁴ Union’s Br. 7

¹⁵ 46 D.C. Reg. 8090, Slip Op. No. 450, PERB Case No. 95-N-01 (1995).

¹⁶ 579 A.2d at 248.

¹⁷ 465 U.S. 271 (1984).

¹⁸ *Id.* at 283.

¹⁹ *Id.*

²⁰ See *AFGE Local 631 v. D.C. Water & Sewer Auth.*, 60 D.C. Reg. 16462, Slip Op. No. 1435 at 2, 5, PERB Case No. 13-N-05 (2013); *Washington Teachers’ Union v. DCPS*, 46 D.C. Reg. 8090, Slip Op. No. 450 at 13, PERB Case No. 95-N-01 (1995).

Public Schools,²¹ cited by the Association, but in addition the proposal prescribes the venue: the Association can express its views at “every Board meeting” including those held in executive session. While the Association contends that the proposal gives it little more than is available to the general public, the difference is not so little. In order for a person who is not a member of the Board of Trustees to attend or listen to an executive session, there must be a motion, a second, and approval of the Board.²²

The Federal Labor Relations Authority (“FLRA”) has held that management rights encompass not only the right to make decisions on certain matters but also the right to deliberate upon and discuss the factors involved in the decisions. A proposal requiring union participation in such discussions is substantive not procedural.²³ Accordingly, the FLRA found a proposal that a union have a representative on an agency’s position management committee and professional standards boards was nonnegotiable.²⁴ The FLRA held that a proposal requiring union participation in a formal organizational structure established for deliberations as a part of an agency’s substantive decision-making process “would have the effect of directly interfering with management’s statutory right to make the decisions involved.”²⁵

The FLRA’s reasoning is sound and applicable here. The authority of the Board of Trustees includes making decisions involving such management rights as determining the University’s mission²⁶ and budget²⁷ as well as to “generally determine, control, supervise, manage, and govern all affairs of the University.”²⁸ To require union participation in all of the executive sessions of the Board of Trustees would directly interfere with the University’s statutory right to make decisions on matters set forth in section 1-617.08(a).

The University does not question the negotiability of Section A(3), and we see no grounds for questioning its negotiability.

Article VII, Sections (A)(1) and (2) are *nonnegotiable*. Article VII, Section A(3) is *negotiable*.

2. Article VII(G) Access to Offices and Laboratories

Article VII(G) as proposed by the Association is as follows:

ARTICLE VII - ASSOCIATION RIGHTS

- G. Faculty will be given ~~reasonable~~ **unlimited** access to their offices and laboratories, but the University may close buildings or deny such access when necessary for reasons related to

²¹ Slip Op. No. 450 at 18.

²² 8-B DCMR § 105.12(b).

²³ *AFGE, Local 3804 v. FDIC, Madison Region*, 21 F.L.R.A. 870, 875-76 (1986).

²⁴ *Nat’l Fed’n of Fed. Employees and Veterans Admin. Med. Center*, 9 F.L.R.A. 998, 999 (1982).

²⁵ *Id.* at 999.

²⁶ D.C. Official Code § 38-1202.06(2)(B).

²⁷ D.C. Official Code § 38-1202.06(4).

²⁸ D.C. Official Code § 38-1202.06(16).

security such as fire, construction or criminal activity ~~and efficient operations~~. The University, after ~~consultation~~ negotiation with the Association, may set non-uniform rules and procedures for access to different facilities based on the particular administrative, physical, and security problems posed.

a. University's Position

The proposal restricts the University's right to maintain the efficiency of its operations and to determine its mission and internal security practices. If the University wants to make an exception to the faculty's unlimited access to offices and laboratories, it must negotiate one.

b. Association's Position

The Association asserts that "[i]t is important that faculty be allowed access to their offices and laboratories."²⁹ The University police operate around the clock. The proposal would not require additional staffing. The University has not opposed replacing "consultation" with "negotiation" in the second sentence of the proposal. That change must be deemed negotiable.

c. Analysis

The University merely names without elaboration the management rights it asserts in opposition to the proposed changes to the first sentence of Article VII(G). Of those management rights, the right of an agency to determine "[t]he agency's internal security practices"³⁰ seems relevant to this proposal. However, the University does not explain the connection between the proposed change and its internal security practices or internal security considerations. Absent a suggested link between limiting faculty's access to their offices and a security concern, we deem the proposal negotiable.³¹

Because the University does not challenge the negotiability of replacing "consultation" with "negotiation" in its briefs or its February 11, 2016 declaration of nonnegotiability, no issue has arisen as to whether that change is within the scope of bargaining³² and there is no disputed case for the Board to decide.³³ The Board therefore takes no position on the change's negotiability. If a proposal pertains to management rights, it does not become negotiable simply because the agency did not declare it nonnegotiable.³⁴

²⁹ Union's Original Br. 9.

³⁰ D.C. Official Code § 1-617.08(a)(5).

³¹ See *F.O.P. Lodge #1F and U.S. Dep't of Veterans' Affairs, Med. Center, Providence, R.I.*, 57 F.L.R.A. 373, 379 (2001).

³² Board Rule 532.1 provides, "If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board."

³³ See D.C. Official Code § 1-605.02(5).

³⁴ See *AFGE, Local 631 v. D.C. Water & Sewer Auth.*, 60 D.C. Reg. 16462, Slip Op. No. 1435 at 5, PERB Case No. 13-N-05 (2013). However, an agency "may waive a management right in a round of bargaining by choosing to bargain in that round over an issue where it has no duty to do so." *Local 36, Int'l Ass'n of Firefighters v. D.C. Dep't of Fire & Emergency Med. Servs.*, 60 D.C. Reg. 17359, Slip Op. 1445 at 2-3, PERB Case No. 13-N-04 (2013).

The first sentence of Article VII(G) is *negotiable*.

3. Article VII(L) Polling

Article VII(L) as proposed by the Association is as follows:

ARTICLE VII - ASSOCIATION RIGHTS

...

L. Polling or surveying of Bargaining Unit employees will not be conducted by the Administration without prior ~~consultation~~negotiation with the Association.

a. University's Position

The Association's overbroad proposal prohibits all polling without negotiation, including polling that does not involve negotiable subjects. This absolute prohibition on communication would interfere with the University's right to direct its employees, maintain the efficiency of its operations, and to determine its mission, budget, and organization.

During the 2008 negotiation for the Seventh Master Agreement, the Association proposed the current provision that it be consulted prior to polling or surveying of employees. In a negotiability appeal involving that proposal, PERB Case No. 09-N-02, counsel for the Association argued that "[t]he current provision makes the crucial distinction between 'negotiation' and 'consultation,'" requiring consultation only. The Association fails to articulate why this distinction is no longer crucial and negotiation may now be substituted for consultation.

b. Association's Position

Polling on negotiable subjects of bargaining violates D.C. Official Code section 1-617.04(a)(1) and (5). The Association proposes negotiation over the content of polls to ensure that the University does not violate the CMPA. PERB never addressed the merits of Case No. 09-N-02.

c. Analysis

In its decision in PERB Case No. 09-N-02, the Board held that the University's declaration of nonnegotiability was untimely. The Board did not reach the merits of any proposals.³⁵ UDC asserts that the Association does not articulate why the distinction it made between negotiation and consultation was crucial in Case No. 09-N-02 but no longer is. However, UDC does not articulate why the distinction would ever be crucial for purposes of negotiability. Both parties' arguments regarding negotiability assume that polling of Association members is an unfair labor practice only if the polling concerns negotiable subjects of bargaining. The assumption underlying these positions is not quite correct. The Board has

³⁵ *Univ. of D.C. Faculty Ass'n v. Univ. of D.C.*, 59 D.C. Reg. 6481, Slip Op. No. 1104, PERB Case No. 09-N-02 (2011).

found the polling of employees on alternative proposals related to terms and conditions of employment to be an unfair labor practice in cases where the subject of the polling involved a management right that could have been implemented without bargaining.³⁶

The Association can agree to allow the University to deal directly with its members on contemplated changes in conditions of employment by polling them, but absent the Association's permissive agreement on polling, such direct dealing is an unfair labor practice.³⁷ The proposal is a means of obtaining that agreement. With regard to polls on conditions of employment, the proposal merely asks the University to do what the CMPA requires. While polls on other subjects or polls that merely gather information may not require the Association's consent, conducting such polls is not a management right listed in section 1-617.08(a).

Article VII(L) is *negotiable*.

4. Article XI(A) Discipline for Cause

In pertinent part, Article XI(A) as proposed by the Association is as follows:

ARTICLE XI - NON-RENEWAL AND DISCIPLINARY/ADVERSE ACTION

A. PRINCIPLES

...

3. A faculty member may be subject to disciplinary or adverse action only for cause which for the purposes of this Article shall be defined as either professional misconduct or a pattern of dereliction of duties or responsibilities. It is the intent of the parties that cause, as defined in the contract, shall also include a conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee's job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law; any on-duty or employment related act or omission that interferes with the efficiency or integrity of the University operation; and any other on-duty or employment related reason of corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination (refusal to comply with a reasonable request), misfeasance, malfeasance, the unreasonable failure to assist a fellow University employee in performing his or her official duties, or the unreasonable failure to

³⁶ *AFGE Local 3721 v. D.C. Fire & Emergency Servs. Dep't*, 51 DC Reg. 5132, Slip Op. No. 706 at 3, PERB Case No. 01-U-29 (2003); *F.O.P./Metro. Police Dep't Labor Comm. v. Metro. Police Dep't*, 48 D.C. Reg. 8530, Slip Op. No. 649 at 6, PERB Case No. 99-U-27

³⁷ *Dep't of Health & Human Servs. and AFGE, Local 3512*, 28 F.L.R.A. 409, 431 (1987).

give assistance to a member of the public seeking service or information from the University.

...

5. The University shall carry the burden of proof by clear and convincing evidence in all proceedings for disciplinary or adverse action under this Article.

a. University's Position

Sections A(3) and A(5) of Article XI, as they exist in the Seventh Master Agreement and as revised by the Association in its proposal, interfere with the University's right to discipline for cause provided in D.C. Official Code § 1-617.08(a)(2).

Section A(3) of Article XI is a specific standard where none existed, like the proposal held nonnegotiable in *Washington Teachers' Union, Local 6 v. D.C. Public Schools*.³⁸ It conditions "cause" by defining it. Limitations on the management right to discipline have been held to be nonnegotiable.³⁹

Section A(5) restricts management's right to discipline for cause just like a proposal in *Washington Teachers' Union, Local 6 v. D.C. Public Schools* that would have restricted that right to instances where all remediation efforts had been exhausted. The Board held the proposal to be nonnegotiable.⁴⁰ The University asserts that, as with the remediation requirement, the requirement of clear and convincing evidence "is not simply a procedural matter but rather, again, an attempt to establish a standard where the law clearly upholds management's unfettered right to discipline for cause."⁴¹

b. Association's Position

The Board has never held that an employer has a unilateral nonnegotiable right to define cause or that labor and management cannot bargain about it. The CMPA included a definition of cause, but it was repealed.⁴² The University's regulations incorporate the repealed definition by reference.⁴³ Thus, a standard does exist, contrary to the University's assertion. A proposal to incorporate an employer's regulations into a contract is negotiable.

³⁸ 46 D.C. Reg. 8090, Slip Op. No. 450 at 5, PERB Case No. 95-N-01 (1995).

³⁹ University's Original Br. at 9 (citing *D.C. Fire & Emergency Med. Servs. and AFGE, Local 3721*, 54 D.C. Reg. 3167, 874 at 11, PERB Case No. 06-N-01 (2007); *Washington Teachers' Union, Local 6 v. DCPS*, 46 D.C. Reg. 8090, Slip Op. No. 450 at 12, PERB Case No. 95-N-01 (1995)).

⁴⁰ Slip Op. No. 450 at 5.

⁴¹ University's Original Br. 9.

⁴² Union's Original Br. 11 (citing D.C. Code § 1-617.1(d), D.C. Law 2-139 § 1601(d); D.C. Official Code § 1-616.01(d)).

⁴³ Union's Original Br. 12 (citing 8-B DCMR §§ 1520.2, 1520.3).

Procedural aspects of discipline are negotiable.⁴⁴ Choice of burden of proof is a negotiable procedural matter.

c. Analysis

Section A(3) defines cause as “either professional misconduct or a pattern of dereliction of duties or responsibilities.” It then sets forth numerous specific acts and omissions that the definition includes.

The University is entitled to the full scope of the management right to discipline for cause. The proposed definition confines that scope, as would virtually any other definition. To give a couple of examples, misconduct other than professional misconduct as well as a serious dereliction of duties or responsibilities that is not part of a pattern are excluded from the proposed definition, yet they might be found to be cause for discipline in particular cases.

The University contends that the proposal creates a standard where none exists. That is not the proposal’s flaw. A standard exists: cause. The proposal limits the existing standard of cause. For that reason, section A(3) is nonnegotiable.

A proposal that affords employees the same standard for imposing discipline as that provided by section 1-617.08(a)(2), *i.e.*, cause, is negotiable.⁴⁵ Section A(5)’s requirement that the University “carry the burden of proof by clear and convincing evidence in all proceedings for disciplinary or adverse action” does not change the standard from cause to something else; it establishes the certainty with which the University must establish cause.

The management right to discipline for cause set forth in section 1-617.08(a)(2) “is silent with the respect to the procedures utilized in the exercise of that authority.”⁴⁶ Procedural matters concerning discipline are negotiable.⁴⁷ The burden of proof is a procedural matter.⁴⁸

As was the case with the procedural matter the Board considered in *Teamsters Local Union No. 639 and D.C. Public Schools*,⁴⁹ nothing in section A(5) prevents the University from determining cause for discipline or takes away management’s right to discipline for cause.

Article XI, Section A(3) is *nonnegotiable*. Article XI, Section A(5) is *negotiable*.

⁴⁴ Union’s Original Br. 13 (citing *Teamsters Local Unions No. 639 & 730 v. DCPS*, 38 D.C. Reg. 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990)).

⁴⁵ *Washington Teachers’ Union, Local 6*, Slip Op. No. 450 at 11.

⁴⁶ *Teamsters Local Unions No. 639 & 730 v. DCPS*, 38 D.C. Reg. 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990).

⁴⁷ *NAGE Local R3-06 v. D.C. Water & Sewer Auth.*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at 5, PERB Case No. 13-N-03 (2013).

⁴⁸ *United Sec. Corp. v. Bruton*, 213 A.2d 892, 893 (D.C. 1965). See also *In re Tinney*, 518 A.2d 1009, 1019 (D.C. 1986).

⁴⁹ 38 D.C. Reg. 6693, Slip Op. No. 263 at 21, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990).

