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

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In the Matter of:		)	
		)	
Washington Teachers' Union		)	
		)	
	Petitioner	)	
		)	PERB Case No. 24-N-11 & 24-N-13
	v.	)	
		)	Opinion No. 1886
		)	
District of Columbia Public Schools		)	
		)	
	Respondent	)	
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**DECISION AND ORDER**

**I. Statement of the Case**

On May 28, 2024, the Washington Teachers' Union (WTU) filed a negotiability appeal in PERB Case No. 24-N-11. On July 23, 2024, WTU filed a negotiability appeal in PERB Case No. 24-N-13. These two negotiability appeals were consolidated on August 28, 2024, and PERB Case No. 24-N-11 was designated as the lead case. The instant consolidated negotiability appeal concerns two (2) proposals made by WTU and declared nonnegotiable by District of Columbia Public Schools (DCPS).

**II. Background<sup>1</sup>**

Since June of 2023, WTU and DCPS have been negotiating a successor collective bargaining agreement (CBA) concerning terms and conditions of employment for a unit of schoolteachers and other employees who render educational services to DCPS.<sup>2</sup> On or about September 29, 2023,<sup>3</sup> WTU sent DCPS a proposal for a new CBA provision, labeled Article 27.4 and titled "Athletic Trainers," which would address the working conditions, health and safety,

<sup>1</sup> There are no factual disputes in this case.

<sup>2</sup> 24-N-11 Appeal at 1-2.

<sup>3</sup> 24-N-11 Answer at 1.

basic work scheduling, hours (for the purposes of compensation), and workload for athletic trainers.<sup>4</sup> On November 29, 2023, DCPS declared that proposal nonnegotiable in its entirety.<sup>5</sup> On April 9, 2024, WTU sent DCPS a revised version of Article 24.7.<sup>6</sup> DCPS responded on April 25, 2024, declaring portions of the revised proposal nonnegotiable.<sup>7</sup>

Additionally, on April 9, 2024, DCPS sent WTU a proposal to strike certain language from Article 4 of the current CBA, titled “Teacher Transfer Policy,” which concerned the placement of excessed teachers.<sup>8</sup> WTU sent a counterproposal on May 17, 2024; DCPS sent a counterproposal on May 28, 2024; and WTU sent another counterproposal on June 24, 2024.<sup>9</sup> On June 27, 2024, DCPS responded to WTU’s latest counterproposal, declaring it nonnegotiable.<sup>10</sup>

WTU’s latest counterproposal regarding Article 4 and WTU’s revised proposal regarding Article 24.7 are before the Board for disposition.

### III. Standard of Review

There are three categories of collective bargaining subjects: (1) mandatory subjects, over which the parties must bargain if either party requests it; (2) permissive subjects, over which the parties may bargain; and (3) illegal subjects, over which the parties may not bargain.<sup>11</sup> A permissive subject of bargaining is nonnegotiable if either party declines to bargain on the subject.<sup>12</sup> Management rights are permissive subjects of bargaining.<sup>13</sup> Section 1-617.08(a) of the D.C. Official Code sets forth management rights giving management the “sole rights” to undertake actions listed therein.<sup>14</sup>

Matters that do not contravene section 1-617.08(a) or other provisions of the Comprehensive Merit Personnel Act (CMPA) are negotiable.<sup>15</sup> 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.<sup>16</sup>

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<sup>4</sup> 24-N-11 Appeal at 1.

<sup>5</sup> 24-N-11 Appeal at 2.

<sup>6</sup> 24-N-11 Appeal at 1,4

<sup>7</sup> 24-N-11 Appeal at 2.

<sup>8</sup> 24-N-13 Appeal at 2-3. Article 4.5.1.1. of the current CBA defines “excessing” as “an elimination of a Teacher’s position at a particular school due to a decline in student enrollment, a reduction in the local school budget, a closing or consolidation, a restructuring, or a change in the local school program, when such an elimination is not a ‘reduction in force’ (RIF) or ‘abolishment.’”

<sup>9</sup> 23-N-13 Appeal at 3.

<sup>10</sup> 24-N-13 Appeal at 4.

<sup>11</sup> *D.C. Nurses Ass’n v. D.C. Dep’t of Mental Health*, 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)).

<sup>12</sup> *UDC Faculty Ass’n v. UDC*, 64 D.C. Reg. 5132, Slip Op. No. 1617 at 2, PERB Case No. 16-N-01 (2017).

<sup>13</sup> *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. 874 at 9, PERB Case No. 06-N-01 (2007).

<sup>14</sup> D.C. Official Code § 1-617.08(a).

<sup>15</sup> *UDC Faculty Ass’n*, Slip Op. No. 1617 at 4.

<sup>16</sup> D.C. Official Code § 1-617.08(b).

Pursuant to § 1-605.02(5) of D.C. Official Code, 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.<sup>17</sup> The Board will separately consider the negotiability of each of the matters in a dispute.<sup>18</sup>

#### IV. Analysis

There are two (2) proposals which DCPS has identified as nonnegotiable subjects of bargaining. The chronology of those proposals is set forth below.

