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

In the Matter of:)	
)	
American Federation of)	
Government Employees, Local 3721)	
)	
Petitioner)	PERB Case No. 17-N-03
)	
v.)	Opinion No. 1658
)	
Department of Fire and Emergency)	
Medical Services)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On April 10, 2017, the American Federation of Government Employees, Local 3721 (“Union”) filed the instant Negotiability Appeal (“Appeal”). The Appeal concerns two proposals made by the Union and declared nonnegotiable by the Department of Fire and Emergency Medical Services (“Department”). The Union and the Department are negotiating a successor collective bargaining agreement concerning non-compensation terms and conditions of employment.

The Union transmitted its proposals to the Department on July 8, 2016.¹ In an email on March 7, 2017, the Department declared two of the Union’s proposed articles related to impasse procedures and mid-term bargaining nonnegotiable and outside of the scope of bargaining.²

The Union timely filed the instant Appeal, asserting that the two proposed articles were negotiable, and requested that the Board order the Department to immediately commence negotiations with the Union over each of the contested articles.³ In “Respondent’s Answer to the Negotiability Appeal” (“Answer”) filed on April 25, 2017, the Department withdrew its non-negotiability declarations with respect to two clauses of the Union’s “Existing Rights and

¹ Appeal at 1.

² Appeal at 3; Appeal, Exhibit 1.

³ Appeal at 2.

Benefits” proposal and eight clauses of the “Union Initiated Midterm Bargaining” proposal.⁴ The Department reasserted the non-negotiability of the remaining four clauses and responded to arguments made by the Union in its Appeal.

The Union’s Appeal and the Department’s Answer are before the Board for disposition. For reasons stated herein, the Board concludes that both proposals are negotiable.

II. Standard of Review

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.⁵ A permissive subject of bargaining is nonnegotiable if either party declines to bargain on the subject.⁶

Management rights are permissive subjects of bargaining.⁷ 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.⁸

Matters that do not contravene section 1-617.08(a) or other provisions of the Comprehensive Merit Personnel Act (“CMPA”) are negotiable.⁹ 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.¹⁰

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.¹¹ The Board will separately consider the negotiability of each of the matters in a dispute.¹²

⁴ Answer at 1.

⁵ *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)).

⁶ *Univ. of D.C. Faculty Ass’n v. Univ. of D.C.*, 64 D.C. Reg. 5132, Slip Op. 1617 at 2, PERB Case No. 16-N-01 (2017).

⁷ *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).

⁸ D.C. Official Code § 1-617.08(a).

⁹ *Univ. of D.C. Faculty Ass’n*, Slip Op. 1617 at 2.

¹⁰ D.C. Official Code § 1-617.08(b).

¹¹ *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).

¹² *Univ. of D.C. Faculty Ass’n*, Slip Op. 1617 at 2-3.

III. Analysis

At issue are the following proposals: an unnumbered article regarding Existing Rights and Benefits and an unnumbered article regarding Union Initiated Midterm Bargaining.¹³ The Union's proposals that were declared nonnegotiable by the Department are set forth below. The proposals are followed by: the Department's arguments in support of non-negotiability; the Union's arguments in support of negotiability; and the conclusion of the Board.

A. Existing Rights and Benefits

ARTICLE [] –EXISTING RIGHTS AND BENEFITS

All terms and conditions of employment not covered by the terms of this Agreement continue to be enforced in the event either party wishes to extinguish or modify the practices within the parties, notice and bargaining is required; provided that if the Agency desires to institute a change that impacts upon a term(s) or condition(s) of employment, the following procedure shall apply:

3. If the parties reach impasse, the parties may jointly request the assistance of a third-party to resolve the impasse, through mediation, fact-finding or other mutually agreeable process. Either party may invoke "last best offer" item by item interest arbitration within a reasonable period after reaching impasse.
4. Should an arbitrator's award issue pursuant to the terms of this Article, the arbitrator's award shall be final and binding on both parties, and, at the arbitrator's direction, may be retroactive.
5. No changes shall take effect until after all bargaining including impasse proceedings.

Department: The Department argues that the Union's proposal is nonnegotiable because it would require that the implementation of a management right be subject to impasse proceedings.¹⁴ The Department further notes that the fifth clause is nonnegotiable pursuant to PERB Case 17-I-03, Slip Opinion 1612, which held that impacts and effects bargaining can never reach impasse and therefore, does not qualify for PERB impasse resolution procedures.¹⁵ The Department also challenges the Union's argument that the parties may seek impasse

¹³ Appeal at 6.

¹⁴ Answer at 3.

¹⁵ Answer at 6.

resolution outside of PERB.¹⁶ The Department contends that it is subject to PERB's jurisdiction and cannot circumvent the CMPA in matters related to collective bargaining.¹⁷

Union: The Union argues that the Department's non-negotiability declaration fails to assert a basis for declaring part 3 and 4 of the proposal nonnegotiable.¹⁸ The Union states that contrary to the Department's argument, part 3 and 4 of the Article does not relate to "whether the Department may implement a change to employee working conditions prior to the completion of impact and effects bargaining."¹⁹ As to part 5, the Union contends that longstanding PERB jurisprudence supports its position that bargaining must take place before implementation of any changes to employee working conditions.²⁰ The Union cites to *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*²¹ and *District of Columbia Nurses Association v. Department of Mental Health*,²² wherein the Board held that upon request, management was required to engage in impact and effects bargaining prior to implementing a change to a management right.²³ Therefore, the Union argues, part 5 of the proposal is negotiable because commencing impact and effects negotiations before implementing a change in employee working conditions is required by D.C. Official Code § 1-617.04(a)(1) and (5).²⁴ The Union counters the Department's argument that the proposal defies the Board's holding in PERB Case No. 17-I-03. The Union asserts that PERB Case No. 17-I-03 did not address whether parties must complete negotiations prior to implementation of a change to employee working conditions.²⁵ Instead, the Union argues that in PERB Case No. 17-I-03 the Board's decision was limited to whether impasse procedures under the D.C. Official Code and PERB rules apply to impact and effects negotiations.²⁶ Further, the Union contends PERB Case No. 17-I-03 is not implicated in its proposal because the Article does not propose that the parties use impasse procedures under the D.C. Official Code or PERB rules.²⁷