5. Article XIV Peer Assessment and Evaluation

The Association proposes to replace Article XIV as it presently exists with the following article.

ARTICLE XIV - PEER ASSESSMENT AND EVALUATION

A. GENERAL PROVISIONS

1. The University will provide an annual peer assessment of the performance of each faculty member. This assessment is to be used by the faculty member as a basis for maintaining or improving the quality of his or her performance. The University will also provide an annual evaluation used to monitor the quality of faculty performance and as a basis for employment decisions.
2. A faculty member may be rated as “Less than Satisfactory” (which means that the faculty member failed in significant respects to meet the generally expected level of performance under the applicable criteria); “Satisfactory” (which means that the faculty member met the generally expected level of performance under the applicable criteria); “Above Average” (which means that the faculty member exceeded the generally expected level of performance under the applicable criteria); and “Excellent” (which means that the faculty member substantially exceeded the generally expected level of performance under the applicable criteria).
3. There shall be no pre-set distribution of ratings (i.e., quotas) among the aforesaid four categories in any department or University-wide. Assessment and Evaluation are individual, not a comparative processes and each faculty member shall be evaluated on his or her own merits.
4. The quality of a faculty member’s performance shall be the determinative consideration. The criteria used to assess and evaluate faculty must be related to job performance.
5. The Assessment and Evaluation period shall be from January 1 through December 31. The Teaching and Job Related Responsibilities criterion for teaching faculty members shall be based on the faculty member’s performance during the Spring and Fall Semesters, and activities engaged in by a faculty member during the Summer Semester shall not be considered for purposes of this criterion. Such Summer Semester activities may be considered only in connection with the Scholarship and Professional Growth, University Service, and Public Service criteria.

B. DEPARTMENTAL ASSESSMENT AND PROMOTION COMMITTEE

1. On or before September 1 of each academic year, a Departmental Assessment and Promotion Committee (“DAPC”) shall be established in each Department of the University. The DAPC shall consist of 3 members in departments with 7 or less fulltime non-probationary faculty members; 5 members in departments with 8 to 15 fulltime non-probationary faculty members; and 7 members in departments with 16 or more full-time non-probationary faculty members. The members of the DAPC shall be full-time non-probationary faculty in the Department and shall be elected by a vote of full-time faculty members in said Department to serve for the academic year in question. The Department Chair shall not be a member of the DAPC, nor shall he

or she vote in the election for DAPC members. When a DAPC cannot be established in the manner provided above, the Dean and the Association President shall make arrangements to establish through other appropriate means a DAPC that is designed to meet the interest of this Article. Each program within a Department shall have one representative on the DAPC even if this requires increasing the size of the DAPC.

2. Except for the quorum requirements (which shall be 3 for a 3-member DAPC; 4 for a 5-member DAPC; and 5 for a 7-member DAPC), each DAPC shall establish its own rules of procedure, including selection of a Chair.

3. On or before October 1 of each academic year, and at such other times as may be appropriate, the DAPC shall make itself available to any individual faculty member who wishes to obtain guidance as to how the evaluation criteria shall apply to him or her during the academic year in question.

C. CRITERIA FOR EVALUATION

The criteria to be used for evaluating the performance of a faculty member, and the relative weight to be given to each criterion, are as follows. In each case, the sum of the weights must equal 100%.

1. Teaching Faculty

<u>Criteria</u>	<u>Weight</u>
<u>Teaching and Job Related Responsibilities (including knowledge of subject matter; ability to communicate with students; quality of instructional materials, course outlines, etc.; student consultation and advising; timely submission of grades, and other required reports; attendance at department, college and University meetings, etc.)</u>	<u>60-75%</u>
<u>Scholarship and Professional Growth (including original research; publications in professional journals; creative works, shows and performances; inventions, patents and technical or vocational products; instructional materials and methods developed; professional consultancies and special activities that enhance the prestige of the University; study/work with peers and experts in the field leading to improved capabilities and credentials, etc.)</u>	<u>15-30%</u>
<u>University Service (including participation in Departmental, College and University activities, both within and outside the discipline; leadership in the University community; participation in faculty, institutional and Faculty Association governance; representing the University at appropriate functions; securing grants and contracts, and otherwise contributing to the growth and development of the University, etc.) and Public Service (including participation in community activities, organizations and functions)</u>	<u>10-25%</u>

2. Clinical Faculty

<u>Criteria</u>	<u>Weight</u>
<u>Teaching/Clinical Instruction</u>	<u>70% - 90% as per faculty election</u>

	<u>in keeping with institutional expectations at hire</u>
<u>Scholarship/Professional Activities</u>	<u>5% - 15% as per faculty election in keeping with institutional expectations at hire</u>
<u>University/Community Service</u>	<u>5% - 15% as per faculty election in keeping with institutional expectations at hire</u>

3. Research Faculty

<u>Evaluation Component</u>	<u>Component Weight</u>
<u>Research/Scholarship/Professional Activities</u>	<u>50% - 100% as per faculty election in keeping with institutional expectations at hire</u>
<u>Teaching</u>	<u>0% - 30% as per faculty election in keeping with institutional expectations at hire</u>
<u>University/Community Service</u>	<u>0% - 30% as per faculty election in keeping with institutional expectations at hire</u>

4. LRD Faculty

<u>Criteria</u>	<u>Weight</u>
<u>Job Performance (including preparation of appropriate work documents; communication with students; maintenance of appropriate duty hours, etc.)</u>	<u>60-75%</u>
<u>Scholarship and Professional Growth (including original research; publications in professional journals; creative works, shows and performances; inventions, patents and technical or vocational products; instructional materials and methods developed; professional consultantships and special activities that enhance the prestige of the University; study/work with peers and experts in the field leading to improved capabilities and credentials, etc.)</u>	<u>15-30%</u>
<u>University Service (including participation in Departmental, College and University activities, both within and outside the</u>	<u>10-25%</u>

<p><u>discipline; leadership in the University community; participation in faculty, institutional and Faculty Association governance; representing the University at appropriate functions; securing grants and contracts, and otherwise contributing to the growth and development of the University, etc.) and Public Service (including participation in community activities, organizations and functions)</u></p>	
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Each DAPC shall establish its own guidelines for the consideration of student assessments and evaluations as provided under Section D below, which guidelines will be made available to all faculty in the Department.

D. STUDENT ASSESSMENT AND EVALUATIONS

1. Recognizing the importance of effective student participation in the assessment and evaluation processes, prior to the last regularly scheduled class session in each course that a faculty member is teaching, the DAPC shall afford the students in said course an opportunity to complete a Student Course Assessment form, a copy of which is attached in Appendix B. (An appropriate explanatory cover memorandum, agreed to by the parties, shall be attached to the Student Course Assessment form.)

2. The Chair shall arrange for the statistical analysis of all Student Course Assessment forms. Upon request, the Chair shall provide the DAPC with access to the statistical analyses and the completed forms. After the submission of grades for the course in question, the Chair shall provide the faculty member with a copy of the statistical analysis for each course taught by the faculty member and, if so requested, by the faculty member, a copy of the Student Course Assessment forms for such course.

E. ASSESSMENT AND EVALUATION TIMELINE

1. The timeline for the annual assessment and evaluation process commences with discussions of academic assessment and planning. The outcomes of these discussions inform expectations for the predetermined criteria sets to be established by the institution and departments/programs/disciplines. These predetermined criteria set forth the foundation for the annual assessment and evaluation process.

2. The timeline for the annual evaluation process is set forward as follows:

• **August - Opening Professional Development Day:** University Provost announces broad institution expectations for annual faculty evaluation process. The University shall distribute an evaluation package including criteria, expectations, standards, and the scholar-teacher-participant model.

• **Within 3-5 Working Days of Opening Professional Development Day:** Department or program faculty, as appropriate, in concert with Department Chairs and/or academic program directors finalize discipline level predetermined criteria.

• **Within 7 Working Days After Opening Professional Development Day or No Later Than the First Day of Classes, whichever is earlier:** Colleges and Schools host information/training sessions to support faculty use of

predetermined criteria in developing their individual assessment and evaluation plans and Narratives.

• **First Week of September:** DAPC members are selected. Department or program faculty, as appropriate, establish preliminary guidelines for informing predetermined criteria.

• **First & Second Weeks of September:** Chairs provide prior spring student course evaluation data to faculty members.

• **Second & Third Weeks of October:** Mid-semester review - Individual faculty member meetings with Chair. Review evaluation plan and evidence collection to date. Suggest revisions, additional evidence needs and opportunities to gather.

• **Second Week in January:** Opening Professional Development Session. Case based training with examples of completed portfolios. Example portfolios will be rated and ratings will be explained.

• **Second Week of February:** Fall student course evaluation provided to faculty in individual meetings with Chairs.

• **Third Friday in February:** Faculty member submits assessment and evaluation portfolio to DAPC.

• **Second Friday in March:** DAPC Chair forwards assessment and portfolios to Department Chair.

• **Last Friday in March:** Chair and DAPC ratings are transmitted to faculty member and Dean. Faculty member has five (5) working days to rebut Chair ratings.

• **Second Friday in April:** Dean transmits ratings and rationale to faculty member and Provost. Faculty member may rebut Dean's rating within five (5) working days through an appeal to the Provost. The faculty member's appeal must contain both a mailing and e-mail address where the faculty member can be reached and which will ensure timely delivery to the faculty member.

• **Last Friday in April:** Provost transmits assessment and evaluation outcome to faculty member. The decision of the Provost is final, subject to Section (E)(6) of this Article.

• **May 15:** Assessment and evaluation reports, performance improvement recommendations, or other status are communicated to faculty member via next academic year contract.

F. EVALUATION PORTFOLIO

Each faculty member is required to submit a portfolio which includes his self-assessment and supporting documents which will enable the DAPC, the Chair, the Dean, and the Provost/VPAA to assess and evaluate the faculty member's performance during the period. See Appendix ???.

G. EVALUATION AND DECISION BY DEPARTMENT CHAIR

1. Each DAPC shall, in consultation with the Department Chair, adopt such written guidelines as it deems appropriate for assessing the faculty members in the

Department on the basis of the criteria set forth in Section C above.

2. On or about the last Friday in March, the DAPC shall submit to the Department Chair for each faculty member in the Department a completed Faculty Member Assessment Form which shall include the DAPC's recommendation as to whether the faculty member should be rated as "Less than Satisfactory", "Satisfactory", "Above Average", or "Excellent". (A sample of the Faculty Member Assessment Form is attached to this Agreement.)

3. Upon consideration of the Faculty Member Assessment Form, the criteria set forth in Section C, and such other information as the faculty member deems relevant (e.g., the statistical compilation of the Student Course Assessment forms), the Department Chair shall rate the faculty member as "Less than Satisfactory", "Satisfactory", "Above Average", or "Excellent". If the rating given by the Department Chair is less favorable to the faculty member than the recommendation made by the DAPC, the Department Chair shall attach to the Faculty Member Evaluation Form an addendum, which sets forth in specific terms the basis for his or her disagreement with the DAPC.

4. By April 15, the Department Chair shall give a copy of the Faculty Member Evaluation Form, and any addendum prepared by the Department Chair in accordance with paragraphs 2, 3, and 4 above, to the faculty member and the DAPC. The faculty member and the Department Chair shall meet promptly thereafter to discuss the faculty member's evaluation, unless both the Department Chair and the faculty member agree to waive such meeting. At the invitation of either the Department Chair or the faculty member, the Chair of the DAPC shall attend this meeting.

5. In addition to the annual evaluation provided for in paragraphs 2, 3 and 4 above, an interim evaluation, covering only the Fall Semester, shall be conducted for each first year faculty member. This interim evaluation shall follow the aforesaid procedures, provided that the April 1 and April 15 dates shall be changed to January 15 and January 30, respectively. The purpose of the interim evaluation shall be to assist the faculty member in adjusting to his or her new position, and shall not be used by the University as the basis for employment decisions. The interim evaluation shall not be subject to appeal under Section F or G of this Article.

6. If an individual is employed as a full-time faculty member after the commencement of an academic year, he or she shall be evaluated in accordance with the procedure set forth in paragraphs 2 and 3 and/or 4 above for that portion of the year during which he or she is employed.

7. Faculty members who are on an authorized leave of absence shall be exempt from the provisions of this Article for the period of such leave.

H. APPEAL TO DEAN

1. A faculty member shall have ten (10) working days from the meeting with the Department Chair, or from the receipt of the Faculty Member Evaluation Form from the Department Chair if the meeting has been waived, to file an appeal with the Dean. If the faculty member does not appeal the decision of the Department Chair within the aforesaid ten (10) day period, said decision shall not be subject to further review

under this Agreement.

2. A faculty member who wishes to appeal the decision of the Department Chair shall, within the aforesaid ten (10) day period, send a Notice of Appeal, using a copy of the form which is attached hereto, to the Dean, with a copy to the Department Chair, setting forth the specific basis for challenging the Evaluation.

3. The Dean shall take such steps as he or she deems appropriate to consider the appeal, and shall meet with the faculty member unless the faculty member waives in writing his or her right to such a meeting. Within thirty (30) days after receipt of the Notice of Appeal, the Dean shall issue his or her decision, either sustaining or modifying the decision of the Department Chair. The Dean's decision shall be in writing, and shall include the Dean's findings and conclusions. A copy of the Dean's decision shall be sent to the faculty member and to the Department Chair.

I. APPEAL TO PROVOST/VICE PRESIDENT FOR ACADEMIC AFFAIRS

1. The faculty member shall have ten (10) working days after receipt of the Dean's decision to file an appeal with the Provost/Vice President for Academic Affairs ("VPAA"). If the faculty member does not appeal the decision of the Dean within the aforesaid ten (10) day period, said decision shall not be subject to further review under this Agreement.

2. A faculty member who wishes to appeal the decision of the Dean shall, within the aforesaid ten (10) day period, send a Notice of Appeal, using a copy of the form which is attached hereto, to the VPAA, with a copy to the Dean, setting forth the specific basis for his or her challenge to said decision.

3. The VPAA shall take such steps as he or she deems appropriate to consider the appeal. Within thirty (30) days after receipt of the Notice of Appeal, the VPAA shall issue his or her decision, either sustaining or modifying the decision of the Dean. The VPAA's decision shall be in writing, and shall include the VPAA's findings and conclusions. A copy of the VPAA's decision shall be sent to the faculty member, the Dean, and the Department Chair. The decision of the VPAA shall be final and not subject to further review under this Agreement except if the evaluation results in discipline, in the imposition of a Performance Improvement Plan, or in the denial of a step increase.

