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

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In the Matter of:	)	
	)	
American Federation of State	)	
County and Municipal Employees,	)	
District Council 20, Local 1959	)	
	)	
Petitioner	)	PERB Case No. 17-N-04
	)	
v.	)	Opinion No. 1659
	)	
Office of the State Superintendent of	)	
Education	)	
	)	
	)	
Respondent	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On August 4, 2017, the American Federation of State, County and Municipal Employees, District Council 20, Local 1959 (“Union”) filed this negotiability appeal (“Appeal”).<sup>1</sup> The Appeal concerns ten proposals made by the Union and declared nonnegotiable by the Office of the State Superintendent of Education (“OSSE”). The Union and OSSE are negotiating their successor collective bargaining agreement concerning compensation and terms and conditions of employment.

During negotiations, the Union transmitted to OSSE its initial proposals. On July 5, 2017, OSSE informed the Union that twenty-five of the Union’s proposals were nonnegotiable and outside of the scope of bargaining.<sup>2</sup> