

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

_____)	
In the Matter of:)	
)	
District of Columbia Nurses Association,)	
)	PERB Case No. 12-N-01
Complainant,)	
)	Opinion No. 1285
v.)	
)	
Government of the District of Columbia)	
Department of Mental Health,)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case

The present case is a negotiability appeal (“Appeal”) filed by the District of Columbia Nurses Association (“Union” or “Complainant”). In the Appeal, the Union identified a single proposal raised in connection with bargaining over the parties’ successor collective bargaining agreement (“CBA”) that was challenged by the Government of the District of Columbia Department of Mental Health (“DMH” or “Respondent”).

DMH filed a response to the Union’s Appeal (“Response”), contending that the Union’s negotiability appeal should be found non-negotiable as the proposal at issue infringes on its management rights provided by the Comprehensive Merit Personnel Act (“CMPA”) D.C. Code § 1-617.08. (Response at 2).

The Complainant’s Appeal and the Respondent’s Response are before the Board for disposition.

II. Discussion

On November 21, 2011, DMH notified the Union that its proposed new Article 21 entitled “New Hires” constituted a violation of DMH’s management rights and, therefore, non-

negotiable. (Appeal at 2 and Enclosure 5). The Union filed the present Appeal on December 21, 2011.

There is no indication from the parties' pleadings that the parties had bargained to impasse. Non-negotiability declarations are timely when they are made "prior to the conclusion of collective bargaining." *Teamsters Local Unions Nos. 639 and 730 v. District of Columbia Public Schools*, 43 D.C. Reg. 7014, Slip Op. No. 403 at p. 2-3, PERB Case no. 94-N-06 (1994). Bargaining between DMH and the Union is ongoing, so the Union's Appeal may be properly considered at this time.

The Union claims that its "proposal requires management to place newly hire[d] registered nurses on a specific step on a salary scale negotiated by the parties. The proposal does not require management to place the new hire on a particular grade and is similar in nature to provisions in prior collective bargaining agreements negotiated with the Government of the District of Columbia." (Appeal at p. 2).

DMH argues that the proposal is non-negotiable because, pursuant to D.C. Code § 1-617.08¹:

¹ § 1-617.08. Management rights; matters subject to collective bargaining, provides:

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

- (1) To direct employees of the agencies;
- (2) To hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause;
- (3) To relieve employees of duties because of lack of work or other legitimate reasons;
- (4) To maintain the efficiency of the District government operations entrusted to them;
- (5) To determine:
 - (A) The mission of the agency, its budget, its organization, the number of employees, and to establish the tour of duty;
 - (B) The number, types, and grades of positions of employees assigned to an agency's organizational unit, work project, or tour of duty;
 - (C) The technology of performing the agency's work; and
 - (D) The agency's internal security practices; and
- (6) To take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

management [has] the sole right to "hire" employees within the Agency as stated in § 1-617.08(a)(2). Petitioner's proposal to require management to hire new registered nurses at a specific grade step violates management's right to hire employees as it deems appropriate. Union seeks to bind the Agency to hire at a certain step irrespective of the competitive nature of the nursing field. The Agency cannot agree to do so without surrendering control of a management right. In its Negotiability Appeal, Union argues that its proposal "does not require management to place the new hire on a particular grade." Nevertheless, Union's proposal to place a new hire at a specific step within the grade infringes on management's right to hire a registered nurse in violation of § 1-617.08(a)(2).

The Board has the authority to consider the negotiability of the proposals pursuant to Board Rules 532.1 and 532.4.² This Negotiability Appeal presents a single issue for the Board to resolve.

ARTICLE 21: NEW HIRES

Effective October 1, 2011, the Employer shall place new bargaining unit hires as follows:

Grade 5, Step 1 - Registered Nurses with less than 1 year experience with an Associate's Degree in Nursing.

Grade 7, Step 1 - Registered Nurses with less than 1 year experience with a Bachelor's of Science Degree in Nursing.

Registered Nurses hired as a Grade 5 shall be eligible for promotion to Grade 7 upon completion of 1 year of service at Grade 5 and satisfactory demonstration of the ability to perform the duties of Grade 7. Registered Nurses in Grade 7 shall be eligible for promotion to Grade 9 upon completion of 1 year of service at Grade 7 and satisfactory demonstration of the ability to perform the duties of Grade 9. Promotion to Grades 11 and 12 require competitive promotion.