J. ASSOCIATION REPRESENTATION

If requested to do so by a faculty member, the Association may, at its discretion, represent said faculty member in the appeal to the Dean provided for in Section F and/or in the appeal to the VPAA provided for in Section G. If the Association does not represent the faculty member in one or both of the aforesaid appeals, the Dean or the VPAA, as the case may be, shall notify the Association in writing of such appeal, and make available to it upon request copies of all documents exchanged between the parties, including without limitation Notices of Appeal and decisions, as soon as said documents are available. The Association may process a grievance in the limited circumstances noted in Section G(3).

K. RESERVATION OF RIGHTS

Nothing contained in this Article shall be construed to prevent a faculty member from exercising any right that he or she may have under law to challenge any aspect of his or her evaluation. Notwithstanding the foregoing, the parties agree that a procedural defect in the evaluation process shall be subject to the grievance and arbitration procedure set forth in Article IX of this Agreement.

L. MISCELLANEOUS

1. The revision to Article XIV will take effect on August 16 after the execution of this Agreement.
2. After the completion of each evaluation cycle, the University will submit to the Faculty Association a list of each faculty member and his/her overall rating score.

a. University's Position

Citing D.C. Official Code § 1-613.53(b) and PERB cases that interpret that provision, the University asserts that implementation of a performance management system is nonnegotiable.⁵⁰

The University also relies upon several management rights set out in section 1-617.08(a). First, the University argues that the proposed article interferes with the University's rights to determine its mission (section 1-617.08(a)(1)) and to direct its employees (section 1-617.08(a)(5)(A)). A proposal that establishes the purposes of a performance evaluation system interferes with those rights.⁵¹ The proposed article defines the purpose of evaluation in Section A(1) and restricts that purpose in Section G(5). The restrictions prohibit the University from disciplining a faculty member for performance reasons, thereby infringing the University's right under section 1-617.08(a)(2) as well. Sections E, G, H, and I establish the content and not merely the timing of evaluations. The proposed article establishes the criteria of evaluations in Sections A(4), A(5), C(1-4), G(3), and G(2).

Second, the proposed article interferes with the University's right under section 1-617.08(a)(4) to maintain the efficiency of its operations. Section A(5) sets an evaluation period that conflicts with the academic calendar. The proposed article establishes a Departmental Assessment and Promotion Committee ("DAPC") for each department and inefficiently requires each DAPC to establish its own set of rules. It mandates meetings and other steps that the University must take during an appeal. Section I(3) implies that only the vice president of academic affairs can impose discipline.

Finally, Sections B(1), D(2), G(1), and G(5) interfere with the University's right under section 1-617.08(a)(1) and (2) to direct employees and assign work. Section B(1) provides that full-time faculty members elect the members of the DAPC for their department. The other sections mandate various tasks to be performed by DAPCs.

⁵⁰ University's Original Br. 11; University's Reply Br. 7.

⁵¹ University's Original Br. 11

b. Association's Position

Section 1-613.53(a) provides, "Until regulations are issued by . . . the University of the District of Columbia to implement the provisions of this subchapter for their respective employees, the performance evaluation systems in effect on June 10, 1998, shall continue in effect." UDC has not issued regulations concerning faculty evaluation since June 1998. Compliance with the CMPA would require restoration of the evaluation procedure in the Fourth Master Agreement.

The Association distinguishes between performance management and evaluation. The "performance management system" that section 1-613.53(b) makes nonnegotiable does not include an evaluation procedure. Otherwise, there would have been no reason for the City Council to subsequently adopt section 1-617.18, which makes "the evaluation process and instruments for evaluating District of Columbia Public Schools employees" nonnegotiable. In view of the distinction between the performance management system and evaluation procedures, Sections C, D, F, and G, which concern evaluation, should be negotiable even if the performance management system is not.

The Association also distinguishes between evaluation and peer assessment. The Association states, "Peer Assessment or Peer Review is the evaluation of college faculty by their peers, other faculty in their college or department who are familiar both with the subject matter and teaching ability of their co-workers."⁵² Unlike peer assessments, performance evaluations can be the basis for personnel actions such as discipline, promotion, tenure, and merit pay. Consequently, a performance evaluation system is nonnegotiable⁵³ and evaluating employees is a managerial function that would exclude from the bargaining unit any faculty that evaluated other faculty members.⁵⁴ Sections A, B, and G involve peer assessment.

Section 1-613.53(b) does not preclude impact and effects bargaining. Procedures for evaluation are negotiable if they do not include criteria for evaluation. Procedural matters addressed by the proposed article are timeliness of evaluations (Sections E and G), frequency of evaluations (Section G), review and appeal (Sections H, I, J, and K), and the miscellaneous subjects in Section L.

c. Analysis

UDC claims that the proposed article is nonnegotiable under two statutes, section 1-613.53(b) and the management rights statute, section 1-617.08(a). Section 1-613.53, entitled "Transition Provisions," provides:

(a) Until regulations are issued by the Mayor, the Board of Education and the Board of Trustees of the University of the District of Columbia to implement the provisions of this

⁵² Union's Original Br. 20.

⁵³ *Id.*

⁵⁴ Union's Reply Br. 4-5.

subchapter for their respective employees, the performance evaluation systems in effect on June 10, 1998, shall continue in effect.

(b) Notwithstanding any other provision of law or of any collective bargaining agreement, the implementation of the performance management system established in this subchapter is a non-negotiable subject for collective bargaining.

An agency relying on section 1-613.53(b) for nonnegotiability must show that it is seeking to exempt from bargaining over “the implementation of the performance management system established in this subchapter,” i.e., subchapter XIII-A (“Performance Management”) of the CMPA. The University has not made that showing. As the Association points out, the University has not adopted regulations concerning faculty evaluations since June 1988. Pursuant to section 1-613.53(a), the University is operating under the evaluation system in effect on June 10, 1998, rather than the one subsequently established by subchapter XIII-A of the CMPA.

However, portions of the proposed article are nonnegotiable under the management rights statute. Although the Association asserts that sections dealing with peer assessments, as distinguished from evaluations are negotiable, the proposed article has the two processes working together. Section A(1) requires the University to provide both peer assessments and annual evaluations. Only Sections B and D(2) deal with peer assessments only.

The sections dealing with evaluations or with both evaluations and peer assessments are negotiable if they do not contain any language affecting the University’s right to establish the criteria or the purpose of performance evaluations.⁵⁵ Section A(1) states the purpose of annual evaluations, and Section G(5) states the purpose of interim evaluations. Hence, those sections are nonnegotiable. Sections A(2), A(3), A(4), A(5), C, G(1), and G(3) expressly concern criteria for evaluations and accordingly are nonnegotiable. Sections E, F, G(2), G(4), G(6), G(7), H, I, K, and L are negotiable as they contain no language affecting UDC’s right to establish either the criteria or the purposes of the performance evaluations.⁵⁶

Articles XIV and XV of the proposed Eighth Master Agreement replace the Department Evaluation and Promotion Committees established by the Seventh Master Agreement with Departmental Assessment and Promotion Committees (“DAPCs”). Under the Seventh Master Agreement, the University and the Association separately select members of the Department Evaluation and Promotion Committees and jointly select one member of each committee. Article XIV(B)(1) of the proposed Eighth Master Agreement proposes that each academic year a DAPC be established in each department and elected by the full-time faculty in the department.

The University contends that the election of DAPCs and the responsibilities assigned to them “would interfere with the University’s right to direct employees and assign work”⁵⁷ The

⁵⁵ *SEIU, Local 500 and Univ. of D.C.*, 62 D.C. Reg. 14633, Slip Op. No. 1539 at 10-15, PERB Case No. 15-N-01 (2015).

⁵⁶ *Id.*

⁵⁷ University’s Original Br. 14.

management rights statute does not use the words “assign work.” It provides that management has the sole right “[t]o hire, promote, transfer, assign, and retain employees in positions within the agency.” D.C. Official Code § 1-617.08(a)(2). The selection of members of DAPCs by vote of faculty members in each department, as proposed by the third sentence of Section B(1), abridges UDC’s right to “assign . . . employees in positions within the agency.”⁵⁸ The third sentence of Section B(1) is nonnegotiable. None of the other sections of Article XIV implicate section 1-617.08(a)(2).

The tasks Article XIV directs the DAPCs to perform—establishing their procedures and giving guidance to faculty members who request it—do not infringe the right to direct employees pursuant to section 1-617.08(a)(1). To conclude that a proposal such as this interferes with the University’s right to direct employees because it requires the University to take certain actions through a committee would, as the FLRA said in a similar case, “nullify the obligation to bargain because no obligation of any kind could be placed on management through negotiations.”⁵⁹

The University’s objection to certain alleged inefficiencies relate more to the merits of the proposals than to the University’s right to “maintain the efficiency of the District government operations entrusted to” the University as provided in section 1-617.08(a)(4).

Section D(1) places requirements on the University regarding the nature of student evaluations. These requirements infringe UDC’s right to determine its mission and educational policy. Therefore, the section is nonnegotiable.⁶⁰

Under Section J, the Association may, at its discretion, represent a faculty member in certain appeals in the evaluation process if the faculty member requests. This is a right of the Association under section 1-617.11(a). Section J is negotiable.

In summary, the following sections of Article XIV are *nonnegotiable*: A(1)-(5), the third sentence of B(1), C, D(1), G(1), G(3), and G(5). The following sections of Article XIV are *negotiable*: B(1) except the third sentence, B(2), D(2), E, F, G(2), G(4), G(6), G(7), H, I, J, K, and L.

6. Article XV Academic Rank and Promotions

Article XV as proposed by the Association is as follows:

ARTICLE XV - ACADEMIC RANK AND PROMOTION PROCEDURES

A. PRINCIPLES

1. Faculty may be hired at any rank provided that they have met the requirements set

⁵⁸ D.C. Official Code § 1-617.08(a)(2). See *Int’l Fed’n of Prof’l & Technical Eng’rs and U.S. Dep’t of the Interior Bureau of Land Reclamation Denver Office*, 43 F.L.R.A. 998, 1001 (1992).

⁵⁹ *Nat’l Fed’n of Fed. Employees Local 2099 and Dep’t of the Navy, Naval Plant Representative Office*, 35 F.L.R.A. 362, 368 (1990).

⁶⁰ *Id.* at 15.

forth in Section (A)(5) prior to their employment by the University. The DAPC for the Department into which a faculty member will be hired will review the proposed rank before an offer of employment is made.

2. Individuals hired from outside the Bargaining Unit at or above the position of Dean cannot be awarded academic rank except as consistent with this Article based on employment at another university.
3. Promotion refers to the advancement from one academic rank to a higher rank. Promotion shall be the result of a selective process to identify the candidates from among the eligible regular full-time faculty. It is awarded in recognition of the professional stature achieved by an individual as assessed in relation to one's contributions to the three-fold mission of the University, namely teaching, research, and service. While the scrutiny of the scholarship and professional activity of an individual will be rigorous regardless of the academic rank for which a faculty member is being considered, the expectations will necessarily vary with the academic rank sought. Thus, the expectations for promotion to the rank of Assistant Professor will be less than those for the rank of Professor.
4. The following shall form the parameters for assessing applicants for promotion:
 - a. Academic, scholarly, and service achievements;
 - b. Quality of teaching and teaching-related performance (in the case of LRD faculty, quality of Job performance).
5. Assessment of promotion applications will be based on uniformly administered principles, procedures, and criteria which have been designed to ensure fair and impartial judgments. Consistent with the provisions of this Article, it shall be the responsibility of the Administration to disseminate to the faculty at the beginning of each academic year the guidelines and procedures for applying for promotion and the established criteria for promotion together with the weights and standards applicable to the criteria for the academic year. For faculty applying for the rank of Associate Professor or Professor, their promotion portfolio will include a statement from two (2) external reviewers in the appropriate discipline.
6. Faculty members applying for promotion must meet the following requirements of minimum eligibility:
 - a. For the last three evaluations at [sic] least one Distinguished rating and none less than Outstanding or at least two Distinguished ratings one of which shall be the most recent;
 - b. Met the required amount of time in lower rank by August 16 of the submitting year as shown below.
 - c. Met the degree requirements by September 15 of the submitting year as shown below:

RANK	YEARS AT LOWER RANK	DEGREE REQUIREMENTS
<u>Instructor Aviation</u>		<u>Bachelor of Science degree in Aviation Technology and FAA Airframe and</u>

<u>Technician</u>		<u>Powerplant certification</u>
<u>Instructor</u>		<u>Except in the Department of Aviation Maintenance Technology, a Masters Degree in the appropriate discipline</u>
Assistant Professor	0 5	Appropriate terminal degree OR At least 12 graduate credits, appropriate to the discipline, beyond the Master's Degree
Associate Professor	4 8	Appropriate terminal degree OR At least 24 graduate credits, appropriate to the discipline, beyond the Master's Degree
Professor	5 10	Appropriate terminal degree OR At least 36 graduate credits, appropriate to the discipline, beyond the Master's Degree

It is understood that the foregoing represent only minimum eligibility requirements. Whether a faculty member who satisfies these eligibility requirements is promoted will be determined with reference to the degree to which he or she meets the applicable criteria as applied in accordance with this Article. Under exceptional circumstances, however, in the absence of the appropriate years of service, a faculty member may apply for promotion before the above referenced periods of consideration. The request for exception should be directed to the department chair by the individual requesting the exception. The URC will determine whether such exceptional circumstances warrant promotion for said faculty member. This request is then processed in the manner established for all recommendations for promotion. The burden of showing exceptionality of qualifications for consideration for promotion (with regard to any of the criteria) rests with the faculty member requesting the exception.

7. The University shall budget annually an amount at least equal to 1% of the salary of Bargaining Unit faculty for use in funding promotions for Bargaining Unit members.
8. The faculty member applying for promotion has the right to have his or her scholarship judged by persons who are competent to do so.
9. In the development of University promotion standards and weights, recognition shall be given to rating(s) awarded for previous application(s) for promotion.
10. An Administrator returning to the Bargaining Unit cannot retain or be awarded

faculty rank inconsistent with the standards set forth in this Article.

B. PROMOTION COMMITTEES

1. Departmental Assessment and Promotion Committee (DAPC)

See Article XIV, Peer Assessment and Evaluation Procedures, for structure.

