

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

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In the Matter of:	)	
	)	
American Federation of State, County and Municipal Employees, District Council 20, Local 1959	)	
	)	
Petitioner	)	PERB Case No. 21-N-01
	)	
v.	)	Opinion No. 1766
	)	
Office of the State Superintendent of Education	)	
	)	
Respondent	)	
	)	

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**DECISION AND ORDER**

**I. Statement of the Case**

On November 9, 2020, the American Federation of State, County and Municipal Employees, District Council 20, Local 1959 (AFSCME) filed the instant Negotiability Appeal (Appeal). The Appeal concerns eight proposals made by AFSCME and declared nonnegotiable by the Office of the State Superintendent of Education (OSSE).

AFSCME and OSSE are engaged in negotiations for a successor collective bargaining agreement concerning terms and conditions of employment for a unit of bus drivers and attendants. On October 9, 2020, OSSE declared eight proposals submitted by AFSCME to be nonnegotiable. AFSCME timely filed this Appeal asserting that the proposals were negotiable. On November 30, 2020, OSSE filed its Answer to the Appeal.

In its Answer, OSSE withdrew its declaration of non-negotiability concerning two proposals. The remaining six proposals, the Appeal, and the Answer are before the Board for disposition.

**II. Standard of Review**

There are three categories of collective bargaining subjects: (1) mandatory subjects over which the parties must bargain; (2) permissive subjects over which the parties may bargain; and

(3) illegal subjects over which the parties may not legally bargain.<sup>1</sup> A permissive subject of bargaining is nonnegotiable if either party declines to bargain on the subject.<sup>2</sup>

Management rights are permissive subjects of bargaining.<sup>3</sup> Section 1-617.08(a) of the D.C. Official Code sets forth management rights giving management “sole rights” to undertake actions listed therein.<sup>4</sup>

Matters that do not contravene section 1-617.08(a) or other provisions of the Comprehensive Merit Personnel Act (CMPA) are negotiable.<sup>5</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>6</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’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>7</sup> The Board will separately consider the negotiability of each of the matters in a dispute.<sup>8</sup>

### **III. Analysis**

There are six proposals that OSSE has identified as nonnegotiable subjects of bargaining. AFSCME’s proposals that were declared nonnegotiable by OSSE are set forth below.

#### **A. Article V (Discipline and Adverse Action)**

Absent written agreement by the Union, any internal investigation shall be completed within 30 days or the disciplinary action or measure imposed on the employee shall be deemed untimely.

#### **OSSE’s Position**

OSSE argues that the proposal goes beyond the procedural limits that the Board has deemed negotiable. OSSE asserts that the proposal “would clearly eviscerate management’s right

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<sup>1</sup> *D.C. Nurses Ass’n v. D.C. Dep’t of Pub. Health*, 59 D.C. Reg. 10,776, Slip Op. No. 1285 at p. 4, PERB Case No. 12-N-01 (2012) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1975)).

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

<sup>3</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>4</sup> D.C. Official Code § 1-617.08(a).

<sup>5</sup> *Univ. of D.C. Faculty Ass’n*, Slip Op. No. 1617 at 2.

<sup>6</sup> D.C. Official Code § 1-617.08(b).

<sup>7</sup> *Fraternal Order of Police/Protective Serv. Police Dep’t Labor Comm. v. Dep’t of Gen. Serv.*, 62 D.C. Reg. 16505, Slip Op. 1551 at 1, PERB Case No. 15-N-04 (2015).

<sup>8</sup> *Univ. of D.C. Faculty Ass’n*, Slip Op. No. 1617 at 2-3.

to propose discipline if the agency could not complete its investigations within 30 days and thereby clearly reflects substantive limitations on management's right to discipline."<sup>9</sup>

### **AFSCME's Position**

AFSCME argues that the proposal is negotiable because it does not interfere with management rights to discipline employees. AFSCME asserts that the proposed language is a procedural limitation on the time that OSSE may "draw out an investigation." AFSCME cites to the Board for the proposition that "Procedural matters concerning discipline are negotiable."<sup>10</sup>

### **Board's Conclusion**

The Board finds AFSCME's proposal nonnegotiable. The proposal would bar as untimely an underlying disciplinary action upon the expiration of 30 days. This proposal interferes with management rights under D.C. Official Code § 1-617.08(a)(2) because it creates a "contractual statute of limitations which prevents management from disciplining an employee after the time limit expires."<sup>11</sup>

### **B. Article XI (Administrative Closing)**

#### Section C: Inclement Weather Work

1. Reporting Time: During inclement weather where the District Government has declared a snow emergency, Employees (other than those designated as emergency employees) will be given a reasonable amount of time to report for duty without charge to leave. Those employees required to remain on their post until relieved will be compensated at the appropriate overtime rate or will be given compensatory leave for the time it takes his/her relief to report for duty.

