GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: The University of the District of Columbia Faculty Association/ National Education Association, Petitioner, and The University of the District of Columbia, Respondent.	PERB Case No. 82-N-01 Opinion No. 43

DECISION AND ORDER

The parties to this proceeding are the University of the District of Columbia (UDC) and the University of the District of Columbia Faculty Association/National Education Association (NEA). A dispute as to the negotiability of certain collective bargaining issues arose in connection with their negotiation of a renewal contract last September.

Although settlement has been reached regarding compensation, a combination of circumstances has contributed to delay in resolving some twenty issues involving terms and conditions of employment. The present determination is essential to proceeding toward a resolution of these issues.

During the negotiations last fall, starting September 4, 1981 and continuing into December, 1981, a serious question arose as to the negotiability of four of these twenty issues: reduction in force, transfer policy, workload determination, and the selection of department chair nominees. All four issues had been the subject of bargaining in the preceding contract negotiations and provisions covering them had been included in the 1980-81 Collective Bargaining Agreement. The UDC negotiators took the position in the negotiation of the renewal contract, however, that these issues were actually non-negotiable, at least as a matter of statutory obligation.

This issue of negotiability was appealed to the Public Employee Relations Board (PERB or the Board) by the NEA on November 16, 1981. The UDC filed a reply on December 7, arguing the merits of the negotiability issue and also that the NEA's appeal was untimely. After getting certain necessary clarifications, the Board sent the Negotiability Appeal to a Hearing Examiner, who held hearings on February 11 and 18, 1982. Post-Hearing Briefs were then filed with the Hearing Examiner. Her recommendation was filed with the Board on May 6, 1982. Written exceptions were received from UDC on May 24, 1982.

By its terms the provisions of the 1980-81 Agreement continue in effect until the date on which a new contract is signed or until September 30, 1982, whichever comes first. Arrangements have been made to expedite mediation of all remaining terms and conditions issues as soon as the Negotiability Appeal is resolved.

The Hearing Examiner's statement of facts, summary of the parties' positions, setting out of applicable statutory provisions and of relevant contract clauses are incorporated here by reference. Her recommendation is broad: "That the Negotiability Appeal of the UDCFA/NEA be considered timely filed and that the four issues appealed be considered negotiable."

Timeliness of Appeal

The Board concludes, on its own analysis as well as on the analysis and reasoning pursued by the Hearing Examiner, that the NEA Negotiability Appeal of November 16, 1981 was timely under the provisions of PERB Interim Rules, Section 106.2.

Merits of Negotiability Appeal

The Board considers the issue presented here one of substantial importance. The instruction of the various relevant provisions of the Comprehensive Merit Personnel Act of 1978 (CMPA) is by no means clear. The highly competent briefs and documents filed by the representatives of both parties properly highlight the uncertainties the statute leaves. A broad review of precedents that have developed under similar statutes and in other jurisdictions confirms the pervasiveness of the confusion attending this duty to bargain issue. It is a critical question in collective bargaining whether particular contract proposals are to be considered (i) mandatory, (ii) permissive, or (iii) illegal subjects of bargaining. The U.S. Supreme Court established and defined in National Labor Relations Board v. Borg-Warner Corp., 356 U.S. 342 (1975), these three categories of bargaining subjects as follows: mandatory subjects over which the parties must bargain; permissive subjects over which the parties may bargain; and illegal subject over which the parties may not legally bargain. The Court held further that mandatory subjects are those which are determined to be within the scope of wages, hours and terms and conditions of employment and that the parties may bargain on these subjects to the point of impasse. Bargaining on permissive subjects, however, was held to be discretionary and neither party is required to negotiate in good faith to agreement or impasse. These principles are generally accepted today in both private and public sector labor relations.

The situation prompts caution in proceeding here on the basis of generalization. The broad interpretation placed by UDC on Section 1708(a) (Management Rights; Matters Subject to Collective Bargaining) (codified as D.C. Code Section 1-618.8(a)) of the CMPA would vitiate collective bargaining, and would nullify other provisions of the Act. The NEA argument, on the other hand, would deny Section 1708(a) its clearly intended effect, i.e., to permit management to manage the agencies and direct their employees.

Particular consideration has been given to the special circumstances in this case: that the four issues in controversy were in fact subjects of bargaining in the 1980 negotiations and a provision covering each of them was included in the 1980-81 Agreement.

The NEA argues that subsequent questions of negotiability are foreclosed when, as in this case, the parties had not only bargained the issues in dispute, but also incorporated those agreed upon provisions and made them integral parts of their collective bargaining agreement.

UDC argues, that the question of whether an issue is validly negotiable in the first instance, or whether mandatory and permissive (as well as illegal) subjects of bargaining can be subsequently changed, cannot and should not be determined by virtue of any previous bargaining action or agreement by the parties.

The Board's position on this point is basically that asserted by UDC. Yet where there is a close question regarding a particular issue and the statutory dictate is unclear, it becomes relevant that the parties have on previous occasion either accepted on rejected negotiation overtures. The previous practice does not control or settle the issue, but it offers guidance as to the parties' intent and accord as to their understanding of the statute.