2. College Promotion Committee (CPC)

This Committee is a group of full-time faculty members in a College, consisting of one representative from each Department in the College. The Learning Resources Division shall be considered a College within the context of this Article. Each Department shall elect its representative by the second Friday in February.

a. Not later than the first Friday in May of each year, the Provost/VPAA shall forward to each CPC the University criteria for promotion in effect for the coming academic year. It is agreed between the parties that for the duration of this Agreement, said criteria shall be the criteria presently set forth at 8 DCMR Sections 1413, 1414, and 1415.

b. Based upon such criteria, each CPC shall develop recommended standards and weights to be used in assessing applicants for promotion, which shall include a formula for giving credit to faculty reapplying for promotion whose ratings for the previous year(s) was (were) strongly recommended. Each CPC shall submit its recommendations to the applicable Dean no later than the third Friday in March. A copy of the CPC's recommendation shall be submitted to the Faculty Association, which may submit comments thereon to the Dean. The Dean shall review the CPC recommendations and any comments received from the Association and forward them, together with his or her comments, to the UPC no later than the second Friday in April.

3. University Promotion Committee (UPC)

Membership on this committee shall be limited to the chairs of the various CPCs, the academic Deans, and a representative of the faculty Senate. The Provost/VPAA shall serve as chair of the Committee. Using the various CPC recommendations and comments, and consistent with University policies and criteria applicable under this Article, the UPC shall establish University-wide promotion standards and weights, which shall remain in effect for the duration of this Agreement. Such standards and weights shall include a formula for giving credit to faculty reapplying for promotion whose rating(s) for the previous year(s) (were) "strongly recommended." In recognition of the differing missions of the several Colleges of the University, the Committee may, with the VPAA's approval, establish differential standards and weights for different Colleges.

4. University Review Committee (URC)

The Committee (URC) shall consist of one faculty member holding the rank of professor from each of the Colleges, appointed by the Faculty Senate in such fashion, as it shall deem appropriate. The URC shall (I) hear appeals of applicants who have been declared ineligible and as provided below render binding rulings

on those appeals, (ii) hear appeals from the decisions of a Dean, and (iii) advise the Provost/VPAA on appeals at that level.

C. PROCEDURES

1. An applicant for promotion shall submit his or her application with supporting documents to the Department Chair no later than the second Friday in September. The application is to be filed on Form P-1, a copy of which is annexed to this Agreement. The Department Chair shall issue a receipt to the applicant for the materials submitted.
2. The Department Chair shall promptly review the records and certify whether the applicant meets minimum eligibility requirements as outlined in Paragraph B above. The Department Chair shall send notice of eligibility to the DAPC, with a copy to the applicant, by the third Friday in September. If a faculty member disagrees with the minimum eligibility determination given, or if the Department Chair fails to send the notice of eligibility by the indicated date, the faculty member may within five (5) working days after receipt of said notice, or after the third Friday in September if said notice is not received by that date, file a written request for a determination of eligibility by the URC.
3. The URC shall notify the faculty member of its decision by the fourth Friday in October with a copy to the Department Chair, in which case the URC's decision shall be final and not subject to grievance or arbitration under this Agreement except for alleged procedural violations. No final action on promotion will be taken absent a final determination with respect to eligibility.
4. The Department Chair shall review the documents and make a recommendation no later than the fourth Friday in October as to whether or not an applicant should be promoted. The Chair shall rank the applicants separately for each academic rank. The following ratings shall be used: (I) Strongly Recommended; (ii) Recommended; (iii) Not Recommended. The Chair is required to state reasons for the given rating. This rating shall be made on Form P-2, a copy of which is annexed to this Agreement. The Chair shall promptly send a copy of this form to the CPC Chair and to the applicant and forward the original of the form and all supporting documents to the DAPC.
5. The DAPC shall review the application with all the supporting documents and make a recommendation no later than the third Friday in November as to whether or not the applicant should be promoted. The shall rank the applicants separately for each academic rank. The following ratings shall be used: (I) Strongly Recommended; (ii) Recommended; (iii) Not Recommended. The Committee is required to state reasons for the given rating. This rating shall be made on Form P-3. The Committee shall send the form along with all supporting documents to the Chair of the CPC no later than the first Friday in December, with a copy of the form to the applicant.
6. The applicant may submit to the CPC comments on the decision of the Department Chair and/or the DAPC no later than the first Friday in January.
7. The CPC shall review the materials of all the applicants along with the comments

submitted by the applicants, if any, and make a recommendation as to whether or not an applicant should be promoted. The CPC may hold such interviews or hearings as it deems necessary to make a recommendation. The Committee shall rank the applicants separately for each academic rank. The following ratings shall be used: (I) Strongly Recommended; (ii) Recommended; (iii) Not Recommended. The Committee is required to state reasons for the given rating. The Committee shall complete its reviews by the first Friday in February and shall promptly forward its recommendations, assigned rankings and all supporting materials to the Dean, with a copy of the recommendation to the faculty member.

8. The Dean shall review all the information received and shall rank the applicants separately for each academic rank giving one of the following ratings: (I) Recommended; (ii) Not Recommended. The Dean shall state reasons for the given rating. The rating shall be made on Form P-5. The Dean shall forward the recommendations for all applicants together with all the supporting materials for the college's recommended candidates to the Provost/VPAA no later than the fourth Friday in February. A copy of the rating, with reasons, and rank assigned to the promotion application, shall be simultaneously provided to each applicant.
9. The applicant may appeal the recommendation of the Dean to the Provost/VPAA within five (5) working days of receiving the Dean's recommendation. The Provost/VPAA shall convene the URC and shall submit to it all appeals and all relevant supporting documents no later than the second Friday in March. The URC shall conduct such review and make its recommendations to the Provost/VPAA no later than April 1. The Provost/VPAA shall review the recommendations of the Dean together with the recommendations of the URC and make an independent recommendation to the President no later than April 10. A copy of the Provost/VPAA's recommendation shall be sent simultaneously to the applicant and to the Association.
10. Promotion applicants not included on the listing of University candidates for promotion but who were strongly recommended for promotion by their CPC or recommended by the URC may appeal to the President within five (5) working days after receiving the listing of University candidates for promotion. The applicant shall have the right to meet with the President within two (2) weeks after the filing of said appeal. The President shall consider the recommendations and reports of the Provost/VPAA, CPC and URC, if any, and render a decision within five (5) working days after the meeting, or if no meeting is held, within ten (10) working days after the filing of the appeal. The President shall include the reasons for his decision in writing and provide a copy to the applicant as well as the Association. The decision of the President shall not be subject to Article IX (Grievance Procedure and Arbitration) of this Agreement except as to alleged procedural violations. Nothing contained in this Article shall constitute a waiver by the Association or any member of the Bargaining Unit of any right that it or he or she may have under D.C. law.
11. The faculty member's personal portfolio submitted as supporting documentation shall be returned within sixty (60) calendar days after promotions have been announced unless it is necessary to retain them for an appeal in process. It is the

responsibility of the faculty member to retrieve this material from the Provost/VPAA's office within thirty (30) days of the above date.

IMPLEMENTING FORMS for this Article appear in Appendix C.

a. University's Position

Article XV interferes with management's right to hire and promote. Criteria for promotion are for management to determine. Article XV contains nonnegotiable criteria including seniority and criteria in the University's regulations. The latter do not become negotiable merely because they are currently in the University's regulations. The University states, "UDC may act to change such regulations without negotiating with the Association. The fact that UDC's current regulations happen to mirror a proposal or part of a proposal is irrelevant. Provisions set forth in collective bargaining agreements trump regulations, including these set forth in the DCMR."⁶¹

The involvement of committees with bargaining unit members in promotion decisions and in reviewing the proposed rank of hires is incompatible with the University's rights to hire, direct, and promote employees.⁶² Section A(7) interferes with the University's right to determine its budget. Section A(10) interferes with the University's right to retain employees.

b. Association's Position

Section A(6) incorporates the University's regulations on minimum requirements for assistant professor, associate professor, and professor. A proposal that incorporates legal requirements including regulations, which have the force of law, is negotiable.⁶³

A proposal that is procedural in nature and neither requires nor prevents the promotion of an employee does not violate the management right to promote employees. By this standard, Article XV is negotiable.⁶⁴ Article XV requires seniority only to establish the minimum number of years for promotion from one academic rank.

The provision requiring the University to budget for promotions, Section A(7), can be considered negotiable as part of the Association's compensation proposal that promotions must include a wage increase. The proposal does not limit the University's right to control its budget.

⁶¹ University's Reply Br. 8 (citing 6-B DCMR § 1602.2(c); *Dist. Council 20, AFSCME and D.C. Pub. Sch.*, 28 D.C. Reg. 3947, Slip Op. No. 15, PERB Case Nos. 80-U-05 and 81-A-01 (1981)).

⁶² University's Original Br. 16.

⁶³ Union's Original Br. 32.

⁶⁴ Union's Original Br. 32 (citing *D.C. Fire & Emergency Med. Servs. Dep't and AFGE Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007)); Union's Reply Br. 6 (citing *Local 36, Int'l Ass'n of Firefighters v. D.C. Dep't of Fire & Emergency Med. Servs.*, 60 D.C. Reg. 17359, Slip Op. 1445 at 11, PERB Case No. 13-N-04 (2013)).

It merely asks the University to plan ahead for wage increases that will result if faculty members are promoted.⁶⁵

c. Analysis

In *D.C. Fire and Emergency Medical Services Department and AFGE, Local 3721*,⁶⁶ the Board considered whether two proposals infringed the management right to promote employees. The first proposal specified the contents of an application for promotion and stated general principles of promotion procedure. The second proposal made employees who were not chosen for a training course but passed a required examination eligible for the next training course without re-taking the examination. The Board found that the proposals did not infringe management's right to promote employees because the proposals were procedural in nature and would neither prevent nor require the promotion of an employee.⁶⁷

Promotion criteria would prevent the promotion of an employee who lacks one of the criteria. Just as a proposal creating criteria for an agency to consider or not consider when deciding whether to re-appoint or assign an employee is nonnegotiable,⁶⁸ so also a proposal establishing criteria for a promotion is nonnegotiable as it restricts the agency's right to promote employees.

The nonnegotiability of such criteria is unaffected by the criteria's presence in current regulations. The Association cites no authority for the proposition that a proposal is negotiable if it incorporates regulations having the force of law. An agency is free to change its own regulations concerning a management right.⁶⁹ Section B(2)(a) of Article XV would prevent the University from changing its regulations concerning the qualifications for professor, associate professor, and instructor "for the duration of this agreement" in violation of D.C. Official Code § 1-617.08(a)(2). In addition, Section A(6), as the Association states, incorporates those regulations along with other required criteria for eligibility.⁷⁰ Sections B(2)(a) and A(6) are nonnegotiable.

The generalities in the first sentence of Section A(5) do not amount to criteria that would prevent or require the promotion of an employee. The promotion portfolio required by Section A(5) is procedural and similar to the required application materials found to be a negotiable item in *D.C. Fire and Emergency Medical Services Department*. Section A(5) is negotiable. Sections A(8) and (9) are procedural and do not establish criteria that would prevent or require the promotion of an employee. Sections A(8) and (9) are negotiable.

⁶⁵ Union's Reply Br. 8.

⁶⁶ 54 D.C. Reg. 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007).

⁶⁷ *Id.* at 19-21. *Accord Local 36, Int'l Ass'n of Firefighters*, Slip Op. No. 1445 at 11.

⁶⁸ *SEIU, Local 500 and Univ. of D.C.*, 62 D.C. Reg. 14633, Slip Op. No. 1539 at 10, PERB Case No. 15-N-01 (2015).

⁶⁹ *See AFGE, Local 631 v. D.C. Water & Sewer Auth.*, 51 D.C. Reg. 4163, Slip Op. No. 730, PERB Case No. 02-U-19 (2003) (Where a union alleged that an agency committed an unfair labor practice by denying its request to bargain over newly promulgated regulations concerning reductions in force, the Board held that the subject was nonnegotiable and dismissed the complaint.)

⁷⁰ Union's Original Br. 31.

Section A(2) is nonnegotiable because in proposing Section A(2) the Association seeks to negotiate terms and conditions of employment of individuals who are not in the bargaining unit.⁷¹

Section B(1), entitled “Departmental Assessment and Promotion Committee (DAPC),” states only, “See Article XIV, Peer Assessment and Evaluation Procedures, for structure.” Section B(1) is negotiable.

Sections B(2), B(3), and B(4) establish the College Promotion Committee, the University Promotion Committee, and the University Review Committee, respectively. The University objects to the participation of bargaining unit members in the committees. The validity of that objection depends upon what the sections have the committees doing. Section B(2)(b) directs the College Promotion Committee to make recommendations only. Section B(2)(b) is negotiable. Section B(3) requires the University Promotion Committee to establish university-wide promotion standards and weights. Section B(4) authorizes the University Review Committee to “hear appeals of applicants who have been declared ineligible[,] . . . render binding rulings on those appeals” and hear appeals from the decisions of a dean. These two sections go beyond proposing procedures by which management makes appointment decisions. They require that bargaining unit members share the University’s decision-making authority over a management right. For that reason, Sections B(3) and B(4) are nonnegotiable.⁷²

The negotiability of the Association’s proposal in the compensation article that a promotion in rank must include a wage increase⁷³ is undisputed. But Section A(7)’s requirement of a line in the University’s budget equal to at least one percent of the salary of bargaining unit faculty in order to fund promotions implicates the University’s right to determine its budget. This provision cannot subject to negotiation the University’s right under section 1-617.08(a)(5)(A) to determine its budget even if it is characterized as a compensation item.⁷⁴ The Association’s contention that the proposal “asks only that the University plan ahead and not be caught short financially” addresses the merits of the proposal and is irrelevant to its negotiability.⁷⁵ Section A(7) is nonnegotiable.

⁷¹ *AFGE, Local 1403 and D.C. Office of the Corp. Counsel*, Slip Op. No. 709 at 10, PERB Case No. 03-N-02 (July 25, 2003).

⁷² *Cf. Nat’l Fed’n of Fed. Employees, Local 1745 v. FLRA*, 828 F.2d 834, 841-42 (D.C. 1987) (affirming FLRA decision finding nonnegotiable a proposal that the union appoint a member to a panel that formulates criteria to be used in rating candidates for promotion). *Accord Am. Fed’n of Gov’t Employees, Mint Council 157 and Dep’t of the Treasury, Bureau of the Mint*, 19 F.L.R.A. 640, 643-44 (1985) (holding that a proposal that would require the participation of a Union representative on a promotion ranking panel interfered with management’s right to make selections for appointments).

⁷³ Proposed Eighth Master Agreement art. XIX(A)(4) (p. 52).

⁷⁴ *See Washington Teachers’ Union Local 6 v. D.C. Pub. Schs.*, 46 D.C. Reg. 8090, Slip Op. No. 450 at p. 17, PERB Case No. 95-N-01(1995); *Teamsters Local Unions No. 639 & 730 v. DCPS, a/w Int’l Bhd. of Teamsters*, 43 D.C. Reg. 3545, Slip Op. No. 377 at 4-6, 5 n.5, PERB Case No. 94-N-02 (1994).

