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

In the Matter of:)	
)	
Doctors' Council of the District of Columbia,)	
)	
Petitioner,)	PERB Case No. 07-N-01
)	
and)	Slip Op. No. 921
)	
District of Columbia Department of Mental Health,)	
)	
Respondent.)	
)	

DECISION¹

I. Statement of the Cases

On August 29, 2007, the Doctors' Council of the District of Columbia ("Petitioner" or "Union" or "Doctors' Council") filed a Negotiability Appeal ("Appeal") in the above-captioned matter, in response to the assertion by the District of Columbia Department of Mental Health ("DMH" or "Respondent") that numerous proposals were "nonnegotiable". The Petitioner and the DMH had been engaged in negotiations for a successor agreement. It is undisputed that the Petitioner submitted to the Respondent compensation proposals concerning on-call pay and gain sharing contained in Article 4, Sections A, E and F and an unnumbered Article, and that the Respondent has asserted that these proposals are nonnegotiable. The Petitioner files the Appeal in this case asking the Board "to rule that each of the challenged proposals is negotiable and further to rule that the Agency's declarations of nonnegotiability were not timely." ("Reply to Response to Complainant's Amended Negotiability Appeal and Request for Expedited Consideration.") (Complaint at p.1). The Respondent opposes both requests and has also moved that the Board hold a related Impasse arbitration hearing in abeyance until this matter is resolved.

¹ In view of the time sensitive posture of this case, the Board issued its Order on November 6, 2007, and advised the parties that this Decision would follow. The November 6, 2007 Order is attached.

II. Background

This matter involves compensation negotiations between the parties for a successor agreement to the FY 2005-2007 compensation agreement. The Comprehensive Merit Personnel Act ("CMPA") sets forth the procedures to be followed for compensation negotiation.

D.C. Code § 1-617.17(f) (1) and (2) provide as follows:

(f)(1) A party seeking to negotiate a compensation agreement shall serve a written demand to bargain upon the other party during the period 120 days to 90 days prior to the first day of the fiscal year, for purposes of negotiating a compensation agreement for the subsequent fiscal year.

(f)(2) If the parties have failed to begin negotiations within 90 days of the end of the annual notice period, or have failed to reach settlement on any issues 180 days after negotiations have commenced, then an automatic impasse may be declared by any party. The declaring party shall promptly notify the Executive Director of the Public Employee Relations Board in writing of an impasse. The Executive Director shall assist in the resolution of this declared automatic impasse by selecting an impartial person experienced in public sector disputes to serve as a mediator. . . .

Pursuant to the above provision, the Union presented the Respondent with a request for compensation negotiations on June 30, 2007, within the designated statutory period. The Respondent did not begin negotiations within 90 days; therefore the Union informed the Board's Executive Director that the parties were at automatic impasse.

By letter dated February 12, 2007, the Executive Director determined that the parties were at automatic impasse and appointed a mediator to assist the parties. The parties met for three negotiating sessions and were unable to reach a settlement on all issues. When the parties are unable to reach a settlement on all issues, the procedures set forth at D.C. Code § 1-617.17(f) (2) provide as follows:

. . . If the mediator does not resolve the dispute within 30 days, or any shorter period designated by the mediator, or before the automatic impasse date, the Executive Director, upon the request of any party, shall appoint an impartial Board of Arbitration to investigate the labor-management issues involved in the dispute, conduct whatever hearing it deems necessary, and issue a written

award to the parties with the object of achieving a prompt and fair settlement of the dispute. . . .

On July 26, 2007 the Mediator informed the Board's Executive Director that the parties were unable to reach a settlement in mediation. By letter dated August 5, 2007, the Executive Director appointed an Impasse Arbitrator to hear the issues that remained unresolved. Subsequently, the parties and the Impasse Arbitrator considered several dates for the impasse hearing. Pursuant to the CMPA, prior to the Impasse hearing, the parties must submit last best offers. D.C. Code § 1-617.17(f) (2) provides as follows:

The last best offer of each party shall be the basis for such automatic impasse arbitration. The award shall be issued within 45 days after the Board has been established. The award shall contain findings of fact and a statement of reasons. The award shall be final and binding upon the parties to the dispute.

Pursuant to the CMPA, on August 19, 2007, the parties exchanged last best offers in preparation for the impasse hearing. On August 23, 2007, the Respondents for the first time informed the Union's attorney that there were four (4) issues which they deemed to be nonnegotiable.

III. Petitioner's Request for the Board to Declare the Respondent's Declaration of Nonnegotiability as Untimely

Board Rule 532.1 and 532.3 concerns the filing of negotiability appeals and provides as follows:

532.1 If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board.² (emphasis added).

....

532.3 Except as provided in Subsection 532.1 of these rules a negotiability appeal shall be filed within thirty (30) days after a

² Board Rule 532.1 continues as follows: "If the Board determines that an impasse has occurred regarding *noncompensation* matters, and an issue of negotiability exists at the time of such impasse determination, the negotiability issue must be withdrawn or a negotiability appeal filed with the Board within five (5) days of the Board's determination as to the existence of an impasse. Except when otherwise ordered by the Board in its discretion, impasse proceedings shall not be suspended pending the Board's determination of a negotiability appeal." (emphasis added).

written communication from the other party to the negotiations asserting that a proposal is nonnegotiable or otherwise not within the scope of collective bargaining under the CMPA.

