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

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In the Matter of:	)	
	)	
Fraternal Order of Police /Metropolitan	)	
Police Department Labor Committee,	)	
	)	
Petitioner,	)	PERB Case No. 04-N-03
	)	
and	)	
	)	Opinion No. 842
Metropolitan Police Department,	)	
	)	
Respondent.	)	
	)	
_____	)	

**DECISION AND ORDER**

**I. Statement of the Case**

The parties are engaged in bargaining for a successor collective bargaining agreement. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP", "Union" or "Petitioner"), asserts that by correspondence dated January 15, 2004, the Metropolitan Police Department ("MPD" or "Respondent") served on the Petitioner responses to proposals previously submitted by the Petitioner in connection with negotiations for a successor collective bargaining agreement. The Respondent declared numerous proposals to be non-negotiable. As a result, on February 26, 2004, the Petitioner filed this Negotiability Appeal ("Appeal") pursuant to Board Rule 532.<sup>1</sup> The Respondent filed an Opposition on March 3, 2004. The Respondent asserts that the existing language as well as the Union's proposed changes are non-negotiable.

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<sup>1</sup>PERB Rule 532.1 states as follows: "If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board."

Pursuant to Board Rule 532, the Board has jurisdiction over Negotiability Appeals. There are fifteen (15) proposals concerning conditions of employment that have been challenged as non-negotiable by the MPD.

The specific issue presented by the Petitioner in this appeal concerns whether the challenged provisions of the Union's proposals are negotiable subjects of bargaining. Specifically, the following proposals are at issue: (1) Article 11 - Use of Department Facilities; (2) Article 12, § 2, § 9, § 11, § 14, § 16 - Discipline Provisions; (3) Article 14, § 1 and § 3 - Transfers ; (4) Article 16.2 § 3 - Employee Records; (5) Article 19, Part B, § 3 and Part C, § 2(2)(g) - Grievance Procedures; (6) Article 26 - Details; (7) Article 27 - Performance Evaluations; (8) Article 28 - Polygraph Tests; (9) Article 30, § 1, § 2 and § 3 - Overtime; (10) Article 38 - Skills Premium; and (11) Article 39, § 1 and § 3 - Uniform Allowance.

## II. Discussion

The "Management Rights" provision found in the Comprehensive Merit Personnel Act ("CMPA") at D.C. Code § 1-617.08(a) (2001 ed.), establishes certain subjects that are management rights. In addition, D.C. Code § 1-617.08(b)(2001 ed.) provides that "all matters shall be deemed negotiable, except those that are proscribed by this subchapter." As a result, there is a presumption of negotiability. See *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 3, PERB Case No. 95-N-01 (1995). However, the Board has stated that "in view of specific rights reserved solely to management under . . . D.C. Code § 1-617.08(a), the Board must be careful in assessing proffered broad interpretation of either subsection (a) or (b)." *Id.* at p. 4.

Also, in *University of the District of Columbia Faculty Association/National Education Association and University of the District of Columbia*, 29 DCR 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982), this Board adopted certain principles concerning mandatory, permissive and illegal subjects of bargaining.<sup>2</sup>

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<sup>2</sup>The Board stated as follows: "[i]t 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: [m]andatory subjects over which the parties must bargain; permissive subjects over which the parties may bargain; and illegal subjects 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." *Id.*

### III. Findings of the Board

The Union's proposals which the Respondent contends are nonnegotiable are set forth below. They are followed by the positions of the parties and the Board's ruling. The proposals on which the Board has made a determination are discussed first, then those proposals where the Board requests additional information from the parties are listed. All proposed changes are italicized, omitted language is identified in brackets and new or replacement language is in bold print.

#### Article 11: "Use of Department Facilities"

Section 4. ["With specific approval by the Commanding Officer,"]  
The Union may utilize Departmental mailboxes, teletype, electronic mail and the daily dispatch to **disseminate information to union members provided the message sought to be transmitted pertains to official union business. Such messages may be sent to all union members throughout the Department, or within specific commands. The Chairman or his designee must sign in writing, or by electronic simulation, all messages that originate from the Union. A management official of the appropriate rank, which depends on the distribution sought, may review the message before it is distributed. The management official may disallow the issuance of the message if it does not pertain to matters relating to official union business, but may not disallow the issuance of the message based on a disagreement with the contents of the message.**

The Petitioner asserts that the proposal is negotiable because it allows for the Union's use of the Employer's facilities without improperly inserting any absolute entitlement for use of such facilities. In support of its position, the Respondent cites the *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at pgs. 15-16, PERB Case No. 95-N-01 (1995). In that case, the Board held that use of office space by teachers was negotiable.

The Respondent counters that this subject is nonnegotiable because it requires management to impermissibly assist the Union in violation of the CMPA at D.C. Code § 1-617.04.

The Board finds that the Petitioner's proposal pertaining to Article 11 is negotiable based on the general negotiability presumption found in the CMPA that "[a]ll matters shall be deemed negotiable except those proscribed by [D.C. Code § 1-617.08(a)]". *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 4, PERB Case No. 95-N-01 (1995); see also, *Committee of Interns and Residents and District of Columbia General Hospital Commission*, 41 DCR 1602, Slip Op. No. 301 at n. 2 and p. 6, PERB Case No. 92-N-01 (1992).