⁷⁵ *Comm. of Interns & Residents and D.C. Gen. Hosp. Comm’n*, 41 D.C. Reg. 1602, Slip Op. No. 301 at 6, PERB Case No. 92-N-01 (1992).

In Section A(10), the Association adds a prohibition against awarding an administrator returning to the bargaining unit a rank “inconsistent with the standards set forth in this Article.” With the nonnegotiable provisions removed from Article XV, this prohibition is negotiable.

In summary, Article XV, Sections A(2), A(6), A(7), B(2)(a), B(3), and B(4) are *nonnegotiable*. All other sections in Article XV, namely, Sections A(1), A(3)-(5), A(8)-(10), B(1), B(2)(b), and all of Section C are *negotiable*.⁷⁶

7. Article XVI Tenure

Article XVI as proposed by the Association is as follows:

ARTICLE XVI - UNIVERSITY TENURE

A. GENERAL PRINCIPLES

The University, as a public land-grant institution, recognizes and supports the concept of tenure.

1. All faculty hired to begin teaching after September 30, 2006 shall be on a five-year tenure track. All faculty hired to begin teaching before September 30, 2006 have University tenure.
2. Faculty members who have not been granted tenure shall be on probation for the first three years of their employment at the University and shall be employed pursuant to a one-year individual employment agreement in each such year. During the probation period, the University, at its sole discretion, may decide for any reason not to renew a faculty member’s contract, or to terminate the employment of a faculty member, and such decisions shall not be subject to the grievance and arbitration procedure.
3. Full-time faculty members who have been placed by the University in tenure track positions may apply for tenure. Such applications shall normally be submitted following the fifth year of service on the faculty. Tenure decisions shall not be subject to the grievance and arbitration procedure (except for alleged procedural violations) and shall not be considered disciplinary or adverse actions.
4. This Article shall have no effect on any “Reserved Interest Status” that may be held by any faculty member.
5. Persons who are hired into non-Bargaining Unit positions cannot be awarded University tenure except according to the provisions of this Article.

B. PROCEDURE

1. A faculty member may apply for tenure in or after the sixth year of employment with the University. A faculty member hired to begin teaching after September 30, 2006 who has not already been awarded tenure must apply for tenure in the Fall Semester after the effective date of this Agreement.
2. A faculty member cannot apply for tenure before completion of the probation period.
3. A faculty member who is denied tenure may be issued either a terminal one-year

⁷⁶ D.C. Official Code § 1-617.08(b).

- contract or may be retained on a series of two-year contracts and may reapply for tenure after three years.
4. Decisions concerning tenure are based upon effective teaching as judged by peers and students, and other academic accomplishments.
 5. Promotion to Professor automatically includes tenure.
 6. The procedure for obtaining tenure will follow the Promotion Procedure in Article XV. However, recommendations of the Committee cannot be overturned by the Administration except for procedural grounds.

a. University's Position

Article XVI is nonnegotiable. While tenure is of limited import, it is a management prerogative.

The University contends that the proposal infringes every management right listed in section 1-617.08(a)(1) through 1-617.08(a)(5)(B) except the right of an agency to determine its own budget. In particular, Section A(5) of Article XVI interferes with the right to hire and maintain employees.⁷⁷ Section B(3) “seemingly requires a faculty member rejected for tenure to receive a one or two year contract.”⁷⁸ Section B(5) directs that a promotion to professor automatically includes tenure. Section B(6) directs that recommendations regarding tenure can be overturned only on procedural grounds.

In addition, Sections A(1), B(1), B(2), and B(4) establish criteria for tenure, setting a standard where none exists.⁷⁹ The criteria include years of service. “[I]t is the University’s exclusive right to retain employees and, given the relationship between tenure and retention, it is the University’s decision—not the Association’s decision—as to the criteria upon which tenure should be considered and whether a faculty member qualifies for tenure, regardless of number of years of service to the University.”⁸⁰

b. Association's Position

There is no relationship between tenure and retention. Tenure is not a factor in a promotion, order of separation, assignment, or reduction in force. Its one significant effect under the Seventh Master Agreement is that tenured faculty can be discharged only for just cause, like all other faculty after three years of service.⁸¹

Section 1-608.01a(b)(2)(A)(i) of the D.C. Official Code states, “Excluding those employees in a recognized bargaining unit, . . . a person appointed to a position within the Educational Service shall serve without job tenure.” By making an exception for bargaining unit

⁷⁷ University’s Original Br. 18.

⁷⁸ University’s Reply Br. 9.

⁷⁹ University’s Original Br. 18 (citing *Washington Teachers’ Union v. DCPS*, 46 D.C. Reg. 8090, Slip Op. No. 450 at 13, PERB Case No. 95-N-01 (1995)).

⁸⁰ University’s Original Br. 18.

⁸¹ Union’s Original Br. 48.

members, this provision mandates bargaining over tenure. It supersedes section 1-617.08 because it was adopted later.⁸²

The proposal incorporates one of the University's own regulations, 8B D.C.M.R. § 1471.2, which mandates continued employment of faculty denied tenure.⁸³

c. Analysis

Both parties advise the Board that tenure is not very important at UDC. The University asserts, however, that “proposals to restrict management’s ability to grant or deny tenure interfere with management rights.”⁸⁴ But the University does not explain how they would interfere with management rights other than to allude to a “relationship between tenure and retention.”

Determining whether there would be interference with management rights requires a consideration of what privileges, if any, tenure affords to faculty at UDC. The Association says that under the Seventh Master Agreement there is only one significant impact of tenure. The impact the Association refers to is set forth in Article XI(A)(2), which states, “For the first three years of their employment, non-tenured faculty . . . may be discharged or their contracts not renewed without recourse to the grievance and arbitration procedures; thereafter, non-renewal or discharge decisions are subject to the ‘cause’ provisions of the contract and may be challenged in the grievance and arbitration procedure.” Thus, a tenured faculty member, despite having served less than three years, cannot be discharged without recourse to grievance and arbitration procedures for challenging whether the discharge was for cause. A proposal granting tenure on a given basis is the same as a proposal to extend to some probationary employees the standard of just cause that applies to non-probationary employees. As the latter proposal does not interfere with management rights,⁸⁵ the former does not either.

The only other effect of tenure proposed by the Eighth Master Agreement is that “[a]n award of tenure independent of promotion includes a two step increase.”⁸⁶ The University does not contend in its briefs that a step increase is a management rights decision, and section 1-617.08 does not suggest that it is.

Therefore, all of Article XVI is *negotiable*—with one exception. Section A(5) is *nonnegotiable* because in proposing Section A(5) the Association seeks to negotiate terms and conditions of employment of individuals who are not in the bargaining unit.⁸⁷

⁸² Union’s Original Br. 49.

⁸³ Union’s Reply Br. 8.

⁸⁴ University’s Reply Br. 9.

⁸⁵ *Washington Teachers’ Union v. DCPS*, 46 D.C. Reg. 8090, Slip Op. No. 450 at 11-12, PERB Case No. 95-N-01 (1995)

⁸⁶ Eighth Master Agreement art. XIX(A)(4) (p. 52).

⁸⁷ *AFGE, Local 1403 and D.C. Office of the Corp. Counsel*, Slip Op. No. 709 at 10, PERB Case No. 03-N-02 (July 25, 2003).

8. Article XVII Workload

Article XVII as proposed by the Association is as follows:

ARTICLE XVII – WORKLOAD

A. PREAMBLE

Faculty responsibilities fall into two distinct categories -- those specifically assigned by the Administration and those undertaken by the selective choice of the individual faculty member in the areas of scholarship and professional growth and service, either University or community. In recognition of the responsibilities expected to be undertaken in the areas of scholarly activities and service, the University limits its assigned workload so as to leave a faculty member free the equivalent of one full day per week. The University may, however, include scholarly or service activities as part of an individual's assigned workload. In these instances, the activity will be reflected in the workload as "Authorized University Activity." (see subsection (B)(4)(g) below for valuation of such activities.)

B. TEACHING FACULTY

1. The workload of teaching faculty shall be consistent with the University mission and may consist of a combination of teaching and teaching-related activities, research, University service, and public service.
The basis for determining the composition of faculty member's workload shall be University responsibilities and need.
In determining a faculty member's workload, and in making any changes or adjustments thereto, there shall be no retaliation for the exercise by the faculty member of any rights afforded by this Agreement, personnel policies, or by law, nor shall decisions regarding workload be made on the basis of disciplinary considerations, or for arbitrary and capricious reasons.
No later than the first Friday in May, the Department Chair shall, after consulting with the individual faculty member, establish the faculty member's work plan for the coming academic year. For faculty on leave and for new faculty, the deadline to complete the work plan shall be the third Friday in August. The plan shall include the anticipated number of courses to be taught and all other anticipated activities involving Professional Units ("PUs") of work. The plan shall be a flexible document which may be adjusted, after consultation with the faculty member (unless the faculty member is unavailable), as necessary to reflect changes which might be caused by new circumstances.
If one-half (½) or more of the assigned workload is in Authorized University Activity ("AUAs"), that assignment must be endorsed by the Provost and Vice President for Academic Affairs.
2. Academic year appointments shall be from August 16 through May 15 which covers both Fall and Spring Semesters.
3. The normal workload assignment shall be a semester average of thirty two (32) Professional Units ("PUs") computed annually in the second semester. One Professional Unit is equivalent to fifteen (15) hours per semester.

4. For the determination of workload the following shall apply:
 - a. Instructional Activity – One (1) PU per semester for one (1) hour of instruction (i.e., fifty minutes) per week.
 - b. Pre-Class Activity
 - (1) One (1) PU per semester per credit hour for preparation of the first each section of a course the faculty member has taught before.
 - (2) One and one-half (1.5) PUs per credit hour for preparation of each ~~the first section~~ of a course the faculty member has not taught before.
 - ~~(3) One half (0.50) PU per credit hour for preparation of each additional section of the same course.~~
 - (4) One-half (0.50) PU per lab session per course.
 - (5) One (1) PU per credit hour for scholarly activity necessary to maintain currency in the discipline for teaching a graduate course.
 - c. Post-Class Activity
 - (1) One-half (0.50) PU per credit hour for grading and record keeping.
 - (2) One (1) PU per semester for each 45 student credit hours (“SCH”), or fraction thereof, taught beyond 225 SCH per semester.
 - (3) Special Rules for On-Line and Non-Classroom Courses: Class size will not exceed 25 students.
 - d. Student Consultation -- One (1) PU per course taught.
 - e. Graduate Thesis or Dissertation Advisement -- One (1) PU for each graduate student for whom the faculty member serves as the thesis or dissertation advisor.
 - f. Independent Study -- One (1) PU per independent study topic.
 - g. Authorized University Activity -- Recognizing the University’s commitment to scholarship, research, public service and the professional growth of the faculty, the Chair, in consultation with the faculty member, and with the approval of the Dean, may substitute Authorized University Activity for all or a portion of the teaching workload. Authorized University Activity may include, but is not limited to, scholarly research, publication or equivalent creative activity, and/or organized University or public service. The amount of time to be spent on these activities, except for public service, shall be agreed to in writing by the faculty member, Department Chair and the Dean. The amount of time to be spent on public service shall be established by the Chair and the Dean, after consultation with the faculty member.
One (1) PU for each fifteen (15) hours shall be awarded for Authorized University Activity.
5. Each semester schedule of classes, including Summer, will be posted for a minimum of one (1) week to permit faculty to make known to the Chair any preferences. The University will endeavor to post the list at least sixty (60) days prior to the start of the semester. Individual workload assignments shall be made by the department Chair in consultation with the individual faculty member and with the approval of the dean. The chair, with the dean’s approval, and after

consulting with the individual faculty member (unless the faculty member is unavailable), shall have the right to change such assignment, for reasons related to the cancelling or adding of classes, enrollment shifts, or other appropriate reasons, provided, however, that if, less than thirty (30) days prior to the start of the semester, a faculty member who has been assigned to teach a particular course is relieved of that assignment and is required to teach another course that he or she has not taught within the previous two (2) years, the affected faculty member shall be awarded one (1) additional PU.

6. To the extent reasonable, the University will make a good faith effort to fund and support research or research-related activities.
 7. Faculty shall receive overload compensation for workloads beyond the full assigned workload of sixty four (64) PUs per academic year at the rate of 1/80 of their academic year salary for each PU overload. The University may, with written consent of the faculty member, choose to level his/her workload, without overload compensation, over two (2) consecutive academic years. Faculty shall be free to accept or reject without prejudice any overload assignment in excess of 4.5 PUs per academic year.
 8. Faculty shall not be required to maintain more than five (5) office hours per week during the academic year nor more than one (1) office hour per week per course or section during the Summer.
 9. Changes in faculty schedules must be announced at least twenty-four (24) hours in advance and cannot be announced on Saturday or Sunday.
 10. Limitations
 - a. In no case shall a faculty member be required to teach more ~~than twenty-four (24) credit hours~~ sixty four (64) PUs per academic year without receiving overload compensation.
 - b. Absent the consent of a faculty member in writing, no assignment shall be made which requires duty (i) beyond an eight hour span in one day; (ii) within a twelve hour span in two consecutive days; or (iii) on more than five (5) days per week.
 - c. Absent the consent of the faculty member in writing assignment shall be made which requires more than (i) three different preparations or (ii) more than two (2) sections of a single course in a single semester unless additional preparations or sections are dictated by program requirements, course configuration, student demand or faculty expertise, in which case any such additional preparation(s) or section(s) shall be assigned only to the extent necessary to prevent undue interference with the program in question, and the University will consult with the Faculty Association prior to making such assignments.
- [11].⁸⁸ Qualified faculty in a Department may request to be assigned one (1) course for which a part-time faculty appointment would have to be made. The University has discretion whether to grant any such request, although it may not deny such

⁸⁸ This section and the previous section are both listed as number 10 in the proposed Eighth Master Agreement. The second section B(10) will be referred to as B(11) in this opinion.

request for arbitrary and capricious reasons. The rate of pay shall be based on the part-time salary scale.