##### A. Article 4 (Teacher Transfer Policy)

**On April 9, 2024, DCPS sent WTU a proposal to strike certain language from the CBA, as follows:**

##### 4.4. Mutual Consent

4.4.1. No Teacher shall be placed at a school without the Teacher's and the Supervisor's consent, except as provided for in this Agreement ("mutual consent").

##### 4.5. Performance-Based Excessing Policy

##### 4.5.4. Placement of Excessed Teachers

4.5.4.1 The placement of excessed teachers shall be subject to the mutual consent policies outlined in this Agreement.<sup>19</sup>

**On May 17, 2024, WTU sent DCPS a counterproposal, presenting the Agency with the following three choices:**

- (1) Retain the current versions of Articles 4.4 and 4.5.4.1;
- (2) Revert to the excessing provisions from a prior CBA; or
- (3) Strike Articles 4.4 and 4.5.4.1 as requested, but replace them with the following new language:

Notwithstanding any other provision of this agreement, each excessed teacher shall be guaranteed a placement in DCPS for the following school year no later than July 31, except when there are no openings systemwide for which the Teacher qualifies.<sup>20</sup>

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<sup>17</sup> *FOP/Protective Serv. Police Dep't Labor Comm. v. DGS*, 62 D.C. Reg. 16505, Slip Op. 1551 at 1, PERB Case No. 15-N-04 (2015).

<sup>18</sup> *UDC Faculty Ass'n*, Slip Op. No. 1617 at 2-3.

<sup>19</sup> 24-N-13 Appeal at 2.

<sup>20</sup> 24-N-13 Appeal at 3. In WTU's May 17, 2024, counterproposal, the proposed language regarding excessed teachers was not given an article number.

**On May 28, 2024, DCPS sent WTU a counterproposal, rejecting options (1) and (2), and proposing the following language as an alternative to option (3):**

Notwithstanding any other provision of this agreement, DCPS will make its best efforts to provide each eligible excessed teacher a placement in DCPS for the following school year.<sup>21</sup>

**On June 24, 2024, WTU sent DCPS another counterproposal, rejecting the alternate version of option (3) and proposing the following new language, labeled Article 4.4.8:**

4.4.8. Notwithstanding any other provision of this agreement, no Teacher shall be separated as a result of being excessed, except when there are no vacant positions systemwide for which the Teacher qualifies.<sup>22</sup>

**On June 27, 2024, DCPS responded to WTU, declaring the proposed Article 4.4.8. nonnegotiable.**<sup>23</sup>

### **DCPS' Position**

DCPS acknowledges that it bargained over WTU's May 17, 2024, counterproposal when it responded with its own counterproposal on May 28, 2024.<sup>24</sup> However, DCPS argues that WTU's June 24, 2024, counterproposal differs materially from the previous one because it places conditions on management's right, under D.C. Official Code §1-617.08(a)(2) and (3), to separate excessed teachers.<sup>25</sup> Thus, DCPS denies waiving non-negotiability concerning WTU's June 24, 2024, counterproposal.<sup>26</sup>

DCPS argues that at a minimum, WTU's June 24, 2024, counterproposal is nonnegotiable because it interferes with management's right, under D.C. Official Code §1-617.08(a)(3), "[t]o relieve employees of duties because of lack of work or other legitimate reasons."<sup>27</sup> DCPS also notes that D.C. Official Code § 1-624.08(j) of the CMPA expressly provides that "reductions in force" or "abolishment of positions" by an agency "shall not be deemed negotiable."<sup>28</sup>

### **WTU's Position**

WTU argues that, under Board precedent, where an agency strikes language in a union's proposal and presents a counterproposal, the agency has waived its right to declare non-

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<sup>21</sup> 24-N-13 Appeal at 3. In DCPS' May 28, 2024, counterproposal, the proposed language regarding excessed teachers was not given an article number.

<sup>22</sup> 24-N-13 Appeal at 3.

<sup>23</sup> 24-N-13 Appeal at 4.

<sup>24</sup> 24-N-13 Answer at 2.

<sup>25</sup> 24-N-13 Answer at 2-3 (citing *FEMS and AFGE Local 3721*, 51 D.C. Reg. 4158, Slip Op. No. 728 at 2, fn. 6, PERB Case No. 02-A-08 (2003)).

<sup>26</sup> 24-N-13 Answer at 2-4.

<sup>27</sup> 24-N-13 Answer at 4.

<sup>28</sup> 24-N-13 Answer at 4.

negotiability.<sup>29</sup> WTU contends that DCPS waived its right to declare WTU's June 24, 2024 counterproposal nonnegotiable because, earlier in the current negotiations, DCPS engaged in substantive bargaining over the subject of excessing.<sup>30</sup>

Separate from the issue of waiver, WTU acknowledges that D.C. Official Code § 1-617.08(a)(2) creates a management right to discharge employees.<sup>31</sup> However, WTU contends that this management right applies solely to discharges for cause.<sup>32</sup> WTU asserts that excessing occurs when a teacher's position is eliminated and, therefore, excessing is not a reflection of the teacher's performance or conduct.<sup>33</sup> WTU contends that, because there is no "cause" for termination when a teacher is excessed, WTU's June 24, 2024 counterproposal to add Article 4.4.8. to the CBA does not infringe on management's right to discharge employees for cause.<sup>34</sup> Thus, WTU argues, its June 24, 2024, counterproposal is negotiable.<sup>35</sup>

WTU also argues that the Board rejected a similar assertion of non-negotiability regarding a proposal which sought to require DCPS to assign excessed employees to vacant positions.<sup>36</sup> WTU asserts that, in that matter, the Board rejected DCPS' argument that the proposal interfered with the Agency's right to assign, transfer, RIF and discipline employees.<sup>37</sup> WTU contends that the Board has established that, under the CBA, there is a "clear distinction between excessing and a RIF."<sup>38</sup> WTU also contends that the Board previously held that a proposal by WTU to expand just cause protection for probationary DCPS employees was negotiable, as the CMPA already limits DCPS' management right to impose discipline for cause.<sup>39</sup>

Regarding relief, WTU requests that the Board find WTU's June 24, 2024 counterproposal concerning teacher transfer policy to be negotiable.<sup>40</sup> WTU asks that, if the Board finds any portion of that counterproposal nonnegotiable, the Board sever it from the remainder.<sup>41</sup>

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<sup>29</sup> 24-N-11 Appeal at 6 (citing *AFGE Local 383, et al. v. RHC, et al.*, 68 D.C. Reg. 40, Slip Op. No. 1798 at 9, PERB Case No. 21-N-03 (2021)).

<sup>30</sup> 24-N-13 Appeal (citing *AFGE Local 383, et al. v. RHC, et al.*, 68 D.C. Reg. 40, Slip Op. No. 1798 at 8-9 & fn. 45, PERB Case No. 21-N-03 (2021); *AFGE Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435, PERB Case No. 13-N-05 (2013)).

<sup>31</sup> 24-N-13 Appeal at 4.

<sup>32</sup> 24-N-13 Appeal at 4 (citing *WTU, Local 6 v. DCPS*, 46 D.C. Reg. 8090, Slip Op. No. 450 at 11, fn. 9, PERB Case No. 95-N-01 (1999)).

<sup>33</sup> 24-N-13 Appeal at 4.

<sup>34</sup> 24-N-13 Appeal at 4.

<sup>35</sup> 24-N-13 Appeal at 4; Reply Brief at 2-4.

<sup>36</sup> 24-N-13 Appeal at 5 (citing *AFSCME, Local 2921 v. DCPS*, 65 D.C. Reg. 11099, Slip Op. No. 1677, PERB Case No. 18-N-02 (2018)).

<sup>37</sup> 24-N-13 Appeal at 5 (citing *AFSCME, Local 2921*, Slip Op. No. 1677 at 9).

<sup>38</sup> 24-N-13 WTU Reply Brief at 4.

<sup>39</sup> 24-N-13 Appeal at 5 (citing 24-N-13 Appeal at 4 (citing *WTU, Local 6*, Slip Op. No. 450 at 11-12)).

<sup>40</sup> 24-N-13 Appeal at 6.

<sup>41</sup> 24-N-13 Appeal at 6.

## Board's Conclusion

Pursuant to Board precedent, there is a presumption in favor of negotiability<sup>42</sup> and thus, the party declaring a proposal nonnegotiable has the burden to prove non-negotiability.<sup>43</sup> In this case, DCPS asserts that Article 4.4.8. is nonnegotiable because it infringes on management's right, under D.C. Official Code § 1-617.08(a)(2), (3), and 1-624.08(j) of the CMPA, to separate excessed teachers.<sup>44</sup> Thus, DCPS has the burden to demonstrate that Article 4.4.8. is nonnegotiable.

DCPS has not met its burden to show non-negotiability. The Board finds that § 1-617.08(a)(2) is inapplicable to the instant case, as that provision only addresses hiring, promotion, transfer, assignment, retention, and discipline for cause, while excessing constitutes separation which is not for cause.<sup>45</sup> The Board further concludes that § 1-624.08(j) is inapplicable to this matter, as that provision solely governs abolishment, and Article 4.5.1.1. of the current CBA explicitly states that excessing does not constitute abolishment. Section 1-617.08(a)(3) of the CMPA grants management the sole right to relieve employees of their duties due to lack of work or other legitimate reasons. However, the Board has established that, while the decision of which employees to excess constitutes a nonnegotiable management right, the agency's obligation and process for transferring those excessed employees does not.<sup>46</sup>

Here, WTU's proposal concerns DCPS' post-excess process and obligations. It does not purport to dictate how DCPS selects employees for excessing. Thus, the Board finds that Article 4.4.8. is negotiable.<sup>47</sup>

### B. Articles 24.7. (Athletic Trainers)

**In early September of 2023, WTU sent DCPS a proposal to add Article 24.7. to the CBA. The proposed Article 24.7. contained the following new language regarding athletic trainers:**

#### 24.7. Athletic Trainers

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<sup>42</sup> *AFGE, Local 3721 v. FEMS*, 64 D.C. Reg. 13378, Slip Op. No. 1641, PERB Case No. 16-N-03 (2017).

<sup>43</sup> *Teamsters, Local 639 v. DCPS*, 38 D.C. Reg. 6693, Slip Op. No. 263 at 13, PERB Case Nos. 90-N-02, 90-N-03, & 90-N-04 (1990).

<sup>44</sup> 24-N-13 Answer at 2-4.

<sup>45</sup> Excess is a process through which unneeded teachers are laid off; it is not a disciplinary measure. *See e.g., WTU, Local 6*, Slip Op. No. 450 at 8-11.

<sup>46</sup> *See AFSCME, Local 2921*, Slip Op. No. 1677 at 8-9 (holding that a proposal requiring DCPS to base excessing decisions on seniority was nonnegotiable, while a proposal requiring DCPS to assign excessed employees to vacant positions was negotiable).

<sup>47</sup> Additionally, the Board notes that even if the subject of excessed employee transfer was nonnegotiable, DCPS waived any claims of non-negotiability when it responded to WTU's May 17, 2024, counterproposal with its May 28, 2024, counterproposal. The Board has established that waiver occurs where, as here, the agency strikes language from a proposal and issues a counterproposal without having asserted that the initial proposal was nonnegotiable. *AFGE Local 383, et al.*, Slip Op. No. 1798 at 8-9 & fn. 45 (citing *AFGE Local 631*, Slip Op. No. 1435).

24.7.1. Certification. All Athletic Trainers shall be certified through the Board of Certification and meet the requirements outlined by the job requirements of DCPS.

24.7.2. Each DCPS middle school, educational center with grade 6 and above, and high school will be assigned a 1.0 FTE athletic trainer.

24.7.3. Each Athletic Trainer shall be provided with the resources necessary to function as health care providers, including safe and healthy facilities, and adequate equipment and supplies.

24.7.3.1. Automated external defibrillators (AEDs) and Stop the Bleed kits shall be made available and readily accessible within three minutes of all spaces where athletic events and/or practices are held. As these activities may occur simultaneously, multiples of these items may be required. Each athletic trainer will have an AED and Stop the Bleed kit.

24.7.3.2. Athletic trainers shall have unrestricted access to appropriate shelter for students in case of emergencies, including adverse weather and community threats. Consideration will be given to management of such events at each venue utilized by students for athletic participation.

24.7.3.3. Athletic trainers shall have immediate access to communicate with security personnel in case of emergency. This may include but is not limited to landline telephone access where cellular service is not reliable, walkie-talkies, “panic buttons”, etc.

24.7.3.4. The athletic trainer may remove themselves from any situation they deem a threat to their personal safety without fear of reprisal. Athletic trainers often work in environments where people are emotionally charged, security is not present, and the public has unrestricted access to their workspace. The athletic trainer may remain sheltered until such a time the threat is fully resolved.

24.7.4 Athletic trainer presence will be prioritized as follows:

24.7.4.1 Collision sport (football) competitions and practices.

24.7.4.2 Contact sport (basketball, wrestling, soccer, indoor or outdoor track and field events, or cross-country) competitions and practices.

24.7.4.3 All other competitions as available.

24.7.4.4 All other practices as available.

24.7.5 No athletic trainer shall be scheduled away from their primary school assignment more than one (1) day/week, inclusive of event assignments.

24.7.6. If staffing is insufficient to meet this prioritization, then additional athletic trainers will be hired until these needs are met.

24.7.7. Per diem athletic trainers will be used to fill needs not met by full-time athletic trainer staffing and allow for substitute coverage during full-time athletic trainer absences. Per

diem athletic trainers will be utilized to supplement full-time athletic trainer staff shortages on a temporary basis not to exceed one academic semester or until full-time athletic trainers are identified and hired. DCPS will make good-faith efforts to recruit full-time athletic trainers.

24.7.8. ET15 Professional development days built into the DCPS calendar will be held as non-duty days for athletic trainers to engage in appropriate professional development.

24.7.9. The Saturdays and Sundays immediately bracketing a DCPS holiday will be held as non-duty days for athletic trainers.

24.7.10. Each athletic trainer will be granted an allotment of 200 hours of overtime per academic year to be used for the appropriate and thorough completion of their responsibilities, including administrative tasks and record-keeping.

24.7.11. A commercial electronic medical records (EMR) program will be purchased and maintained. This EMR will be evaluated and chosen in consultation with the athletic trainers and will meet the following needs:

24.7.11.1. Electronic signatures for athletic participation documents.

24.7.11.2. Upload required documents for athletic participation, such as the Universal Health Certificate, Asthma Action Plan, Anaphylaxis Plan, etc.

24.7.11.3. Streamline communication with parents/guardians.

24.7.11.4. Streamline communication with outside providers such as physicians, hospitals, etc.

24.7.11.5. Interface with ASPEN to eliminate time gaps in notification of student eligibility.

24.7.11.6. Maintain medical documentation of injuries and treatments.

24.7.11.7. Generate reports for coaches and end-of-year data.<sup>48</sup>

**On November 29, 2023, DCPS responded, declaring the entire proposal nonnegotiable.<sup>49</sup>**

**On April 9, 2024, WTU sent DCPS a new version of the proposal.<sup>50</sup>**

**On April 25, 2024, DCPS responded, declaring some portions of the new version to be nonnegotiable.<sup>51</sup> DCPS has since partially withdrawn that declaration of non-negotiability.<sup>52</sup> However, DCPS still asserts that the following provisions are nonnegotiable:**

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<sup>48</sup> 24-N-11 Appeal at 2.

<sup>49</sup> 24-N-11 Appeal at 2.

<sup>50</sup> 24-N-11 Appeal at 2.

<sup>51</sup> 24-N-11 Appeal at 2.

<sup>52</sup> 24-N-11 Answer at 2.



24.7.2. For purposes of Article 20, the term “non-teaching duties” for an Athletic Trainer shall be defined as duties related to their special field and pursuant to the Board of Certification, Inc. (BOC) and DC Board of Medicine.

24.7.5 Each DCPS high school will be assigned a 1.0 FTE certified athletic trainer according to the following staffing ratio allocation:

<u>FTE Athletic Trainer (ET15/11 month)</u>	<u>1 for every high school.</u>	
<u>Part-time Athletic Trainer</u>	<u>For high schools with more than 750 student athletes, 1 for every 750 student-athletes.</u>	<u>Allocations are rounded to the nearest 0.5. A high school with 1125 student-athletes receives one full time Athletic Trainer and one part- time Assistant Athletic Trainer.</u>

24.7.6. Each DCPS middle school and educational centers with grade 6 and above will be assigned a 1.0 FTE certified athletic trainer according to the following staffing ratio allocation:

<u>FTE Athletic Trainer (ET15/10 month)</u>	<u>1 for every middle school with a football team.</u>	
<u>FTE Floater Athletic Trainer (ET15/10 month)</u>	<u>1 for every 5 middle schools with an athletic program (not including middle schools with football).</u>	<u>Duties and assignments will be equitable based on number of student athletes and sports teams.</u>

24.7.9. Each Athletic Trainer shall be provided with the resources necessary to carry out the job duties assigned by DCPS, including:

24.7.9.1. Automated external defibrillators (AEDs) and Stop the Bleed kits, or comparable resources, shall be made available and readily accessible within three minutes of all spaces where athletic events and/or practices are held. As these activities may occur simultaneously, multiples of these items may be required. Each athletic trainer will have an AED and Stop the Bleed kit, or equivalent resources as determined by DCPS.<sup>53</sup>

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<sup>53</sup> 24-N-11 at 2. There were additional portions of the April 9, 2024, proposal concerning athletic trainers which DCPS concluded concerned management rights. However, DCPS waived the non-negotiability of those provisions. Thus, those portions of Article 27.4. do not affect the Board’s determinations and are not discussed herein.

24.7.9.2. Athletic trainers shall have unrestricted access to appropriate shelter for students in case of emergencies, including adverse weather and community threats. Consideration will be given to management of such events at each venue utilized by students for athletic participation.

24.7.9.3. Athletic trainers shall have immediate access to communicate with security personnel in case of emergency.<sup>54</sup> This may include but is not limited to landline telephone access where cellular service is not reliable, walkie-talkies, “panic buttons”, etc, or comparable resources.

24.7.9.5. Athletic Trainers will not be assigned to off-campus athletic venues that do not provide restrooms.<sup>55</sup>

### **DCPS’ Position**

As a preliminary matter, DCPS argues that WTU’s negotiability appeal is untimely, and asserts that the Board must address the issue of timeliness before it can make a substantive negotiability determination regarding Article 24.7.<sup>56</sup> DCPS contends that under Board Rule 532.2, a negotiability appeal must be filed no later than thirty-five (35) days after a written assertion of non-negotiability.<sup>57</sup> DCPS argues that, with the exception of Article 24.7.9.5.,<sup>58</sup> WTU’s April 9, 2024 proposal regarding athletic trainers is substantively unchanged from its September 2023 proposal regarding athletic trainers.<sup>59</sup> Thus, DCPS asserts that, aside from Article 24.7.9.5., the negotiability appeal impermissibly attempts to “turn back the clock and manufacture a second chance at challenging DCPS’s non-negotiability declarations of November 2023.”<sup>60</sup>

Turning to the substantive issues, DCPS argues that Article 24.7.2 is nonnegotiable because it “adds term definitions to the Union’s proposed Article 20 [“Relief from Non-Teaching Duties”], which itself has been declared non-negotiable by the Agency.”<sup>61</sup>

DCPS also argues that Articles 24.7.5. and 24.7.6. are nonnegotiable, as those provisions infringe on management’s right to hire, promote, transfer, assign, and retain employees in positions within the agency, as established in D.C. Official Code § 1-617.08(a)(2).<sup>62</sup> DCPS further contends that Articles 24.7.5. and 24.7.6. are nonnegotiable because those provisions interfere with management’s right, under D.C. Official Code § 1-617.08(a)(1), (4), and (5)(A)(B), to direct

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<sup>54</sup> DCPS has withdrawn its assertion of non-negotiability regarding the first sentence of Article 24.7.9.3., but that sentence is included herein for context. 24-N-11 Appeal at 2.

<sup>55</sup> 24-N-11 Answer at 4-10. In its April 25, 2024, counterproposal, DCPS also asserted non-negotiability regarding several additional proposals, which WTU designated as Articles 24.7.11-24.7.14. 24-N-11 Answer at 6. However, because WTU does not appeal DCPS’ declarations of non-negotiability regarding Articles 24.7.11-24.7.14., those proposals are not discussed herein.

<sup>56</sup> 24-N-11 Answer at 3 (citing *WTU, Local 6*, Slip Op. No. 450 at 2).

<sup>57</sup> 24-N-11 Answer at 3 (citing Board Rule 532.2).

<sup>58</sup> 24-N-11 Answer at 10.

<sup>59</sup> 24-N-11 Answer at 3-6, 10.

<sup>60</sup> 24-N-11 Answer at 10.

<sup>61</sup> 24-N-11 Answer at 7.

<sup>62</sup> 24-N-11 Answer at 8.

employees, maintain Agency operational efficiency, determine organization of the Agency, and determine the number and types of positions assigned organizationally.<sup>63</sup> Additionally, DCPS asserts that Articles 24.7.5. and 24.7.6. are nonnegotiable because those provisions would create mandatory student-to-teacher ratios, and the Board has established that proposals dictating class size are nonnegotiable.<sup>64</sup>

DCPS asserts that Articles 24.7.9.1.; 24.7.9.2., and 24.7.9.3. are nonnegotiable because those provisions seek to impose strict limitations on DCPS' ability to determine its own emergency protocol, emergency communications, and equipment needs, thereby violating D.C. Official Code § 1-617.08(a)(5)(C)(D) and (6).<sup>65</sup> DCPS argues that “[b]oth emergency and communications equipment are precisely the type of technology contemplated by D.C. Official Code § 1-617.08(5)(c) – technology ‘used to perform the agency’s mission.’”<sup>66</sup>

Lastly, although DCPS concedes that WTU’s proposal regarding Article 24.7.9.5. is timely, DCPS argues that Article 24.7.9.5. is substantively nonnegotiable, as it infringes on the management right to assign employees, as established under D.C. Official Code § 1-617.08(a)(2).<sup>67</sup>

### **WTU’s Position**

WTU argues that its negotiability appeal is timely.<sup>68</sup> WTU asserts that the version of Article 24.7 which it proposed on April 9, 2024, is significantly different from the version of Article 24.7 which it proposed in September of 2023.<sup>69</sup> WTU contends that between September of 2023 and April 9, 2024, the Union “removed language related to certification, built in added discretion for DCPS in numerous provisions, and revised workload provisions to provide student-to-athletic trainer ratios.”<sup>70</sup> WTU asserts that the significance of these changes is evidenced by DCPS’ generalized, overarching declaration of non-negotiability regarding the September 2023 proposal, as compared to the Agency’s in-depth, line-by-line declaration of non-negotiability concerning the April 9, 2024, proposal.<sup>71</sup>

Additionally, WTU argues that its proposal concerning Article 24.7.2. is substantively negotiable.<sup>72</sup> WTU asserts that, when read in conjunction with Article 20 [“Relief from Non-Teaching Duties”], Article 24.7.2. permits DCPS to freely assign duties to athletic trainers, while “require[ing] DCPS to follow a process of impacts and effects bargaining if it starts to assign duties

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<sup>63</sup> 24-N-11 Answer at 8.

<sup>64</sup> 24-N-11 Answer at 8-9 (citing *WTU, Local 6*, Slip Op. No. 450 at 13, 17-18).

<sup>65</sup> 24-N-11 Answer at 9-10 (citing *Teamsters Local 446 v. D.C. Gen. Hosp.*, 42 D.C. Reg. 5482, Slip Op. No. 336 at 2, PERB Case No. 92-N-05 (1995)).

<sup>66</sup> 24-N-11 Answer at 9-10 (citing *Teamsters Local 446*, Slip Op. No. 336 at 2).

<sup>67</sup> 24-N-11 Answer at 10.

<sup>68</sup> 24-N-11 Appeal at 2-4.

<sup>69</sup> 24-N-11 Appeal at 3.

<sup>70</sup> 24-N-11 Appeal at 3.

<sup>71</sup> 24-N-11 Appeal at 3.

<sup>72</sup> 24-N-11 Appeal at 9-11.

that have not traditionally been performed by athletic trainers.”<sup>73</sup> WTU also notes that Article 24.7.2. establishes premium pay, which is consistent with D.C. Official Code § 1-617.17(b).<sup>74</sup>

WTU argues that Articles 24.7.5. and 24.7.6. are substantively negotiable because those provisions concern staffing ratios, which are distinguishable from class size.<sup>75</sup> WTU asserts that by establishing the number of students for whom athletic trainers provide services, Articles 24.7.5. and 24.7.6. address workload, a subject which the Board has found to be negotiable.<sup>76</sup>

WTU contends that Articles 24.7.9.1.; 24.7.9.2.; and 24.7.9.3. are negotiable, as those provisions would ensure that athletic trainers have access to appropriate health and safety equipment, as well as unrestricted access to appropriate shelter, while giving DCPS discretion to determine the precise equipment and venues to be provided.<sup>77</sup> WTU also argues that Articles 24.7.9.1.; 24.7.9.2.; and 24.7.9.3. are negotiable because they relate to the health and safety of athletic trainers, which is a mandatory subject of bargaining.<sup>78</sup>

Lastly, WTU contends that Article 24.7.9.5. is substantively negotiable, as that provision would protect the safety of athletic trainers by ensuring they have access to restrooms at work.<sup>79</sup> WTU argues the Board has established that proposals which would keep employees out of dangerous work environments are negotiable.<sup>80</sup>

Concerning relief, WTU requests that the Board finds the April 9, 2024, version of WTU’s proposal regarding athletic trainers to be negotiable.<sup>81</sup> WTU asks that if the Board finds any portion of that version nonnegotiable, the Board severs that portion from the remainder.<sup>82</sup>

### **Board’s Conclusion**

The Board has held that there is a presumption in favor of negotiability.<sup>83</sup> Thus, the Board has established that the party declaring a proposal nonnegotiable has the burden to prove non-negotiability.<sup>84</sup> Here, DCPS is the party asserting non-negotiability, so it has the burden to show that Articles 24.7.2.; 24.7.5.; 24.7.6.; 24.7.9.1.-24.7.9.3; 24.7.11.1.-24.7.11.5.; and 24.7.12.-24.7.14 are nonnegotiable due to untimeliness; and that those provisions, as well as Article 24.7.9.5., are nonnegotiable because they infringe on the various management rights set forth in

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<sup>73</sup> 24-N-11 Appeal at 10.

<sup>74</sup> 24-N-11 Appeal at 10.

<sup>75</sup> 24-N-11 Appeal at 12.

<sup>76</sup> 24-N-11 Appeal at 12-13 (citing *UDC Faculty Ass’n*, Slip Op. No. 1617 at 34-40).

<sup>77</sup> 24-N-11 Appeal at 13-16.

<sup>78</sup> 24-N-11 Appeal at 14-15 (citing *FOP/DOC Labor Comm. v. DOC.*, 67 D.C. Reg. 8532, Slip Op. No. 1744 at 6, PERB Case No. 20-U-24 (2020); *Teamsters, Local 639*, Slip Op. No. 263 at 5-6).

<sup>79</sup> 24-N-11 Appeal at 16.

<sup>80</sup> 24-N-11 Appeal at 16 (citing *Teamsters, Local 639*, Slip Op. No. 263 at 5-6). DCPS’ Appeal also presents arguments that Article 24.7.3.5.; 24.7.10; and 24.7.15. are negotiable. 24-N-11 Appeal at 11-12, 17-18. The Board does not address those arguments herein, as DCPS has waived its assertion of non-negotiability regarding those articles. 24-N-11 Answer at 7, 10.

<sup>81</sup> 24-N-11 Appeal at 18.

<sup>82</sup> 24-N-11 Appeal at 18.

<sup>83</sup> *AFGE, Local 3721*, Slip Op. No. 1641.

<sup>84</sup> *Teamsters, Local 639*, Slip Op. No. 263 at 13.

D.C. Official Code § 1-617.08(a) of the CMPA. WTU has requested severance of the issues. Herein, the Board sets forth a separate negotiability analysis for each disputed portion of Article 24.7., addressing timeliness (where applicable), as well as substantive negotiability.

Regarding Article 24.7.2, DCPS has not met its burden to demonstrate non-negotiability due to untimeliness. Under Board Rule 532.2, a negotiability appeal must be filed no later than thirty-five (35) days after a written communication from the other party to the negotiations asserting that a matter is nonnegotiable or otherwise not within the scope of collective bargaining under the CMPA. The Board has established that a modified proposal will only be dismissed as untimely if the change is merely superficial.<sup>85</sup> The version of Article 24.7.2. which WTU proposed to DCPS on April 9, 2024, discusses “non-teaching duties,” a subject which was not covered in WTU’s September 2023 proposal. WTU filed the negotiability appeal regarding Article 24.7. on May 28, 2024, thirty-three (33) days after DCPS’ April 25, 2024, declaration of non-negotiability. Thus, the Board finds that WTU negotiability appeal regarding Article 24.7.2. is timely, under Board Rule 532.2.

The Board further finds that DCPS has not met its burden to demonstrate that Article 24.7.2. is nonnegotiable. On July 29, 2024, in the related matter of PERB Case No. 24-N-04, DCPS and WTU submitted a joint stipulation which stated that DCPS waived non-negotiability regarding Article 20 (“Relief from Non-Teaching Duties”). Thus, the argument that Article 24.7.4. impermissibly seeks to add definitions to a nonnegotiable contract provision is moot. For the reasons stated, the Board finds that Article 24.7.2. is negotiable.

Concerning Articles 24.7.5 and 24.7.6., the Board concludes that DCPS has not met its burden to demonstrate untimeliness. The versions of Article 24.7.5. and 24.7.6. which WTU proposed to DCPS on April 9, 2024, address “staffing ratio,” a subject which was not covered in WTU’s September 2023 proposal. Thus, the difference is more than superficial. WTU filed the negotiability appeal regarding Article 24.7. on May 28, 2024, thirty-three (33) days after DCPS’ April 25, 2024, declaration of non-negotiability. Thus, the Board finds that WTU’ negotiability appeal regarding Article 24.7.5. and 24.7.6. is timely, pursuant to Board Rule 532.2.

Regarding substantive negotiability, D.C. Official Code § 1-617.08(a)(2) grants management the right to assign employees, and § 1-617.08(a)(1), (4), and (5)(A)(B) give management authority to determine the number and types of positions assigned within DCPS. Articles 24.7.5. and 24.7.6. explicitly designate which schools “will be assigned a 1.0 FTE certified athletic trainer according to the...staffing ratio allocation.” Articles 24.7.5. and 24.7.6. also determine the number of athletic trainer positions DCPS can create. The Board has held that basic work scheduling within an established tour of duty is negotiable for DCPS faculty.<sup>86</sup> However, the Board has concluded that faculty-to-student ratios, such as the ones proposed here, infringe on

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<sup>85</sup> *WTU, Local 6*, Slip Op. No. 450 at 3.

<sup>86</sup> *UDC Faculty Ass’n*, Slip Op. No. 1617 at 34-40 (finding that provisions regarding the notice required for changes to faculty schedules were negotiable).

the management rights established under D.C. Official Code § 1-617.08(a).<sup>87</sup> For the reasons stated, the Board finds that Articles 24.7.5. and 24.7.6. are nonnegotiable.

Turning to Articles 24.7.9.1.; 24.7.9.2., and 24.7.9.3., the Board finds that WTU's negotiability appeal is untimely. Those provisions existed in WTU's September 2023 proposal in nearly identical form, although they were labeled as Articles 24.7.3.1.; 24.7.3.2.; and 24.7.3.3. DCPS declared those provisions nonnegotiable on November 29, 2023. The renumbering and slight rephrasing from one proposal to the next constitute changes which are merely superficial. WTU's negotiability appeal in PERB Case No. 24-N-11 was submitted on May 28, 2024, one hundred and eighty-two (182) days after the written assertion that the content of Articles 24.7.9.1.; 24.7.9.2., and 24.7.9.3. was nonnegotiable. Because that portion of the negotiability appeal is untimely under the thirty-five (35) day appeal deadline set forth in Board Rule 532.2, the Board finds it unnecessary to address the substantive negotiability of those provisions.

Lastly, the Board finds that DCPS has not met its burden to show that Article 24.7.9.5. is nonnegotiable. Athletic trainers' access to restrooms in the workplace relates to health and safety, which the Board has established is a mandatory subject of bargaining.<sup>88</sup> DCPS is not required to bargain over health and safety proposals which interfere with its management right, as established under D.C. Official Code § 1-617.08(a), to determine when work will occur and to whom it will be assigned.<sup>89</sup> However, Article 24.7.9.5. does not constrain which athletic trainers are assigned to a specific task or when that task is accomplished. Thus, the Board finds that Article 24.7.9.5. is negotiable.

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<sup>87</sup> *UDC Faculty Ass'n*, Slip Op. No. 1617 at 34-40.

<sup>88</sup> *FOP/DOC Labor Comm.*, Slip Op. No. 1744 at 6-7 (holding that DOC was required to bargain with FOP over health and safety conditions related to the pandemic); *Teamsters, Local 639*, Slip Op. No. 263 at 5-6 (finding that DCPS was required to bargain with the Teamsters over a proposal aimed to prevent employees from working in dangerous locations alone).

<sup>89</sup> *AFSCME, Local 1959 v. OSSE*, 68 D.C. Reg. 1349, Slip Op. No. 1766 at 4, PERB Case No. 21-N-01 (2021) (citing *AFGE, Local 1985*, 55 FLRA 1145, 1148 (1999)).

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. WTU's proposal to add Article 4.4.8. is negotiable.
2. WTU's proposal to add Article 24.7.2. is negotiable.
3. WTU's proposal to add Article 24.7.5. is nonnegotiable.
4. WTU's proposal to add Article 24.7.6. is nonnegotiable.
5. WTU's proposal to add Article 24.7.9.1. is nonnegotiable.
6. WTU's proposal to add Article 24.7.9.2. is nonnegotiable.
7. WTU's proposal to add Article 24.7.9.3. is nonnegotiable.
8. WTU's proposal to add Article 24.7.9.5. is negotiable.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

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

October 17, 2024  
**Washington, D.C.**

## **APPEAL RIGHTS**

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.