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

In the Matter of:)	
)	
Service Employees International Union, Local 500)	PERB Case No. 15-N-01
)	
Petitioner)	Opinion No. 1539
)	
and)	
)	
University of the District of Columbia)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On February 9, 2015, the Service Employees International Union, Local 500 (“SEIU” or “Union”) filed a Negotiability Appeal (“Appeal”), pursuant to Board Rule 532. SEIU and the University of the District of Columbia (“UDC” or “Agency”) are currently negotiating their first Collective Bargaining Agreement (“CBA”) on working conditions. SEIU filed this Appeal, in response to UDC’s written rejection of a number its contract proposals as nonnegotiable. UDC filed an Answer, contesting SEIU’s position that the provisions in question were negotiable. The parties submitted briefs in support of their positions.¹

II. Discussion

The Board has the authority to consider the negotiability of the proposals pursuant to Board Rules 532.1 and 532.4.

In *UDCFA/NEA v. UPC*, the Board adopted the Supreme Court standard for subjects for bargaining that was established and defined in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342 (1975).² Under this standard, the three categories of bargaining subjects are as follows: (1) mandatory subjects-over which the parties must bargain; (2) permissive subjects,

¹ SEIU requested that the parties be given the opportunity to brief their positions.

² 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982).

over which the parties may bargain; and (3) illegal subjects, over which the parties may not legally bargain.³

UDC opposes the Union's proposals found *infra*, because UDC asserts that the proposals affect management's rights under the CMPA. D.C. Official Code § 1-617.08(a) designates management rights:

(a) The respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations:

(1) To direct employees of the agencies;

(2) To hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause;

(3) To relieve employees of duties because of lack of work or other legitimate reasons;

(4) To maintain the efficiency of the District government operations entrusted to them;

(5) To determine:

(A) The mission of the agency, its budget, its organization, the number of employees, and to establish the tour of duty;

(B) The number, types, and grades of positions of employees assigned to an agency's organizational unit, work project, or tour of duty;

(C) The technology of performing the agency's work; and

(D) The agency's internal security practices; and

(6) To take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

The D.C. Court of Appeals has recognized that "verbs such as 'must' or 'shall' denote mandatory requirements, unless such construction is inconsistent with the manifest intent of the legislature or repugnant to the context of the statute."⁴

Additionally, D.C. Official Code § 1-617.08(b) provides that "all matters shall be deemed negotiable, except those that are proscribed by this subchapter." The Board has held that this language creates a presumption of negotiability.⁵ The Board has stated that "in view of specific rights reserved solely to management under this same provision, i.e. D.C. Official Code § 1-617.08(a), the Board must be careful in assessing proffered broad interpretations of either

³ *Id.* See also *D.C. Nurses Association v. D.C. Department of Mental Health*, 59 D.C. Reg. 10776, Slip Op. No. 1285, PERB Case No. 12-N-01 (2012).

⁴ *Leonard v. District of Columbia*, 801 A.2d 82, 84-85 (2002).

⁵ *International Association of Firefighters, Local 36 v. D.C. Department of Fire and Emergency Medical Services*, 51 D.C. Reg. 4185, Slip Op. No. 742, PERB Case No. 04-N-02 (2004).

subsection (a) or (b).”⁶

III. Positions of the Parties

The Union's proposals are set forth below. The proposals are followed by: (1) UDC's arguments in support of nonnegotiability; (2) SEIU's arguments in support of negotiability; and (3) the findings of the Board. The Board considers each proposal as a whole, unless the Union has requested that only a particular portion of a proposal be considered.

Union Proposed Article 5 – Assignments, Appointments and Re-appointment

The Union proposed an article concerning the assignment, appointment and reappointment of employees. The Agency has declared most of the Union's proposals non-negotiable, arguing that the proposals infringe on UDC's management rights.⁷

I. Union's Proposals:

A. Assignments shall be for [a] duration of 3 years, 1 year or by semester.

B. UDC shall notify the part-time faculty member of their course assignment/s, in writing, no later than March 1 for the following fall semester and October 1 for the following spring semester in which the assignment is offered. The appointment letter shall include details of the courses to be taught and pay rates for each course.

Agency: UDC argues that these provisions “infringe on UDC's right to direct and assign employees; to maintain the efficiency of the University; and to determine the mission, budget and organization of the University.”⁸ UDC asserts that the length of time of an employee's assignment is a management right to set educational policy and to “suspend, demote, discharge, or take other disciplinary action against employees for cause” and to “relieve” employees of their duties due to lack of work or other legitimate reason.”⁹ Further, UDC asserts that prescribing a time period to notify employees of their work assignment interferes with UDC's right to establish educational policy.

Union: As noted above, the Union asserts that its proposals are procedural in nature, and therefore, negotiable.¹⁰

Board: D.C. Official Code § 1-617.08(a)(1) grants management the sole right “[t]o direct

⁶ *Washington Teachers' Union v. District of Columbia Public Schools*, 46 D.C. Reg. 8090, Slip Op. No. 450 at p.4, PERB Case No. 95-N-01 (1999).

⁷ UDC's Brief at 3.

⁸ UDC's Brief at 3 (citing D.C. Official Code § 1-617.08(a)(1), (2), (4) & (5)(A)).

⁹ UDC's Brief at 3.

¹⁰ SEIU's Brief at 2.

employees of the agencies,” while subsection (a)(2) grants management the sole right “[t]o hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause.”¹¹ The CMPA reserves the right to direct and assign employees solely to management.¹² Proposal A requires management to only offer assignments of three (3) years, one (1) year, or by semester. The right to determine the length of an assignment infringes on UDC’s right to assign work. Additionally, the language in Proposal B, which requires UDC to notify employees by particular dates of their assignments, affects UDC’s management’s right to assign work by requiring UDC to make assignments by particular dates.¹³ The Board finds that the proposals are nonnegotiable, as they interfere with management’s right to assign.