2. By December 1 of each year, volunteers may sign up for inclement weather duty. Terminal managers will determine the number of volunteers needed. Such volunteers are expected to report for duty under all inclement weather conditions.

### **OSSE's Position**

OSSE asserts that the proposal interferes with management rights to assign work. OSSE argues that the proposal would negatively or detrimentally impact bus operations by affording bus drivers and bus attendants "a reasonable amount of time to report for duty without charge to leave," thereby interfering with management's right to assign work under inclement weather conditions.<sup>12</sup> Similarly, OSSE contends that part 2 of the proposal, which permits volunteers to sign up for inclement weather duty, "contravenes OSSE's management rights to assign work and to direct all

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<sup>9</sup> Answer at 4.

<sup>10</sup> Appeal at 3 (citing *UDC Faculty Association v. UDC*, Slip Op. No. 1617 at 11, PERB Case no. 16-N-01 (2017)).

<sup>11</sup> *Merchant Marine Academy*, 39 FLRA 187, 200-201 (1991). Generally, the FLRA has held that proposals establishing a time limit on management's ability to initiate disciplinary or adverse actions against employees directly interfere with management's right to discipline employees.

<sup>12</sup> Answer at 5.n

school bus drivers and bus attendants (not just volunteers) to perform their essential core duties. . .<sup>13</sup>

### **AFSCME's Position**

AFSCME argues that OSSE has failed to articulate any legitimate basis for declaring the proposal nonnegotiable. AFSCME disagrees that the entire bargaining unit is designated as "emergency employees." AFSCME argues that the Board has never established that the designation of an employee as an "emergency employee" is a management right.<sup>14</sup> Notwithstanding, AFSCME asserts that it is entitled to bargain instances where not all employees are required to work on a snow day. Furthermore, AFSCME argues that the proposal applies to employees who are not designated as "emergency employees."<sup>15</sup>

### **Board's Conclusion**

The Board finds the proposal nonnegotiable. Part 1 of the proposal interferes with management rights to assign work. The right to assign work encompasses the right to determine particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.<sup>16</sup> As written, the proposal prevents management from determining when work will occur and to whom work will be assigned.

Part 2 of the proposal is also nonnegotiable. According to the undisputed interpretation by OSSE, the proposal limits which employees may be assigned to inclement weather duty. This violates D.C. Official Code § 1-617.08(a)(2) because it infringes on management rights to assign work.

### **C. Article XII (Workforce Changes)**

Involuntary transfers shall be made only after consultation and discussion with the employee involved. At the employee's request, there may be present at such discussion a representative of the Union.

### **OSSE's Position**

OSSE asserts that the proposal is nonnegotiable because it "violates management's rights under D.C. Official Code §1-617.08(a)(2), to transfer and discipline employees."<sup>17</sup> OSSE argues that the mandatory requirement for a consultation and discussion limits management's ability to effectuate an involuntary transfer.<sup>18</sup>

### **AFSCME's Position**

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<sup>13</sup> Answer at 6.

<sup>14</sup> Appeal at 4.

<sup>15</sup> Appeal at 4.

<sup>16</sup> *AFGE, Local 1985, 55 FLRA 1145, 1148 (1999)*.

<sup>17</sup> Answer at 6.

<sup>18</sup> Answer at 7.

AFSCME contends that the proposal is negotiable. AFSCME argues that the proposal “does not impinge on management’s right but is merely a procedural requirement that addresses the impact and effect on the employee of an involuntary transfer.”<sup>19</sup>

### **Board’s Conclusion**

The proposal is nonnegotiable. The mandatory language that an involuntary transfer “shall be made only after a consultation and discussion” infringes upon management rights to transfer employees under D.C. Official Code § 1-617.08(a)(2).<sup>20</sup>

### **D. Article XVII (Compensation)<sup>21</sup>**

Fiscal Year 2021: Effective the first day of the first full pay period beginning on or after October 1, 2020, the FY 2021 salary schedules of Motor Vehicle Operators and Attendants employed in the bargaining unit as certified and assigned to AFSCME, District Council 20, Local 1959 by the Public Employee Relations Board shall be adjusted 3.0%.

