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

In the Matter of:)	
)	
)	
AFGE Locals 383, 1000, 1975, 2725, 2741, and 2978)	
)	
)	PERB Case No. 21-N-03
Petitioner)	
)	Opinion No. 1798
v.)	
)	
)	
Rental Housing Commission, et al. ¹)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On April 15, 2021, the American Federation of Government Employees Locals 383, 1000, 1975, 2725, 2741, and 2978 (Union) filed the instant Negotiability Appeal (Appeal). The Appeal concerns twenty-six proposals made by the Union and declared nonnegotiable by the various departments of the District Government (Agency) during negotiations over a new master agreement.²

¹ The Union listed the following District entities: Department of Behavioral Health, Rental Housing Commission, Department on Disability Services, Department on Youth Rehabilitation Services, Department of Employment Services, Department of Housing and Community Development, Department of Consumer and Regulatory Affairs, Department of Energy and Environment, Office of the State Superintendent of Education, Department of General Services, Department of Parks and Recreation, Department of Forensic Sciences, and Department of Health. The Union improperly included the Department of Forensic Sciences (DFS) and the Department of Behavioral Health (DBH). Employees at DFS are no longer represented by the Union. Further, AFGE Local 383 agreed to exclude DBH from negotiations because it has a separate working conditions agreement. Therefore, DFS and DBH are dismissed as Respondents.

² Appeal at 1.

II. Background

On February 25, 2019, and September 28, 2020, the Union submitted its initial proposals to the Agency.³ The Union and Agency held eight bargaining sessions.⁴ On April 6, 2021, the Agency declared twenty-six proposals nonnegotiable. The Union timely filed this Appeal, asserting that the proposals are negotiable. On May 17, 2021, the Agency filed its Answer to the Appeal and withdrew, in part, its declarations of non-negotiability for nine proposals.⁵

III. Standard of Review

There are three categories of collective bargaining subjects: (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.⁶ A permissive subject of bargaining is nonnegotiable if either party declines to bargain on the subject.⁷

Management rights are permissive subjects of bargaining.⁸ Section 1-617.08(a) of the D.C. Official Code sets forth management rights giving management “sole rights” to undertake actions listed therein. Management rights are subject to waiver. The Board has held that:

- 1) If management has waived a right in the past (by bargaining over the right) this does not mean that it has waived that right (or any other management right) in any subsequent negotiations.
- 2) Management may not repudiate any previous agreement concerning management rights during the term of the agreement.
- 3) Nothing in the statute prevents management from bargaining over management rights listed in the statute if it so chooses.
- 4) If management waives a management right by currently bargaining it, this does not mean that it has waived that right (or any other right) in future negotiations.⁹

Matters that do not contravene section 1-617.08(a) or other provisions of the Comprehensive Merit Personnel Act (CMPA) are negotiable.¹⁰ Section 1-617.08(b) of the D.C. Official Code provides that the right to negotiate over terms and conditions of employment extends to all matters except those that are proscribed by the CMPA.¹¹

³ Appeal at 1.

⁴ Appeal at 2. Bargaining sessions were held on October 6, 2020, November 20, 2020, December 15, 2020, January 15, 2021, February 3, 2021, February 18, 2021, March 4, 2021, and April 9, 2021.

⁵ Answer at 2.

⁶ *DCNA v. DOH*, 59 D.C. Reg. 10776, 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)).

⁷ *UDCFA v. UDC*, D.C. 64 D.C. Reg. 5132, Slip Op. No. 1617 at 2, PERB Case No. 16-N-01 (2017).

⁸ *NAGE Local R3-06 v. WASA*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at 4, 13-N-03 (2013); *FEMS and AFGF, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at 9, PERB Case No. 06-N-01 (2007).

⁹ *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435 at 5, PERB Case No. 13-N-05 (2013).

¹⁰ *UDCFA*, Slip Op. No. 1617 at 2.

¹¹ D.C. Official Code § 1-617.08(b).

Pursuant to D.C. Official Code § 1-605.02(5), the Board is authorized to make a determination in disputed cases as to whether a matter is within the scope of collective bargaining. The Board's jurisdiction to decide such questions is invoked by the party presenting a proposal that has been declared nonnegotiable by the party responding to the proposal.¹² The Board will separately consider the negotiability of each of the matters in a dispute.¹³ Further, the Board has adopted the Federal Labor Relations Authority's practice of requiring the appealing party to request severance of a proposal.¹⁴ Unless a party has requested severance, proposals that include negotiable and nonnegotiable terms will be found nonnegotiable.

In its Appeal, the Union presented proposals of whole articles, as well as proposals severed by subsection. The Agency responded accordingly. The Board will evaluate the proposals as presented by the parties.

IV. Analysis

There are twenty-six proposals that the Agency has identified as nonnegotiable subjects of bargaining.¹⁵ The Union's proposals that were declared nonnegotiable by the Agency are set forth below.

Proposal # 1- Section B(2), B(4) and D(1)

Section B – Representation by Union Officers, Stewards and Representatives

2. Performance evaluations and work assignments of an employee will be adjusted to accommodate the performance of these official duties. If the employee does not perform any Employer work such that he or she may be evaluated, the employee representative will receive his or her most recent rating of record for the prior appraisal year.

4. All Union representatives must receive approval to perform official time with the exception of the Union President and the Union Chief Steward or designee.

Section D – Circumstances Surrounding Official Time Usage

1. The President of the Local shall be provided official time to carry out his/her responsibilities in dealing with Labor-Management business. Union representatives, excluding the Local President, shall be granted official time,

¹² *FOP/Protective Serv. Police Dep't Labor Comm. v. DGS*, 62 D.C. Reg. 16505, Slip Op. No. 1551 at 1, PERB Case No. 15-N-04 (2015).

¹³ *UDCFA*, Slip Op. No. 1617 at 2-3.

¹⁴ See *NAGE v. D.C. National Guard*, 68 D.C. 4749, Slip Op. No. 1779 at n. 34, PERB Case No. 21-N-02 (2021) (adopting the FLRA's practice that permits a party to request that the Board's review the negotiability of a severed portion of a proposal.).

¹⁵ The Agency withdrew its objection to proposals numbers 5, 12, 17, 18, 19, and 24. Therefore, those proposals are negotiable.

subject to prior supervisory approval from his/her supervisor, to perform Labor-Management responsibilities.

Agency Position

The Agency argues that the Union's proposal infringes on management's right to direct employees and to hire, promote, transfer, assign, and retain employees.¹⁶ Further, the Agency argues that the language in B(2) infringes on management's right to evaluate employees because it precludes management from evaluating union representatives.

Union Position

The Union argues that the proposal is negotiable¹⁷ because official time is a mandatory subject of bargaining.¹⁸

Board Finding

Section B(2) of the proposal is nonnegotiable. The Board has held that a proposal that contains criteria for an agency to consider for performance evaluations is nonnegotiable under D.C. Official Code § 1-617.08(a) because such a proposal interferes with management's right to direct and assign employees.¹⁹ The Board made it clear that "it is within management's exclusive rights to implement a performance evaluation system."²⁰

Section B(4) and D(1) of the proposal are negotiable. The Board has held that official time is a mandatory subject of bargaining.²¹ Parties must negotiate over mandatory subjects of bargaining.²²

Proposal # 2- Article 4, Section M(1) and N

Section M – Office Space

1. Management agrees to provide each AFGE Local Union with office space that is at least 800 square feet for the purpose of protecting the privacy of its

¹⁶ D.C. Official Code § 1-617.08(a)(1), (2).

¹⁷ The Union argues that the Agency did not properly identify the proposal in its declaration of non-negotiability. This argument is unpersuasive. The proposals declared non-negotiable are identifiable and were presented in writing as required by Board Rule 532.

¹⁸ Appeal at 4.

