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

_____)	
In the Matter of:)	
)	
American Federation of Government Employees,)	
Local 631, ¹)	
)	
Petitioner,)	PERB Case No. 05-N-02
)	
and)	Opinion No. 877
)	
District of Columbia Water and Sewer Authority,)	
)	
Respondent.)	
)	
_____)	

DECISION AND ORDER ON NEGOTIABILITY APPEAL

I. Statement of the Case

On July 23, 2005, the American Federation of Government Employees, Local 631

¹On December 15, 2005 the American Federation of Government Employees, Local 631 ("AFGE, Local 631") submitted a document styled "Brief of the Unions in Support of the Negotiability Appeal". In the December 15th submission, the Petitioner stated that "[t]he original petition, erroneously, listed only the American Federation of Government Employees, Local 631 [and requested that] the [caption] in this matter be corrected to include American Federation of Government Employees, Local 2553 and the National Association of Government Employees, AFL-CIO, Local R3-06, which were parties to the negotiations." However, when the Appeal was originally considered by the Board, it only referred to the American Federation of Government Employees, AFL-CIO Local 631 as the Petitioner. The Board considered the Appeal and determined that it could not reach a decision based on the pleadings that were submitted. Therefore, we ordered the parties to submit briefs in this matter. See Decision and Order ("D&O") in Slip Op. No. 811, PERB Case No. 05-N-02 (December 1, 2005). As a result, the Board's D&O in Slip Op. No. 811 only concerned AFGE, Local 631. Thus, the Board had already acted with regard to the sole Petitioner in Slip Op. No. 811, when the Petitioner made the request to amend the caption in this matter. In addition, WASA's brief indicated that AFGE, Local 631 was the sole Petitioner. In view of the foregoing facts and because the other Unions will not be prejudiced by the Board's denial, we deny the Union's request to amend.

("Petitioner" or "Union") filed a Negotiability Appeal ("Appeal") in the above-captioned matter. WASA ("WASA" or "Respondent") and the Petitioner entered into a collective bargaining agreement effective October 4, 2001. The parties have been engaged in negotiations for a successor agreement. The Petitioner claims that it submitted a proposal (Article 23) concerning job descriptions to the Respondent. The Respondent asserted in its Response to the Negotiability Appeal ("Response") that the proposal was nonnegotiable. The Petitioner filed the Appeal in this case asking the Board to declare Article 23 in its entirety to be negotiable.

II. Background

On July 23, 2005, the Union filed a Negotiability Appeal in the above-captioned matter. In its submission, the Union did not state why it believes the proposal is negotiable. Therefore, by Decision and Order (D&O) in Slip Op. No. 811, PERB Case No. 05-N-02, dated December 1, 2005, the Board requested that the parties submit briefs in this matter. The parties complied with the D&O in a timely manner.

III. Position of the Parties

The Agency's Position Regarding the 2005 Amendment to the CMPA found at D.C. Code § 1-617.08(a-1)

WASA claims that "the Union's proposal would place an improper restraint on WASA's management rights" under the Comprehensive Merit Personnel Act ("CMPA"). (Response at p. 2) WASA notes that the Board has held that "[w]here a proposal infringes upon an agency's management rights, the Board has shown it will reject a negotiability appeal." Citing *American Federal of Government Employees, Local 3721 and D.C. Fire and Emergency Medical Services Department*, Slip Op. No. 390, PERB Case No. 94-N-04 (1999). (Response at p. 3) WASA further contends that "[p]roposals that involve a management right are permissive subjects of bargaining, except as to the impact and effect of such rights. Citing *International Brotherhood of Teamsters, Local 446 v. D.C. General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1994).

WASA cites Board case law stating that where the Board found that a proposal contained a limitation of management's right to assign duties, the proposal was found to be nonnegotiable.²

²See also *Teamsters Local No. 639 v. D.C. Public Schools*, Slip Op. No. 263 (1991), PERB Case Nos. 90-N-02, 90-N-03, 90-N-04 (1990); *International Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, Slip Op. No. 336, PERB Case No. 92-N-05 (1992); and *National Association of Government Employees v. D.C. Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635, 99-U-04 (2000).

(Response at p. 4) Further, WASA maintains that it has the right to alter the job duties of positions and to assign employees within the agency. Therefore, WASA claims that the Union's proposal to limit such rights is nonnegotiable.³ WASA asserts that D.C. Code § 1-617.08(a)(5) gives management the absolute right to determine, among other things, the assignment of work and types and grades of positions.