2. *Union proposal:*

C. Part-time faculty members who are on 3-year or annual appointments may be offered additional course assignments. They shall be shall be (sic) solicited by UDC as to their interest in receiving an additional assignment(s) no later than March 1 for the following annual or 3-year appointment.

Agency: UDC argues that Section C requires UDC to offer certain employees additional assignments.

Union: As noted above, the Union argues that this is procedural.

Board: The language of the proposal does not require that the Agency assign particular work to certain employees. The language of the proposal provides for the employees to provide input on their assignment preferences. It does not impose a duty on the Agency to assign an employee his or her preference. Therefore, the Board finds that the proposal is negotiable.

3. *Union proposal:*

D. A part-time faculty member who is provided notice of course assignments(s) for a semester shall notify UDC of the acceptance of the assignment(s) within two (2) weeks of receiving notice of assignment, except in circumstances beyond the part-time faculty member’s reasonable control.

Agency: UDC argues that the proposal sets a time limit for acceptance, which “interferes with the University’s right to hire, assign and maintain the efficiency of the University.”¹⁴

¹² D.C. Official Code § 1-617.08(a)(1) and (2).

¹³ Although bargaining over notice for re-assignments is governed differently in the federal sector, the FLRA has found proposals requiring notice that limit’s management’s ability to change work schedules nonnegotiable. *See Illinois Nurses Ass’n and VAMC, Hines*, 28 FLRA 212, 227-28 (1987).

¹⁴ UDC Brief at 3 (citing D.C. Official Code § 1-617.08(a)(1)).

Union: As stated above, the Union argues that this proposal is procedural.

Board: Proposal D would require UDC to hold positions open for a minimum of two weeks, while a part-time faculty member decides to accept the position. This proposal affects UDC's right to assign, because it prevents UDC from assigning courses as needed by UDC.¹⁵ The Board finds that this proposal is nonnegotiable.

4. *Union proposal:*

G. If a part-time faculty member's assigned course is cancelled due to lack of enrollment, the department shall promptly notify the part-time faculty of the cancellation. In the case of course cancellation, the part-time faculty member shall be offered an available alternative course, that has not been assigned to another part-time faculty member and which the part-time faculty member is qualified to teach.

The parties only dispute the negotiability of the second sentence of Section G.

Agency: UDC asserts that the sentence is nonnegotiable, because the sentence interferes with "UDC's management right to direct and assign work, to maintain the efficiency of the University, and to determine the University's mission, budget, organization, and number, types and grades of positions."¹⁶

Union: As stated above, the Union argues that this proposal is procedural.

Board: The Board finds that this proposal is nonnegotiable, because it requires UDC to assign particular work to a particular employee without regard for UDC's right to maintain the efficiency of the agency and determine UDC's mission.

5. *Union proposal:*

H. Part-time faculty members shall be given the opportunity to give input to the department on what courses s/he would like to teach. Part-time faculty members shall have the ability to propose new courses, programs or seminars to departments. Part-time faculty members shall receive the same support accorded to full-time faculty in the pursuit of their contributions to the departments' course offerings. Department Chairs or designees shall meet, on request, with a part-time faculty member to discuss the part-time faculty member's qualification to teach other courses.

¹⁵ In general, the FLRA will find a proposal negotiable concerning vacancy filling as long as the proposal does not establish particular time for a vacancy to be filled. *AFGE Local 1738 and VAMC, Salisbury*, 27 FLRA 52, 61-63 (1987).

¹⁶ UDC Brief at 4.

Agency: UDC argues that the Union's proposal "interferes with UDC's mission and its organization by requiring that part-time faculty members have input into new courses, programs and seminars," the development of which UDC argues is a management right to direct educational policy.¹⁷ In addition, UDC asserts that the Union's proposal requires UDC to assign work to the Department Chairs or designees.¹⁸

Union: As stated above, the Union argues that this proposal is procedural.

Board: The proposal is nonnegotiable. The language "shall receive the same support" requires that management provide certain type of support to the part-time faculty members. The language infringes on management's right to determine the mission and organization of the agency. The Board notes that if the proposal was presented to the Board without the nonnegotiable language discussed above, the proposal would have been negotiable. Allowing input from employees would not require management to take any action. Further, a Department Chair or another designated employee is only proposed to discuss a member's qualifications. It does not require the Chair in particular to meet with a faculty member, nor does it require the Chair or designee to assign a faculty member to another course.¹⁹

6. *Union proposal:*

I. If a part-time faculty member(s) designs a new course, and the department intends to offer the course, the part-time member shall be given the first right of refusal to teach the course/s suggested and developed until such time in the future the part-time faculty member declines to teach the course.

Agency: UDC argues, "By mandating that a part-time faculty member be given 'the right of first refusal' to teach a course, this Section infringes on UDC's right to direct and assign employees, to hire employees, to determine the mission of the University and its organization, and to determine the number, types and grades of positions assigned to an organizational unit."²⁰

Union: As stated above, the Union argues that this proposal is procedural.

Board: The Board finds that the Union's proposal is nonnegotiable. It requires UDC to assign a particular class to a particular employee, regardless of any discretion or standards for assigning the employee.

¹⁷ UDC Brief at 5.

¹⁸ UDC Brief at 5-6.

¹⁹ The FLRA has stated, "[T]he right to assign work 'encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.' However the mere fact that a proposal or provision entails some kind of agency action does not necessarily implicate an agency's right to assign work." *NTEU and DHS, Customs & Border Protection*, 64 FLRA 443, 447 (2010).

²⁰ UDC Brief at 6.

7. *Union proposal:*

J: Part-time faculty members shall not be limited in the number of courses they can teach per semester or per academic year, as a result of this agreement.