¹⁹ *Comp Unit 31 v. WASA*, 64 D.C. Reg. 9287, Slip Op. No. 1624 at 6, PERB Case 16-N-02 (2017).

²⁰ *Id.* at 5. See *SEIU, Local 500, v. UDC.*, Slip Op. No. 1539 at 12-14, PERB Case No. 15-N-01(2015); *AFGE Local 1403 v. D.C. Office of the Corp. Counsel*, Slip Op. No. 709 at 6, PERB Case No. 03-N-02 (2003).

²¹ *FOP/DOC Labor Comm. v. DOC*, 67 D.C. Regs. 8532, Slip Op. No. 1744 at 7, PERB Case No. 20-U-24 (2020).

²² *DCNA v. DOH*, 59 D.C. Reg. 10776, Slip Op. No. 1285 at 4, PERB Case No. 12-N-01 (2012) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1975)).

members as it discharges its duty to represent them as well as for meetings. The office space shall include offices, a conference room, office furniture, printers, computers, and telephones. In addition, each AFGE Local will be permitted to maintain its current office space if it so elects.

2. The Department will also provide the Union with the ability to utilize Department conference rooms to meet with employees free of charge.

Section N – Parking

The Employer will provide a designated parking space for each AFGE Local President or designee at each facility where the applicable Union represents bargaining unit employees. Accommodations for visitor's parking will be reasonably made on an as needed basis.

Agency Position

The Agency argues that the proposals are nonnegotiable and prohibited by law under D.C. Official Code § 1-617.04(a)(2) because the District would be required to contribute financial support to the Union.²³ The Agency asserts that the District would have to rent or lease additional office space and procure parking spaces for union officials.²⁴

Union Position

The Union argues that the proposals do not involve financial contributions to the Union and are not precluded by D.C. Official Code § 1-617.04(a)(2).²⁵ The Union asserts that Section M(1) proposes that the Agency allocate a space within its building for the Union's use.²⁶ Moreover, the Union argues that Section N provides for parking for the Union's use among existing parking facilities.²⁷

Board Finding

Sections M(1) and N are negotiable. Sections M(1) and N concern Agency-provided space for the Union's use. The Board has held that employer-provided office space for a labor organization's use is a term and condition of employment over which there is a duty to bargain.²⁸ Further, in the absence of precedent, the Board looks to established precedents of the National Labor Relations Board (NLRB). The NLRB has held that employer-provided parking for a labor

²³ Answer at 7. The statute prohibits an agency from “[d]ominating, interfering, or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it, except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay.”

²⁴ Answer at 8.

²⁵ Appeal at 4.

²⁶ Appeal at 4.

²⁷ Appeal at 4.

²⁸ *IBPO v. Dept. of Admin. Svcs.*, 48 D.C. Reg. 8522, Slip Op. No. 406 at n.2, PERB Case No. 94-U-13 (2001).

organization's access to a facility constitutes a term and condition of employment and, thus, a mandatory subject of bargaining.²⁹ Therefore, Sections M(1) and N are mandatory subjects of bargaining and negotiable.

Proposal # 3 Article 7, Section F

Section F – Other Duties as Assigned

When the phrase “other duties as assigned” is used in a position description, the phrase shall mean the employee(s) may be assigned to other duties related to those listed in the position description.

Agency Position

The Agency argues that the proposal is nonnegotiable. The Agency cites the Board's holding that a proposal that attempts to establish a definition for “other related duties” is nonnegotiable because it infringes upon management's right to direct its employees under D.C. Official Code § 1-617.08(a).³⁰

Union Position

The Union asserts that the proposal uses a “long-standing” definition of the term “other duties as assigned” that does not impact the Agency's right to assign work and is informative for employees to understand this nuance of their position descriptions.³¹

Board Finding

Section F of the proposal is nonnegotiable. Here, the proposal creates a definition for “other duties as assigned” that requires management to only assign duties related to the duties listed in an employee's position description. The CMPA reserves to management the right to direct employees. The proposal limits assignments to related duties, thus, infringing on management's right to direct employees under D.C. Official Code § 1-617.08(a)(1).³²

Proposal # 4 Article 8, Sections E, F, and G

Section E – Rating Panels

When a rating panel is convened for positions in the bargaining unit, the Union may send one (1) representative. The panel shall meet to review the candidates' applications and rank the candidates in accordance with the District's

²⁹ *Oaktree Capital Management (Turtle Bay Resorts)*, 355 NLRB 1272.

³⁰ Answer at 8 (citing *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No.1435 at 4-5, PERB Case No. 13-N-05 (2013)).

³¹ Appeal at 6.

³² *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No.1435 at 4-5, PERB Case No. 13-N-05 (2013).

Merit Staffing Plan. Such Union representative must meet qualifications for panel membership as required by the District Merit Staffing Plan. DCHR will provide necessary training if required for the Union representative to participate on the panel.

Section F – Notification of Rating Panel

The Department agrees to notify the Union at least five (5) working days prior to the convening of the rating panel. The Union agrees to furnish the name of the Union representative appointed to the panel. Such Union representative must meet all conditional qualifications for panel membership as required by the DCHR's Merit Staffing Plan.

Section G – Applications

Employees wishing to be considered for the vacancies will apply electronically to the appropriate Personnel Office contained on the vacancy announcement.

Agency Position

The Agency argues that Sections E and F of the proposal are nonnegotiable because those proposals infringe upon management's right to hire employees under D.C. Official Code § 1-617.08. Likewise, the Agency asserts that Section G of the proposal infringes on management's right to determine the technology of the Agency under D.C. Official Code § 1-617.08(5)(C).³³

Union Position

The Union asserts that Sections E and F of the proposal do not infringe upon management's right.³⁴ Further, the Union argues that Section G permits employees to electronically submit their applications consistent with the existing process for submitting applications.³⁵

Board Finding

Sections E and F of the proposal are nonnegotiable. The Board relies on precedent of other the labor relations agencies, where it has no precedent on an issue.³⁶ Here, the Board relies on the FLRA's rationale that participation on a ratings panel allows a union to directly participate in the decision-making process.³⁷ Management possesses the exclusive authority to hire under D.C.

³³ Answer at 10.

³⁴ Appeal at 7.

³⁵ Appeal at 7.

³⁶ *AFGE, Local 1403 v. D.C. Office of Corp. Counsel*, Slip Op. No. 709 at 6, PERB Case No. 03-N-02 (2002).

³⁷ *Nat'l Federation of Fed. Employees, Local 1745 v. FLRA*, 828 F.2d 834, 842 (D.C. Cir. 1987).

Official Code § 1-617.08(a)(2). Therefore, Sections E and F of the proposal infringe on management's right by allowing the Union to share the Agency's decision-making authority.³⁸

Section G of the proposal is negotiable. The Board has held that establishing the method and means of recruiting employees is beyond the reach of management's right to determine the technology of the agency under D.C. Official Code § 1-617.08(5)(C).³⁹ Therefore, the Board rejects the Agency's argument.

Proposal # 6 Article 10, Sections A(2), H(3) and (4)

The Agency withdrew its declarations related to Article 10, Sections H(3) and H(4) from the Board's consideration. Therefore, Article 10, Sections H(3) and (4) are negotiable. Article 10, Section A(2) remains in dispute.

Section A(2) – Details and Temporary Promotions

Details shall not be made as a means of retaliation or discipline. Nothing in this Agreement prevents the Department from detailing an employee to maintain and preserve the efficiency of the service or the health, safety, or welfare of the Department.