Relying on the recent amendment to the CMPA found at D. C. Code § 1-617.08(a-1), WASA contends that management cannot waive its management rights through any action, exercise or agreement. Thus, WASA argues that "the Union may not attempt to justify [its] proposal by referring to the [current provisions of] Article 23 in the parties' previous[ly] [negotiated] contract." (Response at p. 6).

The Union's Position Regarding the 2005 Amendment to the CMPA found at D.C.
Code § 1-617.08(a-1)

In its brief, the Union relies on D.C. Code § 1-617.08(b), which states that "All matters shall be deemed negotiable except those that are proscribed by this subchapter. Negotiations concerning compensation are authorized to the extent provided in § 1-617.16." (emphasis added) Therefore, the Union argues that all subjects except those specifically enumerated in D.C. Code § 1-617.08(a) are negotiable. The Union asserts that its proposal is entitled to a presumption of negotiability.⁴ (See Petitioners' Brief at p. 3).

In addition, the Union cites *University of the District of Columbia Faculty Association and the University of the District of Columbia*, 29 DCR 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982), where the Board held that when there is a close question or the statute is unclear, it is relevant that the parties have previously bargained on a subject. The Union claims that the current collective bargaining agreement shows that the parties have previously bargained on the following issues: (1) supplying employees and the Union with job descriptions (current proposal at Section A.1) (2) the definition of "other duties as assigned;" (current proposal at Section A.2; and (3) a process of review when an employee is dissatisfied with his or her job description current proposal at Section F).

³*International Association of Police Officers, Local 446 and D.C. General Hospital*, 42 DCR 5482, Slip Op. No. 336 at p. 2, PERB Case No. 92-N-05 (1992); where the Board found that a proposal making light duty work available for officers was nonnegotiable to the extent it would have limited management's right to assign employees. (Response at p. 4) See also, *American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, 49 DCR 770, Slip Op. No. 418, PERB Case No. 94-U-09 (1995).

⁴Citing *Washington Teachers Union, Local 6, AFT and District of Columbia Public Schools*, 46 DCR. 8087, Slip Op. No. 450, PERB Case No. 95-N-01 (1992).

The Union contends that the amendment found at D.C. Code § 1-617.08 (a-1) (Supp. 2005) does not change or expand the management rights defined in the statute. The Union asserts that this language merely clarifies that management's actions cannot be deemed to waive any rights set forth in the statute. Finally, the Union concludes that WASA misinterprets D.C. Code § 1-617.08 (a)(5)(B) when it states in its Response that this statutory provision means that management has the sole right to determine the assignment of work and the types and grades of positions.

IV. Discussion Concerning the 2005 Amendment to the CMPA found at D.C. Code § 1-617.08(a-1)

This case represents one of the first negotiability appeals considered by the Board after the April 2005 amendment to the CMPA found at D.C. Code § 1-617.08(a-1) (Supp. 2005). Therefore, it is appropriate to review our prior holdings under the CMPA and consider what impact, if any, the 2005 amendment has on the instant appeal.

When considering a negotiability appeal, the Board has adopted certain principles concerning: (1) mandatory, (2) permissive; and (3) illegal subjects of bargaining. In *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 29 DCR 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982), the Board stated as follows:

It is a critical question in collective bargaining whether particular contract proposals are to be considered (i) mandatory, (ii) permissive, or (iii) illegal subjects of bargaining. The U.S. Supreme Court established and defined in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342 (1975), these three categories of bargaining subjects as follows: mandatory subjects over which the parties must bargain; permissive subjects over which the parties may bargain; and illegal subjects over which the parties may not legally bargain. The court held further that mandatory subjects are those which are determined to be within the scope of wages, hours and terms and conditions of employment and that the parties may bargain on these subjects to the point of impasse. Bargaining on permissive subjects, however, was held to be discretionary and neither party is required to negotiate in good faith to agreement or impasse. . . .”

The CMPA at D.C. Code § 1-617.08(a) (2001), defines management rights as follows:

(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,
 - (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.

Regarding the issue of negotiability, D.C. Code § 1-617.08(b) provides in pertinent part as follows:

- (b) All matters shall be deemed negotiable except those that are proscribed by this subchapter. . . .

