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

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| In the Matter of: | ) | |
| | ) | |
| American Federation of Government Employees, Local 631, | ) | |
| | ) | |
| Petitioner, | ) | PERB Case No. 08-N-02 |
| | ) | |
| and | ) | Opinion No. 965 |
| | ) | |
| District of Columbia Department of Public Works | ) | |
| | ) | |
| and | ) | |
| | ) | |
| District of Columbia Office of Property Management, | ) | |
| | ) | |
| Respondents. | ) | |
| | ) | |

## DECISION AND ORDER ON NEGOTIABILITY APPEAL

### I. Statement of the Case

On March 13, 2008, the American Federation of Government Employees, Local 631 ("Petitioner" or "Union") filed a Negotiability Appeal ("Appeal") in the above-captioned matter. The District of Columbia Department of Public Works and District of Columbia Office of Property Management ("Respondents" or "Management") and the Petitioner have been engaged in negotiations for a successor agreement on working conditions. (Response at p. 2, Art. 23). The Respondents are represented by the Office of Labor Relations and Collective Bargaining ("Respondents" or "OLRCB"). The Petitioner submitted proposals on numerous proposals concerning 14 Articles which the Respondents assert are nonnegotiable. The Petitioner filed the Appeal in this case asking the Board to declare the proposals to be negotiable. The Respondents contend in their Response to the Negotiability Appeal ("Response") that the proposals are nonnegotiable.

### II. Background

The parties have been in negotiations for a successor agreement. In 2005, the City Council amended the Comprehensive Merit Personnel Act ("CMPA") at D.C. Code § 1-

617.08(a-1). The 2005 amendment provides that "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section." D.C. Code § 1-617.08(a-1) (Supp. 2005).

The Board has found that D.C. Code § 1-617.08(a-1) (Supp. 2005), as clarified by the legislative history, does nothing more than codify the Board's prior holding that management rights are permissive subjects of bargaining. See *District of Columbia Fire and Emergency Medical Services Department and American Federation of Government Employees, Local 3721*, 54 DCR 3167, Slip Op. No. 874 at p. 9, PERB Case No. 06-N-01 (February 16, 2007). Specifically, the Board has interpreted the amendment as follows:

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

*Id. at pgs. 8-9.*

The Board's complete discussion of the impact of the 2005 amendment to the CMPA can be found at *District of Columbia Fire and Emergency Medical Services and American Federation of Government Employees*, Local 3721, 54 DCR 3167, Slip Op. No. 874 at pgs. 4-9, PERB Case No. 06-N-01 (2007); see also, *American Federation of Government Employees, Local 631 and District of Columbia Water and Sewer Authority*, __DCR __, 54 DCR 3210, Slip Op. No. 877 at pgs. 4-9, PERB Case No. 05-N-02 (February 16, 2007). The Board shall review the current negotiability appeal in light of the above.

## III. Position of the Parties

At issue are the following Articles: **Article 3**, Section A - "*Union Security and Union Dues*"; **Article 6** - "*Employee Rights*" - Sections A and B; **Article 8** - Sections A(4), D and I "*Official Time for Union Officers and Stewards*"; **Article 18** - Section A, "*Use of District Government Facilities*"; **Article 23** - "*Equal Pay Equal Work*", **Article 24** - Section K - "*Merit Staffing*"; **Article 29** - Section A - "*Reduction in Force*"; **Article 30** - Sections A, C and E, "*Contracting Out*"; **Article 35** - "*Snow Emergency Operations*"; **Article 40** - "*Uniforms*"; unnumbered **Article** re: "*Alcohol and Drug Testing*"; unnumbered **Article** re: "*Personnel Files*" - Sections C, D and G; unnumbered **Articles** re: "*Electronic Communications*"; and unnumbered **Article** re: "*Employee License and Certification*".

The Union's proposals are set forth below. The proposals are followed by the: (1) Respondents' arguments in support of nonnegotiability, including comments found in the Response to the Negotiability Appeal ("Response") and Management's Chart of Nonnegotiable Articles ("Management's Chart" or "Chart"); (2) the Union's arguments in support of negotiability; and (3) the findings of the Board.

**Article 3: *Union Security and Union Dues***

> **Section A** - Union Dues Deduction
> The terms and conditions of this Agreement shall apply to all employees in the bargaining unit(s), described within this Agreement, without regard to Union membership. Employees covered by this Agreement have the right to join or refrain from joining the Union.
>
> The Employer agrees to deduct Union dues from each bargaining unit employee's bi-weekly pay upon receipt of the Form 277 Dues Authorization Form. Union dues withholding authorization may be canceled upon written notification to the Employer, by the Union and the Employee prior to the beginning of the thirty (30) calendar days before each annual anniversary of the effective date of this Agreement. The cancellation notice shall be effected on the annual anniversary date of this Agreement. *A cancellation notice which is signed within the thirty day period prior to the annual effective anniversary date, shall not be effected until the succeeding annual anniversary date.* Regardless of the provisions on the Form 277, when Union dues are canceled, the Employer shall

> withhold a service fee in accordance with Section B of this Article.

