GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: The American Federation of State, County and Municipal Employees, Council 20, Local 1959, AFL-CIO, Petitioner, and The District of Columbia Board of Education, Respondent.	PERB Case No. 85-N-01 Opinion No. 159

DECISION AND ORDER

The parties to this proceeding are the American Federation of State, County and Municipal Employees (AFSCME), Local 1959 and the District of Columbia Board of Education (DCBE). A dispute as to the negotiability of certain proposed items arose in connection with the parties' negotiation of an initial contract. As a result, AFSCME filed the instant negotiability appeal on September 9, 1985.

The issues presented to the Board by this appeal are whether the negotiability appeal is timely and whether the proposal submitted by AFSCME is nonnegotiable by virtue of being inconsistent with law and regulation.

During the negotiations beginning in early 1985 and culminating in the execution of an agreement between the parties on September 10, 1985, AFSCME presented a set of proposals pertaining to fringe benefits for a unit of employees located in DCBE's Transportation and Warehouse Services Section. These employees serve under a wages-as-earned (WAE) appointment. The unit was certified as appropriate for purposes of collective bargaining on September 25, 1984 (PERB Case No. 83-R-08, Opinion No. 70). AFSCME, Council 20, was designated as the exclusive representative of this unit by the Board on September 25, 1984 (Certification No. 25).

The background regarding the establishment of this unit is as follows. A Recognition Petition was filed by AFSCME on July 22, 1983, seeking to represent the WAE employees as a separate and distinct unit. DCBE opposed the petition on the basis that these employees serve under temporary appointments, terminable at will, and therefore were not an appropriate unit for the purpose of collective bargaining.

Pursuant to the Board's Interim Rule 101.12(d), the matter was referred to a hearing examiner. In his report and recommendations issued on January 3, 1984, the Hearing Examiner found that the WAE employees were not "casual or intermittent employees, but rather they have a reasonable expectation of reemployment, and that they have a substantial interest in working conditions..." Accordingly, the Hearing Examiner concluded that the WAE employees were "employees" within the meaning of the provisions of the CMPA and that the petitioned-for unit was appropriate. The Board adopted the Hearing Examiner's recommendations.

On November 20, 1985, the instant negotiability appeal was referred to a hearing examiner for a report and recommendation on the issues of (1) whether the appeal was timely filed in accordance with Board Rule 106.2; and (2) whether the union's proposal, which provided for the inclusion of sick and annual leave, holiday pay, health benefits, life insurance and within-grade increases is negotiable. In her Report and Recommendations issued on May 15, 1986, the Hearing Examiner concluded that the appeal was timely filed by the union. According to the report, the union made one last effort to present its proposal to DCBE on July 26, 1985. At that point, DCBE clearly refused to negotiate over the proposed items. Its representatives, however, indicated that if it was subsequently determined that they were not precluded by law from negotiating these items, negotiations would be re-opened for the purpose of discussing the union's proposal.

With respect to the merits of the union's appeal, the Hearing Examiner concluded that by virtue of the Board's Opinion in PERB Case No. 83-R-08 (Opinion No. 70), it had already been established that those in the WAE unit were "employees" within the meaning of the CMPA provisions and therefore entitled to engage in collective bargaining as set forth in the statute. The hearing examiner then noted that Section 1-618.8(b) states that "all matters shall be deemed negotiable except those proscribed by this subchapter." The hearing examiner concluded that the "subjects raised by the Union during negotiations and in its appeal are not so proscribed."

In its exceptions to the Hearing Examiner's recommendations, DCBE challenges the finding that the union's appeal was timely filed as erroneous and not supported by the record. DCBE argues that the resubmission by AFSCME of the set of proposals regarding the previously described fringe benefits on July 26, 1985, was not sufficient to restart the time for filing the negotiability appeal.

Moreover, DCBE contends the second set of proposals was not substantially different from the proposals submitted by the union during May, 1985. At that time, says DCBE, the union had been notified that DCBE was precluded by the provisions of part 5 of the Code of Federal Regulations from granting life insurance, health benefits and within-grade increases to employees whose appointments were temporary in nature. Therefore, DCBE contends, the union's filing of this negotiability appeal is untimely because the issue was ripe for appeal in May, 1985. DCBE further points to the fact that the appeal was not filed until the day before the execution of an agreement on September 10, 1985 and months after the union's membership had ratified the agreement.

In effect, the argument runs, negotiations had concluded at the time the appeal was filed.

DCBE also takes exception to the hearing examiner's findings on the merits of the negotiability appeal, contending that the hearing examiner erred in deferring to the findings of the hearing examiner in PERB Case No 83-R-08. Thus, DCBE claims, the hearing examiner failed to rule on the question whether the WAE employees, who are appointed for one year or less, are barred from bargaining over fringe benefits.

DCBE further excepts to the hearing examiner's conclusion that the WAE employees are "employees" and therefore entitled to bargain over benefits. DCBE contends that this finding "infringes upon management's rights under Section 1-618.9 of the CMPA to hire and assign employees as WAE employees." Finally, DCBE urges that life, health and retirement benefits are merely "permissible," and not mandatory subjects of bargaining.

AFSCME, in response, contends that the Board's denial of the negotiability appeal on the basis of untimeliness would in effect deny the WAE employees full opportunity to bargain collectively. The timeliness of the appeal should be premised upon the employer's last refusal to negotiate on the submitted proposal, AFSCME argues, and July 30, 1985 was the date that DCBE conveyed its final position regarding the non-negotiability of the union's proposal. The appeal was filed forty (40) days from that date and is therefore within the prescribed time period established by PERB Rule 106.2.