The Board has previously noted that there is nothing in the statute that specifically proscribes or prohibits bargaining over the management rights listed in D.C. Code § 1-617.08(a) (2001):

D.C. Code § 1-61[7].08(b), which provides that “[a]ll matters shall be deemed negotiable except those that are proscribed by this subchapter”, establishes a presumption of negotiability.⁵ While [the Board] start[s] with this presumption, we have stated that in view of specific rights reserved solely to management under this same provision, i.e., D.C. Code § 1-617.08(a), ‘the Board must be careful in assessing proffered broad interpretations of either subsection (a) or (b)’.⁶ Notwithstanding the rights reserved to management, a limited right to bargain nevertheless exists with respect to matters concerning the exercise of management rights, i.e., its impact and effect on terms and conditions of employment, and procedures concerning how these right are implemented.⁷ (Citation omitted) We are mindful of these competing statutory rights and interests as we consider the negotiability of the proposals that are the subject of this appeal.” (emphasis added) *Washington Teachers’ Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No 450 at p. 4, PERB Case No. 95-N-01 (1995).

Further, this Board has acknowledged that by electing to bargain over the management rights listed in the statute, management was making these subjects *permissive* subjects of bargaining. See *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982).

When bargaining over a successor agreement in cases where management had previously bargained over a management right, labor organizations have argued that a matter which is designated a management right was rendered negotiable because the parties had previously bargained over it. We have consistently rejected this argument and found that although the parties had previously bargained over a management right, the management right reverted back to management after the

⁵*International Association of Firefighters, Local 36 and D.C. Fire Department*, 35 DCR 118, Slip Op. No. 167, PERB Case No. 87-N-01 (1988).

⁶*Teamsters Local Union. No. 639, supra*, Slip Op. No. 263, at 2-3.

⁷*Id.*

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collective bargaining agreement expired.⁸ Nonetheless, in *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 8, PERB Case No. 95-N-01 (1995) and *International Brotherhood of Police Officers, Local No. 445, AFL-CIO v. District of Columbia Department of Administrative Services*, 43 DCR 1484, Slip Op. No. 401 n.3, PERB Case No. 94-U-13 (1994), we also held that when "there is a close question of whether or not a particular matter is a proper subject of bargaining, 'it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures'."⁹ However, the new amendment to the CMPA impacts on this finding.

On April 13, 2005, the CMPA was amended at D.C. Code § 1-617.08(a-1) (Supp. 2005). Subsection (a-1) provides as follows:

(a-1) 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. (emphasis added)

The Board will now consider the impact of the 2005 Amendment. The Board notes that at 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 § 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, we believe that the language contained in the statute is ambiguous and unclear. Therefore, in order to determine the intent of the City Council, the Board reviewed the legislative history of the 2005 amendment.

⁸See *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 4, PERB Case No. 95-N-01 (1995).

⁹See also, *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 2977, Slip Op. No. 43 at 3, PERB Case No. 82-N-01 (1982), where the Board found that "where there is a close question regarding a particular issue and the statutory dictate is unclear, it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures". Therefore, in that case, the Board looked at the prior bargaining history of the parties. Also, in *IBPO, Local 445 and D.C. Dept. of Administrative Services*, 43 DCR 1484, Slip Op. No. 401 at p. 3, PERB Case No. 94-U-13 (1994), the Board stated at p. 3 that "when there is a close question of whether or not a particular matter is a proper subject of bargaining, 'it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures'." Citing *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 2977, Slip Op. No. 43 at 3, PERB Case No. 82-N-01 (1982) and *International Association of Firefighters, Local 6 and D.C. Fire Department*, 35 DCR 118, Slip Op. 167, PERB Case No. 87-N-01 (1988).

The section-by-section analysis prepared by the Subcommittee on Public Interest, chaired by Councilmember Mendelson, states as follows:

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.* (emphasis added).

In view of the above, the Board makes the following observations regarding management rights under the 2005 amendment:

- (1) if management has waived a management right in the *past* (by bargaining over that right) this does not mean that it has waived that right (or any other management right) in any subsequent negotiations;
- (2) management may not repudiate any previous agreement concerning management rights during the term of the agreement;
- (3) nothing in the statute prevents management from bargaining over management rights listed in the statute if it so chooses; and
- (4) if management waives a management right *currently* by bargaining over it, this does not mean that it has waived that right (or any other management right) in future negotiations.

