Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
AFGE LOCALS 383, 1000, 1403, 1975, 2725, 2741, 2978, and 3721	
Petitioners	PERB Case No. 21-N-02
v.	Opinion No. 1779
OAG, MPD GARAGE, DBH, RHC, DCRA, DDS, DOEE, DOES, OSSE, DFS, DGS, DOH, DHCD, DPR, DYRS, FEMS[1]	
Respondents	

DECISION AND ORDER

I. Statement of the Case

On January 14, 2021, the American Federation of Government Employees Locals 383, 1000, 1403, 1975, 2725, 2741, 2978, and 3721 (Union) filed the instant Negotiability Appeal (Appeal). The Appeal concerns eight of thirteen proposals made by the Union and declared nonnegotiable by the various departments of the District Government (Agency) during impact and effects bargaining over the Emergency and Proposed Rulemaking of Chapter 4 of the District Personnel Manual (DPM) that establishes new regulations for the drug testing program.[2]

[1] The Union captioned the case District Departments and listed the following Departments: Office of the Attorney General, Metropolitan Police Department, Metropolitan Police Garage, Department of Behavioral Health, Rental Housing Commission Department of Consumer and Regulatory Affairs, Department of Disability Services, District Department of Energy and the Environment, Department of Employment Services, Office of the State Superintendent of Education, Department of Forensic Sciences, Department of General Services, Department of Health, Department of Housing and Community Development, Department of Parks and Recreation and Department of Youth Rehabilitation Services Columbia, Fire and Emergency Medical Services Department.
[2] 6-B DCMR §§ 407, 409-411, 425-444, and 499.

II. Background

On August 17, 2020, the Union submitted its initial proposal.[3] On December 21, 2020, the Agency declared eight proposals submitted by the Union to be nonnegotiable. The Union timely filed this Appeal asserting that the proposals were negotiable. On February 9, 2021, the Agency filed its Answer to the Appeal. On February 18, 2021, the Agency Amended its Answer.[4]

III. 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.[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 giving management "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

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[3] Appeal at 2.
[4] The Agency asserts without reference to any legal principle that the Appeal must be dismissed on procedural grounds because the Union failed to list the Department of Public Works, Department of Motor Vehicles, Department of For-Hire Vehicles, and District of Columbia Department of Transportation as parties. This argument is unpersuasive. Board Rule 532.3 requires the petitioner to provide the name and contact information for the chief negotiator in the appeal. The Office of Labor Relations and Collective Bargaining is the representative for the above agencies in the negotiations and in this Appeal. To the extent that the Agency is asserting a violation of due process, the Board finds that the above agencies have not been prejudiced and that the failure to list those agencies was a harmless error.
[5] *DCNA v. DOH*, 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)).
[6] *UDCFA v. UDC, D.C.*, 64 D.C. Reg. 5132, Slip Op. No. 1617 at 2, PERB Case No. 16-N-01 (2017).
[7] *NAGE Local R3-06 v. WASA*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at 4, 13-N-03 (2013); *FEMS 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] *UDCFA*, Slip Op. No. 1617 at 2.
[10] D.C. Official Code § 1-617.08(b).

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]

IV. Analysis

There are eight proposals that the Agency has identified as nonnegotiable subjects of bargaining. The Union's proposals that were declared nonnegotiable by the Agency are set forth below.

Proposal #2- Section 409. 3

A. Union Proposal

> In the event a District Agency wishes to detail an employee, the Agency will provide 30-days advance notification of the detail being covered by drug and alcohol screening requirements.

B. Agency Position

The Agency argues that the Union proposal "exceeds the scope of the instant impacts and effects negotiations as there was no substantive change whatsoever to Section 409.3."[13] Further, the Agency contends that the proposal interferes with management's rights to direct employees and to hire, promote, transfer, assign, and retain employees.[14] The Agency argues that the proposal restricts management's right to make such details on short notice or in emergency situations.[15]

C. Union Position

The Union argues that Agency "declared this proposal non-negotiable without any legal or other basis for doing so."[16]

D. Board's Finding

As an initial matter, the Union's proposal is within the scope of bargaining because the section is included in the emergency and proposed rulemaking. The Agency argues that it has not made any substantive changes to the wording of this particular section, however, by including the section in the rulemaking, the Agency has made it subject to change and therefore subject to impact and effects bargaining.