Agency: UDC argues that “whether there should be a limit on the number of courses a part-time faculty member is permitted to teach should be determined by the University.”²¹ UDC asserts that the Union’s proposal interferes with the management rights to direct its mission and organization, by interfering with UDC’s right to determine the criteria and number of courses that defines part-time and full-time faculty members.²² In addition, UDC asserts that the proposal affects its right to determine tours of duty.

Union: As stated above, the Union argues that this proposal is procedural.

Board: The Board finds that the proposal is negotiable. The language of the Union’s proposal “as a result of this agreement” saves the proposal. The Union does not assert that the number of courses cannot be limited. The proposal states that the parties’ agreement does not establish a limit on the number of courses a part-time faculty member can teach.

8. *Union proposal:*

L: When courses become newly available that are not assigned to any part-time faculty member or additional sections of existing courses are opened, part-time faculty will be notified of the available courses and the courses will be posted on the UDC website. Qualified part-time faculty members who apply to teach such courses and who already teach at UDC shall be given preferential treatment in assignment over applicants who do not teach at UDC. Where more than one part-time faculty is a qualified applicant under this article and merit and ability are approximately equal in the Employer’s reasonable judgment, the course will be offered to the longest serving part-time faculty member. If two or more part-time faculty members have equal length of service, the course will be offered to the part-time faculty member who has taught the greatest number of courses during their length of service at UDC.

Agency: UDC argues that the provision “is a direct infringement on UDC’s right to direct employees; hire and assigned employees; maintain the efficiency of the University; and determine the mission of the University, its budget, organization and number of employees; and determine the number, types and grades of positions within each organizational unit.”²³

²¹ UDC Brief at 8.

²² UDC Brief at 8.

²³ UDC brief at 8-9.

Union: As stated above, the Union argues that this proposal is procedural.

Board: The Board has held that seniority is negotiable.²⁴ Notwithstanding, the provision establishes a “reasonable judgment” standard that may interfere with management’s right to determine who is qualified. Therefore, the proposal is nonnegotiable.

9. Union proposal:

M: When multiple sections of a course are assigned to multiple part-time faculty members and the department determines that one or more of those sections will be canceled, the section/s assigned to the shortest-serving part-time faculty member shall be cancelled first.

Agency: UDC argues that the provision infringes on UDC’s right to direct, hire and assign employees, maintain the efficiency of the agency, and determine its mission and organization.²⁵ UDC argues that the cancellation of a course “goes to the heart of its mission and educational policy.”²⁶

Union: As stated above, the Union argues that this proposal is procedural.

Board: The Board finds that the proposal is nonnegotiable. Section M infringes on UDC’s educational mission, as it requires UDC to determine the availability of courses based on seniority. Specifically, UDC would be required to make determinations of which sections to offer to students, based solely on seniority, instead of other factors like student enrollment in other sections. The proposal infringes on UDC’s right to determine which sections to provide, which interferes with UDC’s right to determine its educational mission.

10. Union proposals:

O: Part-time faculty members who have previously taught a course for a minimum of two (2) semesters within a period of two (2) academic years at UDC shall be offered re-appointment at a course load at least equal to the number of courses assigned (“courses assigned” shall mean either courses having been assigned to the part-time faculty member or actually taught) during the previous corresponding semester (fall to fall and spring to spring), excluding overload courses.

P: Part-time faculty members who have taught a course for a minimum of three (3) semesters within a period of three (3) academic years shall be offered an annual appointment at a course load at least equal to the number of courses assigned during the previous academic year. Part-time

²⁴ Teamsters Local Union No. 639 and D.C. Public Schools, Slip Op. No. 263, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990).
²⁵ UDC brief at 8-9.
²⁶ UDC Brief at 9.

faculty members who do not want to be assigned to an annual appointment shall continue to be re-appointed on a semester basis as per Article 5, section N. above, until such time as the part-time faculty member desires an annual appointment.

Q: Part-time faculty members who have taught a course for a minimum of four (4) semesters within a period of four (4) academic years shall be offered a 3-year appointment at a course load at least equal to the number of courses assigned during the previous academic year. Part-time faculty members who do not want to be assigned to a 3-year appointment shall continue to be re-appointed on a semester or Annual basis as per Article 5, section N and/or O above, until such time as the part-time faculty member desires a 3-year appointment.

Agency: UDC argues that the proposals mandate that UDC reappoint certain faculty members, violating management's rights "to direct, hire, assign and retain employees; to maintain the efficiency of the University; to determine its mission, budget, organization and number of employees; and to determine the number, types and grades of positions within each unit."²⁷

Union: As stated above, the Union argues that this proposal is procedural.

Board: The provisions are nonnegotiable, as the provisions violate management's right to assign, hire, and direct work by requiring management to reappoint faculty members.

11. Union proposals:

R: Re-appointment may be denied, reduced, or subsequently cancelled only in the following circumstances:

- a. Elimination or downsizing of a department or program, or a reduction in the number of courses or sections (hereinafter, "courses") offered in the applicable semester, but the impact shall be limited to the relevant course(s) taught by the Part-time faculty member;
- b. Cancellation of a course(s) due to under enrollment, based on a predetermined standard for minimum enrollment, but the impact shall be limited to the relevant course(s) taught by the part-time faculty member;
- c. Elimination or decrease in courses due to changes in General Curriculum requirements or major or minor or program offerings, but the impact shall be limited to the relevant course(s) taught by the part-time faculty member;
- d. Poor performance by the part-time faculty member, as evidenced by the part-time faculty member's evaluation file as set forth in Article , or the

²⁷ UDC Brief at 10.

part-time faculty member's failure to correct a performance problem identified in an evaluation conducted pursuant to Article or by a Department Chair/Program Director or designee through prior discussion, provided that the part-time faculty member has been given a reasonable opportunity to remedy such deficiencies;
e. Discharge or serious misconduct or neglect of duties resulting in a suspension or written reprimand in accordance with Article

Agency: UDC argues that "Section R limits the circumstances under which re-appointment of a part-time faculty member can be denied, reduced or cancelled."²⁸

Union: As stated above, the Union argues that this proposal is procedural.