The Board finds that D.C. Code § 1-617.08(a-1) (Supp. 2005), as clarified by the legislative history, does nothing more than codify the Board's prior holdings with respect to management rights being permissive subjects of bargaining.

However, under D.C. Code § 1-617.08(a-1) (Supp. 2005), the Board may no longer rely on the bargaining history of the parties in determining the negotiability of an issue "when there is a close question of whether or not a particular matter is a proper subject of bargaining". (See n. 11, above).

This is based on the fact that the 2005 amendment provides that “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”. D.C. Code § 1-617.08(a-1) (Supp. 2005).

V. Summary of Challenged Portions of Article 23:

Article 23 consists of Sections A through F. WASA did not raise any argument regarding subsections B and C of the Union’s proposal.

Sections A, D, E and F of the Union’s Article 23 proposal are at issue. The Union’s proposals which the Respondent contends are nonnegotiable are set forth below, followed by the positions of the parties and the Board’s ruling.

Section A.1:

A.1 Each employee covered by this Agreement shall be supplied with a copy of his/her job description. Employees are entitled to accurate job descriptions. The Local Unions shall be supplied with a copy of each job description upon request. The Local Unions shall be given the opportunity to review A and bargain over changes in job descriptions prior to implementation.

WASA: WASA asserts that Section A.1 is nonnegotiable because it would impermissibly require WASA to bargain over any changes in job descriptions or job duties. WASA maintains that “the CMPA on its face grants to WASA the management right to assign work to employees and assign employees.” (Response at p. 5) Furthermore, WASA argues that “the Union may not attempt to justify its proposal by referring to the old Article 23 in the parties’ previous contract.” (Response at p. 6)

Union: The Union states that a petitioner in a negotiability appeal is entitled to a presumption that the proposal is negotiable. The Union contends that this proposal merely requests a copy of the job description. The parties have previously bargained on the issue of *supplying employees and the Union with job descriptions*. Further, the Union asserts that the proposal in Section A.1 does not infringe on WASA’s right to determine the number, types and grades of positions assigned to WASA’s organizational units, nor does it infringe on WASA’s right to hire, promote, assign, or retain employees. (Union’s Brief at p. 4) In addition, the Union argues that “bargaining over *changes* [to a position description], does not restrain management[’s] right to establish the positions. Under the CMPA, compensation is negotiable.” (Union’s Brief at p. 5).

Board: The Board finds that the proposal in Section A.1 is **nonnegotiable**. The Union’s

assertion that the above proposal is negotiable because it involves the duty to bargain over compensation does not properly characterize the language of the proposal. There is nothing in the proposal concerning compensation bargaining. Therefore, this argument has no merit.

The Board has held that the establishment of qualifications for a *new* position is nonnegotiable as a management right because it is an integral part of management's decision as to how it will utilize its employees to perform its work. See *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635 at p. 6, PERB Case No. 99-U-04 (2000) (where WASA's Chief Financial Officer implemented a reorganization of his office and the Board adopted the Hearing Examiner's finding that he need not bargain over the qualifications for the new positions). However, the Board has not previously addressed the issue of whether making changes to a job description is negotiable.

We note that "job descriptions" are not specifically listed as a management right under the CMPA. However, in the CMPA, management rights include among other things the right to: (1) direct employees within the agency; (2) assign employees within the agency; and (3) determine the number, types and grades of positions of employees; (4) determine the technology of performing its work; and (5) establish its internal security practices. In order to determine whether a proposal requiring bargaining over "changes in job descriptions" is negotiable, we must consider whether the proposal infringes on *any* of these statutory rights.

We see no difference between bargaining over the establishment of qualifications for a new position and bargaining before changing an existing position. Both cases represent a restriction on management's right to assign work by requiring management to bargain prior to implementing any change in the duties that are assigned to an employee. This renders the proposal nonnegotiable.

Section A.2:

- A.2 The phrase "other duties as assigned" shall not be used to regularly assign work to an Employee that is not reasonably related to his/her position description. Work assignments shall normally reflect the grade level, classification, and performance required of an Employee. Higher level duties and responsibilities, as documented in an established position description, may not be assigned to an Employee on a continuing basis if not assigned in accordance with merit principles.