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[11] *FOP/Protective Serv. Police Dep't Labor Comm. v. DGS*, 62 D.C. Reg. 16505, Slip Op. No. 1551 at 1, PERB Case No. 15-N-04 (2015).
[12] *UDCFA*, Slip Op. No. 1617 at 2-3.
[13] Amended Answer at 5.
[14] D.C. Official Code § 1-617.08(a)(1),(2).
[15] Amended Answer at 5.
[16] Appeal at 4.

The Board has held that the decision to implement a drug testing program is a management right.[17] Nonetheless, the exercise of a management right does not relieve an agency of the duty to bargain over the impact and effects of its decision to implement a drug testing program.[18] The impacts of a drug testing program include discipline, procedural aspects of discipline, procedures of the test, and procedures concerning the implementation of the program.[19] The Union's proposal is within the scope of impact and effects bargaining, nevertheless, it infringes upon management rights. The requirement that the Agency provide 30-day advance notice prevents management from detailing employees for periods shorter than 30 days. This interferes with management's right to hire, promote, transfer, assign, and retain employees under D.C. Official Code § 1-617.08(a)(2). Therefore, the proposal is nonnegotiable.

Proposal #3- 426.6(c) and 426.6(d)

A. Union Proposal

> Drug and alcohol screening notification requirements may not be waived for any reason. In the event a District Agency fails to provide proper notification regarding drug and alcohol screenings, then any later actions based on the drug and alcohol screening will be invalid.

B. Agency Position

The Agency argues that "the Union's proposal number 3 is nonnegotiable as it would negate management's right to discipline employees by requiring any subsequent action taken to be invalid if the actual notice is not provided to employees."[20] Further, the Agency argues that the proposal infringes upon its internal security protocols.[21] The Agency asserts that the designation of positions as safety sensitive provides a basis for random drug screenings. The Agency contends that the proposal would nullify discipline or prohibit management from disciplining employees despite the safety-sensitive designation.[22] Thus, the Agency argues that the proposal erodes management right to determine internal security protocols.[23]

C. Union Position

The Union argues that the proposal requires the Agency to follow District law and regulations.[24] The Union asserts that the proposal has no requirement that the District violate its

[17] *AFGE Local 631 v. DGS*, 60 D.C. Reg. 12068, Slip Op. No. 1401 at 5, PERB Case No. 13-U-23 (2013).
[18] *Id.*
[19] *Id. See also, Teamsters Local 639 and 730 v. DCPS,* 38 D.C. Reg. 96, Slip Op. No. 249 at 6, PERB Case No. 89-U-17 (1991).
[20] Amended Answer at 7.
[21] Amended Answer at 8.
[22] Amended Answer at 8.
[23] Amended Answer at 9.
[24] Appeal at 5.

internal security procedures and thus it is negotiable consistent with PERB precedent.[25] The Union's position is that, if the Agency provides a drug and alcohol screening in violation of required notice provisions, then any action taken as a result will be invalid as the underlying activity violates applicable law, rule, and regulation.[26]

D. Board's Findings

The exercise of a management right does not relieve an agency of the duty to bargain over the impact and effects of its decision to implement a drug testing program. The impacts of a drug testing program include discipline, procedural aspects of discipline, procedures of the test, and procedures concerning the implementation of the program.[27] Although the Union has the right to impact and effects bargaining, the instant proposal nullifies management's right to discipline employees by voiding discipline imposed by management.[28] Therefore, Proposal #3 is nonnegotiable.

Proposal #4- 429.2

A. Union Proposal

> There shall be no presumption of impairment in cannabis use cases. District Agencies must establish impairment by a preponderance of the evidence. In addition, the District Agency has an obligation to establish a connection between a positive marijuana screening and the employee's official duties.