Because the applicable CMPA provisions are different with respect to the four issues controverted here, they must be taken up and disposed of separately. In summary, the Board finds the impact and implementation of a reduction in force and transfer policy clearly subjects of mandatory bargaining, the selection of department chair nominees clearly not. The workload issue presents a closer question.

1. Reduction in Force

Section 1708(a)(3) of the CMPA[1] (codified as of Section 1.618.8 (a)(3)) clearly indicates the intention that management shall have

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[1] Section 1708(a)(3) (D.C. Code Section 1-618.8(a)(3) provides that:
"(a) The respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations:
(3) To relieve employees of duties because of lack of work or other legitimate reasons;"

exclusive authority to determine what work force is needed. A distinction must be made, however, between the authority, on the one hand, to decide how many employees are needed, and the determination, on the other, of how the effects or impact of this decision are to be handled. The District of Columbia Board of Labor Relations (BLR) recognized this distinction in Federal City College Faculty Association and Federal City College, BLR Case No. TU001, Opinion No. 15 (April 12, 1977), involving the predecessor parties to the relationship involved in the present case. The holding there was that "the practical impact of the decision [to reduce force]... is negotiable but not the decision itself." The Opinion stated further that "[a]lso included within the scope of bargaining are the procedures for implementing the decision." More recently the California Public Employee Relations Board has held in Merced Community College District, 3NPER 11197 (CA., 11/17/80) that the "[c]ollege's decision to layoff employees was a managerial prerogative, but the college's refusal to bargain concerning the effects of the layoffs was unlawful."

Although these are unquestionably hard distinctions to make, these parties are familiar with them. Article XV of their 1980-81 Agreement[2] reflected a recognition of the relationship between the unilateral right to reduce a work force and the obligation to bargain about the procedures for implementing such a decision and about how to meet its impact and effects. Neither of the parties is obligated to stay with the language adopted in the 1980-81 Agreement. Nor is there ever any statutory requirement that agreement be reached on anything. The question here is whether this issue is negotiable in the sense of there being a duty to bargain about it. The Board's holding is that there is such a duty; not with respect to the determination of whether a reduction in force is necessary but with respect to the procedures for implementing that determination, if and when it is made, and resolving any problems arising from its impact or effect.

2. Transfer Policy

This issue shapes up along lines closely paralleling those developed in connection with the reduction of force issue. In the

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[2] Article XV of the 1980-81 Agreement entitled, "REDUCTION IN FORCE", provides that:

"A. A reduction in force shall be defined as a decrease in the number of faculty as a result of:
a) A bona fide financial exigency, or
b) A discontinuance or curtailment of department(s), program(s), or function(s) of the University.
The Board of Trustees shall determine when a RIF must be undertaken.

B. The parties agree that RIF is a last resort action. Prior to effecting a RIF, alternatives will be sought such as normal attrition, retirement (both mandatory and early), and resignations.

C. When a proposed RIF is not mandated by financial exigency, the University shall make every effort to place the affected faculty member(s) in other suitable positions and provide retaining if necessary as an alternative to a RIF."

The remaining sections of Article XV pertain to the procedures by which RIF's are to be implemented.

Board's judgment, the provisions of Sections 1708(a)(2) of the CMPA[3] (equivalent of D.C. Code Section 1-618.1(a)(2)) establish a management responsibility regarding personnel transfers which goes beyond what the Hearing Examiner appears to have found. Management has the sole right "[t]o...transfer, assign and retain employees in positions..."

Yet here, again, there is a mandatory duty to bargain regarding the procedures for implementing transfers and for meeting their impact and effect. This duty derives from the overall purpose of collective bargaining, fully recognized and incorporated in the CMPA, to establish a workable and constructive relationship between the parties. See, for example, Sections 2401 and 2402 of the CMPA (codified as D.C. Code Sections 1-624.44-.45). Even those sections recognizing broadest managerial rights with respect to particular matters are carefully couched in terms guarding against the exercise of these rights in a manner which will be disruptive of the relationship.

The issue as it has been raised here involves only voluntary transfers. The 1980-81 Agreement included in Article XVI(B)[4] provisions regarding such transfers. If UDC concludes that those provisions inhibit its transfer rights as established by Section 1701(a)(2) of the CMPA (codified as D.C. Code Section 1-618.1(a)(2)), it is entitled to assert this claim in the bargaining and to argue its position without constraint arising from previous practice. It is obligated at the same time to negotiate in good faith regarding the procedures for implementing transfers, including those which are voluntary, and for handling their impact and effects.

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[3] Section 1708(a)(2), (D.C. Code Section 1-618.8(a)(2)) provides that:

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

[4] Article XVI(B) of the 1980-81 Negotiated Agreement provides that:

"1. Voluntary transfers shall be based on the individual's qualifications, the availability of vacancies, and the willingness of the two involved departments to recommend the transfer. An individual requesting transfer to another academic department (lateral transfer) must have credentials acceptable to faculty of the receiving department.
2. Requests for transfer shall be made no later than April 1 and shall be made effective at the beginning of the following academic year.
3. Voluntary transfers shall be given priority consideration over involuntary transfers if all conditions outlined in B1 and B2 are met."