### **OSSE’s Position**

OSSE asserts that AFSCME’s wage proposal for Fiscal Year 2021 is nonnegotiable. OSSE argues that the Budget Support Act for Fiscal Year 2021<sup>22</sup> “prohibits cost-of-living adjustments and any increase in salary or wages for Fiscal Year 2021 [and] [...] explicitly requires [...] [that] salary schedules for Fiscal Year 2020 shall be in place for Fiscal Year 2021.”<sup>23</sup>

### **AFSCME’s Position**

AFSCME argues that the Fiscal Year 2021 Budget Support Act does not preclude compensation bargaining. AFSCME asserts that although OSSE may be restricted by the Budget Support Act in its ability to pay increases in Fiscal Year 2021, that does not make compensation nonnegotiable.<sup>24</sup>

### **Board’s Conclusion**

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<sup>19</sup> Appeal at 5.

<sup>20</sup> *FOP/MPD Labor Comm. v. MPD*, 54 D.C. Reg. 2895, Slip Op. No. 842 at 6-7, PERB Case No. 4-N-03 (2007).

<sup>21</sup> Ex. E at 2. AFSCME asserts that OSSE declared proposals for FY2022 and FY2023 nonnegotiable. Ex. E demonstrates that OSSE declared the proposal for FY2021 nonnegotiable and provided a counter-proposal to AFSCME’s proposals for FY2022 and FY2023. Therefore, the Negotiability Appeals related to FY2022 and FY2023 are dismissed.

<sup>22</sup> D.C. Act 23-404, 67 DCR 10098.

<sup>23</sup> Answer at 8.

<sup>24</sup> Appeal at 6.

The Board finds that the proposal is nonnegotiable. The Budget Support Act preempts the obligation to bargain cost-of-living adjustments and increases in salary.<sup>25</sup> In pertinent part the Budget Support Act states, as follows:

Sec. 1023. Freeze on cost-of-living adjustments. Notwithstanding any other provision of law, rule, or collective bargaining agreement, an employee of a covered agency shall not receive a cost-of-living adjustment during the period from October 1, 2020, through September 30, 2021. Nothing in this subtitle shall be construed to prohibit collective bargaining on non-compensation issues.

Sec. 1024. Maintenance of Fiscal Year 2020 salary schedules and benefits, Notwithstanding any other provision of law, collective bargaining agreement, memorandum of understanding, side letter, or settlement, whether specifically outlined or incorporated by reference, all Fiscal Year 2020 salary schedules of covered agencies shall be maintained during Fiscal Year 2021 and no increase in salary or benefits, including increases in negotiated salary, wage, and benefits provisions, and negotiated salary schedules, shall be provided in Fiscal Year 2021 from the Fiscal Year 2020 salary and benefits levels of covered agencies.

Accordingly, OSSE has no authority to bargain a cost-of-living adjustment, or any other salary or wage increase for Fiscal Year 2021, as it is prohibited by law. Therefore, AFSCME's proposal is nonnegotiable.

#### **E. Article XVII (Compensation: Attendance and On-time Arrival Bonus)**

##### Section E: Attendance

Employees will receive an incentive for each quarter worked (every 3 months) if they do not use unscheduled leave in a 3-month period (\$350 ~~\$200~~ per qualifying quarter).

##### Section F: On-Time Arrival Bonus

Employees will receive an incentive if their route (permanent or swing) on-time arrival rate in a quarter is 94% or above (\$350 ~~\$250~~ per qualifying quarter). The employee must meet the requirements for the attendance incentive to qualify for this incentive.

#### **OSSE's Position**

OSSE argues that the proposal is nonnegotiable. OSSE asserts that the District's prohibition against "Bonus and special awards pay" applies to the proposals because the proposals cannot be reasonably read to qualify as "salary incentives," which is an undefined term in the statute's exceptions.<sup>26</sup> Additionally, OSSE argues that the proposal is nonnegotiable under the Budget Support Act.

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<sup>25</sup> See *AFSCME, D.C. Council 20, et al. v. Government of the District of Columbia*, et al., 43 DCR 1148, Slip Op. No. 330, PERB Case No. 92-U-24 (1993).