Board: Section R is nonnegotiable. The provision places restrictions on UDC's ability to re-appoint employees. Consequently, the provision affects UDC's management right to assign work.

11. Union proposal:

S: Student evaluations alone shall not be used as the exclusive basis to deny, reduce, or subsequently cancel an appointment.

Agency: UDC argues that this provision "interferes with the right to assign and undermines the University's ability to determine its mission and the right to relieve an employee from duty for lack of work or other legitimate reason."²⁹ In addition, UDC argues that SEIU cannot determine UDC's criteria for making a decision for re-appointment of a faculty member.³⁰

Union: As stated above, the Union argues that this proposal is procedural.

Board: The Board finds the proposal nonnegotiable. The provision creates criteria for UDC to consider or not consider when re-appointing or assigning an employee. This provision restricts UDC's right to assign work.

12. Union proposal:

T. Courses shall not be scheduled in a manner that impacts the part-time faculty member's availability to continue teaching the course, unless there is a demonstrable operational or programmatic need, in the Employer's reasonable discretion. In the circumstances set forth in subparagraphs a, b, and c, the Department Chair/Program Director or designee shall offer the

²⁸ UDC Brief at 11.

²⁹ UDC Brief at 12.

³⁰ *Id.*

impacted part-time faculty member an available scheduled course that the part-time faculty member is qualified to teach.³¹

Agency: UDC argues that the provision “interferes with UDC’s right to maintain the efficiency of the University; to determine the University’s mission and organization; and to establish the tour of duty.”³² UDC also argues that the proposal interferes with its right to assign.

Union: As stated above, the Union argues that this proposal is procedural.

Board: The Board finds that the provision is nonnegotiable, because it limits the basis on which UDC can schedule a class and requires that an employee be offered a class to teach. This requirement infringes on UDC’s right to assign work.

13. Union proposal:

U. Should a part-time faculty member be denied a reappointment for alleged poor performance, pursuant to paragraph R (d) of this Article, UDC shall inform the part-time faculty member of the specific deficiencies resulting in such denial and the University's reasonable expectations and timeline for remedying such deficiencies. Upon satisfying those expectations in the University's reasonable judgment, the part-time faculty member shall have their rights under this article fully restored to them. Should UDC fail to provide the part-time faculty member with such expectations, the part-time faculty member may consider his/herself as terminated and shall have the right to challenge the UDC's actions pursuant to Article (Grievance and Arbitration) of this agreement.

Agency: UDC argues that the provisions “infringes on UDC’s right to suspend or discharge an employee for cause to relieve an employee of his duty for legitimate reasons if UDC is required to undo such action by setting conditions for the re-appointment of the faculty member.”³³

Union: As stated above, the Union argues that this proposal is procedural.

Board: The Board finds that the provision is nonnegotiable, because it interferes with UDC’s right to discharge. The provision requires UDC to create a timeline for the employee to remedy the deficiencies and then requires UDC to restore the employee to his or her full employment rights. The provision does not provide UDC with any discretion to discharge for poor performance, and requires UDC to allow the part-time faculty member to continue teaching.

³¹ Subparagraphs a, b, and c were not included in the negotiability appeal.

³² UDC Brief at 12.

³³ UDC Brief at 14.

14. Union proposal:

V. In the case of course cancellation due to under-enrollment the effected part-time faculty member shall be offered the opportunity to teach the students who had signed up for the course on a per-student basis. The rate for such per-student teaching will be as outlined in this agreement.

Agency: UDC argues that this provision “infringes on UDC’s right to direct and assign employees; to relieve employees of duty for lack of work or other legitimate reason; to maintain the efficiency of the University’s operations; to determine the mission of the University, its budget, its organization and number of employees; and to determine the number types and grades of positions of employees assigned to each organizational unit.”³⁴

Union: As stated above, the Union argues that this proposal is procedural.

Board: The Board finds that this provision is nonnegotiable. The provision requires that UDC continue to teach students in a particular subject. This infringes on UDC’s right to maintain efficiency of UDC’s operations.

Union Proposed Article 6 – Evaluations

15. Union proposal:

A. The purpose of evaluations is to support excellence in teaching and adherence to academic and professional standards, while creating opportunities for professional advancement.

Agency: UDC asserts that the provision is not negotiable because it seeks to establish the purpose of UDC’s evaluation system.

Union: SEIU asserts that the provision “concern[s] procedures to be followed and the impact of Employer decisions on bargaining unit employees.”³⁵ SEIU argues that it intends to “supplement rather supplant” UDC’s evaluation system.³⁶

Board: The Board finds that the provision is nonnegotiable. The Board has previously held that a proposal that sets forth the purpose of a performance evaluation system is nonnegotiable, because it interferes with management’s rights to direct and assign employees.³⁷

16. Union proposals:

³⁴ UDC Brief at 14.

³⁵ SEIU Brief at 2.

³⁶ SEIU Brief at 2.

³⁷ AFGE, Local 1403 and D.C. Office of the Corp. Counsel, Slip Op. No. 709, PERB Case No. 03-N-02.

B. All part-time faculty members shall be evaluated at least once every academic year of appointment.

D. Evaluation of part-time faculty members will be based on student feedback, peer evaluations, classroom observation, a review of the syllabus and course materials, evidence of part-time faculty member's scholarship or professional/artistic or other achievements in their field, additional statements of support from students and/or peers, and an optional part-time faculty member self-evaluation. The Evaluator shall give consideration to all relevant material provided by the part-time faculty member in advance of the evaluation being prepared.

