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

In the Matter of:	)	
	)	
	)	
Fraternal Order of Police/ Department of Youth Rehabilitation Services Labor Committee,	)	
	)	
Petitioner,	)	PERB Case No. 17-N-02
	)	
v.	)	Opinion No. 1636
	)	
Department of Youth Rehabilitation Services,	)	
	)	
Respondent.	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On March 24, 2017, the Fraternal Order of Police/Department of Youth Rehabilitation Services Labor Committee (“Union”) filed the instant Negotiability Appeal (“Appeal”). The Union and the Department of Youth Rehabilitation Services (“Department”) are negotiating a successor collective bargaining agreement concerning non-compensation terms and conditions of employment.

The relevant facts are not in dispute. Pursuant to the parties’ ground rules, the Union transmitted its opening proposals to the Department on January 13, 2017.<sup>1</sup> The Union submitted additional proposals on February 13, 2017.<sup>2</sup> On February 22, 2017, the Department sent the Union a letter declaring one of the Union’s initial proposals and three of the Union’s subsequent proposals non-negotiable and outside of the scope of bargaining.<sup>3</sup>

The Union timely filed the instant Appeal, asserting that each of the four proposals was negotiable. The Union argued that the Board should either find that its proposals are negotiable or direct the parties to file briefs in support of their positions.<sup>4</sup> In “Respondent’s Answer to the

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<sup>1</sup> Appeal at 2.  
<sup>2</sup> Appeal at 2.  
<sup>3</sup> Appeal at 2; Appeal, Exhibit C.  
<sup>4</sup> Appeal at 9.

Negotiability Appeal” (“Answer”) filed on April 13, 2017, the Department asserted the non-negotiability of the proposals and responded to arguments made by the Union in its Appeal.

On June 30, 2017, the Union filed Partial Withdraw of Negotiability Appeal, affirming that it had decided to voluntarily withdraw three of the four proposals that the Department maintained were non-negotiable.

The Union’s Appeal (as amended by the Union’s partial withdraw) and the Department’s Answer are before the Board for disposition.

## II. Discussion

There are three categories of collective bargaining subjects: (1) mandatory subjects over which parties must bargain; (2) permissive subjects over which the parties may bargain; and (3) illegal subjects over which the parties may not legally bargain.<sup>5</sup> Management rights are permissive subjects of bargaining.<sup>6</sup> Section 1-617.08(a) of the D.C. Official Code sets forth management rights and management retains the “sole rights” to undertake actions listed therein.<sup>7</sup> Matters that do not contravene section 1-617.08(a) or other provisions of the Comprehensive Merit Personnel Act (“CMPA”) are negotiable.<sup>8</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>9</sup>

Pursuant to section 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 will separately consider the negotiability of each of the matters in a dispute.<sup>10</sup>

At issue is an unnumbered article regarding Essential/Emergency Employees.<sup>11</sup> The Union’s proposal is set forth below. The portion of the proposal that the Board has determined is non-negotiable is underlined for clarity. The proposal is followed by: the Department’s arguments in support of non-negotiability including comments found in the Answer as well as the Department’s February 22, 2017 letter; the Union’s arguments in support of negotiability from its Appeal; and the conclusion of the Board.

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<sup>5</sup> *D.C. Nurses Ass’n v. D.C. Dep’t of Pub. Health*, 59 D.C. Reg. 10776, Slip Op. 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>6</sup> *NAGE Local R3-06 v. D.C. Sewer & Water Auth.*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at 4, 13-N-03 (2013); *D.C. Fire & Emergency Med Servs. Dep’t and AFGE, Local 3721*, 54 D.C. Reg. 3167, Slip Op. 874 at 9, PERB Case No. 06-N-01 (2007).

<sup>7</sup> D.C. Official Code § 1-617.08(a).

<sup>8</sup> *Univ. of D.C. Faculty Ass’n v. Univ. of D.C.*, \_\_\_ D.C. Reg. \_\_\_, Slip Op. 1617 at 2, PERB Case No. 16-N-01 (April 4, 2017).

<sup>9</sup> D.C. Official Code § 1-617.08(b).