**Article 12 § 2: "Discipline"**

*Section 2 - The parties recognize the need for discipline to be investigated and administered both expeditiously and fair[l]y, while avoiding even the appearance of impropriety, unfairness or arbitrariness. The parties agree that a system in which command authority, other than the Chief of Police, is exercised directly over both the members conducting investigation that could result in discipline and the members tasked with administering discipline based on the result of the investigation, gives rise to an appearance and possibility of impropriety, unfairness or arbitrariness. Therefore, the parties agree that the members tasked with administering discipline and member tasked with conducting investigations that could result in discipline shall be assigned to separate commands under the authority of two different Assistant Chief of Police.*

The Petitioner argues that this proposal is procedural and merely seeks to ensure compliance with the legally imposed "for cause" standard found in D.C. Code § 1-616.51, by separating the departmental investigative and administrative disciplinary functions.

The Respondent counters that this proposal infringes on the right of management under the CMPA to determine its organization.

The Board finds that Article 12 § 2.2 is nonnegotiable. Although disciplinary procedures are usually negotiable, the Board finds that this proposal infringes on management's right to determine its organization under D.C. Code § 1-617.08(a)(2). Therefore, the above proposal is nonnegotiable.

**Article 12 § 9: "Discipline"**

*Section 9 - If management does not provide the employee with a written decision within the allotted period of time, the matter shall be considered settled in favor of the employee and no discipline may be imposed upon the employee by the Department. The Union and the employee shall be notified in writing that the matter has been dismissed due to the violation of the established time limits.*

The Petitioner contends that the above proposal is procedural and merely seeks to negotiate a remedy for violating established time limits. In this regard, the Union cites *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450, PERB Case No. 95-N-01 (1995), for the proposition that a proposal is nonnegotiable if it inserts a standard limiting the exercise of a management right. In keeping with this principle, the Petitioner argues that this proposal does not limit management's right to discipline.

The Respondent maintains that this proposal infringes on the right of management to discipline its employees whenever the established time limits are not met. The Respondent cites *Washington Teachers' Union and D.C. Public Schools, Id.*, at p. 8, in support of its position that the attempt to limit a management right "by establishing any standard at all where no standard exists is nonnegotiable".<sup>3</sup> (Opposition at p.6)

The Board finds that Article 12 § 9 is negotiable. The Board has held that D.C. Code § 1-617.08 (a)(2) provides as a sole management prerogative, the right to "suspend, demote, discharge, or take other *disciplinary* action against employees for cause." *Washington Teachers' Union and D.C. Public Schools*, 46 DCR 8090, Slip Op. No. 450 at pg. 11, PERB Case No. 95-N-01 (1995). However, the Board has also held that procedural matters concerning discipline are negotiable. *Id.* at p. 12. Therefore, the Board finds that the proposal pertaining to Section 9 is procedural in nature because it provides a remedy for failure to follow the established procedures. As a result, the Board concludes that the above proposal is negotiable.

**Article 12 § 11: "Discipline"**

Section 11 - [omit the following language: "The appeals allowed by Section 6 of this Article shall not serve to delay the effective date of the decision by the Department."] and add:

**No discipline shall be implemented pursuant to this article until affirmed on appeal to an arbitrator or the Office of Employee Appeals (OEA), if such avenues of appeal are available and the employee and/or Union has not waived such an appeal. The decision of an arbitrator or the OEA shall be enforceable upon issuance and any disciplinary action approved by an arbitrator or the OEA shall be imposed no later than sixty (60) days following that decision. If the Department fails to act to impose discipline within this 60-day period, no discipline shall be imposed.**

The Petitioner argues that this proposal is procedural in nature. Therefore, it poses no limitation on management's right to discipline where the termination is subject to a due process review through the arbitration process.

The Respondent argues that this proposal seeks to dispossess management of a statutory right to discipline employees.

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<sup>3</sup>In *Washington Teachers' Union*, at page 9, *Id.*, the proposal stated as follows: "Involuntary transfers shall be made for just cause including but not limited to: reduction in staff due to loss in enrollment, reduction or elimination of programs, loss of funds, failure to meet minimum class size, or closing of buildings. Involuntary transfers shall not be made for disciplinary reasons". The Board held this proposal to be non-negotiable because "[the 'just cause' standard] . . . limits [management's rights] by establishing any standard at all where no standard exists."

The Board finds Article 12 § 11 is nonnegotiable. D.C. Code § 1-617.08(a)(2) provides that management shall retain the sole right to “suspend, demote, discharge, or take other disciplinary action against employees for cause”. Specifically, the above proposal concerning Article 12, § 11 provides that “[n]o discipline shall be implemented . . . until [it is] affirmed on appeal to an arbitrator or the Office of Employee Appeals (OEA)”. The Board finds that this proposal “limits management’s right to discipline” because it “establishes [a] standard where none exists.” *Washington Teachers’ Union and District of Columbia Public Schools, Id.* at p. 8. This proposal would interfere with management’s statutory right to discipline employees by preventing management from imposing disciplinary action under certain circumstances. As a result, the Board concludes that Article 12 § 11 is nonnegotiable.

**Article 12 § 14: “Discipline”**

Section 14 - An employee shall be given administrative leave of up to [omit: “ten (10)”] **twenty-four (24)** hours to prepare for his/her defense against any proposed discharge or suspension of more than thirty (30) days[;] [omit: “four (4)”] **sixteen (16) hours** to prepare his/her defense against any proposed fine or suspension of (10) days through thirty (30) days; [omit: “two (2)”] **eight (8) hours** to prepare his/her defense against any proposed fine/suspension of less than ten (10) days. If the employee requests the assistance of a Union employee representative, the representative shall be granted official time within his/her regularly scheduled hours up to the same amount of time as the employee he/she is representing.

The Petitioner acknowledges that this proposal is nonnegotiable to the extent that it proposes administrative leave in excess of the ten (10) hour limitation in D.C. Code § 1-612.03(q).

The Respondent claims this proposal interferes with its statutory right to determine internal security. Furthermore, the proposal exceeds the provisions of the CMPA cited above by more than two (2) hours.

The Board finds that the above proposal is nonnegotiable because this issue is addressed in the CMPA. Specifically, D.C. Code § 1-612.03(q) allows “up to 10 hours of leave for the purpose of responding to adverse actions”. Therefore, it is clear that ten (10) hours of leave is the statutory limit. This 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.” See *Teamsters Local 639 and 730 and District of Columbia Public Schools*, 43 DCR 7014, Slip Op. No. 403 at p. 4, PERB Case No. 94-N-06 (1994).

**Article 14 § 1: “Transfers”**

Section 1 - Employee(s) may be transferred from one Division or District to another for the efficiency of the service of the Department. The employee(s) shall be informed in writing by an official of the

Department of the reason for his/her transfer, unless the transfer was initiated at the request of the employee. The reason given will entail an explanation which will elaborate on why the transfer is for the efficiency of the service. Such elaboration will not be the basis of a grievance by the transferred employee or any other employee affected unless it conflicts with Section 3 of this Article.

The Petitioner argues that the above proposal concerning transfers is negotiable because it is procedural and places no limitation on management's right to transfer. Citing *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 9, PERB Case No. 95-N-01 (1995), the Petitioner asserts that "PERB has held that Management's decision to exercise its right . . . to transfer employees is not compromised when the proposal is limited to procedures that place no limitations on the right to transfer or to accommodations for employees transferred." The Petitioner claims that this proposal is merely a notice provision.

The Respondent maintains that this provision is nonnegotiable because it improperly creates a standard (i.e., "efficiency of the service") that does not exist in law concerning the exercise of a management right under D.C. Code § 1-617.08(a)(2). Management cites *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450, at p. 8, PERB Case No. 95-N-01 (1995), asserting that the Board has held that an attempt to limit a management right "by establishing any standard at all where no standard exists" is nonnegotiable. (Citing PERB Case No. 90-N-02, et al.)<sup>4</sup>

The Board finds that Article 14 § 1 is nonnegotiable. D.C. Code § 1-617.08(a)(2) states that management shall retain the sole right to . . . transfer . . . employees in positions within the agency". In *Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools*, 38 D.C. Reg. 6693 Slip Op. No. 263 at p. 11, PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04 (1991), the Board held nonnegotiable a proposal stating that "involuntary transfers or details shall be based on operational requirements . . . except in emergencies and in cases where it would create a hardship on the employee and/or the operations at the work site [because the provision placed] absolute limitations on management's sole right to transfer that are incompatible with D.C. Code § 1-61[7].08(a)(2)." Consistent with our previous holding, the Board finds that the Union's proposal concerning Article 14, § 1, limits the reasons for which an employee may be transferred and thereby places an improper restraint on management's right to transfer employees. Therefore, the proposal is nonnegotiable.

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<sup>4</sup>We have held that management's decision to exercise its sole right under D.C. Code § 1-617.08(a)(2) to transfer employees is not compromised when the proposal is limited to procedures that place no limitations on the right to transfer or to accommodations for employees transferred. See *Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools*, 38 DCR 116, Slip Op. No. 259, (Slip Op. 263, Proposal No. 9), PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04 (1990).

**Article 14 § 3: "Transfers"**

Section 3 - Transfers or reassignments will not be used in lieu of discipline but may form part of a disciplinary action as provided under Article 12, Section 13, Discipline, and except the Chief of Police or the Acting Chief of Police may transfer a member in a review of an appeal of adverse action in lieu of any other penalty imposed. This decision by the Chief constitutes final agency adverse action which may be further contested outside the agency as provided in other applicable articles of this agreement.

The Petitioner argues that the above proposal does not compromise management's right to transfer or discipline employees, but acknowledges that transfers may be used as part of a disciplinary measure. Also, the Union states that the parties have previously negotiated similar language. The Union further asserts that the Board looks at the parties' current and prior agreement when there is a close question of negotiability. Citing *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at pg. 8, PERB Case No. 95-N-01 (1995), (where the Board "looked to the parties' current and prior agreement when it is a close question whether a matter is a required subject of bargaining.")

The Respondent finds objectionable that portion of the above proposal which provides that: "[t]ransfers or reassignment will not be used in lieu of discipline but may form part of a disciplinary action as provided under Article 12, [Section] 13", arguing that this is not a standard found in the law. Management maintains that this proposal is non-negotiable because under the CMPA management may transfer employees for any legal reason, including as a disciplinary measure. The Respondent asserts that the disputed language limits management's right to transfer and is therefore contrary to *Washington Teachers' Union and District of Columbia Public Schools, Id.*

The Board finds that Article 14 § 3 is nonnegotiable. In *Washington Teachers' Union and District of Columbia Public Schools, Id.*, at page 9, the Board considered the following proposal:

Involuntary transfers shall be made for just cause including but not limited to: reduction in staff due to loss in enrollment, reduction or elimination of programs, loss of funds, failure to meet minimum class size, or closing of buildings. Involuntary transfers shall not be made for disciplinary reasons".

In *Washington Teachers' Union*, the Board held the above proposal to be non-negotiable. Specifically, in *Washington Teachers' Union* the Board found that: "[the proposed 'just cause' standard] . . . limits [management's rights] by establishing any standard at all where no standard exists."<sup>5</sup> Consistent with Board precedent, we conclude that Article 14 § 3 is nonnegotiable because

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<sup>5</sup>See, also *Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools*, 38 DCR 6693, Slip Op. No. 263 at p. 11, PERB Case Nos. 90-N-02, 90-N-03, 90-N-04 (1991), where the

it limits the reasons for which an employee may be transferred and thereby places an improper restraint on management's right to transfer employees. See *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at pg. 8, PERB Case No. 95-N-01 (1995).

**Article 19, Part B: "Grievance Procedure"**

Section 3 - A grievance not responded to by the appropriate management representative within the time limits specified at any step shall ~~[delete: "enable the employee to pursue the grievance at the next higher step of the procedure"]~~ *constitute satisfactory settlement of the grievance in favor of the employee with any alleged violation against the member being discharged wholly without the issuance of any discipline, and shall not be subject to any type of appeal by the Department, nor shall the Department be entitled to pursue the disciplinary proceedings further.*

The Petitioner asserts that the above proposal addresses the procedures to be used when submitting a disciplinary action to grievance arbitration review. In support of its position, the Petitioner cites *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at pgs. 12-13, PERB Case No. 95-N-01 (1995). Also, the Petitioner maintains that the proposal does not infringe on management's right to discipline employees.

The Respondent argues that the proposal would cut off management's right to impose discipline if time limits were not met. The Respondent contends that this proposal creates a new standard and a bar to the exercise of a management right and is therefore non-negotiable. The Respondent relies on a ruling by the Superior Court of the District of Columbia in *District of Columbia Metropolitan Police Department vs. Public Employee Relations Board*, 01 MPA 19 (September 11, 2002), where the judge held that an untimely response did not bar the imposition of discipline.<sup>6</sup> However, the Respondent acknowledged that there was another ruling by the Superior Court in *District of Columbia Metropolitan Police Department vs. Public Employee Relations Board* 01-MPA-18 (September 17, 2002), where another judge ruled that an untimely response was a bar to imposing disciplinary action.

The Board finds that Article 19, Part B, § 3 is negotiable. We believe that this proposal is procedural in nature and simply addresses the timeliness of the grievance process and the disciplinary

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Board held nonnegotiable a proposal stating that "involuntary transfers or details shall be based on operational requirements . . . except in emergencies and in cases where it would create a hardship on the employee and/or the operations at the work site" - because the provision "[placed] absolute limitations on management's sole right to transfer that are incompatible with D.C. Code § 1-61[7].08(a)(2)."

<sup>6</sup>In a subsequent case concerning this same issue, the District of Columbia Court of Appeals affirmed the Board's ruling sustaining an arbitrator's finding that an untimely response was a bar to imposing discipline. *Metropolitan Police Department v. Public Employee Relations Board*, 05-CV-004642P MPA (June 13, 2006).

process. Moreover, it does not prevent management from implementing disciplinary action.<sup>7</sup> Specifically, the proposal to dismiss disciplinary action when management fails to adhere to the time limits in the appeal process, places no limitation on management's statutory right to discipline. Therefore, the above proposal is negotiable.

**Article 19, Part C: "Grievance Procedure"**

*2.(2)(g) - The Chief of Police or his/her alternate, shall respond in writing to the class grievance within twenty-one (21) days of its receipt. Failure to reply as required within twenty-one (21) days shall constitute settlement of the grievance in favor of the grieving members.*

The Petitioner argues that the above proposal does not infringe on management's right to discipline employees under D.C. Code § 1-617.08(a)(2). It proposes procedures to be used when submitting a disciplinary action to grievance/arbitration review following the Respondent's exercise of its right to discipline an employee. Citing *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at pgs. 12-13, PERB Case No. 95-N-01 (1995).