3. Workload

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. We consider it here in the sense given it by the parties in Article XVII of their 1980-81 Agreement:

> A. A full workload shall not exceed 24 contact-semester hours per academic year. Contact-semester hour equivalency shall apply to lecture courses on a one-to-one basis. Contact-semester hour equivalency for applied music courses, studio and performing art courses, laboratory courses, and clincial and/or field supervision shall be developed by the appropriate department, based on the recommendations of relevant professional associations, and approved by the Vice President for Academic Affairs.
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> B. No faculty member shall have more than three (3) different classroom preparations per semester unless there is agreement between the affected faculty member and Department Chairperson.
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> C. The full-time teaching load for faculty teaching only graduate courses shall be 18 contact-semester hours per academic year. For those faculty teaching both graduate and undergraduate coures, the full-time teaching load shall range from 18-21 contact-semester hours per academic year as determined by the respective Dean.
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> D. The faculty shall be required to hold no more than five (5) office hours per week."

UDC maintains that despite the parties' previous recognition of this "workload" area as an appropriate subject of bargaining, it falls within management's exclusive responsibilities. The University accordingly proposes to eliminate this article from the new contract and has declined to negotiate about it. Reliance is based on the reservation to management in Sections 1708(a)(1),(4) and (5) of the CMPA (codified as D.C. Code Sections 1-618.8(a)(1),(4) and (5)) of authority to "direct employees," to "maintain efficiency of ... operations," and to "determine the mission of the agency ..., work project or tour of duty ...."

Because of the close relationship of whatever is meant by "workload" to hours of work and work scheduling, Section 1201(a)(2) of the CMPA (codified as D.C. Code Section 1-613.1(a)(2)) is also relevant here:

> "The basic workweek and hours of work for all employees of 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, however, that the basic work scheduling for all employees in recognized collective bargaining units shall be subject to collective bargaining, and collective bargaining agreements shall take precedence over the provisions of this subchapter."

Given these various statutory provisions and recognizing the possible implications of any broad "workload" ruling, the Board confines its determination on this issue to the area indicated by the parties' 1980 course of action. They agreed at that time that the matters covered by Article XVII -- the definition of "workload" in terms of contact semester hours, the number of different classroom preparations, and the number of office hours -- were negotiable. These matters all have a quantitative element in common. They do not involve the qualitative elements that are suggested by the statutory reference to "mission of the agency". They relate not to the "basic work week" which CMPA Section 1201(a)(2) (D.C. Code Section 1.613.1(a)(2)) makes a matter of managerial responsibility, but to "basic work scheduling" which that Section specifically makes a subject of collective bargaining.

These are fine lines. The parties worked out in their 1980 bargaining, however, a solution to the negotiable issue which appears to the Board to accord with the statutory letter and intent. It would be a disservice to the collective bargaining process to dictate or confirm by administrative fiat a different resolution. It would be equally an abuse of authority to issue an order going by its definition of "workload" beyond the essentially quantitative matters covered by Article XVII.

Neither party is committed for the future to particular positions it accepted in previous negotiations. We conclude simply that they are obligated to negotiate with respect to the kinds of matters covered by their 1980 Agreement under the "workload" rubric.

4. Election of Department Chair Nominees

The 1980-81 Agreement includes in Article XIX detailed provisions for the departments' election by secret ballot of departmental chair nominees. UDC insists, however, that it should not be obligated to bargain about this in the future. The Hearing Examiner has dismissed this claim, apparently on the grounds (i) that Section 1708(a) (codified as D.C. Code Section 1-618.8(a)) does not specifically identify this as within management's sole rights, and (ii) that the parties negotiated about it in connection with the preceding contract.

The Board reaches a different conclusion. Department chairpersons are not within the bargaining unit represented by the Association and are, without question, management employees. While the Association contends that department chairpersons serve only temporarily in this capacity for specified terms and then return to their faculty positions, the fact is that, while in office, department chairpersons are management employees. There appears to be no statutory basis to support a contention that a labor organization has any legal or manadatory right to select or nominate management employees. While such participatory management may be a subject over which the University might voluntarily choose to negotiate, it does not appear to be a statutory mandate.

ORDER

IT IS ORDERED THAT:

1. The Negotiability Appeal filed by the UDCFA/NEA is found to have been timely filed under the provisions of Board Rule 106.2.

2. The parties are required to bargain concerning the procedures for implementing and the impact of a reduction in force, but no such requirement exists as to the determination to reduce the work force.

3. The parties are required to bargain concerning procedures for implementing transfers, including those which are voluntary, and for handling the impact or effects of such transfers. No such requirement exists as to the decision to transfer employees.

4. The parties are required to bargain concerning the kinds of "workload" issues covered by Article XVII of their 1980-81 Agreement.

5. The parties are not required to bargain concerning the election of department chair nominees.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

June 24, 1982