<sup>10</sup> *Univ. of D.C. Faculty Ass’n*, Slip Op. 1617 at 2-3.

<sup>11</sup> Appeal at 6.

1. Essential/Emergency Employees

ARTICLE [ ] –ESSENTIAL/EMERGENCY EMPLOYEES

For members of the Union’s bargaining unit whose positions have been formally designated as emergency or essential positions, the parties understand that such employees may be required to report to work during a declared emergency. It is further understood that a declared emergency exists only when the Mayor declares an emergency due to severe weather, natural or manmade disasters, and similar emergency circumstances. The parties agree that an inadequate staffing level does not constitute an emergency.

**Department:** The Department argues that the provision stating that “The parties agree that an inadequate staffing level does not constitute an emergency” infringes upon the Mayor’s right to declare emergencies under section 7-2304 of the D.C. Official Code. The Department asserts that by giving the collective bargaining agreement the authority to determine what constitutes an emergency, the Union’s proposed article directly contravenes section 7-2304. The Department disputes the Union’s argument that the proposal is negotiable because it is not listed as a management right under the D.C. Official Code. The Department notes that in *Teamsters Local Union No. 639 v. District of Columbia Public Schools*,<sup>12</sup> the Board previously held that a proposal for a standard that directly contravenes a standard established by the D.C. Official Code is nonnegotiable.

**Union:** The Union’s position is that the proposal is negotiable because the Mayor’s right to declare emergencies under section 7-2304 is not a management right enumerated in section 1-617.08(a). The Union notes that pursuant to section 1-617.08(b) any matter not reserved as a management right is presumed to be negotiable.

**Board:** Although the Mayor’s authority to determine the existence of an emergency is not a management right enumerated in section 1-617.08(a), the Board finds that the final sentence of the proposed article is non-negotiable.<sup>13</sup> As the Department asserts, the Board previously found non-negotiable a proposal that contravened the employee liability standard statutorily established under the D.C. Official Code.<sup>14</sup> Similarly here, the final sentence of the proposal attempts to undermine the Mayor’s authority to determine the existence of a public emergency established by section 7-2304(a).<sup>15</sup> Therefore, this provision of the proposal is non-

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<sup>12</sup> 38 D.C. Reg. 6693, Slip Op. 263, PERB Case Nos. 90-N-02, 90-N-03, 90-N-04 (1990).

<sup>13</sup> The Board has concerns over the entire proposal, as it appears to conflict with section 7-2304 of the D.C. Official Code. However, since the parties have not raised any issues with this proposal, with the exception of the final sentence, the Board will not address its concerns at this time.

<sup>14</sup> *Teamsters Local Union No. v. D.C. Pub. Sch.*, 38 D.C. Reg. 6693, Slip Op. 263 at 7, PERB Case Nos. 90-N-02, 90-N-03, 90-N-04 (1990).

<sup>15</sup> Section 7-2304(a) of the D.C. Official Code, in pertinent part, states: “(a) Upon reasonable apprehension of the existence of a public emergency and the determination by the Mayor that the issuance of an order is necessary for the immediate preservation of the public peace, health, safety, or welfare, and as a prerequisite to requesting

negotiable. With the exception of the final sentence, the proposal regarding Essential/Emergency Employees is negotiable.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Respondent, Department of Youth Rehabilitation Services, is required to bargain upon request with respect to the proposals of Fraternal Order of Police/Department of Youth Rehabilitation Services Labor Committee concerning:
  - a. Essential/Emergency Employees, with the exception of the final sentence: “The parties agree that an inadequate staffing level does not constitute an emergency.”
2. Pursuant to Board Rule 559, this Decision and Order shall become final thirty (30) days after issuance unless a party files a motion for reconsideration or the Board reopens the case within fourteen (14) days after issuance of the Decision and Order.

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

By the unanimous vote of Board Members Mary Anne Gibbons, Barbara Somson, and Douglas Warshof.

August 17, 2017

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 17-N-02, Op. No. 1636 was sent by File and ServeXpress to the following parties on this the 25th day of August, 2017.

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