Agency Position

The Agency argues that the proposal excessively interferes with management's right to transfer and assign employees. The Agency also asserts that the proposal is nonnegotiable because it prevents the transfer of employees for disciplinary reasons.⁴⁰

Union Position

The Union argues that the proposal is negotiable. The Union contends that the proposal does not interfere with management's rights but simply establishes that details may not be used as a form of retaliation.⁴¹ The Union asserts that the Agency has waived its right to declare the proposal nonnegotiable by bargaining over the proposal.⁴²

Board Finding

Section A(2) of the proposal is negotiable. The decision to transfer employees is a management right. Management rights are permissive subjects of bargaining and subject to

³⁸ *Id.*

³⁹ *IBPO, Local 446 v. D.C. Gen. Hosp.*, 42 D.C. Reg. 5482, Slip Op. No. 336 at 3-4, PERB Case No. 92-N-05 (1992).

⁴⁰ Answer at 11.

⁴¹ Appeal at 8.

⁴² Appeal at 8.

waiver.⁴³ The Agency struck language that it disagreed with and presented a counterproposal to the Union prior to its declaration of non-negotiability.⁴⁴ Here, Section A(2) of the proposal is negotiable because management has waived its right to declare the proposal nonnegotiable by currently bargaining over the language.⁴⁵

Proposal #7: Article 12, Section C(3)

Section C(3)- Part-time Employment and Representation

Prior to an employee accepting a conversion to a part-time status, the Employer will advise the employee in writing of converting to part-time employment as it relates to the employees benefits as well as other conditions of employment. The employee will have at least ten (10) workdays to reach a final decision regarding the conversion to part-time status.

Agency Position

The Agency argues that the proposal is nonnegotiable because it interferes with management's right to hire, promote, and assign employees under D.C. Official Code § 1-617.08(a)(2).⁴⁶ The Agency also asserts that the proposal would excessively interfere with management's right to determine the number and types of positions by requiring mandatory consultation with employees.⁴⁷

Union Position

The Union argues that the proposal is negotiable because it requires management to notify bargaining unit members of the change in benefits and other terms and conditions of employment that results during the conversion from full-time to part-time employment status.⁴⁸ The Union asserts that the 10-workday notice provision is negotiable because it establishes a procedure for the exercise of an underlying management right without any impact on the time the process takes to complete.⁴⁹

Board Finding

Section C(3) of the proposal is negotiable. 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 voluntary transfers, and for handling the impacts

⁴³ *NAGE Local R3-06 v. WASA*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at 4, 13-N-03 (2013); *FEMS and AFGE, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at 9, PERB Case No. 06-N-01 (2007).

⁴⁴ Appeal Ex. 2 at 20.

⁴⁵ *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435, PERB Case No. 13-N-05 (2013) (holding that management waives a management right by currently bargaining it)).

⁴⁶ Answer at 11.

⁴⁷ Answer at 12.

⁴⁸ Appeal at 9.

⁴⁹ Appeal at 9.

and effects of such transfers.⁵⁰ Here, the proposal requires management to inform employees in writing about the changes in benefits that result from a conversion from full-time to part-time employment. The notice provision neither prevents the Agency from converting employees from full-time to part-time positions, nor requires the Agency to limit the number of part-time employees. The proposal establishes a procedure and does not excessively interfere with management's rights.

Proposal #8: Article 13, Section A(2), B, and C

The Agency withdrew its declarations of non-negotiability to Article 13, Sections B(1) and C. Therefore, Article 13, Sections B(1) and C are negotiable. Article 13, Sections A(2) and B(2) remain in dispute.

Section A(2)- Request for Reassignment

Reassignments and/or transfer will not be used as a means of retaliation against employees.

Section B(2)- Reassignment Notification

If a reassignment involves long-term relocation to a different facility or building, the Employer will provide 20 working days advance notice to the employee, unless an emergency situation necessitates the reassignment. When an employee is reassigned, a personnel action will be prepared to initiate the action. Further, upon request, the Employer will bargain with the Union consistent with Article 4, Section L of this Agreement over the impact, effects, and procedures associated with the reassignment.

Agency Position

The Agency argues that the proposal is nonnegotiable because it interferes with management's right to assign, transfer, and discipline employees under D.C. Official Code § 1-617.08(a)(2).⁵¹

Union Position

The Union argues that Section A(2) of the proposal is negotiable because it incorporates into the CBA the CMPA's prohibitions against reprisals.⁵² The Union asserts that the proposals do not interfere with management's rights because the proposals create procedures related to long-

⁵⁰ *AFSCME, District Council 20, Local 2921, DCPS et. al.*, 65 D.C. Reg. 11099, Slip Op. No. 1677 at 9, PERB Case No. 18-N-02 (2017).

⁵¹ Answer at 13.

⁵² Appeal at 9 (citing D.C. Official Code § 1-617.04(a)(4)).

term reassignments that employees may experience. Moreover, the Union argues that Agency has waived its right to declare the proposal nonnegotiable by currently bargaining over the proposal.⁵³

Board Finding

Section A(2) of the proposal is negotiable. The Board has held that the CMPA does not prohibit the restatement of provisions of law in a CBA.⁵⁴ Herein, the proposal incorporates the statutory prohibition against reprisals and does not infringe on management's rights under D.C. Official Code § 1-617.08.

Section B(2) of the proposal is negotiable. The Agency has waived its right to declare the proposal nonnegotiable. Management rights are permissive subjects of bargaining subject to waiver.⁵⁵ The Agency has not denied that it engaged in bargaining over Section B(2). In its initial proposal, the Agency countered the Union's proposal for Section B(2) and added language that changed the meaning of the proposal.⁵⁶ The Agency has waived its management right by bargaining the proposed language.⁵⁷

Proposal #9: Article 14

Section A – Supervisor and Employee Discussions

Each Department shall ensure that each employee's supervisor discusses and provides written feedback on performance to the employee. The employee shall also be commended for good work and counseled where improvement is necessary at the time when the supervisor identifies the need for improvement. This shall be done in the course of day-to-day activities as the supervisor observes the employee's performance verbally and in writing.

Section B – Position Description and Performance Standards

1. Each employee will be given, within 30 days of entering a new position or within 30 days of reassignment involving changes or additional duties, written notification of the duties and responsibilities which will be used in the performance rating process. Performance standards for each employee's position shall be provided in writing at the same time that the position description is provided under this provision.

2. If the employee has any questions or concerns regarding the position description or performance standards during the appraisal period, then the

⁵³ Appeal at 10.

⁵⁴ *NAGE Local R3-07 v. OUC*, 61 D.C. Reg. 7353, Slip Op. No. 1467 at 7, PERB Case No. 14-N-01 (2014).

⁵⁵ *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435, PERB Case No. 13-N-05 (2013).

⁵⁶ Answer Ex. 6 at 20. The Agency proposed language changes to the Union's initial proposal.

⁵⁷ Appeal Ex. 2 at 22.

supervisor will meet with the employee and provide a written follow up regarding the meeting within 15 days of the meeting.

Section C – Performance Appraisal

1. The Employer shall conduct written mid-term reviews for each employee and meet with the employee to discuss the mid-term review. Each supervisor shall notify the employee in writing of any factors or elements for which the employee is not on track to meet the Employer's expectations and provide guidance on how the employee can achieve expectations.

2. When the annual performance appraisal is issued by the immediate supervisor, a meeting shall be held. The performance appraisal rating shall make allowances for job related factors beyond the control of the employee, mutually agreed to by the employee and the supervisor, which may have caused him or her not to have achieved a specific level of performance. Performance evaluations shall not be carried out in a retaliatory manner. At such conference meetings, the supervisor will discuss the rating with the employee and describe how the employee can receive a higher rating.

3. Supervisors shall not ask employees and an employee shall not be required to sign incomplete or blank forms. Any alterations, changes, corrections, modifications, deletions or additions shall require the initials of the employee being rated. The employee shall, upon signing, receive a copy of the appraisal and be advised in writing of his/her appeal rights.

4. If an employee disagrees with his/her rating, then the employee may exercise his/her rights under relevant provisions of the DPM, this Agreement, the Reconsideration and Resolution Committee (hereinafter, "RRC"), and may submit a rebuttal to the rating that will be attached to the rating and become a part of the official rating.