**Respondents:** Citing *Abood v. Detroit Board of Education*, 431 U.S. 209, n.31 (1977), the Respondents claim that the penultimate sentence in Article 3, Section A is illegal as it infringes upon the First Amendment right of free association. (See Management's Chart at p. 4). The Respondents contend that this sentence renders the proposal illegal as it would force a member "to continue paying union dues for as long as 13 months after deciding that he or she no longer wanted to be a union member." (Response at p. 4; see also Management's Chart of Nonnegotiable Articles or Text ("Chart").

**Union:** The Union asserts that "[t]his [proposal] does not infringe on any enumerated right listed in D.C. Code § 1-617.08. [Also,] D.C. Code § 1-617.07 authorizes the negotiation of union dues deductions including the process of termination. The [proposal] provides the procedure for termination of dues deductions and is a proper subject for bargaining under the law." (Appeal at p. 2).

**Board**: D.C. Code § 1-617.07, entitled "Union Security; dues deduction" addresses dues deductions and provides as follows:

> Any labor organization which has been certified as the exclusive representative shall, upon request, have its dues and uniform assessments deducted and collected by the employer from the salaries of those employees who authorize the deduction of said dues. Such *authorization*, costs, and *termination* shall be proper subjects of collective bargaining. . . (emphasis added).

The termination of an employee's authorization to have union dues deducted from his or her salary is expressly negotiable as provided in the above statutory provision. The Board finds that Article 3, Section A is **negotiable**.

**Article 4:** (The parties notified the Board in writing on May 16, 2008, that the Respondents withdraw the claim that Article 4, Section E is nonnegotiable.)

**Article 6 - *Employee Rights***

> **Section A** - *The Agency shall not impose any restraint, interference, coercion, or discrimination against employees in the exercise of their right to organize, participate in the Union and designate representatives of their own choosing for the purpose of collective bargaining, the prosecution of*

> *grievances, appeals, Union-Employer Cooperation, pursuit of actions before the PERB, City Council, the Mayor, Congress nor shall any restraining, interference, coercion, or discrimination be imposed upon duly designated employee representatives acting on behalf of an employee or group of employees covered by this Agreement. (emphasis added).*
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> **Section B** - Each employee shall have the right to bring matters of personal concern to the attention of the appropriate officials of management and/or the Union.

**Respondents:** The Respondents maintain that Section A is nonnegotiable because it "rejects any legal valid restraint" and "the unlimited freedom described in this provision would contravene the management right to direct employees and to maintain the efficiency of government operations as found in D.C. Official Code § 1-617.08(a)(1) and (4)". (Response at p. 5).

**Union:** Relying on *American Federation of Government Employees, Local 631 and D.C. Water and Sewer Authority*, Slip Op. No. 877 at pgs. 4-6, PERB Case No. 05-N-02, the Union contends that the "D.C. Government is required to bargain over all subjects which affect the terms and conditions of employment and has the discretion to bargain over management rights." (Appeal at p. 2).

**Board**: D.C. Code § 1-617.06 grants employees the right to organize and choose a representative of their choice. Here, the proposal would grant employees the right to exercise *"their right to organize, participate in the Union and designate representatives of their own choosing for the purpose of collective bargaining, the prosecution of grievances, [and] appeals."* The Respondents have not established how this proposal "rejects any legal valid restraint" found in D.C. Code § 1-617.06 (Response at p. 5) or how it would contravene the exercise of management rights to direct employees or maintain the efficiency of the District government operations. Since no employee appeals are brought before the City Council, the Mayor or Congress, the proposal presents no restraint on management rights. Therefore, the proposal in Article 6, Section A is **negotiable**.

**Article 8 - *Official Time for Union Officers and Stewards***

> **Section A** - *Official time is authorized for Union officers and Stewards to carry out contractual responsibilities which occur during their regularly scheduled tour of duty, as prescribed by this Article. Such responsibilities may include:*
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> * * *
>
> *4. Attending meetings with the Agency, the Mayor of D.C., the D.C. City Council, Congress, or any other official body;*
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> **Section F** (second paragraph) - *The Agency agrees that there shall be no restraint, interference, coercion, or discrimination against a Union Official for the performance of duties relating to the administration and enforcement of this Agreement.*
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> **Section I - *Administrative Leave to Attend a Union Function or Convention***[1]
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> *The Agency recognizes that the Union may designate employee members, selected or appointed to a Union Office or delegate to a Union function and agrees that, upon request, the employee will be granted administrative leave for the period of time required to be away from his/her job. Such requests will be submitted as far in advance as possible, but in no case less than five (5) working days prior to the day administrative leave is to begin.*

**Respondents:** Sections A and F – The Respondents assert that pursuant to D.C. Code § 1-617.04(a)(2), "[i]t is illegal to contribute financial or other support to a union, 'except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay'." (Response at pgs. 5-6). The Respondents claim that the "proposal has the potential to force the Agency to provide illegal support for the union [as] "'[i]t would allow official time for attending meetings with the Agency, the Mayor of D.C., the D.C. City Council, the U.S. Congress or any other official body." (Response at p. 5).

[1] The parties notified the Board in writing on May 16, 2008, that the Respondents withdraw their claim that Article 8, Section G is nonnegotiable.

The Respondents maintain that Article 8, "Section I would allow administrative leave, i.e., paid leave, for Union designated employees who are appointed or selected for a Union Office or to attend a union function. It is illegal for the Employer to provide financial support for the Union for other than purely representational activities. The proposal does not address whether or not the contemplated Union functions are purely representational in nature." (Response at p. 6).

**Union:** [2] The Union claims that Article 8, Section A.4 "permits Union officers and stewards the use of official time to attend meetings with representatives of the D.C. government, Congress, and other official bodies . . . [and] is not in conflict with any provisions of the laws of the District of Columbia or management rights. The section is an expression of the intent of D.C. Code § 1-617.11 requiring the Union to represent all employees, which includes presenting the views of employees to the representatives of the District of Columbia Government." (Appeal at p. 3).

The Union maintains that Section F, paragraph 2 "assures [that] union officials will be able to perform duties for administration and enforcement of the collective bargaining agreement without interference . . . [and] is a specific statement of the rights guaranteed by D.C. Code § 1-617.04, as union representatives." (Appeal at p. 3).

The Union asserts that "Section I does not infringe on management rights. [It] affects the terms and conditions of employees who are union members and representatives, permitting them to participate in Union activities without loss of pay." (Appeal at p. 3).

**Board**: Section A and Section F specify that the meetings attended will be for the purpose of carrying out contractual responsibilities, i.e., responsibilities concerning the representation of employees. Therefore, Article 8, Sections A and F are **negotiable.**

Article 8, Section I - Based on the information provided by the parties, the Board is unable to make a determination concerning the negotiability of the issue of administrative leave to attend a union function. Therefore, the Board is directing the parties to **brief** the proposal in Article 8, Section I. 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.

**Article 18 - *Use of District Government Facilities***

**Section A** - Union Space - Each Agency shall provide adequate office space for the Union for the transaction of union business.

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[2] The parties notified the Board on May 16, 2008, that the Union's proposal regarding Union officers and stewards involves Articles 8 and 9 in their previous Agreement. The Union has combined those articles into one article in this proposal, i.e., Article 8.

> Such suitable space will be located as close as practicable to the bargaining unit employees' work areas and enable employee(s) to consult with the Union in a confidential manner. Each Agency shall provide a telephone, desks and chairs, and electrical hook ups and access for computer equipment for the Union office. The union agrees to exercise reasonable care in using such space, and shall leave it in a clean and orderly condition.

**Respondents:** The Respondents claim that it is illegal to provide financial support to the Union. (See Chart, Art. 18). Article 18, Section A "requires the Employer to provide adequate office space equipped with a telephone, desks, chairs, electrical hook ups and access for computer equipment for the Union office. This is illegal since, once again, it goes beyond the permissible support that the Employer may provide to the Union because there is no guarantee in the proposal that the use of the resources to be provided will be limited exclusively to representational activity. See D.C. Official Code § 1-617.04 (2)." (Response at p. 6).

**Union:** The Union contends that "providing space for the Union to carry out its duties in representing employees does not infringe on any enumerated management rights and is not in violation of D.C. Code § 1-617.08(a)(2). The use of District of Columbia Facilities enables the Union to meet with employees and carry out its duties under the statute." (Appeal at p. 3).

**Board**: Union use of employer-provided office space has previously been declared negotiable by the Board. See *International Brotherhood of Police Officers, Local No. 445, AFL-CIO v. District of Columbia Department of Administrative Services*, Slip Op. No. 401 at p. 3, PERB Case No. 94-U-13 (1994), where the Board determined that "[s]uch office space, in our view, is a convenience for all employees in the same way that union bulletin boards or mailboxes are a convenience." *Id* at p. 3. Consistent with our holding in Slip Op. No. 401, we find that Article 18, Section A is **negotiable**.

> **Article 21:** (The parties notified the Board in writing on May 16, 2008, that Article 21 is the subject of a negotiability appeal in PERB Case No. 08-N-01.)

**Article 23 - *Equal Pay for Equal Work***

> *The Agency agrees to adhere to the principle of equal pay for equal work, pursuant to D.C. law, CMPA, Title XII, D.C. Code, Section 1-611.01(a)(2). Equal pay for substantially equal work shall be supported.*

> *It is further agreed that the Agency shall compensate employees at the higher rate of pay who are required to work additional duties that are significant and different than their position of record if the duties are classified at a higher rate of pay. An employee(s) assigned to unclassified duties for more than sixty (60) days shall be paid at the next higher rate of pay than the employee's official position of record.*

**Respondents:** The Respondents assert that this proposal "addresses compensation issues that properly belong in compensation bargaining. The instant negotiations concern working conditions, and the Board has ruled that attempting to intermix compensation matters in non-compensation bargaining is prohibited. Citing *D.C. Fire and Emergency Medical Services Department and AFGE, Local 3721*, Slip Op. No. 874, [PERB Case No. 06-N-01 (2007)]." (Response at pgs. 6-7, see also Chart, Art 23).

**Union:** The Union states that Article 23 does not infringe on any management rights and is an expression of the statutory commitment of the District of Columbia to provide equal pay for substantially equal work. The proposal affects terms and conditions of employment and is therefore a mandatory subject of bargaining. (See Appeal at p. 4).[3]

**Board**: A portion of Article 23 concerns wages. Consistent with our holding in *D.C. Fire and Emergency Medical Services Department and AFGE, Local 3721*, 54 dcr 3167, Slip Op. No. 874 at pgs. 22-23, PERB Case No. 06-N-01 (2007), we find that the proposal is **nonnegotiable** as a working condition and should be addressed in compensation negotiations.