C. LRD FACULTY

1. The workload of faculty in LRD shall be consistent with the University's mission and shall consist of activities related to maintaining the library and media services, acquisition and cataloging, research, University service, and public service. The basis for determining the composition of a faculty member's workload shall be University responsibilities and need. Except during periods of approved leaves and holidays, faculty shall be available for assignment to professional activities as necessary to maintain the usual hours of operation of the unit. In determining a faculty member's workload, and in making any changes or adjustments thereto, there shall be no retaliation for the exercise by the faculty member of any rights afforded by this Agreement, personnel policies, or by law, nor shall decisions regarding workload be made on the basis of disciplinary considerations, or for arbitrary and capricious reasons.
2. Appointments for faculty on twelve (12) month contracts shall be from October 1 through September 30 and for faculty on academic year appointments shall be from August 16 through May 15.
3. Normal workload assignments shall be thirty-two (32) PUs per week. One PU is equivalent to one (1) hour of assigned duty.
4. Authorized University Activity – Recognizing the University's commitment to scholarship, research, public service and the professional growth of the faculty, the Chair, in consultation with the faculty member, and with the approval of the director, may substitute Authorized University Activity for all or a portion of the workload. Authorized University Activity may include, but is not limited to, scholarly research, publication or equivalent creative activity, and/or organized University or public service. The amount of time to be spent on these activities, except for public service, shall be agreed to in writing by the faculty member, Department Chair and the Dean. The amount of time to be spent on public service shall be established by the Chair and the Dean, after consultation with the faculty member. One (1) PU for each fifteen (15) hours shall be awarded for Authorized University Activity.
5. Each semester schedule of assignments, including Summer, will be prepared and posted for a minimum of one (1) week, four (4) weeks prior to the beginning of the semester, to permit faculty to make known to the Chair any preferences. Individual workload assignments shall be made by the Department Chair in consultation with the individual faculty member and approved by the Director. The Chair, after consultation with the faculty member (unless the faculty member is unavailable), and with the Director's approval, may modify the work assignments as required by changed circumstances.

6. Faculty will be entitled to overload compensation for working beyond the full assigned workload on the basis of 1/80 of their annual salary per PU. Faculty shall be free to accept or reject without prejudice any overload assignment in excess of 4.5 PUs per academic year.
7. In the absence of written consent of the faculty member, assignments will not be made which require duty (a) beyond an eight (8) hour span in one day; (b) within a twelve (12) hour span on two consecutive days; or (c) for more than five (5) consecutive days in any seven (7) day period.
8. To facilitate the scholarly activities of LRD faculty, a good faith effort shall be made, consistent with the efficient operation of the Division, to schedule assignments such that each faculty member shall have at least one block of at least four (4) consecutive hours each week without assigned duties.

a. University's Position

Article XVII is entirely nonnegotiable. It limits the amount and the type of work faculty members may be assigned. The Board has ruled that such limits are nonnegotiable, stating, "We have ruled that determining the number of duty days concerns a matter that has such high policy implications as to preclude a requirement that DCPS engage in collective bargaining."⁸⁹ The Board has held provisions dictating class size to be nonnegotiable.⁹⁰ All of the provisions of Article XVII regarding workload and class size "would interfere with the University's right to direct employees; to assign employees; to maintain the efficiency of its operations; to determine the mission of the University, its organization, and the number of employees; to establish a tour of duty for faculty; and to determine the number, types, and grades of positions of employees assigned to the University's organizational unit, work project, or tour of duty."⁹¹

b. Association's Position

In a decision regarding the parties' Third Master Agreement, *University of the District of Columbia Faculty Association/National Education Association v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982) ("Opinion No. 43"), the Board held that the parties' past negotiations on workload "accord with the statutory letter and intent" of the CMPA and that "[i]t would be a disservice to the collective bargaining process to dictate or confirm by administrative fiat a different resolution."⁹² That decision controls this case in which comparable language is proposed.

⁸⁹ *Washington Teachers' Union v. DCPS*, 46 D.C. Reg. 8090, Slip Op. No. 450 at 16, PERB Case No. 95-N-01 (1995) (quoted in University's Original Br 19).

⁹⁰ University's Original Br. 20 (citing *SEIU, Local 500 and Univ. of D.C.*, 62 D.C. Reg. 14633, Slip Op. No. 1539 at 23, PERB Case No. 15-N-01 (2015)).

⁹¹ University's Original Br. 20

⁹² *Id.* at 7 (quoted in Union's Original Br. 40.)

c. Analysis

In Opinion No. 43, the Board was presented with the issue of the negotiability of the proposed workload article in the agreement UDC and the Association were negotiating in 1981. The Board observed, “This issue is complicated by the fact that there is no statutory language referring in specific terms to the subject matter involved, and workload has no clearly identifiable meaning.”⁹³ That statement remains true.

However, the Board’s analysis of the negotiability of the workload proposal in that case has been superseded by statute, as the Board recognized in *SEIU, Local 500 and University of the District of Columbia (SEIU)*.⁹⁴ After Opinion No. 43 was issued, a new subsection was added to section 1-617.08 stating, “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. Official Code § 1-617.08(a-1). In contrast to that directive, which is now in effect, the Board in Opinion No. 43, carefully explained that it considered the parties’ previous agreement to negotiate on workload to be relevant⁹⁵ and imprudent to disturb⁹⁶ and that the Board “confine[d] its determination on this issue to the area indicated by the parties’ 1980 course of action.”⁹⁷ The analysis and determination in the case are incompatible with section 1-617.08(a-1).

While Opinion No. 43 does not render the entire article negotiable, some of the article is made negotiable by section 1-612.01(a)(2), which provides,

The basic workweek, hours of work, and tour of duty for all employees of the Board of Education and the Board of Trustees of the University of the District of Columbia shall be established under rules and regulations issued by the respective Boards; provided, that the basic work scheduling for all employees in recognized collective bargaining units to these established tours of duty shall be subject to collective bargaining, and collective bargaining provisions related to scheduling shall take precedence over conflicting provisions of this subchapter.

Sections B(9) and C(5) concern “basic work scheduling” within established tours of duty and are therefore negotiable.

The Board’s holdings in *SEIU* establish that certain sections of Article XVII are nonnegotiable. Sections B(2) and C(2) set the length of academic appointments and in so doing infringe the management rights to assign and retain employees in positions within the University

⁹³ *Id.* at 6.

⁹⁴ 62 D.C. Reg. 14633, Slip Op. No. 1539 at 22, PERB Case No. 15-N-01 (2015).

⁹⁵ *Id.* at 3.

⁹⁶ *Id.* at 7.

⁹⁷ *Id.*

per section 1-617.08(a)(2).⁹⁸ Section B(4)(c)(3) imposes a limit on class size and thereby interferes with the University's right to maintain the efficiency of its operations per section 1-617.08(a)(4).⁹⁹ Section B(11) provides that the University may not deny for arbitrary and capricious reasons a faculty member's request to be assigned a course for which a part-time faculty appointment would have to be made. The Board held in *SEIU* that a proposal that requests for a teaching assistant "shall not be unreasonably denied" impermissibly required the University to hire or assign teaching assistants.¹⁰⁰ In similar fashion, the stipulation that the University may not deny a request for a certain assignment for arbitrary and capricious reasons removes discretion from the University over such requests in contravention of the management right to direct employees. Section B(11) is nonnegotiable.

With a variety of restrictions on assignments to faculty, Section B(10)(b) and (c) infringes management's right to direct employees per section 1-617.08(a)(1).

As noted, no specific statutory language defines workload or makes it either negotiable or nonnegotiable. Given the presumption of negotiability under section 1-617.08(b), the burden lies with the University to establish its contentions with respect to proposals it declares are nonnegotiable.¹⁰¹ The University's general claim that the entire workload article is nonnegotiable for infringement of a litany of management rights is insufficient to carry that burden. Neither facts nor precedents have been submitted to establish that the remaining sections of Article XVII are nonnegotiable. The Board's holdings that teachers' duty days are nonnegotiable¹⁰² cannot be generalized into a ruling that any limitation on the amount and type of work of employees is nonnegotiable.

With nothing more from the University, we find that the remaining sections of Article XVII are *negotiable*, namely, Sections B(1), B(3), B(4)(a), B(4)(b), B(4)(c)(1), B(4)(c)(2), B(4)(d)-(g), B(10)(a), C(1), and C(3)-(8). Sections B(2), B(4)(c)(3), B(10)(b), B(10)(c), B(11), and C(2) are *nonnegotiable*.

9. XVIII Article Intellectual Property

The Association proposes a new article, Article XVIII, on the subject of intellectual property.

ARTICLE XVIII - INTELLECTUAL PROPERTY

A. GENERAL PRINCIPLES

1. The University supports the development, production, and dissemination of

⁹⁸ Slip Op. No. 1539 at 4, proposal 1(A).

⁹⁹ *Id.* at 23, proposal 29.

¹⁰⁰ *Id.* at 24, proposal 30.

¹⁰¹ *Teamsters Local 639 v. D.C. Public Schools*, 38 D.C. Reg. 116, Slip Op. 263 at 13, 21, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990).

¹⁰² *See, e.g., Washington Teachers' Union, Local 6, AFL-CIO and DCPS*, 48 D.C. Reg. 6555, Slip Op. No. 144, PERB Case No. 85-U-28 (1986), *aff'd*, *PERB v. Washington Teachers' Union, Local 6*, 556 A. 2d 206 (D.C. Ct. App.) (1989).

Intellectual Property by members of the University community. The purpose of this Article is to define the relationship between the University and any Bargaining Unit member(s) who, using substantial University resources, creates or develops Intellectual Property. The public interest is best served by creating an intellectual environment where creative efforts and innovations are encouraged and rewarded while still retaining for the University and its learning communities reasonable access to, and use of, the Intellectual Property for which the University has provided substantial assistance.

2. Intellectual Property developed without using substantial University resources is owned and controlled solely by its creator(s). The University has no claim to any financial or other benefit derived from that Intellectual Property.

B. DEFINITIONS

1. “**Substantial University Resources**” means the involvement of the University support that includes the use of University funding directly related to the professional project, or University property or personnel above the level that is traditionally and commonly made available to Bargaining Unit members generally in their academic responsibilities of service, research, and teaching. For example, use of University library and computers is not considered to be substantial University resources.
2. “**Intellectual Property**” means any trademarkable, copyrightable, or patentable matter including, but not limited to textbooks or other books, articles, laboratory manuals, films, monographs, glossaries, bibliographies, study guides, syllabi, tests and work papers, lectures, musical and/or dramatic compositions, unpublished scripts, filmstrips, charts, transparencies, PowerPoint or similar productions, other visual aids, video and audio recordings, computer programs, software, courseware, web pages, live video and audio broadcasts, programmed instructional materials, Distance Education instructional materials, drawings, paintings, sculptures, photographs and other works of art, devices, inventions, techniques, useful processes and discoveries. Intellectual Property shall be deemed created whenever it is first fixed in some tangible form including but not limited to: notes, sketches, drawings, results of research or experiments, computer code or records, or any other tangible embodiment. The following definitions are based on pertinent federal statutes:
 - (a) “**Copyright**” shall mean that bundle of rights that protect original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.
 - (I) “**Works of authorship**” (including computer programs) include, but are not limited to the following: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works (photographs, prints,

- diagrams, models, and technical drawings); motion pictures and other audiovisual works; sound recordings; software; courseware and architectural works.
- (ii) “Tangible media” include, but are not limited to, books, periodicals, manuscripts, phonorecordings, films, tapes, and disks.
- (b) “Patent” means that bundle of rights that protect inventions or discoveries that constitute any new and useful process, machine, device, manufacture, or composition of matter, or any new and useful sports, mutants, hybrids, and new found seedlings, other than a tuber propagated plant or plant found in an uncultivated state.
- (c) “Trademark” means any word, name, or device, or any combination, used, or intended to be used, in commerce to identify and distinguish the goods of one manufacturer or seller from goods manufactured or sold by others, and to indicate the source of the goods.
3. The terms “Works for Hire” and “Special Assignment” shall mean Intellectual Property that is part of or is the result of an officially assigned project, other than a member’s normal duties.
4. The term “Sponsored Research” applies to Intellectual Property that is produced with the sponsorship of one or more third parties, such as corporations, foundations, or governmental agencies.

C. **OWNERSHIP:** The Association and University recognize that the ownership (and its associated rights) of Intellectual Property developed or created by a Bargaining Unit member shall be as directed by this policy unless required to be otherwise by applicable law. This ownership includes title to the Intellectual Property and the sole right to negotiate sales and licenses relating to this property.

1. **Patentable Material:** Patentable materials using substantial University resources will be jointly owned by the Creator(s) and the University subject to applicable federal law and the provisions of paragraph D (Commercialization), and paragraph E (Sponsored Research).
2. **Course Materials:** The University assigns all rights of ownership of materials developed by a Bargaining Unit member using University resources, both nonsubstantial, that are used in the teaching of courses to the bargaining unit member. These materials include syllabi, notes, assignments, tests, PowerPoint presentations, and other materials associated with the development and teaching of courses. However, the University may be permitted to use such course related materials for satisfying requests of accreditation agencies for faculty authored syllabi and course descriptions. While a bargaining unit member is employed by the University, any commercial use of course materials, excluding syllabi and course descriptions, will be controlled by the unit member. Use of syllabi and course descriptions shall be controlled jointly by the University and the unit member. Revenues derived from such commercial use will be the property of the unit member. In the event that a bargaining unit member leaves the University, he or she continues to own this property except that the University shall have

irrevocable, non-exclusive, royalty free license to use these materials for the remainder of the semester in which the unit member leaves.

3. **Publishable Materials:** Publishable works (namely scholarly writings, such as books and articles; and creative works, such as poems, paintings and musical compositions) are the property of the creator, who will determine how the works are to be distributed and keep any income that they may produce. This will continue to be the policy of the University except when materials are produced as a work for hire or special assignment.
4. **Works for Hire/Special Assignments:** Traditional academic work that is copyrightable, such as lecture notes and courseware, books and articles, is not treated as special assignments or works made for hire. However, some works created by bargaining unit members do property fall within these categories, allowing the University to claim copyright ownership. The University and an individual member of the bargaining unit may enter into an agreement for the member to produce intellectual property, including copyrightable material, classroom materials or other materials, for the University's purposes and ownership. In such cases, the respective rights of individual bargaining unit members and the University concerning ownership, control, use, and compensation related to a work for hire or special assignment shall be negotiated in advance and reduced to a written agreement signed by both parties and filed with the president of the Association. Bargaining Unit members have the right to consult with a representative of the Association when negotiating such an agreement.

D. COMMERCIALIZATION: In the case that a bargaining unit member develops Intellectual Property using substantial University resources and both the University and the bargaining unit member decide to pursue the commercialization of the Intellectual Property by seeking a patent or otherwise, the royalties and other income resulting from the commercialization of the Intellectual Property will be shared by the University and the creator as described in the Allocation of Resources, section 5 of this subsection. The cost of obtaining a patent and bringing the Intellectual Property to market will be borne by the University.