<sup>26</sup> Answer at 14.

### **AFSCME's Position**

AFSCME argues that the proposal is negotiable because salary incentives negotiated through a collective bargaining agreement are exempt<sup>27</sup> from the District's prohibition<sup>28</sup> against "Bonus and special awards pay."<sup>29</sup>

### **Board's Conclusion**

The Board finds that the proposal is nonnegotiable. Although the proposal's language fits squarely within the exception to the District's prohibitions against "Bonus and special awards pay," the proposed increases are preempted by the Budget Support Act's prohibition against negotiated salary, wage, and benefits provisions for Fiscal Year 2021.<sup>30</sup>

#### **F. Article XXII (Seniority)**

##### Section F:

In the event a vacancy arises in another bargaining unit for a full-time driver or attendant position and the Employer makes a determination to fill such vacancy it will do so by offering it to the most senior member of the Union's bargaining unit. As soon as such determination is made to fill a full-time vacancy, and before any offer is made to any employee, the Employer agrees to provide the Union with written notice of the number and types of vacancies to be filled and the names of the employees who will be offered the opportunity to convert to full-time positions. Employees who are offered the opportunity to convert to full-time positions shall be afforded no less than seven (7) calendar days to accept or decline the offer before the offer is withdrawn and extended to another employee who is next on the seniority list.

### **OSSE's Position**

OSSE argues that the proposal is nonnegotiable. OSSE asserts that the first sentence of the proposal requires that promotions be based strictly on seniority. OSSE contends that the strict seniority criterion constrains its right to promote employees.<sup>31</sup> OSSE argues that the latter part of the proposal is nonnegotiable because it impedes management's right to transfer employees by limiting the period during which an employee is eligible for transfer.<sup>32</sup>

### **AFSCME's Position**

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<sup>27</sup> D.C. Official Code § 1-551.06(a)(10).

<sup>28</sup> D.C. Official Code § 1-551.02(a).

<sup>29</sup> Appeal at 8.

<sup>30</sup> D.C. Act 23-404, 67 DCR 10098.

<sup>31</sup> Answer at 16 (citing *UDCFA v. UDC*, 64 D.C. Reg 5132, Slip Op. No. 1617 at 29, PERB Case No. 16-N-01 (2017)).

<sup>32</sup> Answer at 17.

AFSCME argues that the proposal is negotiable because it memorializes the parties' past practice of 15 years and outlines procedures for promotions that do not interfere with decision making by management.<sup>33</sup>

### **Board's Conclusion**

The proposal is nonnegotiable. The Board has held that, if management has waived a management right in the past, this does not create a permanent waiver the right or mean that management has waived that right for future negotiations.<sup>34</sup> Notwithstanding the parties' past practice, the first sentence of the proposal interferes with management rights to promote employees under D.C. Official Code § 1-617.08(a)(2) because it creates a seniority criterion for filling promotional vacancies and constrains management's selection process.<sup>35</sup>

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. AFSCME's proposal concerning Article V (Discipline and Adverse Action) is nonnegotiable
2. AFSCME's proposal concerning Article XI (Administrative Closing) is nonnegotiable.
3. AFSCME's proposal concerning Article XII (Workforce Changes) is nonnegotiable.
4. AFSCME proposal concerning Article XVII (Compensation) is nonnegotiable.
5. AFSCME's proposal concerning Article XVII (Compensation: Attendance and On-time Arrival Bonus) is nonnegotiable.
6. AFSCME's proposal concerning Article XXII (Seniority) is nonnegotiable
7. Pursuant to Board Rule 559.1, this decision and order is final upon issuance.

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

By unanimous vote of Board chairperson Douglas Warshof, Board members Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler

Washington, D.C.  
December 17, 2020

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<sup>33</sup> Appeal at 8.

<sup>34</sup> *NAGE, Local R3-06 v. WASA*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at 4, PERB Case No. 13-N-03 (2013).

<sup>35</sup> *UDCFA v. UDC*, 64 D.C. Reg 5132, Slip Op. No. 1617 at 29, PERB Case No. 16-N-01 (2017).

**CERTIFICATE OF SERVICE**

I hereby certify that the attached Decision and Order, Slip Op. 1766, in PERB Case No. 21-N-01 was served electronically via File & ServeXpress to the following parties on this 22<sup>nd</sup> day of December 2020:

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/s/ Dawan Jones  
Public Employee Relations Board