The Respondent asserts that this proposal would cut off management's right to discipline if the Agency failed to respond within a twenty-one day time limit. The Respondent relies on D.C. Code § 1-617.08(a)(4), which provides that "[t]he Agency personnel authorities are solely entrusted with the statutory right '[t]o maintain the efficiency of the District government operations entrusted to them'." The Respondent cites no Board precedent in support of its position.

The Board finds that Article 19, Part C, § 2.(2)(g) is procedural in nature. Therefore, the proposal is negotiable for the same reasons cited in the discussion concerning "Article 19, Grievance Procedure, Part B, § 3", above.

**Article 26: "Temporary Details and Acting Pay"**

*When a member's temporary detail ends, the Department shall return the member to the member's original assignment, if it still exists. If the member's original assignment no longer exists the member may choose an assignment that is currently open in any unit that the member is qualified to join. The Department will also assign the member the same days off the member had before being detailed,*

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<sup>7</sup>See *Washington Teachers' Union and District of Columbia Public Schools*, Slip Op. No. 450 at pgs. 8-9, *supra*. where the Board held that management's decision to exercise its sole right under D.C. Code § 1-61[7].08(a)(2) to transfer employees is not compromised when the proposal is limited to procedures that place no limitations on the right to transfer or to accommodations for employees transferred. Here, the proposal in Article 19, Part B, Section 3, to dismiss disciplinary action when management fails to adhere to the time limits in the appeal process, places no limitation on management's statutory right to discipline.

*unless the member and the Department agree to change the member's days off.*

The Petitioner acknowledges management's right to assign employees but asserts that this proposal is not an infringement of management's right to assign because it leaves in the hands of management the ability to determine whether an employee is qualified for his or her preferred assignment. The Union cites no precedent in support of its position.

The Respondent argues that this proposal infringes on management's right to assign employees and direct the workforce.

The Board finds that Article 26 is nonnegotiable. Under D.C. Code § 1-617.08(a)(2), assigning employees is a statutory management right. Therefore, we believe that the above proposal impermissibly interferes with management's statutory right because it limits where the MPD may assign employees and gives employees the right to choose their assignment - instead of MPD. Also, we have found nonnegotiable a proposal requiring an employee's consent before his or her detail could be extended. See, *Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools*, 38 D.C. Code 6693, Slip Op. No. 263 at p. 12, PERB Case Nos. 90-N-02, 90-N-03, 90-N-04 (1991); see also, *D.C. Public Schools and Teamsters, Local 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 38 DCR 2483, Slip Op. No. 273 at p. 21, PERB Case No. 95-N-01 (1991). Consistent with our previous holdings, we find that this proposal is nonnegotiable because it infringes on management's right to assign employees under D.C. Code § 1-617.08(a)(2).

**Article 30, § 2 and § 3: "Overtime/Compensatory Time"**

Section 1 - For preplanned events that require the cancellation of days off, the Employer shall first seek volunteers on the basis of seniority from the units that are required to staff the event. If there are insufficient volunteers, the Employer shall assign employees to appropriately staff the event.

Section 2 - [delete: "To the extent that the Fair Labor Standards Act permits the Employer to substitute compensatory time for overtime payments, it is agreed that the Employer may make that substitution in the manner provided by the Act."] And add:

*To the extent that the Employer's [delete: "present"] policies, procedures and practices that were in effect prior to the Order, dated December 27, 1996, from the former District of Columbia Financial Responsibility and Management Assistance Authority were equal to or exceeded the requirement of the Fair Labor Standards Act, those policies, procedures, and practices shall [delete: "remain in effect"] be restored to effectiveness, except as otherwise provided herein.*

Section 3 - [delete: "For the purpose of determining entitlement to compensatory time and overtime pay, all hours of work performed outside the basic work week and the basic work day shall be deemed overtime hours.] And add:

*All hours of work which entitle the employee to overtime compensation will be paid in cash at a rate equal to one-and-a-half times the regular rate of pay.*

The Petitioner believes these proposals are negotiable, arguing that the legislation referenced in Section 2 expired on September 30, 2001, because: (1) it was contained in an appropriations act and (2) this type of legislation expires after one year. The Petitioner notes that the FY 2001 Appropriations Act and its impact on the current labor agreement is the subject of a pending arbitration between the parties. The Union cited no precedent in support of its position.

The Respondent asserts that these proposals are nonnegotiable because Congress intended that § 156 of the FY 2001 Appropriations Act - a provision containing an order by the Control Board limiting overtime as defined in the Federal Labor Standards Act ("FLSA") - extends beyond one year. Furthermore, the Respondent claims that Congress ratified the Control Board's Order to limit overtime in this manner and made it retroactive to December 1996. Management contends that the fact that the provision was made retroactive to 1996, indicates that Congress meant for this provision of the Act to extend beyond one year. The MPD cited no precedent in support of its position.