Section D –Unsatisfactory Performance

1. Employees who are alleged to be working at an unsatisfactory level will be given an opportunity to improve performance for a period of at least ninety (90) days. The employee and supervisor will develop a written work plan that will enable the employee to improve his/her deficiencies. The supervisor will provide the employee with a written update and will meet with the employee at least once a week.

2. The Employer recognizes its responsibility to assure employees fair, objective and attainable standards as well as fair and equitable evaluations. The Employer further agrees to discuss work deficiencies with employees when observed and to advise the employee on ways of improving performance in writing.

3. At the time that an annual performance rating is given, the responsible supervisor will discuss with the employee areas of potential development and improvement including the employee's performance.

Section E – Memorandum of Understanding Regarding ePerformance

The Memorandum of Understanding (hereinafter, "MOU") between the District and the Union shall remain in effect. If there is any conflict between the MOU and this Agreement, this Agreement shall govern.

Section F – Committees and Annual Ratings

1. Each employee's immediate supervisor will conduct the employee's mid-term review and annual performance evaluation.

2. The evaluation of employees should be based solely on the employee's work in relation to the standards set for the employee in the applicable rating period.

3. The supervisor's evaluation will be final unless modified by the supervisor after an employee rebuttal, grieved under this Agreement, modified by the RRC committee, or addressed through another District administrative agency. There shall be no other committees that review or revises employee performance evaluations.

Agency Position

The Agency argues that the proposal is nonnegotiable because it violates management's rights under D.C. Official Code § 1-613.53, which prohibits collective bargaining on the performance management system.⁵⁸ The Agency asserts that it has bargained the e-Performance system to the fullest extent allowed by the statute and that the parties have a Memorandum of Understanding (MOU) in effect concerning e-Performance.⁵⁹

Union Position

The Union argues that the proposal is negotiable because it incorporates the current MOU into the collective bargaining agreement.⁶⁰ The Union asserts that "the proposals provide lawful and negotiable procedures and appropriate arrangements associated with the exercise of this management [right] such as providing employees with a copy of their appraisal, performance standards, and procedures for unacceptable performance."⁶¹

⁵⁸ Answer at 13.

⁵⁹ Answer at 14. *See* Agency Ex. 8.

⁶⁰ Appeal at 10.

⁶¹ Appeal at 10.

Board Finding

The Union presented Article 14 as a whole and did not request severance of the proposal's subsections for the Board's review. The Board finds Article 14 nonnegotiable.⁶² D.C. Official Code § 1-613.53(b) prohibits collective bargaining over the implementation of a performance management system.⁶³ Here, the Union's proposal goes beyond incorporating an existing memorandum of understanding into the parties' collective bargaining agreement. The proposed language specifies actions that the Agency must take in performance management. The Board has held that this type of language is nonnegotiable.⁶⁴

Proposal #10: Article 16, Section A and D

Section A- Contracting Out

The parties agree that, the decision to contract out is a Management Right pursuant to applicable laws, regulations, and policies. The Department, however, agrees to notify the Union of such contracting out at least sixty (60) days prior to contracting out. The notification will include a list of impacted employees, the positions that will be contracted out, the length of the contract, as well as any other pertinent information. Further, bargaining will commence in accordance with Article 4, Section L of this Agreement.

Section D- Employer Efforts

The Employer will make every effort to ensure that contracted employees will not take the place of full-time equivalent bargaining unit employees. If bargaining unit employees work is impacted by contracting out, the Employer will provide the bargaining unit employees with adequate training, hands on experience to qualify for contracted positions.

Agency Position

D.C. Official Code § 2-352.05 governs privatization contracts and outlines measures that an agency must take prior to entering a privatization contract. The Agency argues that the proposal is nonnegotiable because it exceeds the requirements of D.C. Official Code § 2-352.05 and interferes with management's right to maintain the efficiency of District government operations under D.C. Official Code § 1-617.08.⁶⁵

⁶² Unless a party has requested severance, proposals that include negotiable and nonnegotiable terms will be found nonnegotiable.

⁶³ D.C. Official Code § 1-613.53(b) states, "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."

⁶⁴ *AFGE, Local 3721 v. FEMS*, 65 D.C. Reg. 4771, Slip Op. No. 1656 at 6, PERB Case No. 17-N-05 (2018).

⁶⁵ Answer at 15.

Union Position

The Union argues that the Agency has waived its right to declare the proposal nonnegotiable. The Union asserts that the proposal provides training for employees impacted by contracting out decisions but does not interfere with management's right to contract out work.⁶⁶

Board Finding

Section A of the proposal is negotiable. The Board finds that the Agency bargained over the proposal when it struck language that it disagreed with and presented a counterproposal to the Union prior to its declaration of non-negotiability.⁶⁷ Section A of the proposal is negotiable because management has waived its right to declare the proposal nonnegotiable by currently bargaining over the language.⁶⁸

Section D of the proposal is nonnegotiable. The Agency has the right to contract out work. The efforts that the Agency must make to assist employees affected by a privatization contract is addressed by D.C. Official Code § 2-352.05(d)(4)(A)-(D). Although training is generally a negotiable subject,⁶⁹ the Board has held that "when one aspect of a subject matter, otherwise generally negotiable in other respects, is fixed by law, e.g., the CMPA, that aspect is nonnegotiable."⁷⁰ D.C. Official Code § 2-352.05(d)(4)(A)-(D) fixes the efforts that the Agency must make for employees affected by the privatization of work. Therefore, Article 16, Section D is nonnegotiable.

Proposal #11: Article 16, Section C

Section C- Displacing Employees

Whenever possible, the Employer agrees to minimize displacement actions by reassigning, retraining, and taking other actions necessary to retain bargaining unit employees consistent with applicable laws and regulations.

Agency Position

The Agency argues that the Union waived its right to dispute the Agency's declaration of non-negotiability. The Agency asserts that it declared Article 16, Section C nonnegotiable in writing when it submitted its initial proposal to the Union on February 25, 2019. The Agency

⁶⁶ Appeal at 11.

⁶⁷ Appeal Ex. 2 at 26.

⁶⁸ *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435, PERB Case No. 13-N-05 (2013) (holding that management waives a management right by currently bargaining it).

⁶⁹ *NAGE, Local R3-06 v. WASA*, 47 D.C. Reg. 7551, Slip Op. No. 635 at 7, PERB Case No. 99-U-04 (2000).

⁷⁰ *AFGE, Local 631 v. D.C. Office of Property Management*, 59 D.C. Reg. 4968, Slip Op. No. 965 at 10, PERB Case No. 08-N-02 (2012).

claims that the Union's negotiability appeal on this proposal is untimely because it exceeded the thirty-five-day time limit to file an appeal under PERB Rule 532.2.⁷¹

Union Position

The Union argues that the proposal declared nonnegotiable by the Agency is different than the proposal before the Board. The Union asserts that the proposal before the Board has been modified to remove the subject of the Agency's objection.⁷²

Board Finding

Section C of the proposal is not properly before the Board.⁷³ The Union admits that it offered the Agency a revised proposal, which substantively changed the language and meaning found in Section C.⁷⁴ The Union's revision revokes the proposal⁷⁵ that is the subject of the Appeal.⁷⁶ In the absence of a controversy over Section C, the Union's negotiability appeal is dismissed as moot.⁷⁷

Proposal #13: Article 18, Reduction in Force and Furloughs

Article 18- Displacing Employees

Section A – Alternatives to RIF

The Employer agrees to explore, give strong consideration, and due weight to possible alternatives prior to proposing to implement a RIF, or Furlough. When RIFs, or Furloughs, are under consideration the Employer shall notify the Union at least sixty (60) days in advance for discussion, suggestions on alternatives, and planning purposes. The Employer shall notify the Union of all alternatives considered, whether they have been accepted or rejected and on what basis. Reductions in force shall be conducted in accordance with this Agreement, CMPA, and applicable law, rule and regulations.