The Doctors' Council asserts that the declaration of nonnegotiability by the Respondent was improper because the declaration was untimely made. Specifically, the Respondent raised nonnegotiability for the first time after the: (1) completion of mediation, and (2) submission of "last best offers" to the Interest Arbitrator. Moreover, the Doctors' Council points out (and the Respondent does not dispute) that under the parties' "Ground Rules", their last best offers "shall not be modified" after exchange "except by mutual agreement." (Appeal at p. 3).

The Respondent does not address this issue in its Response.

The Board has previously addressed the issue of when a party may declare a proposal nonnegotiable in a number of cases.

In *Teamsters Local Union Nos. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and D.C. Public Schools*, 43 DCR 7014, Slip Op. No. 403 at p. 7, PERB Case No. 94-N-06 (1994) the Board, following prior cases, made clear that the issue of nonnegotiability had to be established "*in connection with collective bargaining*" -- which it understood as referring to the period of the bargaining process -- in order to give proper notice to the opposing party that the issue is nonnegotiable, and thereby avoid unnecessarily undermining the bargaining process. (Emphasis added). (*Id.* at p.2).

This was consistent with the Board's decision in *Teamsters Local Union Nos. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and D.C. Public Schools*, 39 DCR 5992, Slip Op. No. 299 at p. 7, PERB Case No. 90-N-01 (1992). That case involved DCPS' refusal to implement provisions of a collective bargaining agreement that were granted at impasse arbitration to the Teamsters. DCPS claimed that the proposals leading to those provisions were nonnegotiable. The Teamsters then sought enforcement of the Interest Arbitrator's award in the Superior Court of the District of Columbia. The Court declined to rule on the issue of nonnegotiability absent PERB findings on this issue. Thus, the Teamsters filed a negotiability appeal with PERB. The Board found that "no issue of negotiability was established by DCPS during the required period, i.e., *in connection with collective bargaining negotiation*; therefore the period during which an issue of negotiability could have been raised ha[d] elapsed." (Emphasis added). The Board opined as follows:

In accordance [with Board rules,] the assertion that a proposal "is not within the scope of collective bargaining", i.e., nonnegotiable, and the initiation of a negotiability appeal necessarily contemplates

that such appeals would arise “in connection with a collective bargaining negotiation.” A “final and binding” interest arbitration award expressly and by its very nature presupposes the completion of all phases of collective bargaining negotiations. Clearly, all phases of collective bargaining had ceased upon the issuance of the final and binding interest arbitration award. Once the Award was issued, DCPS was foreclosed from raising “an issue . . . as to whether a proposal is contrary to law, regulation or controlling agreement and therefore not within the scope of collective bargaining [i.e. nonnegotiable] in accordance with [Board rules.]”

39 DCR 5992, Slip Op. No. 299 at p. 7, PERB Case No. 90-N-01 (1992).

We find that in the present case collective bargaining negotiations have ended. While in PERB Case No. 90-N-01 the agency had awaited “the issuance of the final and binding interest arbitration award” before making a declaration of nonnegotiability, in the present case the agency made its declaration slightly earlier (i.e., after the failure of mediation and the final submissions of proposed last best offers to the interest arbitrator). However, in both cases the period envisioned for meaningful bargaining between the parties had expired.

There is no dispute that the Respondent’s declaration of nonnegotiability in the present case was made only after the parties submitted their last best offers to the Interest Arbitrator. As noted above, D.C. Code § 1-617.17(f) (2) provides that “[t]he last best offer of each party shall be the basis for . . . automatic impasse arbitration,” a process whose very nature “expressly and by its very nature presupposes the completion of all phases of collective bargaining negotiations.” 39 DCR 5992, PERB Case No. 90-N-01, Slip Op. No. 299 at p. 7. The conclusion that collective bargaining negotiations had ended upon submission of last best offers is bolstered by the fact that the parties mutually agreed in their ground rules that the last best offers could not be modified after they were exchanged, except by mutual agreement. Moreover, it is undisputed that the four Petitioner proposals at issue in this case did not change throughout the mediation process, and DMH’s objection to their negotiability could have been raised while the potential for the ongoing and meaningful give-and-take of bargaining still existed.

In view of the above, we agree that in this case - as in PERB Case No. 90-N-01 - “[c]learly, all phases of collective bargaining had ceased” prior to the nonnegotiability assertions. Thus, under the circumstances of this case, DMH’s declaration of nonnegotiability was untimely, occurring for the first time after the close of collective bargaining. On this procedural basis, and without reaching any determination as to the substantive merits of the Respondent’s nonnegotiability assertions, we grant the Union’s appeal.

In the present case, as in the prior case, a contrary holding could undermine the process of good faith give-and-take that constitutes collective bargaining negotiation, since it would

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allow one party to secretly reserve to itself the unilateral ability to remove aspects of the other party's proposals from the process only after the other party's opportunity to modify its positions had ceased.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

November 21, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Order on Negotiability Appeal in PERB Case No.07-N-01 was transmitted via Fax and U.S. Mail to the following parties on this the 21st day of November, 2007.

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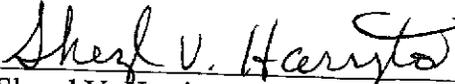
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