1. If the Bargaining Unit member develops Intellectual Property using substantial University resources and elects not to participate in pursuing a patent or otherwise, the bargaining unit member shall promptly notify the University in writing of his/her decision and assign all rights of ownership and all resulting revenue to the University.
2. If a Bargaining Unit member develops Intellectual Property using substantial University resources and the University elects not to participate in pursuing a patent or otherwise, the University shall promptly notify the bargaining unit member in writing of its decision and assign all rights of ownership and resulting revenue to the bargaining unit member.
3. A Bargaining Unit member who develops Intellectual Property without using University resources possesses full ownership of the Intellectual Property and will

be entitled to all royalties and income resulting therefrom. In these cases, the cost of obtaining a patent and bringing the Intellectual Property to market will be borne by the bargaining unit member.

E. SPONSORED RESEARCH: When sponsorship for research is sought in the name of the University, it is important that individuals and the University work together in seeking external support for projects. When Intellectual Property is produced as described above, ownership shall be as directed by applicable law and, in the absence thereof, then in accordance with the sponsorship agreement. Distribution of revenue from such property will be in accordance with the sponsorship agreement. Absent terms in the sponsorship agreement pertaining to ownership or distribution of revenue, the provision of this policy shall apply.

F. COOPERATION: The fair and effective implementation of this agreement requires good faith cooperation, collegiality, and candor on the part of both the University and bargaining unit members. The University will advise affected bargaining unit members promptly and fully on all matters regarding Intellectual Property and will not seek to develop or implement any policy regarding Intellectual Property outside this agreement without the consent and approval of the Association. Bargaining unit members shall communicate promptly and fully with the Provost/Vice President for Academic Affairs whenever their research/work involves or may be reasonably seen to produce Intellectual Property covered by this agreement. The University will have six months to notify the unit members of its intention to share in the revenue or forfeit its rights to do so. Under some United States laws and foreign laws, public disclosure, use, or sale of Intellectual Property prior to obtaining statutory protection may prejudice, or destroy, the availability of obtaining certain legal protection. In order to protect the University's, the unit member's, or any licensee's rights in or to Intellectual Property, no contractual or other legally enforceable agreement for the sale, transfer, or use of Intellectual Property may be made by either University or any affected bargaining unit member except in accordance with this agreement. It is also essential that any affected bargaining unit member and the University consult with one another prior to making any Intellectual Property publicly known or available.

G. RESOLUTION OF EMERGING ISSUES AND DISPUTES: An Intellectual Property Rights Committee shall be created and shall be composed of three (3) faculty members appointed by the Association and three (3) University employees appointed by the University. The committee members shall elect a chair each year. At the time of initial appointment or election, each member shall be designated as serving a one or two year term so that the term of at least one Association appointee and one University appointee will expire each year with replacements being appointed or elected each year. After the first appointment, subsequent members shall serve a two-year term, commencing on August 16. The Committee shall monitor and review technological and legislative changes affecting Intellectual Property and shall report to relevant faculty and administrative bodies when such changes affect existing agreements or policies. Disputes over ownership, and its attendant rights, of Intellectual Property shall be heard by the Intellectual Property Rights Committee as follows:

1. The Committee shall make an initial determination concerning competing claims to the Intellectual Property in question. The failure of the Committee to arrive at a determination will automatically initiate an arbitration proceeding as described

below. If either the University or the creator(s) disagree with the determination of the Committee, either party may appeal to binding arbitration in accordance with the provisions of this Agreement.

2. The fees and expenses of the arbitrator shall be shared equally by the University and the Association. However, if the Executive Committee of the Association votes not to fund its share of the fees and expenses of the arbitrator, the creators(s) may continue the arbitration by agreeing to share the fees and expenses equally with the University.

a. University's Position

Article XVIII establishes an entire intellectual property policy. The policy includes definitions, a prohibition on implementation of an intellectual property policy without the Association's consent, and a committee to make decisions on disputes arising under the article. The University does not object to the Association's attempt to negotiate compensation issues related to intellectual property, but "[a]ll other issues, including what might be encompassed within an intellectual property policy, involve a management right consistent with the University's right to maintain the efficiency of its operations, to determine its mission and budget, and to determine the technology of performing the University's work."¹⁰³

The case relied upon by the Association, *University of the District of Columbia Faculty Association/National Education Association v. University of the District of Columbia*, 60 D.C. Reg. 2528, Slip Op. No. 1349, PERB Case No. 07-U-17 (2013) ("Opinion No. 1349"), supports the negotiability of the impact and effects of a proposal made by the University, not by the Association.¹⁰⁴

b. Association's Position

Article XVIII does not restrict the University in any way except to ensure that the faculty receive credit and pay for their intellectual activity. It does not require or prohibit the introduction of new technology or inhibit the University's ability to define its mission. The proposal affects the University's budget only to the extent it affects the compensation of bargaining unit employees. All forms of compensation are negotiable.¹⁰⁵

The University has no basis for objecting to a grievance panel or to a requirement that a policy in the collective bargaining agreement cannot be amended without the Association's consent.¹⁰⁶ The University concedes that the Association has a role to play with respect to compensation issues related to intellectual property, but there would be no compensation if faculty members have no rights to their intellectual property.¹⁰⁷

¹⁰³ University's Original Br. 21 (citing D.C. Official Code § 1-617.08(a)(4), 5(A), 5(C)).

¹⁰⁴ University's Reply Br. 10.

¹⁰⁵ Union's Original Br. 50, 51.

¹⁰⁶ Union's Reply Br. 9.

¹⁰⁷ Union's Reply Br. 10.

The Association states that in Opinion No. 1349 “PERB first considered the impact of intellectual property and the introduction of new technologies at the University.”¹⁰⁸ In that case, the Association alleged that the University unilaterally implemented a program of on-line courses. The Board adopted a pertinent conclusion of the hearing examiner: “While UDC ‘must engage in bargaining over the impact’ of the online course program it ultimately develops, ‘the matter is not yet ripe for determining if a ULP has been committed.’ . . . A ULP would be appropriate if UDC refuses to bargain upon request once specific proposals have been submitted.”¹⁰⁹

Here, the University has submitted a policy on intellectual property to the Faculty Senate for consideration.¹¹⁰ The Association’s counter-proposal is now “ripe” for negotiation.¹¹¹

c. Analysis

Opinion No. 1349, cited by the Association, is not on point. It concerned the obligation of the University to engage in impact and effects bargaining on the University’s decision to introduce on-line courses. It did not concern an obligation to engage in a decisional bargaining, which the Association is seeking here.¹¹²

Section 1-617.08(a) does not expressly give management the sole right to develop a policy on intellectual property. Consequently, the University had to show how Article XVIII or certain sections of it interferes with the management rights that are created by section 1-617.08(a). Instead of doing that, the University merely asserts that issues of what an intellectual property policy might encompass “involve a management right consistent with” a list of three management rights. As was the case with the workload article, this vague and conclusory assertion does not establish that the proposed intellectual property article is nonnegotiable.

With nothing more from the University, we find that Article XVIII is *negotiable*.

10. Article XIX Annual Notice to Faculty Members

Article XIX is the compensation article of the proposed agreement. Article XIX(Q) as proposed by the Association is as follows:

Q. ANNUAL NOTICE TO FACULTY MEMBERS

Each faculty member shall be issued an individual notice on or before May 1 of each year for the following academic year. The notice shall include the date of issuance and the faculty member’s name, college and department, rank, salary and whether the faculty member has a continuing

¹⁰⁸ Union’s Original Br. 50.

¹⁰⁹ *Univ. of D.C. Faculty Ass’n/NEA v. Univ. of D.C.*, 60 D.C. Reg. 2528, Slip Op. No. 1349 at 3, PERB Case No. 07-U-17 (2013) (quoting hearing examiner’s report).

¹¹⁰ Union’s Original Br. 51; E-mail from Jon Axelrod, counsel for the Union, to PERB (Feb. 9, 2017).

¹¹¹ Union’s Original Br. 51.

¹¹² Further, the Board did not adopt the hearing examiner’s conclusion that the matter was not ripe. It agreed with the exception filed in opposition to that conclusion. *Univ. of D.C.*, Slip Op. No. 1349 at 5.

contract. The notice shall reference this Agreement and shall be signed by an appropriate University Official. If the University does not send s [sic] notice by May 1, the faculty member will continue employment for the next academic year.

a. University's Position

This proposal has two effects that render it nonnegotiable. First, it mandates continuation of an employment contract.

The University has the exclusive right to hire, assign, and retain employees, and the exclusive right to suspend, demote, discharge, or take other disciplinary action against employees for cause. D.C. Code § 1-617.08(a)(2). In addition, the University has the sole right to relieve employees of duty because of lack of work or other legitimate reasons. D.C. Code § 1-617.08(a)(3).¹¹³

The University should not be prevented from relieving faculty members from duty if the arbitrary deadline of May 1 is not met.¹¹⁴

Second, the proposal has wider effects beyond UDC's contractual relationship with individual faculty members. It impacts the number of faculty UDC employs in each department, college, and academic rank.

[T]he Union's proposal would interfere with the efficiency of the University's operations, as well as the right of the University to determine its mission, organization, the number of employees and to establish the tour of duty, and the right of the University to determine the number, types and grades of positions of employees assigned to the University's organizational unit, work project or tour of duty. D.C. Code § 1-617.08(a)(4),(5)(A)-(B).¹¹⁵

These two effects distinguish this proposal from the one at issue in *Fraternal Order of Police/Metropolitan Police Department Labor Committee and Metropolitan Police Department*,¹¹⁶ cited by the Association, which involved a limited remedy for a specific grievance.

In its reply brief, the University denies that it objects only to the one-year contract extension and not to the May 1 date. The University refers to its original brief in which it stated that "the University should not be prohibited from exercising its management rights if a

¹¹³ University's Original Br. 21.

¹¹⁴ University's Original Br. 21-22 (citing *SEIU, Local 500 and Univ. of D.C.*, 62 D.C. Reg. 14633, Slip Op. No. 1539 at 3-4, 9, PERB Case No. 15-N-01 (2015)).

¹¹⁵ University's Original Br. 22.

¹¹⁶ 54 D.C. Reg. 2895, Slip Op. No. 842, PERB Case No. 04-N-03 (2006).

decision regarding the retention or assignment of an employee cannot be made by the arbitrary May 1 deadline.”¹¹⁷

b. Association’s Position

The University does not assert that the May 1 requirement is nonnegotiable. It objects only to the addition of a consequence for missing that deadline.¹¹⁸ The Board has long held that parties can negotiate a provision specifying the consequences for missing a deadline. In *F.O.P./Metropolitan Police Department Labor Committee and Metropolitan Police Department*,¹¹⁹ the Board found negotiable a proposal mandating the remedy for an agency’s failure to adhere to a time limit in the collective bargaining agreement. The deadline of May 1 is no more arbitrary than other time limits the contract provides for grievances and evaluations.

SEIU,¹²⁰ relied upon by the University, is distinguishable because it concerned adjunct faculty, who have no expectation of employment from semester to semester. In contrast, full-time non-probationary faculty members, whom the Association represents, “enjoy a presumption of employment from year to year”¹²¹ “Most University faculty are on a nine month contract, covering the academic year from August 16 through May 16. Non-probationary employees have a reasonable expectancy that they will return the next academic year.”¹²²

The proposal does not impede terminations for cause or reductions in force. The proposal “merely creates a rebuttable presumption of continued employment.”¹²³

c. Analysis

Although the University characterizes the May 1 deadline as arbitrary, it has not objected to the negotiability of that deadline or to any of the existing language of Article XIX(Q). The University’s declaration of nonnegotiability made the University’s position quite clear by entitling the section on this subject as “Article XIX Section Q (new language proposed by Union)” and by stating, “The Union’s proposed language interferes with the University’s right to assign and retain employees” and with other management rights.¹²⁴ The heading and the opening sentence in the University’s original brief are similar.¹²⁵

The Association’s Negotiability Appeal, as one would expect, appeals only from what the University declared nonnegotiable. Part 10 of the Negotiability Appeal uses the same

¹¹⁷ University’s Reply Br. 11 (quoting University’s Original Br. 21-22).

¹¹⁸ Union’s Original Br. 52.

¹¹⁹ 54 D.C. Reg. 2895, Slip Op. No. 842, PERB Case No. 04-N-03 (2006).

¹²⁰ 62 D.C. Reg. 14633, Slip Op. No. 1539, PERB Case No. 15-N-01 (2015).

¹²¹ Union’s Reply Br. 10.

¹²² Negotiability Appeal 14; Union’s Original Br. 52.

¹²³ Union’s Original Br. 53.

¹²⁴ Declaration of Nonnegotiability 3.

¹²⁵ University’s Original Br. 21.

heading as the declaration of nonnegotiability and accurately states, “The University does not assert that the May requirement is non-negotiable.”¹²⁶ The University’s Answer did not deny that statement.

The subjects of a negotiability appeal are determined by the petitioner, not the respondent.¹²⁷ Accordingly, the existing language of Section Q is not before the Board. Only the Association’s proposed addition is.

In that regard, there is no general principle that proposals establishing consequences for breach of a contractual deadline are negotiable, and the case cited by the Association on this point, *F.O.P./Metropolitan Police Department Labor Committee and Metropolitan Police Department*,¹²⁸ does not recognize one. That case held that the consequence proposed for failure to timely provide an employee with a written decision on a disciplinary matter was negotiable because procedural matters concerning discipline are negotiable.¹²⁹

In *SEIU*, the Board held that a proposal requiring reappointment of part-time faculty under certain circumstances was nonnegotiable.¹³⁰ In seeking to distinguish *SEIU*, the Association says that part-time faculty have no expectation of continued employment while full-time, non-probationary faculty members “enjoy a presumption of continued employment from year to year.”¹³¹ Yet the Association also states that its proposal *creates* a presumption of continued employment.¹³²

Whether full-time faculty members currently have a presumption of continued employment or would gain one through the proposal, the effect of the proposal would be, as the Association stated, to “give a full-time faculty member a contract for the next academic year”¹³³ if the member did not receive a timely notice containing the information that Section Q states the notice “shall include.” This compulsory retention would infringe management’s sole rights to retain employees per section 1-617.08(a)(2) and “[t]o relieve employees of duties because of lack of work or other legitimate reasons” per section 1-617.08(a)(3).

The new language proposed by the Association for Article XIX(Q) is *nonnegotiable*.

11. Article XX(I)(2) Sabbatical Leave

Article XX, Section I(2) as proposed by the Association and amended in its original brief is as follows:

¹²⁶ Negotiability Appeal 14.

¹²⁷ *F.O.P./Protective Servs. Police Dep’t Labor Comm. and Dep’t of Gen. Servs.*, 62 D.C. Reg. 16505, Slip Op. No. 1551 at 2, PERB Case No. 15-N-04 (2015).