Board: The Board finds that this article concerns a mandatory subject of bargaining. The Union's proposal does not impact management rights listed in D.C. Official Code § 1-617.08(a). Additionally, the proposal does not contravene the Board's opinion in PERB Case No. 17-I-03 or PERB Rule 527. In PERB Case No. 17-I-03, Slip Opinion 1612, the Board concluded that PERB impasse procedures outlined in PERB Rule 527 were not available to parties engaged solely in impact and effects bargaining.²⁸ However, neither that case, nor D.C. Official Code § 1-

¹⁶ Answer at 7.

¹⁷ Answer at 7.

¹⁸ Appeal at 5.

¹⁹ Appeal at 5.

²⁰ Appeal at 6.

²¹ 47 D.C. Reg. 1149, Slip Op. No. 607, PERB Case No. 99-U-44 (2000).

²² 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012).

²³ Appeal at 6.

²⁴ Appeal at 6.

²⁵ Appeal at 6.

²⁶ Appeal at 6-7.

²⁷ Appeal at 7.

²⁸ *AFGE Locals 1000, 2725, 2741, 2978, 3444, and 3721 v. Dep't of Human Serv.*, 64 D.C. Reg. 4889, Slip Op. 1612, PERB Case No. 17-I-03 (2017).

617.08(a), prevents parties from seeking impasse resolution outside of PERB for impact and effects bargaining cases. The proposal here seeks to create impasse resolution procedures in the parties' collective bargaining agreement independent of those outlined in PERB Rule 527. Therefore, the proposed article is negotiable.

B. Union Initiated Midterm Bargaining

ARTICLE [] –UNION INITIATED MIDTERM BARGAINING

Section 1—General:

6. The Agency will not implement the proposed change prior to completing bargaining except as provided by law.

Department: The Department's position that the proposal is nonnegotiable is again premised on its argument that the proposal would require that the implementation of a management right be subject to impasse proceedings in violation of PERB case law. The Department notes that in Case No. 17-I-03, PERB reaffirmed that "there is no obligation to reach an agreement during I&E ["impacts and effects"] bargaining. Thus I&E bargaining can never reach 'impasse' as defined in PERB Rule 599.17 and therefore does not qualify for the impasse resolution procedures in PERB Rule 526 and 527."²⁹

Union: The Union's position is that the proposal is negotiable because the Article does not propose that the parties use impasse procedures under the D.C. Official Code or PERB rules.³⁰ Instead, the Union argues, it proposes that the parties utilize mediation and interest arbitration. Therefore, the Union argues that PERB's holding in 17-I-03 is not relevant to the proposal at hand. Moreover, the Union argues that the Article is negotiable because the Department never challenged the negotiability of the Articles during the previous nine months of negotiations.³¹ The Union argues that this delay is an attempt to circumvent the bargaining process and is evidence of bad faith bargaining.³²

Board: The proposed clause is negotiable. The Union's proposal here would require the Department to complete bargaining before implementing a proposed change. The proposal does not impact management rights listed in section 1-617.08(a) of the D.C. Official Code. Additionally, the Board has consistently held that an agency has a duty to bargain "upon request, over the impact and effects, which include the procedures for implementing a management

²⁹ Answer at 5.

³⁰ Appeal at 7.

³¹ Appeal at 8.

³² Appeal at 8.

right.”³³ Procedures concerning the implementation of management rights decision are appropriate as a subject of bargaining.³⁴ Finally, the Board rejects the Union’s argument that the Department has waived its negotiability challenge to the proposal. There is no PERB or statutory deadline by which a party must make a non-negotiability declaration.

ORDER

IT IS HEREBY ORDERED THAT:

1. Department of Fire and Emergency Medical Services is required to bargain upon request with respect to the proposals of American Federation of Government Employees, Local 3721 concerning:
 - a. Existing Rights and Benefits; and
 - b. Union Initiated Midterm Bargaining.
2. Pursuant to Board Rule 559.1, this Decision and Order shall become final thirty (30) days after issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By the unanimous vote of Board Chairperson Charles Murphy and Members Ann Hoffman, Mary Anne Gibbons, Barbara Somson, and Douglas Warshof.

March 27, 2018

Washington, D.C.

³³ *Univ. of D.C. Faculty Ass’n v. Univ. of D.C.*, 45 D.C. Reg. 4771, Slip Op. No. 517 at 2, PERB Case No. 97-U-12 (1997).

³⁴ *AFGE Locals 631, 383, 1000, 1403, 1975, 2725, 2741, 2978, 3444 and 3721 v. D.C. Gov’t*, 62 D.C. Reg. 14666, Slip Op. 1541 at 4, PERB Case No. 09-U-31 (2015).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 17-N-03, Op. No. 1658 was sent by File and ServeXpress to the following parties on this the 3rd day of April, 2018.

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