E. Evaluations shall be carried out by a panel of Evaluators. The panel may include full-time faculty and part-time faculty peers.

G. The part-time faculty member may, if he/she chooses, submit a written response to the student evaluations. The written response will be taken into consideration by the Evaluators when evaluating the faculty member and be included in the part-time faculty member's evaluations file.

I. Student feedback will not be used as the sole basis to evaluate a faculty member's performance.

J. Any expectations of course content and materials, teaching methodologies, use of technologies, and academic and professional standards shall be provided by the Department to the part-time faculty member in person and in writing before the beginning of the course. A part-time faculty member will not be held to expectations that were not made clear in advance to her/him.

K. Classroom observation(s) shall be undertaken for purposes of this evaluation.

1. The time and date of the observation shall be designated in advance by mutual agreement between the Evaluator/s and the part-time faculty member.

2. Classroom observation(s) shall be conducted during a period in which instruction is taking place, and for a duration of time reasonably necessary to observe a part-time faculty member's teaching skills and methodologies.

3. The Evaluator/s will be trained in the discipline in which the part-time faculty member is teaching as well as the methodologies used for the course. If the part-time faculty member feels that any of the Evaluators is not qualified to evaluate them, the part-time faculty member may request and shall be provided with an alternative Evaluator.

L. The Evaluators will prepare a written evaluation report within a four (4) week period of time after the classroom observation, review of evaluation materials, and when the student evaluations are made available to the Evaluators. A copy of the evaluation will be made available to the part-time faculty member. Upon request of the part-time faculty member or the Evaluator, the Evaluators will meet with the part-time faculty member in a timely manner to discuss it. A part-time faculty member may appeal the written report in writing within three (3) weeks of the part-time faculty member's receipt of the evaluation. The Evaluators shall review the appeal with the part-time faculty member and respond in writing to the concerns raised by the appeal within three (3) weeks. The part-time faculty member's written appeal and the Evaluators' response shall be maintained as part of the evaluation materials.

M. Part-time faculty members may request additional classroom observations, no more than once a semester, at any time between annual evaluations. Written feedback from additional observations will be made available to the part-time faculty member within a reasonable period of time after the classroom observation. The process followed in paragraph K will apply.

O. External sources of information on part-time faculty, such as "Rate My Professor," or social media sites, shall not be used to evaluate part-time faculty.

Agency: UDC asserts that the Union's provisions are nonnegotiable, because the provisions "seek to establish the purpose of the University's evaluation system and criteria in which a part-time faculty member will be evaluated."³⁸

Union: As stated above, SEIU argues that provisions are intended as procedural in nature.

Board: The Board finds that above provisions are nonnegotiable, because they contain criteria for the UDC to consider for performance evaluations. The Board has held that determining the criteria for a performance evaluation is within management's rights to implement a performance and evaluation system.³⁹

17. Union proposal:

C. Each department will maintain an evaluations file for each part-time faculty member which will contain all evaluations materials, including those provided by the part-time faculty member. The part-time faculty member may examine and make copies of the file at any time.

³⁸ UDC Brief at 15.

³⁹ *AFGE, Local 1403 and D.C. Office of the Corp. Counsel*, Slip Op. No. 709, PERB Case No. 03-N-02.

Agency: UDC asserts that the Union's provisions are nonnegotiable, because the provisions "seek to establish the purpose of the University's evaluation system and criteria in which a part-time faculty member will be evaluated."⁴⁰

Union: As stated above, SEIU argues that provisions are intended as procedural in nature.

Board: The Board finds the provision negotiable. Section C does not contain any language affecting UDC's right to establish criteria or the purpose of the performance evaluations.

18. Union proposals:

F. Student evaluations shall be completed for each course. Students shall submit completed evaluations to the department before the last day of class. Student evaluations shall be released to the part-time faculty member following the submission of final grades. Part-time faculty members shall be included in the design of student evaluation forms and shall have the right to submit additional questions, to suggest the removal of questions or to suggest other changes to the student evaluation forms for the Department or Program to consider, in order to ensure that issues that are specific to the Department, Program, or course are addressed in the evaluations. Departments will make a good faith effort to ensure that the majority of students complete the student evaluations form.

H. Part-time faculty members may solicit feedback from students at any time on their course content and teaching effectiveness in order to allow the part-time faculty member to address any concerns surrounding the student feedback that may arise.

Agency: UDC argues that these provisions "interferes with the University's mission, educational policy, and the efficiency of the University, its budget and its organization, and the right to direct employees."⁴¹

Union: As stated above, SEIU argues that provisions are intended as procedural in nature.

Board: The Board finds that the provisions place requirements on UDC for establishing student evaluations and solicitation of the evaluations. These requirements infringe on UDC's right to determine its mission and educational policy. Therefore, the provision is nonnegotiable.

18. Union proposal:

⁴⁰ UDC Brief at 15.

⁴¹ UDC Brief at 16.

Section N. If a concern arises during the semester regarding the part-time faculty member's teaching performance, the Employer shall promptly notify the part-time faculty member of the alleged performance issue and give the part-time faculty member clear guidelines on how to rectify the issue. The purpose of this paragraph is to provide the part-time faculty member with notice of an alleged performance issue that is capable of being corrected during the remainder of the course while protecting student confidentiality.

Agency: UDC argues that the provision prohibits UDC from taking disciplinary action.⁴²

Union: As stated above, SEIU argues that provision is intended as procedural in nature.

Board: D.C. Official Code 1-617.08(a)(2) designates management's right to discharge. The Board finds that the provision prevents UDC from discharging an employee, by requiring UDC to notify an employee and provide guidelines to correct performance issues. It does not include language that allows UDC to discharge an employee, and restricts UDC from taking action outside of notifying an employee and providing guidelines to correct performance issues. Therefore, the Board finds that the proposal is nonnegotiable.

Union Proposed Article 7- Access to Services- Departmental Support

19. Union proposals:

A. All part-time faculty members will be provided the supplies, materials, technologies, and other resources necessary for teaching the course, before the beginning of the course.

B. Part-time faculty members shall have access to computers with internet access, printers, photocopying, tech support and clerical/administrative support in order to prepare for classes and serve students, on the campus on which she or he teaches. Part-time faculty members who teach after 5 pm and on weekends will have access to office facilities and administrative services in order to prepare for classes, on the campus on which he or she teaches.

O. All equipment shall be maintained in good working order. Technology support shall be made available to part-time faculty who teach in the evenings or on weekends, on the campus on which they teach.

P. Equipment such as projectors and laptops shall be made easily accessible to part-time faculty who teach in the evenings or on weekends.

⁴² UDC Brief at 17.

Agency: UDC asserts that the provisions interfere with its management's rights to determine technology.⁴³

Union: SEIU argues that the proposals are intended to ensure access to UDC's services and resources, as UDC is responsible to provide.⁴⁴

Board: D.C. Official Code § 1-617.08(a)(5)(C) creates management's right to determine "[t]he technology of performing the agency's work." The Union's provisions impose upon UDC's right to determine the technology that is available to an employee. Therefore, the Board finds that the provisions are nonnegotiable.

20. Union proposal:

G. All proposed course-related field trips must be approved in advance by the relevant department or program chair, and if approved, part-time faculty members must abide by applicable guidelines and policies relating to such field trips. Upon prior written approval by the department or program, UDC shall generally make direct payment to the institution or facility to cover the cost of field trips and similar expenses directly related to the course curriculum. Examples of such field trips may include, but are not limited to, visits to galleries and museums, performances, concerts, movies, plays, and readings. If a part-time faculty member receives written authorization to cover the costs of the approved field trip or similar expenses, he/she will be promptly reimbursed, upon submission of a receipt or other documentation of the expense.

Agency: UDC argues that this provision "infringes on UDC's management right to maintain the efficiency of the University."⁴⁵

Union: SEIU argues that the proposals are intended to ensure access to UDC's services and resources, as UDC is responsible to provide.⁴⁶

Board: The Board finds the provision nonnegotiable. SEIU's proposal places requirements on UDC and its interaction and payment of third-party vendors. This proposal interferes with management's rights to maintain the agency's efficiency.

21. Union proposals:

L. UDC shall make available training and/or guidance in teaching methods and grading criteria, curriculum development and shall offer professional

⁴³ UDC Brief at 18, 20.

⁴⁴ SEIU Brief at 3.

⁴⁵ UDC Brief at 19.

⁴⁶ SEIU Brief at 3.

development courses and support. Part-time faculty members shall have the opportunity to apply for grants and professional development programs made available to full-time faculty. Trainings/courses will also be made available in the evenings for those who teach after 5pm and on weekends.

M. Part-time faculty shall be made aware of students' level of preparedness for College-level course before a course begins. The University shall provide orientation, training and assistance to part-time faculty members in approaching the diverse learning styles and levels of preparedness of the students the part-time faculty members are teaching and mentoring.

N. Part-time faculty shall receive regular training in the technologies and equipment used by UDC, including but not limited to, Black Board, Banner and in-classroom Smart Boards.

Agency: UDC argues that the provision infringes on UDC's right to direct and assign employees.

Union: SEIU argues that the proposals are intended to ensure access to UDC's services and resources, as UDC is responsible to provide.⁴⁷

Board: The FLRA has found that the proposals that require training interfere with management's rights to assign work.⁴⁸ The Board adopts the FLRA's holding, and finds the proposals nonnegotiable.

Union's proposed Article 11- Rank and Advancement

22. Union proposal:

A. UDC shall provide in writing to part-time faculty members, and post on the UDC website, the policies and procedures for assignment of title and advancement in rank of part-time faculty.

Agency: UDC argues that the provision interferes with its right to determine technology and interferes with its right to maintain the efficiency of the University and its right to determine its budget.

Union: SEIU argues that the provisions specify procedural requirements for advancement, and does not require the Employer promote any particular candidate.⁴⁹

⁴⁷ SEIU Brief at 3.

⁴⁸ PASS and Dept. of Transp., FAA, 61 FLRA 97, 99 (2005).

⁴⁹ SEIU Brief at 3-4.

Board: The Union's proposal only requires UDC to advertise on its website procedures for assignment of title and advancement in rank. Although not exactly on point, the FLRA has found a proposal was negotiable that required management to instruct employees how to apply for open positions.⁵⁰ The proposal at issue in the present case is similar to the FLRA case, because both proposals only discuss advertising procedural information, and do not require management to make any promotions or hiring decisions. Further, UDC does not argue that the posting of the notice on its website creates any substantial cost or affects the right to determine its budget.⁵¹ Therefore, the Board finds the proposal negotiable.

23. Union proposal:

B. When a full-time position becomes available, UDC shall post the position to the existing part-time faculty for two (2) calendar weeks prior to advertising for external candidates.

Agency: UDC argues that the provision "interferes with UDC's exclusive right to hire, promote, assign, and retain employees."⁵²

Union: As stated above, SEIU argues that the provisions specify procedural requirements for advancement, and do not require the Employer to promote any particular candidate.⁵³

Board: The provision imposes restrictions on the timeframe for UDC to hire. The Board does not have precedent on this issue, and looks to the FLRA. The D.C. Circuit, on review of an FLRA decision, found a proposal negotiable where the proposal provided bargaining unit members with a ten-day advance start on the applications process, during which the employer was allowed to solicit outside applicants.⁵⁴ The Union's proposal in the present case prevents UDC from soliciting outside applicants for two calendar weeks, and thus, interferes with UDC's hiring process. Therefore, the Board finds that the provision is nonnegotiable.