B. Agency Position

The Agency argues that the proposal is nonnegotiable because it conflicts with Mayor's Order 2019-081, which requires a presumption of impairment for a reasonable suspicion-based test or post-accident or post-incident test. The Agency asserts that the proposal interferes with management's right to discipline by "changing the standard to require management to prove impairment by a preponderance of evidence, and also requiring management to establish a connection between the positive cannabis test and the employee's duties."[29]

C. Union Position

The Union asserts that the proposal should be declared negotiable because it does not conflict with any mandate outlined in statute or caselaw.[30] The Union disputes the Agency's

[25] Appeal at 5.
[26] Appeal at 4.
[27] *AFGE, Local 631 v. DGS*, 60 D.C. Reg. 12068, Slip Op. No. 1401 at 5, PERB Case No. 13-U-23 (2013). *See also, Teamsters Local 639 and 730 v. DCPS*, 38 D.C. Reg. 96, Slip Op. No. 249 at 6, PERB Case No. 89-U-17 (1991).
[28] *AFGE, Local 631v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435 at 11, PERB Case No. 13-N-05 (2013).
[29] Amended Answer at 11-12.
[30] Appeal at 6.

interpretation that the proposal violates Mayor's Order 2019-081.[31] The Union argues that the Mayor's Order only allows for a presumption of impairment in discrete circumstances and there is no mandate or controlling caselaw applicable to the presumption of impairment.[32]

D. Board's Finding

The Board has found that the burden of proof is a procedural matter. Standing alone, a proposal establishing the burden of proof may be negotiable.[33] However, the parties have not requested severance of provisions.[34] Taken as a whole, the instant proposal interferes with management's right to discipline employees by limiting the cause for disciplinary action to incidents where a positive cannabis is connected to an employee's job duties.[35] In addition, the proposal would violate Mayor's Order 2019-081 and management's right to determine internal security practices.[36] Therefore, Proposal #4 is nonnegotiable.

Proposal #5- 429.2

A. Union Proposal

> When an employee has a valid medical cannabis prescription, a positive test result will not result in adverse action against the employee permitted that he/she utilized cannabis consistent with a valid medical prescription.

B. Agency Position

The Agency asserts that the proposal excessively interferes with management's right to take disciplinary actions.[37] Further, the Agency explains that (1) the use of cannabis in any form, for employees in positions designated as safety sensitive, is prohibited by Mayor's Order 2019-081, (2) employees who are in safety-sensitive positions are explicitly excluded from protection against adverse actions being taken against them for use of medical marijuana by law under the "Medical Marijuana Program Patient Employment Protection Amendment Act of 2020,[38] and (3)

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[31] Appeal at 5.
[32] Appeal at 5.
[33] *UDCFA v. UDC*, 64 D.C. Reg. 5132, Slip Op. No. 1617 at 11, PERB Case No. 16-N-01 (2017).
[34] The Board adopts the practice of the FLRA. See 5 CFR 2424.22(c) "The exclusive representative may, but is not required to, include in the petition for review a statement as to whether it requests severance of a proposal or provision. If severance is requested in the petition for review, then the exclusive representative must support its request with an explanation of how each severed portion of the proposal or provision may stand alone, and how such severed portion would operate. . . ."
[35] *Id.*
[36] *AFGE, Local 3721 v. FEMS*, 46 D.C. Reg. 7613, Slip Op. No. 390 at 5, PERB Case No. 94-N-04 (1999) (finding that a Mayor's Orders provided a basis in applicable law, rules, or regulations sufficient to support a finding that a proposal contravened a management right).
[37] Amended Answer at 14.
[38] Amended Answer at 14 (citing D.C. Pub. Law 23-540, Section 2062(b)(1) (2020)).

an employee using marijuana is not considered to have a qualified disability under the ADAA for the use of marijuana.[39]

C. Union Position

The Union argues that the proposal is negotiable. The Union asserts that the proposal "seeks to enforce laws, rules, and regulations that protect individuals with disabilities and serious medical conditions who have a lawful right as well as protection in the event they use medications as prescribed."[40] The Union disputes the Agency's declaration of non-negotiability arguing (1) the proposal is consistent with parts of Mayor's Order 2019-081 and (2) that Order 2019-081 alone is not sufficient to find the proposal nonnegotiable.