Section B – Union Notification

The Employer agrees to provide sixty (60) days advance notice to the Union concerning any proposed RIF which may affect employees within the bargaining unit. Such notice shall include:

⁷¹ Answer at 15.

⁷² Appeal at 12.

⁷³ In light of decision that the appeal is moot, the Board finds it unnecessary to address the Agency's timeliness argument.

⁷⁴ Appeal at 12.

⁷⁵ The Union did not allege in its Appeal that the Agency declared its revised proposal nonnegotiable.

⁷⁶ Restatement (Second) of Contracts § 42 (1981) ("An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.").

⁷⁷ See *IAFF, Local 36 v. FEMS*, Slip Op. No. 754 at 2, PERB Case No. 04-N-02 (2004).

1. The reason for the action to be taken;
2. The approximate number of employees who may be affected initially;
3. The types of positions anticipated to be affected initially;
4. The anticipated effective date;
5. An organizational chart for all impacted areas;
6. The number of employees impacted as well as the name, grade, series, title, position, duty station, position description for all impacted employees.

Section C – Information

The Employer shall provide the Union with all relevant and available information used in determining the RIF and/or Furlough. When appropriate, the Employer further agrees to minimize the effect on bargaining unit employees to whatever extent possible through reassignment, retraining, or restructuring recruitment and any other means to avoid separation of employees in full compliance with all laws and regulations of the District of Columbia.

Section D – Re-Employment

1. Priority re-employment rights will be afforded to employees separated through reduction in force, prior to filling vacant positions of the same or similar job classifications in accordance with the District Personnel Manual (DPM), and applicable law, rule, and regulation. To this end, the Employer shall give priority placement within the Department to employees impacted under this Article.

2. The Employer will also work with other District Departments and DCHR to assist where possible with placement in positions in other Departments.

Agency Position

The Agency argues that the Union's proposals are nonnegotiable because they significantly alter the District's reduction-in-force (RIF) procedures and impede management's right to conduct a RIF. The Agency asserts that the right to conduct a furlough has long been found to be a management right by the Board.⁷⁸

Union Position

The Union argues that the CMPA does not preclude bargaining over RIFs or furloughs. The Union asserts that the Agency has failed to identify any authority that precludes all bargaining over furloughs. The Union contends that the proposal requires the Agency to provide information

⁷⁸ Answer at 18 (citing *UDCFA v. UDC*, Slip Op. No. 517, PERB Case No. 97-U-12 (1997), which held that the right to conduct a furlough belonged to management as an exercise of its right to relieve an employee of duty for lack of work or other legitimate reason).

regarding RIFs and furloughs and that this provision implements the mandate that the Agency provide information in connection with the Union's representational responsibilities.⁷⁹

Board Finding

The Union presented Article 18 as a whole and did not request severance of the proposal's subsections for the Board's review. The Board finds that Article 18 is nonnegotiable.⁸⁰ Management has the right to implement a RIF. The Board has held that proposals that limit management's discretion to conduct a RIF, including proposals that impose greater restrictions on an agency than required by the CMPA, are nonnegotiable.⁸¹ The Union's proposal defines for management the way an employee is to be given priority consideration, i.e., how to establish the reemployment list. The proposal exceeds the requirements of the statute. The Board has held that a generally negotiable subject fixed by law, e.g., the CMPA, is nonnegotiable.⁸²

Proposal #14: Article 20, Section C

Section C- Employee Counseling Refusal

If the employee refuses to seek counseling and/or there is not an adequate improvement in work performance and/or attendance, as determined by the supervisor, disciplinary action or appropriate administrative action may be taken by the Department.

Agency Position

The Agency argues that the proposal excessively interferes with management's ability to take disciplinary action for employees who refuse counseling. The Agency asserts that it did not waive its right to declare the proposal nonnegotiable because the Agency struck language from the proposal without providing a counterproposal.⁸³

Union Position

The Union contends that the Agency has waived its right to declare the proposal nonnegotiable because the Agency has currently bargained the proposal.⁸⁴

⁷⁹ Appeal at 13.

⁸⁰ As previously discussed, unless a party has requested severance, proposals that include negotiable and nonnegotiable terms will be found nonnegotiable

⁸¹ *AFGE, Local 631 v. D.C. Office of Property Management*, 59 D.C. Reg. 4968, Slip Op. No. 965 at 10, PERB Case No. 08-N-02 (2012).

⁸² *Id.*

⁸³ Answer 18-19.

⁸⁴ Appeal at 14. *See* Appeal Ex. 2 at 31.

Board Finding

Section C of the proposal is negotiable. The Agency has waived its right to declare the proposal nonnegotiable. Management rights are permissive subjects of bargaining, subject to waiver.⁸⁵

The Agency admits that it struck the proposal's language. The Agency rejected Section C⁸⁶ and revised the remaining proposal. The Agency bargained by providing a counteroffer. The Agency declared Section C nonnegotiable after presenting its counteroffer. Therefore, the Agency has waived its management right by bargaining the proposed language.

Proposal #15: Leave Administration Article 21, Sections A(8), (9), and J

Section A- General

8. Leave will be denied only for appropriate reasons and not as a form of discipline. No approved leave or approved absence will be [*sic*] as basis for disciplinary action except when it is clearly established that the employee submitted fraudulent documentation or misrepresented the reason for the absence.

9. Employees will not be adversely affected in any employment decision solely because of their leave balances.

Section J- Leave Abuse

1. If a supervisor has reason to suspect that an employee is abusing sick or annual leave, the supervisor will schedule a meeting with the employee and the Union to discuss the concerns as soon as possible. During the meeting, the supervisor shall provide the employee and the Union representative with written documentation concerning the reasons for the suspicion of leave abuse.

2. Thereafter, if a supervisor still has reason to believe that the employee is abusing leave, the Employer will provide a written and detailed notification to the employee and the Union concerning its decision to place the employee on leave restriction. The leave restriction may require the employee to furnish documentation of sick leave usage when such documentation would not otherwise be required.

⁸⁵ *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435, PERB Case No. 13-N-05 (2013) (holding that management waives a management right by currently bargaining it).

⁸⁶ Appeal Ex. 2 at 26.

Agency Position

The Agency argues that Sections A(8) and (9) excessively interfere with management's right to take disciplinary action.⁸⁷ Further, the Agency contends that Section J infringes on management's right to take disciplinary action by requiring preconditions prior to management initiating disciplinary action for leave abuse.⁸⁸

Union Position

The Union argues that Sections A(8) and (9) of the proposal restricts management from denying leave as a mechanism for retaliation.⁸⁹ Further, the Union asserts that Section J is procedural and does not infringe on management's right to discipline employees.⁹⁰

Board Finding

Sections A(8) and (9) are nonnegotiable. The Board has found that management's right to discipline includes placing an employee on leave restriction.⁹¹ Section A(8) prohibits management from denying leave as a form of discipline, which interferes with management's rights under D.C. Official Code § 1-617.08(a)(2). Similarly, Section A(9) prohibits an employee's leave balance from constituting the basis of an adverse employment decisions, which could include disciplinary decisions. Therefore, Section A(9) unduly interferes with management's right to discipline under D.C. Official Code § 1-617.08(a)(2).

Section J is nonnegotiable. Management has the right to discipline employees, which includes placing an employee on leave restriction. The Board has found that a proposal that creates preconditions before an agency may impose disciplinary action unduly interferes with management's right to discipline employees.⁹² Section J creates preconditions that the Agency must meet before imposing disciplinary action. Therefore, Section J is nonnegotiable.