24. Union proposal:

C. If a part-time faculty member who has completed two (2) semesters applies for a full-time position at UDC, s/he shall be given the opportunity to interview for the position, provided s/he meets the minimum qualification for said position. If a part-time faculty applicant has qualifications, merit and ability that are equivalent to an external candidate for a full-time position, the part-time faculty members shall be given first consideration for the position.

⁵⁰ *AFGE Local 1760 and DHHHS, SSA*, 28 FLRA 160, 162-64 (1987). Comparatively, the proposal as issue in the present case is similar to the FLRA case, because both proposals only discuss advertising procedural information, and do not

⁵¹ See *AFGE, Local 1441*, 61 FLRA 201, 205 (2005).

⁵² UDC Brief at 21.

⁵³ SEIU Brief at 3-4.

⁵⁴ *NTEU v. FLRA*, 837 F.2d 1163 (D.C. Cir. 1988).

Agency: UDC argues that the provision infringes upon its right to “direct employees, and hire, promote, transfer, assign, and retain employees.”⁵⁵

Union: As stated above, SEIU argues that the provisions specify procedural requirements for advancement, and does not require the Employer promote any particular candidate.⁵⁶

Board: The Board finds that the provision is negotiable. The provision does not prevent UDC from considering outside applicants nor does it require UDC to hire an internal candidate.⁵⁷

Union’s Proposed Article 13 - Health and Safety

25. Union proposal:

A: UDC and the Union are committed to providing a healthy and safe working environment for all faculty members. To that end, the Labor Management Committee (as provided for in Article 8) shall be responsible for considering and making recommendations on health and safety issues as they arise, in addition to its other duties.

Agency: UDC argues that the phrase “shall be responsible for considering and making recommendations on health and safety issues as they arise...” is nonnegotiable. UDC argues that the provision requires that safety recommendations be jointly proposed, which “undermines the authority of management to direct the workforce and maintain operational efficiency.”⁵⁸

Union: SEIU asserts that the language of the provision “recognizes the advisory role that a Labor Management Committee will have with regard to health and safety issues.” SEIU argues that the proposal does not require the adoption of any recommendations made by the committee.

Board: The provision does not require any action by UDC.⁵⁹ Further, the provision does not prevent the UDC from taking action under its management rights. Therefore, the provision is negotiable.

26. Union proposal:

B: Departments will inform part-time faculty members if they are aware that any student/s may pose a potential threat or become potentially disruptive in class. Departments shall inform part-time faculty members of

⁵⁵ UDC Brief at 22.

⁵⁶ SEIU Brief at 3-4.

⁵⁷ The FLRA has found that proposals that do not restrict an agency from considering outside applicants may be found negotiable. See *Dept. of Defense, Dept. of Navy, Navy Ordinance Station, Louisville and IAM Local Lodge 830*, 4 FLRA 760, 777 (1980).

⁵⁸ UDC Brief at 24.

⁵⁹ The Board notes that UDC does not argue that the Labor Management Committee is improper.

the procedures and protocols for dealing with students that the part-time faculty member may consider threatening or hostile. Part-time faculty shall be given opportunities to comment on and be engaged in the updating of such procedures and protocols.

Agency: UDC argues that the provision interferes with management's right to determine security practices.

Union: SEIU asserts that the provision only obligates UDC to inform faculty of potentially disruptive or threatening students, and to allow faculty the ability to provide input on the procedures and protocols.

Board: The Board finds that the provision infringes on management's right to determine internal security practices. The provision requires UDC to act on particular information. Therefore, the provision is nonnegotiable.

27. Union proposal:

C: Room temperature in classrooms shall be maintained at a reasonable level of comfort.

Neither party has presented an argument of the negotiability of this provision in their briefs. The Board dismisses the negotiability appeal on this provision.

Union's Proposed Article 16- Class Size and Teaching Assistance

28. Union proposal:

A. When a part-time faculty member is teaching a course that exceeds 25 students, he/she shall be offered a teaching assistant for that course. For every additional 25 students, another teaching assistant shall be available.

Agency: UDC argues that the provision interferes with its management rights to direct and assign employees.⁶⁰ UDC asserts that it "retains the right to determine the number of employees throughout the University and the number of employees of a particular type and within a particular grade or position."⁶¹ UDC also asserts that the provision requires UDC to provide a teaching assistant, which infringes on its rights to determine its mission and organization, to maintain efficiency, and to control its budget.⁶² UDC argues that the agency has the right to determine the total number of employees, as well as the "specific units" where employees are assigned."⁶³

⁶⁰ UDC Brief at 26.

⁶¹ UDC Brief at 26.

⁶² UDC Brief at 26.

⁶³ UDC Brief at 27 (citing *Int'l Ass'n of Firefighters, Local 36 v. District of Columbia Fire Dep't*, PERB Case No. 87-N-01, Slip Op No. 167 at 3-4, *aff'd*, *Local 36, Int'l Ass'n of Firefighters v. District of Columbia Public Employee*

Union: SEIU argues that the provision relates to workload, which is negotiable. SEIU relies upon *University of the District of Columbia Faculty Ass'n and University of the District of Columbia* ("UDCFA").⁶⁴ SEIU argues that UDCFA as applied to Article 16 makes the Union proposed provisions negotiable, because the provisions concern "quantitative element[s]."