(a-1) 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.

(b) All matters shall be deemed negotiable except those that are proscribed by this subchapter. Negotiations concerning compensation are authorized to the extent provided in § 1-617.16.

² Board Rule 532.1 provides outlines the procedure for filing a negotiability appeal with the Board. Board Rule 532.4 outlines the procedure for handling a negotiability appeal once it is filed.

Newly hired Registered Nurses shall be placed at a Step in the appropriate Grade in accordance with the following years of experience in Mental Health/Psychiatric Nursing:

0-<1	Step 1
1-<3	Step 2
3-<5	Step 3
5-<7	Step 4
7-<9	Step 5
9-<12	Step 6
12 - <15	Step 7
15-<18	Step 8
18-<21	Step 9
21-<24	Step 10
24 - <27	Step 11
27+	Step 12

In *UDCFA/NEA v. UPC*, the Board adopted the Supreme Court standard concerning subjects for bargaining that was established and defined in the *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342 (1975); 29 DCR 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982). Under this standard, the three categories of bargaining subjects are as follows: (1) mandatory subjects-over which the parties must bargain; (2) permissive subjects, over which the parties may bargain; and (3) illegal subjects, over which the parties may not legally bargain. *Id.*

In *District of Columbia Fire and Emergency Medical Service Department and American Federation of Government Employees, Local 3721*, 54 DCR 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007), the Board considered one of the first negotiability appeals filed after the April 2005 amendment. In that case the Board stated "that at first glance, the above amendment could be interpreted to mean that the management rights found in D.C. Code §1-617.08(a) may no longer be a subject of permissive bargaining. However, it could also be interpreted to mean that the rights found in §1-617.08(a) may be subject to permissive bargaining, if such bargaining is not considered as a permanent waiver of that management right or any other management right. As a result, [the Board indicated] that the language contained in the statute is ambiguous and unclear. Therefore, in order to determine the intent of the City Council, the Board reviewed the legislative history of the 2005 amendment." Slip Op. No. 874 at p. 8.

The Board noted that "[t]he section-by-section analysis prepared by the Subcommittee on Public Interest, chaired by Councilmember Mendelson, stated as follows:

Section 2(b) also protects management rights generally by providing that no 'act, exercise, or agreement' by management will constitute a more general waiver of a management right. This new paragraph should not be construed as enabling management to

repudiate any agreement it has, or chooses, to make. Rather, this paragraph recognizes that a right could be negotiated. However, if management chooses not to reserve a right when bargaining, that should not be construed as a waiver of all rights, or of any particular right at some other point when bargaining. (emphasis added).” Slip Op. No. 874 at p. 8.

Moreover, the Board has long held that even in cases where the parties had previously bargained over a management right, the management right reverted back to management after the collective bargaining agreement expired. *Washington Teachers’ Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 8, PERB Case No. 95-N-01 (1995).

In the present case, however, proposed Article 21 is similar to provisions negotiated and agreed to in previous agreements between the parties. In addition, the proposal only concerns the compensation step at which new hires, with a certain level of experience and education, will be placed. The Board has long held that matters of compensation are negotiable subjects of bargaining. *Committee of Interns and Residents v. District of Columbia General Hospital Commission*, 41 D.C.R. 1602, Slip Op. No. 301, PERB Case No. 92-N-01 (1992). Specifically, a proposal concerning pay level and advancement has been found to be negotiable. *Id.* The Board does not find the instant proposal to interfere with management’s right to hire or fill the specified positions. In addition, the proposal does not require newly hired employees to be placed at any particular grade. We, therefore, find the Union’s proposed Article 21 negotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The subject of New Hires is a negotiable subject of bargaining based on the negotiability presumption found in D.C. Code § 1-617.08 (b).
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

June 12, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice in PERB Case No. 12-N-01, Slip Opinion No. 1285 is being transmitted electronically and *via* U.S. Mail to the following parties on this the 21st day of June, 2012.

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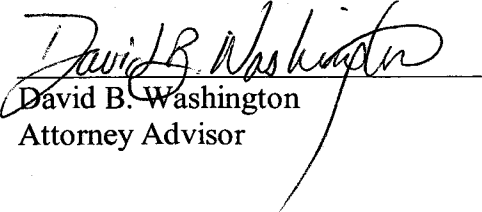
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