Proposal #16: Article 21, Sections C; D(9); G – Other Forms of Leave (1), (2), (3), (5), and (6); G – Leave to Donate Blood; I; K; and L

The Agency withdrew its non-negotiability declarations related to Article 21, Sections B(1); F(1), (8), (9); and M from the Board's consideration. Therefore, Article 21 Sections B(1), F(1), (8), (9) and M are negotiable. Article 21, Sections C; D(9); G – Other Forms of Leave (1), (2), (3), (5), and (6); G – Leave to Donate Blood; I; K; and L remain in dispute.

Section C- Annual Leave Carryover and Restoration

⁸⁷ Answer at 19-20.

⁸⁸ Answer at 20.

⁸⁹ Appeal at 14.

⁹⁰ Appeal at 15.

⁹¹ *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435 at 9, PERB Case No. 13-N-05(2013).

⁹² *Id.* (finding a proposal nonnegotiable because it contained preconditions that restricted management's right to issue a leave restriction).

Annual leave may be accrued, however no more than 240 hours days annual leave may be carried forward into the next leave year unless one of the following conditions are met:

1. To correct an administrative error;
2. When annual leave was scheduled in advanced but its use denied because of exigencies of the public business; or,
3. When the annual leave was scheduled in advanced but its use was precluded because of illness or injury.
4. When the annual leave overage results from a negotiated settlement agreement.
5. If at the end of any leave year, an employee has annual leave in excess of the normal permissible carry over because of one or more of the above reasons cited in item 2, he/she shall not forfeit the excess. All restored annual leave must be taken within two (2) years from the date of restoration.
6. Employees shall receive a lump sum payment for all annual leave not used upon resignation, retirement, or separation.

Section D- Application for Annual Leave

9. All employees shall be excused or receive appropriate pay for all holidays prescribed by the DC Code; Compensation Units 1 & 2 Agreement and that may be added by the DC Code, or that may be designated by Administrative Order.

Section G- Other Forms of Leave

1. Bereavement/ Funeral Leave is defined as the preparation and attendance of a funeral and or memorial service member, as defined by the Compensation Units 1 & 2 Agreement.

2. Employees who are Veterans may be granted administrative leave not to exceed four (4) hours in any workday to enable them to participate as an active pallbearer or as members of firing squad or guards of honor in the funeral or memorial for a member of the Armed Forces of the United States whose remains are being shipped back to the United States.

3. Parental leave may be used before and following the birth of a child. Parental leave is a period of approved absence due to incapacitation related to pregnancy and confinement. An employee (male or female) may use any combination of leave to include annual leave, sick leave, and leave without pay (LWOP) for the purpose of parental leave. An employee who is a parent shall be entitled to a total of twenty-four (24) hours leave during any 12-month calendar year to participate in any school related events of their child, according to DPM Chapter 1280, dated June 3, 2016.

5. Employees are authorized court leave without the loss of leave, pay, credit time or any other benefits for purposes of Court leave when summoned to serve as a juror, or when summoned as a witness in a non-official capacity on behalf of any party in conjunction with any judicial proceeding in which the United States, the District of Columbia, or a State or local Government is a party. The Employer will provide employees with court leave, and employees will provide documentation to the Agency in accordance with applicable statutes, regulations, and policies. The Employer will grant court leave only for days within the employee's regularly scheduled tour of duty when he or she otherwise would be in a duty or pay status.

6. The Employer shall take the necessary steps to ensure that employees are informed of the rules on voting as specified in this section at least forty-eight (48) hours in advance. Whenever the polls for each employee's voting area are not open at least three (3) hours either before or after an employee's regular hours of work, the employee shall be granted an amount of administrative leave (excused absence) that will allow the employee to report to work three (3) hours after the polls open, or leave work three (3) hours before the polls close, whichever requires the lesser amount of absence from duty.

Section G- Leave to Donate Blood

Paid leave, not to exceed four (4) hours on any one occasion, shall be granted for the purpose of donating leave blood at the Red Cross Blood Bank.

Section I- Advance Leave

Advance sick and annual leave may be granted to permanent or probationary employees up to thirty (30) days. Employees requesting such leave must submit a satisfactory medical justification for the request.

Section K- Leave Without Pay

Leave of absence without pay for limited period may be granted for a reasonable purpose. Such leave shall be requested on SF-71 or PeopleSoft for an absence of eighty (80) hours or less and on the appropriate Department Form for an absence of more than eighty (80) hours. Reasonable purposes in each case shall be agreed upon by the employee and the Employer.

Section L- Higher Education Leave Without Pay

After completing one (1) year of service, an employee, upon request may be granted a leave of absence for educational purposes. The period of the leave of absence may not exceed one (1) year but it may be extended at the Employer's discretion.

Agency Position

The Agency asserts that the proposals presented by the Union are compensation proposals and, therefore, inappropriate for non-compensation bargaining. The Agency argues that leave accrual and carryover, the advancement of leave, and leave without pay are compensation matters that should be found nonnegotiable during terms and condition bargaining.⁹³

Union Position

The Union argues that its proposal does not raise any compensation issues but merely references existing authority to address issues regarding leave. The Union asserts that “a reference to an existing law or other authority does not deem a proposal nonnegotiable.”⁹⁴ The Union contends that Section C refers to DPM 1227⁹⁵ and that Sections D(9); G – Other Forms of Leave (1), (2), (3), (5), and (6); and G – Leave to Donate Blood refer employees to District law and the Compensation Unit 1 & 2 Agreement. The Union argues that Sections I, K, and L are procedural and, therefore, all of its proposals at issue are negotiable.⁹⁶

Board Finding

Sections G(1), (2), (5), (6), and G – Leave to Donate Blood are nonnegotiable. These proposals create an accrual of leave. The Board has held that the accrual of leave is a compensation matter under the CMPA.⁹⁷ Compensation matters are nonnegotiable in a non-compensation agreement.⁹⁸

Sections I, K, and L are negotiable. The Board has held that management’s rights are not compromised when a proposal is limited to procedures for implementing its decisions.⁹⁹ Sections I, K, and L do not create new leave accruals but instead provide procedures for accessing existing leave. Here, Sections I, K, and L do not involve compensation and do not infringe on management’s rights. Therefore, Sections I, K, and L are negotiable.

Sections C, D(9), and G(3) are negotiable. The Board has held that proposals requiring consistency with District law are negotiable, unless the proposals’ language unambiguously conflicts with the applicable law referenced.¹⁰⁰ Sections C, D(9), and G(3) are consistent with the

⁹³ Answer at 22-23.

⁹⁴ Appeal at 15.

⁹⁵ 6-B DCMR § 1227.1-3 (as provided in section 1203(a) of the CMPA, D.C. Official Code § 1-612.03(a) (2006 Repl.)).

⁹⁶ Appeal at 15-16.

⁹⁷ *AFSCME, District Council 20, Local 1959 v. OSSE*, 65 D.C. Reg. 7657, Slip Op. No. 1659 at 9, PERB Case No. 17-N-04 (2018).

⁹⁸ *AFGE, Local 3721 v. FEMS*, 64 D.C. Reg. 13378, Slip Op. No. 1641 at 5, PERB Case No. 16-N-03 (2017).

⁹⁹ *AFSCME, District Council 20, Local 2921, DCPS et. al.*, 65 D. C. Reg. 11099, Slip Op. No. 1677 at 9, PERB Case No. 18-N-02 (2017).

¹⁰⁰ *DCPS v. Teamster 639 and 730*, 38 D.C. Reg. 2483, Slip Op. No. 273 at 6, PERB Case No. 91-N-01(1991).

references to statute, regulation, and compensation agreement. Therefore, Sections C, D(9), and G(3) are negotiable.