**Article 24 - *Merit Staffing*** [4]

> **Section K** - Employees Affected by a RIF or Involuntary Demotions - When an employee has been downgraded through no fault of his/her own or affected by a reduction in force, he/she shall be given priority consideration regarding selection for any position vacancy which he/she formerly occupied and/or any position for which the employee meets the

[3] In their Management Chart, the Respondents claimed that this proposal is preempted by the Compensation Agreement. Citing *District of Columbia and Doctors' Council of the District of Columbia*, Slip Op. No. 182, PERB Case No. 87-R-05 (August 2, 1988). The Union asserts that *Doctors' Council* is a case that involves a recognition petition and makes no reference to the negotiability of noncompensation issues.

[4] The parties notified the Board in writing on May 16, 2008, that the Respondents withdrew their claim of nonnegotiability regarding Article 24, Sections a, b, d, e and g.

> minimum qualification or can perform the position with minimum training.

**Respondents**: The Respondents state that "Section K interferes with management's right to implement a reduction in force and, as such, is non-negotiable. *AFGE, Local 631 v. District of Columbia Water and Sewer Authority*, PERB Case No. 02-U-19, Slip Op. No. 730." (Response at p. 7).

**Union:** The Union counters that Section K assures that employees who are downgraded, through no fault of the employee, "will receive the priority consideration guaranteed by the District laws and Personnel Manual. . . . [It] affects the terms and conditions of employees and does not infringe on any management rights. Nothing in the Article is contrary to rights enumerated for employees in D.C. Code §§ 1-608.01 and 1-624.02. D.C. Code § 1-608.01 requires selections be made from a list of the highest qualified eligibles." (Appeal at p. 4).

**Board**: Management has the right to implement a reduction-in-force ("RIF"). The issue of giving priority consideration for reemployment to employees who are subject to a RIF is addressed by statute. D.C. Code § 1-624.02(a)(3) states that the District shall provide "priority reemployment consideration for employees separated" pursuant to a RIF. Chapter 24 of the District Personnel Manual ("DPM") provides for a "Reemployment Priority Program" at § 2427.1. The above proposal defines for management in what manner the employee is to be given priority consideration, i.e., how to establish the reemployment list.

The Board has held that "when one aspect of a subject matter, otherwise generally negotiable in other respects, is fixed by law, e.g., the CMPA, that aspect is nonnegotiable". *Teamsters Local Unions No. 639 and 730, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 43 DCR 7014, Slip Op. No. 403 at p. 4, PERB Case No. 94-N-06 (1994). Therefore, Section K is **nonnegotiable**.

> **Articles 25 and 26:** (The parties notified the Board in writing on May 16, 2008, that the Respondents withdrew their claim of nonnegotiabiity concerning Articles 25 and 26.)

> **Articles 27 and 28:** (The parties notified the Board in writing on May 16, 2008, that Articles 27 and 28 are addressed in the negotiability appeal in PERB Case No. 08-N-01.)

**Article 29 - *Reduction in Force* ["RIF"]**

> **Section A - Reduction in Force** - *Definition - The term reduction in force (RIF), as used in this Agreement means the separation of a permanent employee from his/her position of record; his/her reduction in grade or pay; or a reduction in rank, due to a lack of work, lack of funds, new technology/equipment that reduces staff needs, job consolidation, and/or displacement of an employee from their position during a reorganization.*

**Respondents:** The Respondents state that this proposal is a violation of D.C. Code § 1-617.08 (Management Rights) and D.C. Code § 1-624.01 [RIF provision]. The Respondents claim that "[t]his definition would limit the unabridged management discretion 'to identify positions for abolishment.' D.C. Code § 1-624.08(a). See also, *AFGE Local 631 v. District of Columbia Water and Sewer Authority*, [52 DCR 2510, Slip Op. No. 730], PERB Case No. 02-U-19 (2003). [The Respondents maintain that] both policies and procedures concerning RIFs are nonnegotiable." (Response at pgs. 7-8).

**Union:** The Union contends that "[t]his article does not impinge on the enumerated management rights under the statute and does not interfere with any statutory requirements of management in conducting a reduction in force. The section provides procedures for notification [to] the Union; bargaining over the impact and effect; and providing information to the Union on a reduction in force. [It] does not attempt to negotiate over any procedures which affect the terms and conditions of employment of employees, during a reduction in force." (Appeal at p. 6).

**Board:** D.C. Code § 1-624.08 (a) provides as follows:

> *Notwithstanding any other provision of law, regulation, or collective bargaining agreement* either in effect or to be negotiated while this legislation is in effect for the fiscal year ending September 30, 2000, and each subsequent fiscal year, *each agency head is authorized, within the agency head's discretion, to identify positions for abolishment.* (emphasis added).

Here, the Union's proposal attempts to limit the agency heads' discretionary authority to implement a RIF by defining what constitutes a RIF. The DPM, which implements the CMPA, defines a RIF. DPM § 2401.1 provides that "[e]ach personnel authority shall follow

these [RIF] regulations when releasing a competing employee from his or her competitive level when the release is required by any of the following: (a) Lack of work; (b) Shortage of funds; (c) Reorganization or realignment; or (d) The exercise of restoration rights as provided in 38 U.S.C. § 2021 *et seq.*" The proposed definition in Article 29, Section A is inconsistent with the definition found in the DPM. The statutory provision expressly authorizes each agency head the discretion to identify positions for abolishment "notwithstanding any other provision of law, regulation, or collective bargaining agreement".