The Board finds Article 30, § 2 and § 3 to be negotiable. Section 156 of the FY 2001 Appropriations Act embodied the Control Board's Order of 1996. The Control Board's Order of 1996 limited the payment of overtime pursuant to FLSA regulations, retroactive to 1996. Congress ratified the Order and incorporated it in the FY 2001 Appropriations Act. Subsequently, in two arbitration review requests' involving the same parties involved in this Negotiability Appeal, this Board ruled that the FY 2001 Appropriations Act expired on September 30, 2001. See *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 784 at pgs. 9-11, PERB Case No. 04-A-13 (March 31, 2005); see also *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 795 at p. 4, PERB Case No. 04-A-04 (July 21, 2005). Therefore, the FY 2001 Appropriations Act no longer has any bearing on how overtime is paid in the District. As a result, the requirement which limits the payment of overtime pursuant to FLSA regulations has been lifted, rendering negotiable Article 30, § 2 and § 3.

**Article 39, § 1 and § 3: "Uniform and Clothing Allowance"**

Section 1 - *The clothing allowance for officers detailed to investigative duties in a Detective Unit, and all Investigators and Detectives shall be \$2,000 per year. The clothing allowance for any employee authorized to wear casual clothes in any other unit shall be \$750 per year. Payment shall be made twice yearly, no later than April 15 and October 15 each year. Members shall be authorized to receive prorated payments based on the length of time the member was*

*assigned or detailed to a position in which the member was authorized to receive this payment. The Department recognizes this payment is not part of the member's salary, rather it is reimbursement for costs borne by the member on behalf of the Department due to the member's detailed or assigned position; therefore, such payments shall be made in accordance with applicable federal and District of Columbia tax laws."*

Section 3 - *After the initial increase in the uniform and clothing allowance set forth in Section 1, the uniform and clothing allowance shall increase on the same date and by the same percentage rate of the negotiated salary increase for the life of the contract.*

The Petitioner argues that because previous contracts have exceeded the statutory limitations for uniform and clothing allowance, this proposal is negotiable.

The Respondent claims that this proposal is nonnegotiable because it exceeds the amounts allotted by statute at D.C. Code § 5-111.03, "Appropriations".<sup>8</sup> The Respondent further argues that despite the fact that the parties previously reached agreement on a similar proposal, it has no duty to bargain concerning this proposal because management rights revert back to management when the old contract expires. Citing *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450, PERB Case No. 95-N-01 (1995).

The Board finds that this proposal is nonnegotiable because the subject of the proposal is addressed in D.C. Code § 5-111.03, "Appropriations", which contains "not exceeding" and "not to exceed" language concerning the amounts set by law.<sup>9</sup>

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<sup>8</sup>D.C. Code § 5-111.03 (a) - "Appropriations" provides that "a sum *not exceeding* \$75 per annum for each member of the Metropolitan Police [Department] . . ." for "uniforms and all other official equipment prescribed by Department regulations as necessary and requisite in the performance of duty." Also, D.C. Code § 5-111.03 (b) authorizes the Chief of Police of the Metropolitan Police force "to provide a clothing allowance *not to exceed* \$300 in any 1 year to an officer or member assigned to perform duties in 'plainclothes'."

<sup>9</sup>Furthermore, the Union's argument that this article is negotiable because the parties have previously negotiated this issue is without merit. In *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at page 9, PERB Case No. 95-N-01 (1995), the Board noted the following:

Petitioner asserts that the parties' inclusion of . . . [a] provision in prior agreements has made the subject of the proposal a mandatory subject of bargaining as between the parties. *While an employer may bargain and reach agreement on matters over which it has no duty to bargain under the CMPA, the statutory right remains reserved to management once the contract has expired. We have looked to the parties' current and prior agreements when it is a close question whether a matter is a required*

**IV. Issues to be briefed by the parties**

Based on the information provided by the parties, the Board is unable to make a determination concerning the negotiability of the four (4) articles listed below. Therefore, the Board is directing that the parties brief these proposals. In their briefs, the parties should state their position and provide any legal authority (i.e., case law, Board precedent, etc.) in support of their position.

1. Article 12, § 16 - *Discipline - Carrying guns*;
2. Article 16.2 § 3 - *Employee Records*;
3. Article 28 - *Polygraph Tests*; and
4. Article 38 - *Tech Pay, Special Duty and Skills Premium*;

The positions of the parties regarding the above articles are set forth below:

**Article 12, § 16: "Discipline"**

Section 16 - (Respondent contends the following proposal to strike language from this provision is non-negotiable):

In all other circumstances, it shall be the Department's policy to permit an officer or sergeant to continue to carry [delete: "the authorized weapon for self protection, if he/she so requests, stating that he/she has good reason to fear injury to his/her person or property"] and add:

**all authorized Departmental weapons.** Permission need not be granted if the Chief of Police or his/her agent reasonably determines, based upon the particular facts and circumstances of the case, that the permission should be denied for reasons of public safety or welfare. *A decision to withhold such permission shall include a written explanation articulating the facts and circumstances upon which the Chief of Police relied in making that decision.*

**FOP's Position:** The Union argues that this issue is negotiable because all matters shall be deemed negotiable except those proscribed by the CMPA. Citing *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 4, PERB Case No. 95-N-01 (1995). Furthermore, the Union claims that "by not objecting to the negotiability of the subject matter of this proposal, the Respondent implicitly concedes the negotiability of this [proposal]". (Negotiability Appeal at p. 6).