¹²⁸ 54 D.C. Reg. 2895, Slip Op. No. 842, PERB Case No. 04-N-03 (2006).

¹²⁹ *Id.* at 5.

¹³⁰ 62 D.C. Reg. 14633, Slip Op. No. 1539 at 9, PERB Case No. 15-N-01 (2015).

¹³¹ Union’s Reply Br. 10.

¹³² Union’s Original Br. 53.

¹³³ Union’s Reply Br. 11.

ARTICLE XX – PROCEDURES FOR LEAVES

I. SABBATICAL LEAVE

2. Applications for sabbatical must be filed with the department chair no later than the first Monday in November prior to the academic year during which the leave would be taken. An application approved by the University Sabbatical Leave Committee cannot be denied by the Administration for arbitrary and capricious reasons.

a. University's Position

The last sentence in this paragraph interferes with the University's right to direct its employees; to retain employees; to maintain the efficiency of its operations; to determine the University's budget, its organization, and the number, types, and grades of positions of employees assigned to the University's organizational units, work projects or tours of duty pursuant to D.C. Official Code § 1-617.08(a)(1), (2), (3), (4), (5)(A) and (B).

b. Association's Position

The Association asserts that it disagrees with the University's position.¹³⁴

c. Analysis

The Association's proposal in its Negotiability Appeal stated: "An application by the Sabbatical Leave Committee cannot be denied by the Administration."¹³⁵ The University contends that this provision proposes the "establishment of a sabbatical committee which would have absolute and total authority for the granting of faculty sabbatical requests."¹³⁶ The Association amended the proposal to add "for arbitrary and capricious reasons" in its original brief.¹³⁷ The University contends that the amended phrase "does not cure the deficiencies with the Association's proposal since the Association's new language will still interfere with those several management rights."¹³⁸ The Board agrees with the University's contention and finds that this proposal is nonnegotiable, as it interferes with the University's right to direct its employees. Under D.C. Official Code § 1-617.08(a)(1), the CMPA reserves the right to direct employees solely to management, while subsection (a)(2) grants management the sole right "[t]o hire, promote, transfer, assign, and retain employees in positions within the agency." As amended, the proposal at issue would prevent the University from overturning an approval by the Sabbatical Leave Committee for "arbitrary or capricious" reasons. The amended proposal establishes an

¹³⁴ Negotiability Appeal 15.

¹³⁵ Negotiability Appeal 15.

¹³⁶ University's Reply Br. 2.

¹³⁷ Union's Original Br. 5.

¹³⁸ University's Reply Br. 2.

“arbitrary and capricious” standard that may still interfere with the University’s right to grant or deny sabbatical leave by establishing a standard where none exists.

The new language proposed by the Association for Article XX(I)(2) is *nonnegotiable*.

12. Article XXI Transfers

Article XXI as proposed by the Association is as follows:

ARTICLE XXI – TRANSFERS

A. Definition: As discussed in this Article, a transfer shall mean the reassignment of a faculty member from a full-time faculty position in one department to a full-time faculty position in another department. All transfers shall be documented on a Form 52 and signed by the President.

B. Voluntary Transfers:

1. Faculty members displaced by the elimination of jobs for any reason shall be permitted [to] exercise their seniority rights to transfer to any other vacancy for which they are qualified. An employee transferred as a result of the application of this provision may be given reasonable training needed to assume the duties of the job in which he is transferred.
2. Employees desiring to transfer to other positions shall submit an application in writing to their immediate supervisor for transmittal through supervisory channels with a copy to the division director. The application shall state the reason for the requested transfer. Employees requesting transfers for reasons other than the elimination of jobs shall be transferred to vacancies for which they qualify on the basis of seniority; provided that such transfer shall not adversely affect the operation of the work site from which the employee is leaving. The University shall respond to the employee’s transfer request within twenty (20) work days.
3. If a transfer is granted in response to an employee’s request, such employee shall be ineligible to request another transfer within a one-year period.

C. Involuntary Transfers:

1. When the needs of the University necessitate the transfer of a faculty member, the following factors shall be considered in making the decision: (1) the individual’s qualifications; (2) recommendations of involved departments; and (3) seniority. However, seniority shall be applied in the following manner: In case the transfer is made at the request of faculty members, more senior qualified persons will be given priority over less senior qualified persons. If the transfer is involuntary, faculty with less seniority shall be transferred before those with more seniority provided the faculty with less seniority have the required qualifications.

2. Before an involuntary transfer is initiated, the University shall inform the University faculty of the need and shall invite volunteers for the position. Faculty who volunteer shall submit the request in writing to the Provost and Vice President for Academic Affairs with copies to the involved departments and dean(s) and the Association. Qualified volunteers shall be considered before initiating involuntary transfers. Involuntary transfers shall be in reverse seniority order (i.e., junior faculty first).
3. In the case of an involuntary transfer, the affected faculty member may appeal the proposed action to the President of the University. The President shall meet and discuss with the faculty member and the Association representative before any decision is made.
4. A faculty member may grieve an involuntary transfer.

a. University's Position

This article interferes with the University's right to direct employees, to promote, transfer, assign and retain employees, and to suspend, demote, discharge or take other disciplinary action against employees for cause; to maintain the efficiency of the University's operations; to determine the mission of the University, its organization, the number of employees, and to establish the tour of duty; and to determine the number, types, and grades of positions of employees assigned to the University's organizational unit, work project, or tour of duty pursuant to D.C. Official Code § 1-617.08(a)(1), (2), (4), (5)(A), and (5)(B).

b. Association's Position

Citing to *Teamsters Local 639 v. D.C. Public Schools*,¹³⁹ the Association states that "PERB has held that the proposed Section B is negotiable."¹⁴⁰ Without citation, the Association also states that "PERB has also held that the right to grieve is negotiable."¹⁴¹

c. Analysis

The University does not assert that the definition of transfer in Section A is nonnegotiable. It asserts that transfer as defined in Section A is a management right.¹⁴² 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.¹⁴³ In *Teamsters Local 639 v. D.C. Public Schools*, the Board held a provision nearly identical to Section B, Parts 1, 2, and 3 to be negotiable, finding that the proposals were limited to transfer

¹³⁹ 38 D.C. Reg. 116, Slip Op. 263, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990).

¹⁴⁰ Union's Original Br. 55.

¹⁴¹ *Id.*

¹⁴² University's Original Br. 23.

¹⁴³ *E.g., Washington Teachers' Union, Local 6 v. DCPS*, Slip Op. 450 at 5, PERB Case No. 95-N-01; *Teamsters Local 639 v. DCPS*, 38 D.C. Reg. 116, Slip Op. 263, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990).

procedures and accommodations for those employees transferred.¹⁴⁴ The Board concludes that the Association's proposals regarding voluntary transfer procedures are distinguishable from the University's ultimate decision to transfer employees, matters reserved for the University.

However, the Association's proposal in Section C(2) is similar in nature to a proposal that the Board has found nonnegotiable. In *Teamsters Local 639*, the Board held that the provision placed absolute limitations on management's sole right to transfer that were incompatible with D.C. Official Code § 1-618.8(a)(2).¹⁴⁵ While the proposal's limitations are not absolute, the decision to transfer employees is reserved for management and the proposal places limitations on that managerial decision. With respect to C(4), the Board finds that this provision is also nonnegotiable for the same reasons that C(2) is outside the scope of bargaining. Proposing that the "faculty member may grieve an involuntary transfer" directly contravenes the University's right under section 1-618.8(a)(2).

Sections C(2) and C(4) are *nonnegotiable*. Sections A, B, C(1), and C(3) are *negotiable*.

13. Article XXVI Support Systems

In pertinent part, Article XXVI as proposed by the Association is as follows:

ARTICLE XXVI – SUPPORT SYSTEMS

D. The University and the Association will annually assess the quality of teaching facilities, the need for repairs, and devise a plan for renovation. The Association may notify the President and Board of Trustees of deficiencies in the facilities and plans to correct those deficiencies.

a. University's Position

The Association's new proposed language interferes with the University's right to direct its employees, to maintain the efficiency of the University, and to determine the University's mission, its budget, organization and the technology employed in the performance of its work pursuant to D.C. Official Code § 1-617.08(a)(1), (4), (5)(A) and (B).

b. Association's Position

The Association's proposal does not require any action by the University, except discussion concerning maintenance of the physical plant where the bargaining unit members are employed.¹⁴⁶ PERB has found proposals negotiable where they require discussion, but not action by an employer.¹⁴⁷

¹⁴⁴ *Teamsters Local 639*, Slip Op. 263 at 7.

¹⁴⁵ *Id.*

¹⁴⁶ Union's Original Br. 56.

¹⁴⁷ *Id.*

c. Analysis

The Board finds that these proposals are negotiable. The proposals do not direct employees or determine the mission, budget, organization, or technology of the University. Rather, they require the parties to review the condition of the facilities and formulate a plan for renovation. This matter is a negotiable term and condition of employment not proscribed by the CMPA. Further, these proposals do not require the University to implement any of the repairs or address any of the deficiencies in the facilities. In *Teamsters Local Unions No. 639 and 730 v. D.C. Public Schools*,¹⁴⁸ the Board found a proposal to be negotiable because it “did not require an action within management’s prerogative, i.e., assigning workers.”¹⁴⁹ This determination was based on an interpretation that the proposal required “only that DCPS afford such employees the opportunity . . . if such an opportunity arises.” Consistent with this interpretation, the Board finds that the University’s management rights are not infringed by this proposal, which merely facilitates discussion between the parties and does not compel action by management.

Article XXVI(D) is *negotiable*.

14. Article XXX Faculty Handbook

In pertinent part, Article XXX as proposed by the Association and amended in its original brief is as follows:

ARTICLE XXX – NEW FACULTY

The University agrees to make available to new faculty the following information:

...

2. Faculty Handbook. The Faculty Association and the University shall jointly develop all portions of the Handbook except that those issues determined to be nonnegotiable by the Public Employee Relations Board. Issues deemed non-negotiable shall be developed solely by the University. The Handbook shall be updated every three years and shall also be placed on the University web site. The Handbook shall also be distributed to existing faculty.

a. University’s Position

The Association has revised its proposal requiring faculty input into a faculty handbook by modifying its original position to exclude from the joint development of the handbook “those issues determined to be non-negotiable by the [PERB].”¹⁵⁰ Notwithstanding the Association’s

¹⁴⁸ *Teamsters Local Unions No. 639 & 730 v. DCPS, a/w Int’l Bhd. of Teamsters*, 43 D.C Reg. 3545, Slip Op. No. 377, PERB Case No. 94-N-02 (1994).

¹⁴⁹ *Id.* at 16, (citing *DCPS and Teamsters Local Unions No. 639 and 730, a/w Int’l Bhd. of Teamsters*, 38 D.C. Reg. 2483, Slip Op. 273 at 16, PERB Case No. 91-N-01 (1991); see also D.C. Official Code § 1-618(a)).

¹⁵⁰ University’s Reply Br. 1. (citing Union’s Original Br. 3)

recognition that it lacks authority to determine matters vested in the sole discretion of the University pursuant to the management rights statute, it fails to explicitly state how such matters are identified.¹⁵¹ Presumably, under the Association’s revised proposal, the University would be able to exclude an issue in the same manner as it would do regarding a subject raised by the Association in bargaining—merely by sending a letter to the Association—thereby requiring the Association to petition the PERB for a ruling.¹⁵² Yet, the revised proposal does not set forth a procedure to remove a subject from any handbook discussions in the event that the subject being discussed is non-negotiable.¹⁵³ Due to this ambiguity, the Association’s proposal, even as revised, is non-negotiable.¹⁵⁴

The requirement that the handbook be updated every three years would interfere with the efficiency of the University and its mission, organization and budget. The requirements on how the handbook is distributed would interfere with the technology of performing the University’s work.¹⁵⁵

b. Association’s Position

As amended, the entire Article XXX is negotiable.¹⁵⁶ It merely identifies information which must be distributed to new (and current) employees. It does not infringe upon management rights.

c. Analysis

The absence of a procedure for identifying issues determined by the Board to be nonnegotiable indicates that further negotiation may be warranted, not that the proposal is nonnegotiable.

The requirement that the handbook be available on the University’s website interferes with management’s right per D.C. Official Code § 1-617.08(a)(5)(C) to determine “[t]he technology of performing the agency’s work.” The Association’s provisions impose upon the University right to determine how it uses its technological resources.

The third sentence of Article XXX(2) is *nonnegotiable*. The remainder of Article XXX(2) is *negotiable*.

¹⁵¹ *Id.*

¹⁵² *Id.* at 2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ University’s Original Br. 30-31.

¹⁵⁶ Union’s Original Br. at 3.

ORDER

IT IS HEREBY ORDERED THAT:

1. Article VII, Sections A(1), A (2), are nonnegotiable.
2. Article VII, Sections A(3), G, and L (first sentence) are negotiable.
3. Article XI, Section A(3) is nonnegotiable.
4. Article XI, Section A(5) is negotiable.
5. Article XIV, Sections A(1)-(5), B(1) third sentence, C, D(1), G(1), G(3), and G(5) are nonnegotiable.
6. Article XIV, Sections B(1) except the third sentence, B(2), D(2), E, F, G(2), G(4), G(6), H, I, J, K, and L are negotiable.
7. Article XV, Sections A(2), A(6), A(7), B(2)(a), B(3), and B(4) are nonnegotiable.
8. Article XV, Sections A(1), A(3)-(5), A(8)-(10), B(1), B(2)(b), and C are negotiable.
9. Article XVI, Section A(5) is nonnegotiable.
10. Article XVI, Sections A(1)-(4) and B are negotiable.
11. Article XVII, Sections B(2), B(4)(c)(3), B(10)(b), B(10)(c), B(11), and C(2) are nonnegotiable.
12. Article XVII, Sections B(1), B(3), B(4)(a), B(4)(b), B(4)(c)(1), B(4)(c)(2), B(4)(d)-(g), B(10)(a), C(1), and C(3)-(8) are negotiable.
13. Article XVIII is negotiable.
14. The proposed addition to Article XIX, Section Q is nonnegotiable.
15. The proposed addition to Article XX, Section I(2) is nonnegotiable.
16. Article XXI, Sections C(2) and C(4) are nonnegotiable.
17. Article XXI, Sections A, B, C(1), and C(3) are negotiable.
18. Article XXVI, Section D is negotiable.
19. The third sentence of Article XXX(2) is nonnegotiable. The remainder of Article XXX(2) is negotiable.
20. 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 Chairman Charles Murphy and Members Ann Hoffman and Douglas Warshof.

Washington, D.C.

March 23, 2017

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-N-01 was sent by File & ServeXpress to the following parties on this the 4th day of April, 2017.

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