With respect to DCBE's contention that the hearing examiner did not properly address the issue before her, i.e., the negotiability of the union's proposal, AFSCME argues that the hearing examiner did not err in finding that the provisions of Section 1-618.17 of the CMPA can be and should be construed to include fringe benefits as the statute's language specifies, "[A]nd any other compensation matters."

In addressing the DCBE's contention that the hearing examiner's findings infringe upon management's rights to assign work, the union asserts that it is not possible for the Board to make this determination at this point. The union argues that the right to assign work is not vitiated by the proposal that fringe benefits for the WAE employees should be negotiated by the parties.

The Board's Interim Rules at Sections 106.1 and 106.2 provide as follows:

Determination of Negotiability

106.1 "If, in connection with a collective bargaining negotiation, an issue arises as to whether a proposal is contrary to law, regulation or controlling agreement and therefore is not within the scope of collective bargaining, the party that proposed the matter that is in question may file a negotiability appeal with the Board."

106.2 "A negotiability appeal shall not be accepted by the Board if it is filed more than forty-five days after a party rejects a proposal as being not negotiable."

As the DCBE correctly argues, the language of Rule 106.2 imposes an affirmative duty upon the Board not to accept appeals filed after the prescribed forty-five (45) day period. This rule, however, is applied neither mechanically nor without regard to proper effectuation of the statutory provisions. The rules of the Board are to be construed liberally, permitting the Board the discretion to order a period to be either reduced or extended when an act is required to be done within a specific period of time. This applies in cases where "strict adherence will work surprise or injustice or obstruct the proper effectuation of D.C. Law 2-139." (See PERB Rules 100.12 and 100.13)

Upon assessing the events that gave rise to this appeal, the Hearing Examiner found that there was considerable confusion as to what was said by the parties at the negotiation table regarding their respective positions on the union's proposals. It is clear that there were several discussions between the parties as to whether the items submitted were precluded by law from their negotiations. DCBE admits to the resubmission of the union's proposals pertaining to fringe benefits on July 26, 1985. Nevertheless, it contends that negotiations had concluded. Apparently, AFSCME inferred from the parties' discussions over the issue that its proposal was subject to further discussion and posssible negotiations. In light of the union's attempts to continue to determine the final position of the DCBE, the Board concludes that that position was not ascertained until July 30th. Therefore, the appeal is accepted by the Board as timely filed.

We turn now to DCBE's contention that it is precluded by law from negotiating the matter of benefits for the WAE employees. In citing the various provisions of 5 CFR Sections 831.201 (a), 531.401 (a) and 870.202(a), DCBE urges that the Board take as controlling the fact that these provisions exclude from coverage, for the purposes of receiving these fringe benefits, employees whose appointments are for a duration of one year or less. According to DCBE, these provisions are applicable to the District of Columbia Government employees by virtue of Sections 1-622.1, 1-623.1 and 1-627.2 of the D.C. Code, which provides that the benefits granted under the Code of Federal Regulations and the stated exclusions shall apply to all employees of the D.C. Government.

The Board concludes that the applicability of the CFR provisions to D.C. employees is not in dispute. The critical question here, however, is whether the WAE appointees are "employees" for the purposes of the collective bargaining provisions of the D.C. CMPA. That question was fully litigated in PERB Case No. 83-R-08, Opinion No. 70. A finding

by the Board in the instant case that these employees are not employees for purposes of collective bargaining would represent a complete reversal of its earlier decision, and the Board finds no basis for such action. The fact that the fringe benefits provided for in 5 CFR 831.210(a), 531.401(a) and 870.202(a) may be unavailable to these employees does not limit their right under CMPA 1-618.8(b) to seek to bargain on leave, holiday pay, health benefits and life insurance. To the contrary, the Board construes Section 1-618.17 to require the negotiation of compensation-related items upon request.

In reaching this conclusion, the Board notes a recent analogous decision issued by the Federal Labor Relations Authority (FLRA). The FLRA held that while wages and fringe benefits for most Federal employees are established and controlled by law, there are some exceptions where these issues are left to the discretion of the agency. Accordingly, in AFGE, Local 1897 and Department of Air Force, 24 FLRA No. 41 (December 9, 1986), the FLRA found negotiable the union's proposals pertaining to fringe benefits. The decision discusses at length the legislative history of the federal statute governing labor-management relations, specifically noting that "...Congress intended that matters relating to wages and fringe benefits were to be treated in the same manner as other conditions of employment... [T]hat is, proposals concerning them were to be within the duty to bargain under Section 7117(a)..." (Id. at p. 379).

The Board concludes that fringe benefits are mandatory subjects of bargaining. These items are therefore appropriately included within the scope of bargaining between the parties to this proceeding.

Similarly, the Board does not find the union's proposals non-negotiable as infringing upon management's right to hire and assign employees under a WAE appointment. A proposal to negotiate fringe benefits for these employees would not, in the Board's view, directly affect management's right to hire employees under this type of appointment. In reaching these conclusions, the Board of course does not require agreement on any of these or other subjects of bargaining.

1/ 5 U.S.C. Chapter 71

2/ The FLRA further noted in its decision that the federal statute does not contain any language excluding the general subject of wages and fringe benefits from the definition of conditions of employment or prohibit negotiation on such matters in particular. (Id. at - p. 380)

O R D E R

IT IS ORDERED THAT:

1. The Negotiability Appeal filed by AFSCME, Council 20 was timely filed.

2. The DCBE is required to bargain upon request annual and sick leave benefits, retirement, health and life insurance benefits and within-grade increases.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
April 21, 1987