**MPD's Position:** Management does not articulate an argument concerning Article 12, § 16.

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subject of bargaining. (Citations omitted) We find no close question in considering this proposal, and find it nonnegotiable. (emphasis added).

Similarly, here, we find no close question in considering the Union's proposal. Therefore, Article 39, § 1 and § 3 is nonnegotiable.

**Board:** *The parties shall brief the above issue.* Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position.

**Article 16.2 - "Employee Records"**

**Subsection (3)** - The Department shall, [delete: "at least once per year"] **by the end of each quarter of the fiscal year, review all Personnel Records and remove or obliterate such files or entries as required.**

**FOP: FOP's Position:** The Union contends that "the proposed language merely codifies the legally-imposed obligation to purge records containing 'immaterial, irrelevant, or untimely information [pursuant to D.C. Code § 1-631.05(c).]"<sup>10</sup> The Union further argues that D.C. Code § 1-631.05(b) confers on the employee "the right to . . . seek to have irrelevant, immaterial, or untimely information removed from the record."<sup>11</sup> Therefore, the Union concludes that "in proposing a time frame for the Respondent to conduct a review of personnel records for purposes of insuring compliance with the law, [it] is merely asserting . . . the statutory right to seek the removal of records containing immaterial, irrelevant, or untimely information." (Negotiability Appeal at pgs. 8-9). The Union cites no legal precedent.

**MPD's Position:** Management relies on D.C. Code § 1-631.05(c) which contains a three-year review and purge of documents in an employee's official record. Management maintains that the Union's proposal conflicts with this provision. Management cites no legal precedent.

**Board:** *The parties shall brief the above issue.* Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position. Also, state the issue that the statute addresses (or does not address) as well as the issue that the proposal addresses (or does not address).

**Article 28 - "Polygraph/Deception Detection Examinations"**

*Refusal to take a polygraph examination or to cooperate in any other*

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<sup>10</sup>D.C. Code § 1-631.05(c) provides as follows: "For the purpose of this subchapter, information other than a record of official personnel action is untimely if it concerns an event more than 3 years in the past upon which an action adverse to an employee may be based. Immaterial, irrelevant, or untimely information shall be removed from the official record upon the finding by the agency head that the information is of such a nature. Prior to the removal of any information in the file, the employer shall notify the employee and give him or her an opportunity to be heard."

<sup>11</sup>D.C. Code § 1-631.05(b) provides as follows: "Each employee shall have the right to present information immediately germane to any information contained in his or her official personnel record and seek to have irrelevant, immaterial, or untimely information removed from the record."

*examination utilizing devices designed to detect deception will not be a basis for disciplinary action.*

**FOP's Position:** The Union contends that this proposal is not contrary to law (D.C. Code § 32-902) because the law authorizes polygraph testing, but does not *require* polygraph testing. Therefore, the Union believes that the proposal "does not stand in conflict with this provision of the law." (Negotiability Appeal at p. 11) The Union further argues that the proposal is negotiable because the parties negotiated similar language in the current collective bargaining agreement, citing *Washington Teachers' Union and District of Columbia Public Schools*, Slip. Op. No. 450.

**MPD's Position:** Management asserts that D.C. Code § 32-902 creates a management right to administer lie detector tests, therefore this proposal is non-negotiable. Furthermore, MPD claims that the proposal violates management's right to discipline employees for refusal to obey a lawful directive.

D.C. Code § 32-902 provides as follows:

(a) No employer or prospective employer shall administer, accept or use the results of any lie detector test in connection with the employment, application or consideration of an individual, or have administered, inside the District of Columbia, any lie detector test to any employee, or, in or during any hiring procedure, to any person whose employment, as contemplated at the time of administration of the test, would take place in whole or in part in the District of Columbia.

(b) The provisions of this section shall not apply to any criminal or internal disciplinary investigation, or pre-employment investigation conducted by the Metropolitan police, the Fire Department, and the Department of Corrections, provided that any information received from a lie detector test which renders an applicant ineligible for employment shall be verified through other information and no person may be denied employment based solely on the results of a pre-employment lie detector test.

**Board:** *The parties shall brief the above issue.* Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position. Also, state the issue that the statute addresses (or does not address) as well as the issue that the proposal addresses (or does not address).

**Article 38 - "Tech Pay Special Duty and Skill Premiums"**

*Effective the first pay period on or after October 1, 2003, Tech Pay will be an amount equal to 7.5% of the first step of an Officer's pay. Special duty and still amount equal to 7.5% of the first step of an*

*Officer's pay. Special duty and skill premium pay shall be equal to 10% of the first step of an Officer's pay.*

**FOP's Position:** The Union contends that the D.C. Code does not specifically set a limit on employer contribution for technicians and special skills pay. Therefore, the Union argues that the proposal is negotiable.