Proposal #20: Article 28, Section C

Section C- Emergency Operation

Except for emergency operations or continuous or shift operations, any necessary work performed on a holiday may be performed by qualified volunteers. If there are insufficient qualified volunteers to perform the work, the Department reserves the right to require employees to work on holidays and such assignments will be in reverse Department seniority order.

Agency Position

The Agency argues that the Union's proposal excessively interferes with management's right to assign work under D.C. Official Code § 1-617.08(a)(2) and management's right to take necessary actions during an emergency under D.C. Official Code § 1-617.08(a)(6).¹⁰¹ The Agency asserts that the proposal includes new seniority language that was not present in the initial proposals and, therefore, the Agency did not waive its right to declare the proposal nonnegotiable.¹⁰²

Union Position

The Union contends that the Agency waived its right to declare the proposal nonnegotiable. The Union asserts that seniority provisions do not interfere with management's right to assign work. Therefore, the Union argues that the proposal is negotiable.¹⁰³

Board Finding

Section C of the proposal is nonnegotiable. The proposal infringes on management's right to assign work under D.C. Official Code § 1-617.08(a)(2) by requiring the Agency to assign work in reverse order of seniority.¹⁰⁴ Although the language is similar to the initial proposal presented in February 2019,¹⁰⁵ the Agency did not waive its right to object to the proposal because the Union added new seniority language during later rounds of negotiations, which created obligations that changed the meaning of the proposal and interfered with management's rights.¹⁰⁶

Proposal #21: Telework

¹⁰¹ Answer at 24-25.

¹⁰² Answer at 24.

¹⁰³ Appeal at 17-18.

¹⁰⁴ *AFSCME, District Council 20, Local 1959 v. OSSE*, 65 D.C. Reg. 7657, Slip Op. No. 1659 at 7, PERB Case No. 17-N-04 (2018).

¹⁰⁵ Appeal Ex. 2 at 49.

¹⁰⁶ Appeal Ex. 1 at 69.

The Agency withdrew its declarations related to Article 21, Sections A(5), (6), D, and E from the Board's consideration. Therefore, Article 21, Sections A(5), (6), D, and E are negotiable. Article 21, Sections A(1), (2), (3), (4), (7), (8), (9), (10), B, and C remain in dispute.

Section A- General

1. The Union and the Employer agree that telework is a useful tool for efficiency in operations as well as aiding employee work-life balance.

2. Each Department will make a determination regarding the employees who have portable work and how much of the work is portable (i.e., the amount of days the employee may work from home). The Department will provide employees and the Union with a list of all positions with portable work, the employees in all such positions, including their names, grades, series, and title.

3. Upon request, the Department will hold a meeting with the Union to discuss any disputes or concerns regarding the positions that are eligible or ineligible for telework.

4. Telework must be offered on an equal basis to all agency employees who are in substantially similar positions.

7. Participation in telework is voluntary, and an employee may choose to discontinue a telework arrangement at any time.

8. Participants in the telework program will receive the same treatment/opportunities as non-teleworking employees with respect to work assignments, time and attendance reporting, awards and recognition, development opportunities, and promotions.

9. Generally, there will be no limit on the number of telework days available to employees unless such employees do not have sufficient portable work to sustain full-time telework.

10. An employee, who has been approved in writing to telework, may periodically request authorization to utilize situational telework on a temporary basis for circumstances including but not limited to home repairs, illness, complex assignments, and other circumstances. Such requests will be reviewed and decided upon based on applicable law, rule, and regulation and legitimate workload requirements.

Section B- Suspending Telework

1. Authorization to engage in telework, as provided in this section, may be rescinded by the agency head (or designee) or the immediate supervisor for reasons that include, but are not limited to, a determination that the employee has failed to meet work expectations in a performance period or due to changes to the agency's organizational or operational needs. In such cases, a written explanation of such organizational changes will be provided to the employee and the Union.

2. Whenever an agency head (or designee) or immediate supervisor determines that the approval for telework is to be rescinded, the employee shall be given at least two (2) pay periods advanced written notice prior to the rescission. The Union will be copied on the notification upon issuance to the employee.

3. Upon termination of a telework agreement, the employee shall return to the duty station and tour of duty that existed prior to receiving approval to engage in telework.

Section C- Equipment

The Employer will provide all appropriate equipment to facilitate telework including but not limited to a cell phone, hot spot, and a laptop computer.

Agency Position

The Agency asserts that the Union's proposal excessively infringes on management's rights to direct employees, maintain efficiency of government operations, and to determine the technology used to perform the Agency's work under D.C. Official Code § 1-617.08(a)(1), (2), (4), (5)(A), (B), and (C).¹⁰⁷

Union Position

The Union argues that the proposal "does not mandate telework, impact security, impact technology, or any other matter that is reserved for management."¹⁰⁸ The Union contends that the proposal is negotiable because it is procedural in relation to management's determinations concerning telework.¹⁰⁹

Board Finding

Telework Sections A(2), (3), (10), and B(1) are negotiable. Management may exercise its rights under D.C. Official Code § 1-617.08. Nevertheless, the Board has held that management's rights are not compromised when a proposal is limited to procedures for implementing its

¹⁰⁷ Answer at 25-27.

¹⁰⁸ Appeal at 18.

¹⁰⁹ Appeal at 18.

decisions.¹¹⁰ Here, Section A(2), (3), (10), and B(1) create procedures related to telework assignments. These proposals neither prevent nor require the Agency to assign telework and do not excessively interfere with management's rights under D.C. Official Code § 1-617.08(a)(1), (2), (4), (5)(A) and (B).

Section A(1) requires the Agency to agree that telework is "a useful tool for efficiency of operations." Management has the exclusive right to determine what is necessary for efficient operations. Telework Section A(1) is nonnegotiable because it infringes on management's right to determine what is necessary for efficient operations of the District government under D.C. Official Code § 1-617.08(a)(4).

Sections A(4), (7), (8), (9), and B(2) and (3) require the Agency to provide assignments in a certain manner, allow employees to determine their telework status, and ensure two weeks' notice before the cancellation of telework. Management has the right to determine assignments and tours of duty. Telework Sections A(4), (7), (8), (9), B(2) and (3) are nonnegotiable. The proposals excessively infringe upon management's right to assign work and determine tours of duty under D.C. Official Code § 1-617.08(a)(2) and (a)(5)(b).

Section C requires the Agency to provide a laptop computer, cellphone, and hot spot for teleworking employees. Management has a right to determine the technology necessary to perform work. Section C is nonnegotiable because it infringes on management's right to determine the technology to perform the Agency's work under D.C. Official Code § 1-617.08(a)(5)(C).

Proposal #22: Emergency Preparedness, Section A(5)

Section A- General

5. The District will make computer and cell phone equipment available to employees to reduce employee exposure to contagions and other health hazards during an emergency.

Agency Position

The Agency argues that the proposal excessively interferes with management's right to determine the technology used to perform its work.¹¹¹

Union Position

The Union submits that the proposal is negotiable to address employee health and safety in the event of health hazards during an emergency.¹¹²

¹¹⁰ *AFSCME, District Council 20, Local 2921, DCPS et. al.*, 65 D. C. Reg. 11099, Slip Op. No. 1677 at 9, PERB Case No. 18-N-02 (2017).

¹¹¹ Answer at 28.

¹¹² Appeal at 18-19.

Board Finding

Health and safety are mandatory subjects of bargaining.¹¹³ However, Emergency Preparedness, Section A(5) is nonnegotiable because it excessively infringes on management's right to determine the technology necessary to perform the Agency's work. The proposal removes all of management's discretion to determine the best technology to limit exposure to contagions and other health hazards. Further, in the context of the exigent circumstances of an emergency, an agency has the right to take whatever action is necessary to carry out the mission of the District government, unless circumscribed by an act of the Council.¹¹⁴ Therefore, the proposal is nonnegotiable because it infringes on management's rights under D.C. Official Code § 1-617.08(a)(5)(C).