WASA: WASA claims Section A.2 is non-negotiable because it would impermissibly limit WASA's ability to assign duties and responsibilities to its employees. In support of this position, WASA cites *International Brotherhood of Police Officers and D.C. General Hospital*, 42 DCR 5482, Slip Op. No. 336, PERB Case No. 92-N-05 (1992), *AFGE v. D.C. Department of Human Services*,

Slip Op. No. 418, *supra*; and *Teamsters Local No. 639 and D.C. Public Schools*, Slip Op. No. 263 *supra*. (Response at p. 4) Furthermore, WASA argues that “the Union may not attempt to justify its proposal by referring to the old Article 23 in the parties’ previous contract.” (Response at p. 6)

Union: The Union asserts that the parties have previously bargained over the definition of “*other duties as assigned*.” The Union claims that Section A.2 does not impact on management’s right to assign work to employees. Rather, it defines the manner in which the phrase “other duties as assigned” will be interpreted by the parties and the procedure to be used in assigning higher graded duties to employees. The Union maintains that proposals concerning the procedures by which management implements its decisions are negotiable. Citing *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982).

Board: The Board finds that Section A.2 is **nonnegotiable**. The proposal violates management’s right to assign work by precluding the Agency from requiring employees to perform certain duties. Furthermore, the phrase “*may not be assigned to an Employee on a continuing basis if not assigned in accordance with merit principles*” is vague and undefined. Regarding the Union’s argument that this issue was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), “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”.

Section D.1:

D.1 If the classification of a position results in a reduction in grade or pay to the employee, the employee shall be allowed to contest the action by filing a Step 3 general grievance.

WASA: WASA asserts that Section D.1 would impermissibly allow an employee to submit to grievance, and ultimately to a decision by a third-party arbitrator, any attempt by WASA to exercise its management rights to alter the duties, grades or classifications of job positions. WASA claims that it has the management right to determine the grades of positions under the plain language of D.C. Code § 1-617.08(a)(5). (Response at p. 5).

Union: The Union contends that Section D.1 provides employees with procedural rights concerning position descriptions. Section D.1 specifically provides an employee the right to contest a reduction in grade or pay. The Union argues that “consistent with *University of District of Columbia Faculty Association, supra*” proposals on procedural rights which do not restrain management’s decisions are negotiable. (Union’s Brief at pgs. 3, 5-6).

Board: The Board finds that Section D.1 of the Unions’ proposal is **negotiable**. The Union

has the right to contest an action that adversely impacts an employee's salary. This right must be weighed against management's statutory right under D.C. Code § 1-617.08(a)(5)(B) to determine the grades of positions. We have previously held that a proposal allowing for the *adjudication of disputes* regarding classifications or reclassification contained in position descriptions under the parties' negotiated grievance and arbitration procedure - did not seek to negotiate the grade of the position.¹⁰ Furthermore, we held that because "[t]he plain meaning of the proposal [did] not attempt to establish, develop or evaluate employees' job 'classification system,'" the proposal was negotiable. *Id.* Here, we find that the plain meaning of the proposal is to establish a procedure addressing an employee's loss of pay and does not attempt to establish, develop or evaluate the employee job classification system, nor to negotiate the grade of the position.

Section E.1:

E.1 The Human Resources Department shall provide the affected Local Union with advanced [sic] written notice of five (5) workdays of the Authority's decision to change, evaluate, reclassify, or create a new job description. The notice shall be given to the Union within five (5) workdays of the Authority's decision to change, evaluate, reclassify, or create a new a (sic) job description. The notice shall identify the proposed changes with a copy of the existing job description and proposed new job descriptions. The affected Union shall have the opportunity to bargain over the changes to the job description, job classification or evaluation process, prior to implementation.

WASA: WASA argues that Section E.1 would impermissibly require WASA to surrender its management rights by bargaining over any changes to job descriptions or job classifications. WASA maintains that "the CMPA on its face grants right to WASA the management right to assign work to employees and assign employees" to positions within the agency. (Response at p. 5)

Union: The Union argues that Section E.1 addresses *procedures* by which to challenge the changes in an employee's job description, job classification and evaluation process and E.2 allows for a challenge to an employee's grade and/or pay. The Union takes the position that because management must bargain over economic issues and all of these factors affect an employee's grade or pay, management must bargain concerning the above language.

Board: Section E.1 is **nonnegotiable**. Management has the statutory right under D.C. Code

¹⁰*District of Columbia Public Schools and Teamsters, Local Unions No. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL-CIO*, 38 D.C. Code 2483, Slip Op. No. 273 at p. 11, PERB Case No. 91-N -01 (1991).