**MPD's Position:** Management asserts that the Union's proposal exceeds the stipends set in law for special duty and skill premiums, citing D.C. Code § 5-542.02 and § 5-543.02.<sup>12</sup> Therefore, Management argues that the proposal is nonnegotiable because it is contrary to law.

**Board:** *The parties shall brief the above issue.* Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position. Specifically, the parties should:

- (a) Explain the difference between "Tech pay", "Special duty" and "Skills premiums".
- (b) Give the definition for "tech position";
- (c) State what job classifications are addressed in this proposal; and
- (d) Cite the specific language in the D.C. Code which supports their position (in connection with *each position* that is at issue in the proposal).

#### V. Submission of information to the Board

The Board is unable to make a determination concerning Article 27 - "Performance Evaluation" without receiving further information from the parties. Therefore, the parties Board is directing that the parties provide a copy of General Order 201.20.

#### Article 27 - "Performance Evaluation"

The existing General Order 201.20, Performance Rating Plan, shall remain in effect unless the Department provides the Union with notice of any proposed changes(s). **The Department and the Union shall**

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<sup>12</sup>D.C. Code § 5-542.02 provides in addition to the scheduled rate of pay that "*members of the Metropolitan Police Force . . . appointed . . . (1) to perform the duty of a helicopter pilot; or (2) to render explosive devices ineffective or to otherwise dispose of such devices shall receive . . . \$2,270 per annum. . . [and] each officer or member . . . assigned . . . as scuba divers shall receive . . . \$2,710 per annum so long as he or she remains in such assignment.*" Furthermore, D.C. Code § 5-543.02 provides a \$810 per annum supplement to basic compensation for "*technician's positions*" and a \$595 per annum supplement to basic compensation for "*detective sergeant[s] in subclass (b)*".

**negotiate any changes affecting matters covered in General Order 201.20, in accordance with Part I, A., 2, of same.**

**FOP's Position:** The Union argues that the above proposal is meant to engage management in impact bargaining and is negotiable.

**M.D.'s Position:** The Respondent asserts that this proposal is nonnegotiable relying on D.C. Code § 1-613.53(b) which states as follows: "Notwithstanding any other provision of law or of any collective bargaining agreement, the implementation of the performance management system established [in subsection (a) of that section] is a nonnegotiable subject for collective bargaining."

**Board:** Concerning Article 27 - Performance Evaluation, the parties shall submit a copy of General Oder 201.20, "Performance Rating Plan".

### ORDER

#### IT IS HEREBY ORDERED THAT:

1. The following proposals are negotiable:

- a. Article 11 - Use of Department Facilities;
- b. Article 12, § 9 - Discipline; Time limits;
- c. Article 19, Part B, § 3 - Grievance Procedures;
- d. Article 19, Part C, § 2(2)(g) - Grievance Procedures; and
- e. Article 30, § 2 and § 3 - Overtime.

2. The following Articles are nonnegotiable:

- a. Article 12, § 2 - Discipline; Assignment of investigator and disciplinarians;
- b. Article 12, § 11 - Discipline; Implement discipline only afer going to arbitrator or OEA;
- c. Article 12, § 14 - Discipline; More than 10 hours to prepare a defense;
- d. Article 14, § 1 - Transfers;
- e. Article 14, § 3 - Transfers;

- f. Article 26 - Temporary Details; and
  - g. Article 39, § 1 and § 3 - Uniform Allowance.
3. Pursuant to Board Rule 532.4, the parties shall brief Article 12, § 16 - Discipline; Carrying guns. Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position.
4. Pursuant to Board Rule 532.4, the parties shall brief Article 16.2 § 3 - Employee Records. Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position. *Also, state the issue that the statute addresses (or does not address) as well as the issue that the proposal addresses (or does not address).*
5. Pursuant to Board Rule 532.4, the parties shall brief Article 28 - Polygraph Tests - Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position. *Also, state the issue that the statute addresses (or does not address) as well as the issue that the proposal addresses (or does not address).*
6. Pursuant to Board Rule 532.4, the parties shall brief Article 38 - Skills Premium (Technician Pay) - The parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position. Specifically, the parties shall:
- (a) Explain the difference between “*Tech pay*”, “*Special duty*” and “*Skills premiums*”;
  - (b) Give the definition for “tech position”;
  - (c) State what job classifications are addressed in this proposal; and
  - (d) Cite the specific language in the D.C. Code which supports their position (in connection with *each position* that is at issue in the proposal).
7. The parties’ briefs are due within fifteen (15) days of the date of this Decision and Order.
8. Pursuant to Board Rule 532.4, the parties shall provide the Board with a copy of General Order 201.20. This order concerns Article 27 - Performance Evaluation.
8. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

September 11, 2006

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 04-N-03 was transmitted via Fax and U.S. Mail to the following parties on this 11<sup>th</sup> day of September 2006.

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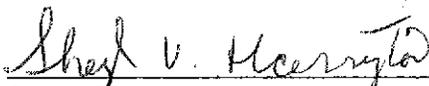
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