Proposal #23: Emergency Preparedness Section B

Section B- Essential and Emergency Designations

1. In the event an employee or group of employees is designated as essential or emergency personnel in response to an emergency, employees and the Union will be provided with written notification. The new essential or emergency designation will only last during the pendency of the emergency. At the conclusion of the emergency, the employee designations will revert back to the pre-emergency designations.

2. The District will also provide employees and the Union with at least five (5) days advance notification of the return to the pre-emergency employee designations.

Agency Position

The Agency submits that the proposal excessively interferes with management's right to direct employees and to determine the number and types of employees.¹¹⁵ Moreover, the Agency asserts that the proposal is contrary to law because it undermines the Mayor's authority to determine a public emergency under D.C. Official Code § 7-2304(a).¹¹⁶

¹¹³ *FOP/DOC Labor Comm. v. DOC*, 67 D.C. Reg. 8532, Slip Op. No. 1744 at 7, PERB Case No. 20-U-24(2020).

¹¹⁴ *Id.* at 4.

¹¹⁵ Answer at 29.

¹¹⁶ Answer at 29.

Union Position

The Union argues that the proposal is a notice requirement that does not interfere with management's right to designate employees as essential. The Union also asserts that the proposal is consistent with the notice provisions of the Section 1271.4 of the DPM.¹¹⁷

Board Finding

Emergency Preparedness, Section B is nonnegotiable. The proposal interferes with management's right to determine the types of employees by requiring a reversion of an employees' designation at the conclusion of an emergency. Further, the proposal is inconsistent with the DPM. The Union cites to Section 1271.4 of the DPM; however, the proposal does not contain a provision that suspends the written notice requirements related to an "essential" designation during a declared emergency. Therefore, the proposal is nonnegotiable.

Proposal #25: Emergency Preparedness, Section D

Section D- Employee Rotations

1. In the event that some but not all qualified employees must work during an emergency, the District will first solicit among qualified volunteers. If there are not enough volunteers to perform the work, the District will select among the qualified employees in reverse seniority order. After the least senior person is selected, he or she will be placed at the bottom of the list until all other qualified employees have worked the assignment.

2. The District will ensure fairness and equity in employee assignments during emergencies as described herein.

Agency Position

The Agency asserts that Section D negates management's right to direct employees, assign work, maintain the efficiency of government operations, and to take whatever action it deems appropriate in an emergency under D.C. Official Code § 1-617.08(a)(1), (2), (4), and (6).¹¹⁸

¹¹⁷ Appeal at 19 (citing 1271.4 of the DPM that provides, "An employee designated as an "emergency employee" under the standards of Subsection 1271.5 of this section shall be informed of the designation in writing within thirty (30) days of such designation. The required thirty (30)-day notification period and the requirement that notification be in writing may be suspended during a period of a declared emergency or during the period preceding an expected declaration of an emergency. A written notification shall follow a verbal notification.").

¹¹⁸ Answer at 30.

Union Position

The Union argues that the proposal is negotiable because it provides for seniority assignments for employees deemed eligible by the Agency.¹¹⁹

Board Finding

Emergency Preparedness, Section D is nonnegotiable. The proposal infringes on management's right to assign work under D.C. Official Code § 1-617.08(a)(2) by requiring the Agency to assign work in reverse order of seniority.¹²⁰ Further, in the context of the exigent circumstances of an emergency, an agency has the right to take whatever action is necessary to carry out the mission of the District government, unless circumscribed by an act of the Council.¹²¹

Proposal #26: Emergency Preparedness, Section F

Section F- Leave and Telework

1. The Agency will provide notice to all employees that they are encouraged to use leave or request expanded telework if they are impacted by a pending emergency. During emergencies, the District will provide liberal use of leave and authorization for telework in response to emergencies that impact the health of employees and their families.
2. In the event an emergency requires school closings, the District will provide liberal leave and maximum schedule flexibility to accommodate individuals who do not have childcare as a result of an emergency.
3. The District will not take disciplinary or adverse action against an employee because of things outside each employee's control, such as illness, family illness, and childcare issues during an emergency.

Agency Position

The Agency asserts that Section F excessively interferes with management's right to direct employees, to discipline employees, to maintain the efficiency of government operations, and to take whatever action is necessary during an emergency under D.C. Official Code §n1-617.08(a)(1), (2), (4), (5)(C) and (6).

¹¹⁹ Appeal at 20.

¹²⁰ *AFSCME, District Council 20, Local 1959 v. OSSE*, 65 D.C. Reg. 7657, Slip Op. No. 1659 at 7, PERB Case No. 17-N-04 (2018).

¹²¹ *Id.* at 4.

Union Position

The Union argues that the proposal is negotiable because it is consistent with existing procedures that the District established related to the global health pandemic.¹²² The Union asserts that the proposal encourages use of liberal leave and ensures employees are not penalized for circumstances outside of their control, like school closings and illness.¹²³

Board Finding

Emergency Preparedness, Section F is nonnegotiable. Sections F(1) and (2) require the Agency to provide liberal use of leave and telework to employees during an emergency, which infringes on management's right to direct employees and determine the efficient operations of the District government in contravention of D.C. Official Code § 1-617.08(a)(1) and (4). Further, Section F(3) restricts the Agency from taking disciplinary action against employees, which is a right reserved to management by D.C. Official Code § 1-617.08(a)(2). Therefore, Emergency Preparedness, Section F is nonnegotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. AFGE's proposal #1- Section B(2) of the proposal is nonnegotiable, and Sections B(4) and D(1) of the proposal are negotiable.
2. AFGE's proposal #2- Sections M(1) and N are negotiable.
3. AFGE's proposal #3- Section F of the proposal is nonnegotiable.
4. AFGE's proposal #4- Sections E and Fare nonnegotiable. Section G of the proposal is negotiable.
5. AFGE's proposal #6- Section A(2) of the proposal is negotiable.
6. AFGE's proposal #7- Section C(3) of the proposal is negotiable.
7. AFGE's proposal #8- Sections A(2) and B(2) of the proposal are negotiable.
8. AFGE's proposal #9- Article 14 is nonnegotiable.
9. AFGE's proposal #10- Section A of the proposal is negotiable, and Section D of the proposal is nonnegotiable.
10. AFGE's proposal #11- Section C of the proposal is dismissed as moot.
11. AFGE's proposal #13- Article 18 is nonnegotiable.
12. AFGE's proposal #14- Section C of the proposal is negotiable.
13. AFGE's proposal #15- Sections A(8), A(9), and J of the proposal are nonnegotiable.
14. AFGE's proposal #16- Sections C, D(9), G(3), I, K, and L of the proposal are negotiable. Sections G – Other forms of Leave (1), (2), (5), (6) and Section G- Leave to Donate Blood of the proposal are nonnegotiable.
15. AFGE's proposal #20- Section C of the proposal is nonnegotiable.

¹²² Appeal at 20.

¹²³ Appeal at 20.

16. AFGE's proposal #21- Telework Sections A(2), (3), (10), and B(1) of the proposal are negotiable, and Sections A(1), (4), (7), (8), (9), B(2), B(3), and C of the proposal are nonnegotiable.
17. AFGE's proposal #22- Section A(5) of the proposal is nonnegotiable.
18. AFGE's proposal #23- Section B of the proposal is nonnegotiable.
19. AFGE's proposal #25- Section D of the proposal is nonnegotiable.
20. AFGE's proposal #26- Section F of the proposal is nonnegotiable.
21. Pursuant to Board Rule 559.1, this decision and order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Douglas Warshof and Board members Mary Anne Gibbons, Peter Winkler, and Renee Bowser.

Washington, D.C.

September 15, 2021

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 21-N-03, Slip Op. No. 1798 was sent by File and ServeXpress to the following parties on this 21st day of September 2021.

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Public Employee Relations Board