§ 1-617.08(a)(2) to assign work to its employees. The last sentence in Section E.1 grants the Union the “opportunity to bargain over changes to the job description, job classification or evaluation process, *prior* to implementation”, thus requiring management to bargain before it assigns work to an employee. This is a restriction on management’s right to assign work.

Section E.2:

E.2 The Union shall be allowed to bargain over grade and pay of newly created position (job descriptions) or reclassified job descriptions that add additional requirements, duties and responsibilities.

WASA: WASA argues that Section E.2 would impermissibly require WASA to surrender its management rights and bargain over the grade of any newly created position or “reclassified” job description that includes any new requirements, duties or responsibilities. WASA contends that it has the management right to determine the grades of positions under the plain language of D.C. Code § 1-617.08(a)(5). (Response at p. 5).

Union: The Union counters that Section E.2 allows for a challenge to an employee’s grade and/or pay. The Union takes the position that because management must bargain over economic issues and all of these factors affect an employee’s grade or pay, management must bargain concerning the above language.

Board: Section E.2 is **nonnegotiable**. The Union has the right to bargain over the salary of employees. However, management has the right to determine the *grade* of a position pursuant to D.C. Code § 1-617.08(a). Therefore, language requiring management to bargain over grades interferes with this right and renders this proposal nonnegotiable. The Union’s right to bargain over salary and pay scales is preserved in the arena of compensation bargaining and is not compromised by this determination.

Section F:

F. Employees are free to grievance (*sic*) the grade and/or classification of their positions at any time without fear of reprisal or prejudice.

WASA: WASA asserts that Section F would impermissibly require WASA to surrender its management rights and allow arbitrators to ultimately review and decide the appropriate grade and/or classification of any job position at any time.

Union: The Union asserts that the current collective bargaining agreement shows that the parties have previously bargained over a process of review when an employee is dissatisfied with his or her job description. The Union contends that Section F provides employees and the Union with

procedural rights concerning position descriptions. Section F allows an employee to grieve his grade and/or classification. The Union argues that consistent with *University of District of Columbia Faculty Association and the University of the District of Columbia*, 29 DCR2975, Slip Op. No. 43, PERB Case No 82-N-01 (1982) proposals on procedural rights which do not restrain management's decisions are negotiable.

Board: The Board finds that there is insufficient evidence to make a determination in this matter. Therefore, the parties are ordered to brief this issue.

With regard to the Union's argument that this proposal was previously negotiated, the parties should note that pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "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".

ORDER

IT IS HEREBY ORDERED THAT:

1. The following proposed Sections of Article 23 are **negotiable**:¹¹

Section D.1 - *contest reduction in grade or pay;*

2. The following proposed Sections are **nonnegotiable**:

Section A.1 - *notice and bargain over changes in job descriptions prior to implementation;*

Section A.2 - *other duties as assigned shall not be used to assign work that is not reasonably related to position description; higher level duties on a continuing basis;*

Section E.1 - *bargaining over changes in job descriptions; job classification or evaluation process prior to implementation;*

Section E.2 - *bargaining over grade and pay;*

3. The parties shall **brief the following issue**:

¹¹All references to individual Sections pertain to Article 23 of the parties' proposed agreement.

Section F - *employee's right to grieve the grade and/or classification of their position:*

The parties shall brief the above issue. Specifically, the parties shall address:

- (a) What procedure is in place for employees to grieve/ appeal their grade and/or job classification?
 - (b) Is the procedure an in-house appeal procedure? Or, is it a grievance/arbitration (third party) procedure?
 - (c) Does the type of procedure impact on the negotiability of the proposal? If so, how?
 - (d) Management has a statutory right to determine the grades of positions pursuant to D.C. Code § 1-617.08(a)(5)(B). Does this right impact on the negotiability of this proposal? If so, how?
 - (e) Cite any rule, law, regulation or Board precedent in support of your position.
4. The parties' briefs shall be filed no later than **fifteen (15) days** from the service of this Decision and Order.
5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

February 16, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order on Negotiability Appeal in PERB Case No. 05-N-02 was transmitted via Fax and U.S. Mail to the following parties on this the 16th day of February 2007.

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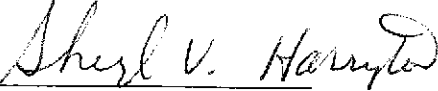
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Sheryl V. Harrington
Sheryl V. Harrington
Secretary