The Board has held that "when one aspect of a subject matter, otherwise generally negotiable in other respects, is fixed by law, e.g., the CMPA, that aspect is nonnegotiable". *Teamsters Local Unions No. 639 and 730, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 43 DCR 7014, Slip Op. No. 403 at p. 4, PERB Case No. 94-N-06 (1994). Therefore, this proposal is **nonnegotiable**.

**Article 30 - *Contracting Out***

> **Section A - Contracting Out Conditions** - During the term of this Agreement, the Agency shall not contract out work normally performed by employees covered by this Agreement. The Agency may contract out work, only when the Director determines that manpower or equipment in the Department is not available to perform such work on a regular and/or overtime basis and provided the total cost to the Agency of the work performed by internal employees is more than the cost of contracting out or when it is determined by the Employer or Agency head that emergency conditions exist and such contracting out is deemed necessary. The Union shall receive written notice of all emergency no bid contracts.
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> If emergency conditions do not exist, the Agency agrees to inform the Union of its proposed contracting out and consult with the Union regarding any adverse impact (and effect) of such contracting out of employees covered by this Agreement and shall give the Union simultaneous notice of invitations to bid or requests for proposals to contract out.
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> * * *
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> **Section C – Analysis** - Prior to contracting out any bargaining unit work, the Agency shall conduct a cost analysis to determine any possible savings. The assessment of the cost of

> retaining the function in-house versus the cost of contracting shall be based upon a reasonable and realistic assessment of the costs related to both. The Agency shall include the costs of quality control and contract administration in assessing the cost of the contractor. The Agency shall give appropriate consideration to the impact and effect of loss of continuity and institutional knowledge in contracting out bargaining unit work. Upon completion of the cost analysis, the Union shall be provided with a copy of the analysis report and support documentation.
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> * * *
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> **Section E - Union-Management Meeting** - Upon being provided the information required in Section D, and at the request of the Union, the Agency shall meet with the Union within eight (8) calendar days to discuss, clarify, and respond to questions regarding the contents of the contracting out notification.

**Respondents:** The Respondents maintain that Article 30 "seeks to limit management's ability and flexibility to contract out. The subject of the entire Article is nonnegotiable . . . ." The Respondents claim that the proposal is in violation of D.C. Code § 1-617.08; a Mayoral Order; and Board precedent. (See Response at p. 8). Specifically, the Respondents cite *AFGE, Local 3721 v. DC Fire and Emergency Medical Services Dept.*, 46 DCR 7613, Slip Op. No. 390, PERB Case No. 94- N-04 (1994), where the "[the Board] wrote 'to contract out is a managerial matter concerning the operation of the agency or personnel authority . . . [The union's] proposal . . . contravenes management's sole right. It is therefore nonnegotiable.'" (Brackets in the original). (Response at p. 9).

The Respondents also rely on the Mayor's Order entitled "Policy, Criteria and Standards for Privatization of Government Function", 40 DCR 5362 Mayor's Order 93-92 (July 8, 1993), which sets out criteria for privatizing at page 3. The Respondents assert that "[t]he Order does address the interests of the unions and the employees at page 4, 40 DCR 5365. That section requires that 'after a decision to privatize has been made the government will . . . [c]onsult with the union about placement of employees'." (Response at p. 9). The Respondents contend that "[t]he Mayor's Order requires addressing the employees' and union's interests only after the decision of contracting out [has] been made. The plain meaning of this language indicates that the union is to have no part in management's sole discretionary decision to contract out. The Union may be involved after the decision, through impact and effects bargaining, but not before." (Response at pgs. 9-10).

The Respondents contend that the Union's proposal in Article 30, Section A "contains criteria to restrict management's right to contract out" by requiring the Director to "evaluate manpower and equipment, evaluate costs and give the Union written notice". (Response at p. 10). Regarding Article 30, Section C, the Respondents assert that "[c]ontracting out is . . . an exclusive management right, and an agency cannot be compelled to negotiate regarding aspects of its implementation. While the government itself may establish binding criteria for such employment action, an agency cannot be forced to repeat such self-regulating language in a CBA." (Response at p. 10).

The Respondents maintain that Article 30, Section D "is nonnegotiable for the same reasons set forth in Section C *supra*. It conflicts with the Mayor's Order and interferes with management's rights by injecting the Union into the contracting out process prior to an agency's decision to do so. Such a provision would allow the Union to enforce the requirements of the Mayor's Order. However [D.C. Code § 1-617.04], *AFGE 3721*, Slip Op. No. 390 and the Mayor's Order . . . do not allow the Union any involvement in the actual decision to contract out." The Respondents do not specifically address Section E.

**Union:** The Union contends that this article provides for the rights of employees in the event the Agency contracts out the employees' work. The Union maintains that Article 30, Sections A through C do not infringe on management's right to contract out. Article 30, Section A defines the circumstances under which contracting out will occur. The Union asserts that Article 30, Section B defines the rights of employees who are displaced and provides procedures for the savings which will result from the contracting out. The Union further states that "Article 30, Sections D through G provide the procedures for notification [to] the Union; the opportunity for the Union to exercise its right to bargain; . . . Sections A through C are procedures to apply when management makes a decision to contract out. Article 30, Sections D through G do not mandate management to take any action with regard to contracting out and provide the procedures by which the Union will be notified and employees reassigned." (See Appeal at pgs. 6-7).[5]

**Board**: D.C. Code § 1-617.08 reserves to management the right to "maintain the efficiency of the of the District government operations". Article 30, Section A of the proposal is **nonnegotiable** as it prohibits management from contracting out work *"normally performed by employees covered by this Agreement"*. This proposal infringes on management's right to maintain the efficiency of government operations by limiting management's right to make the decision to contract out services. The Mayoral Order states as its purpose the following: "The primary objective of the privatization process in the

[5] The Union notes that "Slip Opinion No. 475", cited by management in its Chart, does not address the issue of the negotiability of contracting out. See *Doctors' Council of the District of Columbia General Hospital and District of Columbia General Hospital*, 43 DCR 5159, Slip Op. No. 475, PERB Case No. 92-U-17 (1966).

District is to provide better service at equal or lower cost to taxpayers and at the same time maximize revenues to the District. (Order at p. 2). One of the four stated objectives of the Order is 'to provide needed services in the most efficient manner.' Contracting out is specifically stated as one of the 'two basic models that will serve as the basis for the District's privatization program.'" *American Federation of Government Employees, Local 3721 v. District of Columbia Fire and Emergency Medical Services Dep't.*, 46 DCR 7613, Slip Op. 390 at p. 5, PERB Case No. 94-N-04 (1994).

Article 30, Section C requires that "*[p]rior to contracting out any bargaining unit work, the Agency shall conduct a cost analysis to determine any possible savings*", provide the analysis to the Union and bargain over the impact and effects of contracting out work. Requiring the agency to conduct a cost analysis and share it with the Union prior to contracting out requires actions by management not required by the statute. Also, the proposal does not address all the reasons for which management may contract work outside of the bargaining unit. Therefore, it infringes on management's right to maintain the efficiency of government operations and the Mayoral Order. Thus, the Board finds that Section C is **nonnegotiable.**

Section E is a notice provision that incorporates Sections C and D, and thus is also **nonnegotiable**. (Article 30, Section D, requires that management provide the information in Section C to the Union ninety (90) calendar days prior to the implementation of the contract).

**Article 35 - *Snow Emergency Operations***

> **Section A - Snow Emergency Procedures and Notification -** When a snow or *other emergency situation exists Management shall notify in advance those employees who are required to work. Employees who are designated essential employees for purposes of snow emergency operations shall be given advance written notice informing them that they have been designated as essential for the period of October 15 to April 15 each year. This notice shall be given to the employee prior to October 15 each year and in addition to informing the employee of their essential status, this notice shall also inform the employee of the group to which they have been assigned. On April 16 each year the notice of essential status shall automatically expire.*
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> *Employees working on snow detail or who are required to shovel snow shall be assigned in the following order:*
>
> *1. Volunteers*

*2. Rotated beginning with inverse order of seniority*

*Employees with established health concerns may request to be exempt from snow shoveling assignments.*

*For snow emergencies, the Employer shall divide the employees into identified groups which shall alternate their assigned tours throughout the snow seasons. Employees shall work during their normal tour of duty, and the appropriate group shall be required to remain during a snow situation. Should the snow emergency continue, the other group shall report at the designated time and rotation shall continue until the snow emergency is over. Employees assigned to work a twelve (12) hour period, outside their regularly scheduled tour of duty shall receive overtime pay for all hours worked outside their regularly scheduled tour of duty.*

***Section B - Employee Notification Regarding Snow Emergency** - Bulletin board or telephone communications shall be utilized to notify those employees in any group required to work the snow emergency. Subject to the aforementioned priorities for snow shoveling, reasonable efforts shall be made to equalize overtime. When an emergency arises, employees are required to report to their snow emergency operation groups. A unit employee seeking to be excused must make his/her request with the appropriate supervisor. The supervisor shall provide the employee with a response by the end of the employee's tour of duty or prior to the start time of the employee's snow emergency assignment.*

***Section C - Reporting Time** - If an employee who is assigned to work snow emergency can not get to work, the Employer agrees to make arrangements to have the employee picked-up and transported to work.*

*All employees, essential or non-essential, shall be allowed a reasonable amount of time to arrive to work during a snow emergency without charge to the employee leave, LWOP or AWOL. This reasonable amount of time shall not exceed one hour after the start of the employee's tour of duty or assigned schedule outside of their regular tour of duty. In cases of*

*extreme snow condition, the essential employee may be allowed up to two (2) hours to report to work, after the start of the employee's tour of duty or assigned schedule outside their regular tour of duty.*

***Section D - Assignment Group List*** *- Management shall maintain a current listing of employees in the snow emergency groups. This list of employees in assigned groups shall be reviewed with the Union and posted prior to October 15th of each year. The Union shall be provided a copy of the list.*

*Management shall not be required to work all employees in any one group during any emergency overtime period. Only those employees in a particular group who are needed shall be requested to work. Others shall be worked on a rotating basis as needed.*

***Section E - Meal Breaks*** *- During extended snow emergency operations rest period, shelter, and an opportunity to eat shall be provided. Employees required to work the snow emergency shall be given meal vouchers.*

*Employees shall be provided reasonable opportunity to take meal breaks during their tour of duty. When a snow emergency has been declared, the following paragraphs shall apply:*

*1. An employee's method of compensation shall be consistent with the compensation agreement. In addition, if an employee works through their meal break while on overtime, the employee shall be compensated at the overtime rate.*

*2. During snow emergency operation, employees shall be relieved for rest breaks as often as necessary and reasonable.*

***Section F - Early Dismissal*** *- The Employer agrees to dismiss all non-essential employees when early dismissal is authorized.*

**Respondents:** The Respondents state that this entire Article is preempted by a Memorandum of Agreement ("MOA") with the Union pertaining to an existing

Compensation Agreement between the parties which addresses snow removal. (Management's Chart, last page).

**Union:** The Union maintains that "Article 35 sets out the procedures for employees who are required to work snow operations and is a mandatory subject of bargaining. [Furthermore, the Union asserts that a MOA] does not supersede [the] negotiation of a Collective Bargaining Agreement. [Rather, a Memorandum of Agreement] is no more than an interim provision, which does not take precedence over a Collective Bargaining Agreement. In addition, AFGE, Local 631 is not a party to the MOA and did not authorize negotiation of the MOA." (Appeal at p. 7).

**Board**: The Respondents assert that the parties have addressed the issue of snow emergency operations in an MOA covering Compensation Units 1 and 2. The Union denies being a party to the MOA. Further, the Union maintains that an MOA is not a substitute for a collective bargaining agreement. Based on the information provided by the parties, the Board is unable to make a determination concerning the negotiability of the issue of snow emergency operations. Therefore, the Board is directing the parties to **brief** this proposal. 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.

**Article 40 - Uniforms**

> *Section B - Employee Responsibility*
> *Employee(s) terminating employment may be required to return all badges, uniforms, equipment, and/or any other District of Columbia government property, prior to receiving their final check.*

**Respondents**: The Respondents assert that "[t]he portion of the article that suggests an employee may keep or dispose of an article of clothing furnished by the District as he/she sees fit is nonnegotiable. The uniform remains the property of the District, worn out or not." (Management Chart). The Respondents maintain that "Agencies . . . have a management right to control the use and custody of its property, including uniforms, . . . minimizing waste, securing government issued property and minimizing potential abuse and misuse of government issued property. This right is affirmatively codified as Agencies' responsibility. [Citing] D.C. Code § 1-502." (Response at p. 11). The Respondents claim a right under D.C. Code § 1-502 to demand the return of government property.

**Union**: The Union asserts that "[t]his sentence does not mandate management to take any definite action with respect to the uniforms and specifically states employees are accountable for uniforms lost or damaged. It is consistent with D.C. Code § 1-502." (Appeal at p. 7).

**Board**: This proposal pertains to D.C. Code § 1-502 entitled "Reports by Custodians of Property", which provides as follows:

> All persons in the employment of the government of the District of Columbia having, as a result of such employment, custody of or chargeable with property, other than real estate, belonging to the District of Columbia, **shall** at such times and in such form as the Mayor of the District of Columbia shall require, **make returns to said Mayor** of all such property remaining in their possession, and the condition thereof, and, with reference to all property that may have come into their custody that shall have been consumed in use, a statement showing the quantity thereof and the purpose for which used." (emphasis added.)

Based on the information provided by the parties, the Board is unable to make a determination concerning the negotiability of the Union's proposal regarding returning uniforms upon termination of employment. Therefore, the Board is directing the parties to **brief** this proposal and its relationship to the above-cited D.C. Code provision. 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.

**Article: DRUG AND ALCOHOL TESTING FOR CDL DRIVERS**
[This proposed Article bears no number.]
**Section A - General**

The purpose of this Article is to provide a comprehensive drug and alcohol testing program for employees who occupy position(s) which require a commercial drivers license (herein referred to as "CDL drivers"). This Article shall apply for the discipline of employees for violation of the provisions of the Drug and Alcohol Testing Program, as well as the availability of the Employee Assistance Program for employees who need assistance for drug abuse and/or alcohol misuse.

The Agency's Drug and Alcohol Testing Program shall be administered according to the requirements of the Drug-Free Workplace Act of 1988, and the Americans with Disabilities Act.

**Section B - CDL Driver Testing**

1. **CDL Drivers** - The rules and procedures for Drug and Alcohol training, testing, discipline and assistance for CDL Drivers serving in safety-sensitive positions, who are required to hold commercial driver's licenses shall be administered in accordance with the regulations issued by the Federal Highway Administration, Department of Transportation ("FHWA/DOT") on alcohol and controlled substances testing specified in Title 49 CFR Part 382 through 384 to include (Controlled Substances and Alcohol Use and Testing), Part 383 (Commercial Driver's License Standards; Requirements and Penalties), Part 40 (Procedures for Transportation Workplace Drug Testing Programs) (collectively, "DOT Regulations"). If any procedure or implementation of testing under this Article for CDL drivers is inconsistent with the DOT regulations, the DOT Regulations shall control.

2. **Categories for Testing** - The Agency shall test CDL drivers for the following reasons:

**CDL Employee Testing**

Post Accident
Reasonable Suspicion
Random
Return to Duty
Follow Up

All of the above tests shall be conducted in accordance with DOT Regulations.

3. Description of Testing Categories.

(a) **Post-Accident** - Testing when a D.C. government vehicle is involved in a collision and there is loss of life; or the driver receives a citation under State or local law for a moving traffic violation arising from the accident, if the accident involved a) bodily injury to any person who, as a result of the injury, immediately received medical treatment away from the scene of the accident, or b) one or more of the motor vehicles incurring disabling damage as a result of the accident, required the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

It is the responsibility of the employee to notify his/her immediate supervisor or another manager while still at the scene of the accident or as soon as practicable. If testing is required, the immediate supervisor or another manager shall make arrangements for the employee to be transported to the testing collection location to be tested.

The immediate supervisor is responsible for maintaining a record of the reported accident and of the time elapsed from the point of accident notification to the point of testing. The immediate supervisor shall adhere to the following timetable:

| **Maximum Elapsed Time** | Supervisor Action Required by the Maximum Elapsed Time |
|---|---|
| **2 Hours** | Have employee submit to an alcohol and controlled substances test. |
| **8 Hours** | Cease efforts to have employee submit to an alcohol test, however, continue efforts to have the employee submit to a controlled substances test. |
| **32 Hours** | Cease efforts to have employee submit to a controlled substances test. |

(b) **Reasonable Suspicion** Testing when there is reasonable suspicion that the CDL Employee has violated the prohibition of the use of controlled substances or alcohol based on specific, contemporaneous, or articulable observations concerning appearance, behavior, speech, or body odors. Behavior believed to exemplify reasonable suspicion should be witnessed by one supervisor trained in alcohol and substance abuse recognition.

All employees covered by this Agreement are entitled to Union representation during the testing process and when the employee is contacted to inform them of the test results. After the supervisor(s) substantiate the need for a test by finding reasonable suspicion, the supervisor(s) shall arrange for the employee to be transported to the Employer's designated testing collection facility for testing. As soon as practicable after substance abuse is suspected, the supervisor shall notify the Union President for the employee (at a previously designated telephone number) that a test shall be ordered and the location of the test site. The Employer shall allow up to 2

hours following the call to the Union President for a Union representative to join the employee at the designated testing collection facility before testing. When the Union representative is assigned to the field, the Employer shall arrange for the Union representative to be transported to the testing collection facility prior to the testing of the employee.

No employee is to be questioned during this process without the presence of a Union representative.

(c) **Random Testing** - Testing when employees are selected by the use of a scientifically valid random number generation method that identifies employees by a number, such as employee identification number or social security number.

d) **Return to Duty** - After notification by the Substance Abuse Professional ("SAP") that the employee is ready to return to work, the Employer shall conduct a return to duty test. All return to duty tests must be negative for the employee to return to work. When the Employer receives the negative test result, the employee shall immediately be returned to work.

(e) **Follow-up** - Unannounced testing of an employee after returning to work through the EAP. The frequency and duration of follow-up testing shall be determined by the SAP.

**Section C - Union Notification**

Upon request of the employee, an employee, who has been notified of a post-accident, random, return to duty, or follow-up test may be accompanied by a Union representative. The Union representative may accompany the employee to the test site but may not enter the specimen collection cubicle with the employee. The Union at the end of each month shall be supplied with a list of all employees who were tested for drugs and/or alcohol, which shall include the name of the employee, the type of test and the date of the test.

Upon request the Union shall be provided with the name of the collector's and the company administering the collection of samples, their business address and phone number, the locations of all designated collection sites. In addition,

the Employer agrees that upon, request, they shall provide the union with the name, address and telephone number of all testing laboratories and the doctor(s) or individuals in charge of the laboratory. The Agency shall also provide the contracting documents to the Union upon their request. This information shall be provided to the Union within three (3) days of receipt of the Union's request. The Employer agrees to notify the Union of any changes in these providers.

**Section D - Testing Procedures**

1. All drug and alcohol testing procedures shall be conducted in accordance with DOT regulations, Title 49 CFR Part 40 (Procedures for Transportation Workplace Drug Testing Programs). The Employer shall pay all costs of drug and alcohol testing, except as provided in C.5 ("Split Sample Testing") of this Section.

2. All laboratories conducting testing shall be certified by the U.S. Department of Health and Human Services ("HHS").

   Prior to the selection of a testing laboratory and collection site, the Union shall be notified of the choices of venders/service providers and given an opportunity to check the work and workmanship of the venders/service provider. After a selection of a vender/service provider is made and during the duration of the contract with vender/service provider, the Agency and the Union shall be permitted to check and make periodic inspections of all designated testing collection facilities and all laboratories, to verify the workmanship and standards of the laboratory and the collection sites.

   The Agency shall maintain a designated testing collection facility that is non-mobile, to provide testing required by this Article. The Agency shall not use a mobile testing unit or person to collect or administer a drug an alcohol test for employees covered by this Agreement.

3. **Breath Alcohol Testing** - Breath alcohol testing for the Agency shall be conducted by a Breath Alcohol Technician ("BAT"). The BAT has the responsibility for instructing the