D. Board's Finding

The Board has found that a Mayor's Order is a sufficient basis in law, rule, or regulations to support the finding that a proposal contravenes management rights.[41] The proposal is nonnegotiable as it interferes with management's right to discipline employees and runs afoul of Mayor's Order 2019-081.

Proposal #6 and #12- 429.2 and Medical Marijuana

A. Union Proposal

> #6-The first instance of a positive cannabis test will result in a written reprimand. The second instance will result in a five (5)-day suspension. The third instance will requirement reassignment to a non-safety sensitive position. Only in the event there are no available positions where the employee meets the minimum requirements may an employee be removed for failing to pass a cannabis screening test.
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> #12- Employees who have a valid medical prescription and/or participate in the medical cannabis program will be exempt from disciplinary action based solely on their compliance with such prescription and/or program.

B. Agency Position

The Agency asserts that the Board "has consistently held that the right to bargain over disciplinary action is limited to procedural matters."[42] The Agency argues that #6 is nonnegotiable because the proposal attempts to restrict management's right to take disciplinary action.[43] Likewise, the Agency argues that #12 is nonnegotiable because it interferes with management's

[39] Amended Answer at 14 (citing 42 U.S.C. 12111 (a) and (b)).
[40] Appeal at 6.
[41] *AFGE, Local 3721 v. FEMS*, 46 D.C. Reg. 7613, Slip Op. No. 390 at 5, PERB Case No. 94-N-04 (1999).
[42] Amended Answer at 15.
[43] Amended Answer at 15.

right to discipline employees. The Agency admits that it offered a counterproposal to limit the scope of #12 to non-safety-sensitive positions and avers that the proposal may be negotiable in part. Nevertheless, the Agency posits that the proposal should be deemed nonnegotiable as written because it infringes on management rights.

C. Union Position

The Union contends that #6 and #12 are negotiable. The Union argues that the proposals incorporate principles of progressive discipline into the drug screening program. The Union asserts that #6 is consistent with Mayor's Order 2019-081 because section G of the order states, "As provided in Title 6-B of the DCMR, agencies shall adhere to principles of progressive discipline, unless otherwise negotiated in a collective bargaining agreement."[44]

D. Board's Findings

The right to suspend, demote, discharge, or take other disciplinary action against employees for cause includes the right to determine what disciplinary penalty to impose.[45] The Board has found progressive discipline proposals that prohibit an agency from assigning a penalty for violations committed by employees are inconsistent with the right enumerated in D.C. Code § 1-617.08(a)(2).[46] Because proposal #6 limits the disciplinary actions that the Agency may impose for each violation, it is nonnegotiable.

The Agency has waived its right to declare proposal #12 nonnegotiable. Nothing in the CMPA prevents management from negotiating over the management rights listed in the statute if it so chooses.[47] Here, the Agency admits that it offered a counterproposal to the Union and contends that the proposal "in relation to employees in non-safety sensitive positions is negotiable in part."[48] Although the Board has found that the Agency waived its rights with regards to proposal #12, this means only that the Agency has a duty to bargain in good faith in the context of impact and effects, as required by the CMPA.[49] It does not mean that there is any obligation to reach agreement.[50]

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[44] Appeal at 7 (citing Mayor's Order 2019-081 p.8, Section G).
[45] POPA, 53 FLRA 625, 679 (1997).
[46] *AFGE, Local 631 v. WASA*, 60 D.C. Reg. 16462, Slip Op. No. 1435 at 10-11, PERB Case No. 13-N-05 (2013).
[47] Id. at 5 (citing *AFGE, Local 631 v. WASA*, 54 D.C. Reg. 3210, Slip Op. No. 877 at 7-9, PERB Case No. 05-N-02 (2007)).
[48] Amended Answer at 16.
[49] *AFSCME, District Council 20, Local 2401 v. CFSA*, 61 D.C. Reg. 12856, Slip Op. No. 1497 at 3, PERB Case No. 10-I-06 (2014)(defining good faith during impact and effects bargaining as going beyond simply discussing its proposal with the union, and doing more than merely requesting the union's input. . . . Rather, there must be a give and take with the negotiations entailing full and unabridged opportunities by both parties to advance, exchange and reject specific proposals).
[50] *Compensation Unit 21 v. DOH*, 49 D.C. Reg. 7756, Slip Op. No. 674 at 3, PERB Case No. 02-N-02 (2002).