Board: The Board finds that the present case can be distinguished from UDCFA. Most importantly, UDCFA preceded D.C. Official Code § 1-617.08(a-1), which amended the prior codification of management's rights to state, "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." Although the Board found in UDCFA that provisions related to "workload" were negotiable, the Board relied upon the parties' previous collective bargaining agreement. In particular, in UDCFA, the Board did not find that UDC had expressly waived its management rights, but the Board stated, "Given these various statutory provisions and recognizing the possible implications of any broad 'workload' ruling, the Board confines its determination on this issue to the area indicated by the parties' 1980 course of action." The Board weighed the parties' prior negotiations in its determination of negotiability, finding that prior collective bargaining agreements could provide insight into the intent of the parties and their interpretation of their statutory obligations.⁶⁵ Based on the amendment to § 1-617.08(a-1), the Board finds that UDCFA is inapplicable.

Relations Bd., MPA No. 15-87 (D.C. Superior Court Dec. 15, 1988).

⁶⁴ 29 D.C. Reg. 2975, Slip Op. No. 43, PERB Case No. 82-N-01.

⁶⁵ UDCFA v. UDC, at 6-7. The Board notes, in April 2005, the Council of the District of Columbia amended D.C. Official Code § 1-617.08 to include subsection (a-1), which states: "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." In *District of Columbia Dep't of Fire and Emergency Medical Services v. American Federation of Government Employees, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007), the Board considered a negotiability appeal filed after the April 2005 amendment to D.C. Official Code § 1-617.08. In that case, the Board stated:

[A]t first glance, the above amendment could be interpreted to mean that the management rights found in D.C. Code § 1-617.08(a) may no longer be a subject of permissive bargaining. However, it could also be interpreted to mean that the rights found in D.C. Code § 1-617.08(a) may be subject to permissive bargaining, if such bargaining is not considered as a permanent waiver of that management right or any other management right. As a result, [the Board indicated] that the language contained in the statute is ambiguous and unclear.

Id. at 8. The Board reviewed the legislative history of the 2005 amendment to determine the intent of the Council of the District of Columbia. *Id.* The Board noted that analysis prepared by the Subcommittee on Public Interest stated:

Section 2(b) also protects management rights generally by providing that no "act, exercise, or agreement" by management will constitute a more general waiver of a management right. This new paragraph should not be construed as enabling management to repudiate any agreement it has, or chooses, to make. Rather, this paragraph recognizes that a right could be negotiated. However, if management chooses not to reserve a right when bargaining, that should not be construed as a waiver of all rights, or of any particular right at some other point when bargaining.

Id.

The language of the Union's proposal requires UDC to hire teaching assistants, which interferes with its management rights to assign work and to determine the numbers, types and grades of positions of employees assigned to an agency's organizational unit or work project. Therefore, the Board finds the proposal nonnegotiable.

29. *Union proposals:*

B. UDC shall maintain class sizes appropriate to the course discipline and to historic class sizes.

C. UDC shall maintain appropriate caps on the number of students permitted to take a course. Departments shall not permit students to register for a course if the course cap is full.

Agency: UDC argues that the provisions are non-negotiable, because the Board has previously ruled that class size is non-negotiable, because it affects management's right to decide its mission.⁶⁶

Union: SEIU argues that these provisions are similar to the quantitative standards that were found negotiable in *UDCFA*.

Board: In *WTU*, the Board found that provisions dictating the class size for teachers were nonnegotiable.⁶⁷ The Board reached its determination on the basis that provisions related to class size were within management's rights to determine the mission of the agency and to maintain efficiency of the government operations. The Board finds that class size is nonnegotiable in the present case, because it interferes with management's rights to determine the mission of the agency and maintain efficiency of UDC's operations.

30. *Union proposals:*

D. Part-time faculty members who have a large number of under-prepared students in their course may request a teaching assistant for that course. Such requests shall not be unreasonably denied.

E. Part-time faculty members who teach writing-intensive courses may request a teaching assistant for that course. Such requests shall not be unreasonably denied.

Agency: UDC argues that these provisions are non-negotiable, because the language "shall not be unreasonably denied" creates a standard for the UDC to provide teaching assistants that is not required by the CMPA and interferes with UDC's management rights to hire, direct, and assign employees; to maintain efficiency of its operations; to determine the number of employees

⁶⁶ UDC Brief at 27 (citing *Washington Teachers' Union, Local 6*, PERB Case No. 95-N-01, Opinion No. 450, at 12).

⁶⁷ *WTU*, at 13, 17 & 18.

and each type and grade; and to determine its mission and budget.⁶⁸

Union: The Union argues that these provisions concern workload issues, which are negotiable.

Board: The Board finds that the provisions are nonnegotiable. The language “shall not be unreasonably denied” requires that the Agency hire or assign teaching assistants. Hiring and assignment of work is within UDC’s management rights under the CMPA.

ORDER

IT IS HEREBY ORDERED THAT:

1. SEIU’s Proposed Article 5, Sections A, B, C, D, G, H, I, L, M, O, P, Q, R, S, T, U, and V are nonnegotiable.
2. SEIU’s Proposed Article 5 Section J is negotiable.
3. SEIU’s Proposed Article 6, Sections A, B, D, E, F, G, H, I, J, K, L, M, N, and O are nonnegotiable.
4. SEIU’s Proposed Article 6, Section C is negotiable.
5. SEIU’s Proposed Article 7, Sections A, B, G, L, M, N, O, and P are nonnegotiable.
6. SEIU’s Proposed Article 11, Section A and C are negotiable.
7. SEIU’s Proposed Article 11, Section B is nonnegotiable.
8. SEIU’s Proposed Article 13, Section A is negotiable.
9. SEIU’s Proposed Article 13, Section B is nonnegotiable.
10. SEIU’s Proposed Article 16, Sections A, B, C, D, and E are nonnegotiable.
11. 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 Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, and Member Keith Washington.

Washington, D.C.

August 20, 2015

⁶⁸ UDC Brief at 28.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-N-01, Opinion No. 1539, was served on the following parties on this the 28th day of August, 2015.

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