Proposal #7- 429.5

A. Union Proposal

The District Agency Head has the exclusive authority to issue disciplinary action against its employees consistent with negotiated collective bargaining agreements as well as applicable law and rule. Under no circumstances may DCHR usurp a District Agency's authority to issue disciplinary action.

B. Agency Position

The Agency argues that proposal #7 restricts who can take disciplinary action against an employee, restricting it to a District Agency Head only. The Agency asserts that "the Mayor has delegated the Personnel Authority to the Director of DCHR in Mayor's Order 2008-92, Section (B)44."[51] The Agency states that "there has been no change in DCHR's role in the disciplinary process for employees who have a positive drug or alcohol test. The sole right to…suspend, demote, discharge, or take other disciplinary action for cause belongs to management."[52]

C. Union Position

The Union disagrees with the Agency's declaration of non-negotiability, asserting that it violates the Mayor's statutory responsibility as the personnel authority. The Union asserts that the proposal has no impact on either the Mayor's statutory authority or the authority of the District Agencies.

D. Board's Findings

Proposal #7 is nonnegotiable. The Board has found that a Mayor's Order is a sufficient basis in law, rule, or regulations to support the finding that a proposal contravenes management rights.[53] The proposal is nonnegotiable as it interferes with management's right to discipline employees and runs afoul of Mayor's Order 2008-92.

Proposal #8- 432.3

A. Union Proposal

In order to proceed with reasonable suspicion testing, a trained manager's suspicion of impairment must be certified by a second trained manager.

B. Agency's Position

[51] Amended Answer at 17.
[52] Amended Answer at 18.
[53] *AFGE, Local 3721 v. FEMS*, 46 D.C. Reg. 7613, Slip Op. No. 390 at 5, PERB Case No. 94-N-04 (1999).

The Agency argues that the Union is attempting to negotiate beyond the scope of the impacts and effects of the proposed changes because the language of 432.3 was not changed.

C. Union's Position

The Union asserts that the proposal is consistent with prior DPM provisions as well as the provisions that remain in effect between the parties on reasonable suspicion testing.

D. Board's Findings

Proposal #8 is negotiable. The duty to negotiate the impact of a drug testing program includes negotiation over discipline, procedural aspects of discipline, procedures of the test, and procedures concerning the implementation of the program.[54] The number of supervisors required to proceed with reasonable suspicion testing is a procedural matter that may be negotiated.

ORDER

IT IS HEREBY ORDERED THAT:

1. AFGE's proposal #2- Section 409. 3 is nonnegotiable
2. AFGE's proposal #3- 426.6(c) and 426.6(d) is nonnegotiable.
3. AFGE's proposal #4- 429.2 is nonnegotiable.
4. AFGE's proposal #5- 429.2 is nonnegotiable.
5. AFGE's proposal #6 -429.2 is nonnegotiable and #12- Medical Marijuana is negotiable .
6. AFGE's proposal #7- 429.5 is nonnegotiable.
7. AFGE's proposal #8 -432.3 is negotiable.
8. 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 Barbara Somson, Mary Anne Gibbons, and Peter Winkler

Washington, D.C.

March 18, 2021

[54] *Id. See also, Teamsters Local 639 and 730 v. DCPS,* 38 D.C. Reg. 96, Slip Op. No. 249 at 6, PERB Case No. 89-U-17 (1991).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 21-N-02, Slip Op. No. 1779 was sent by File and ServeXpress to the following parties on this 25th day of March 2021.

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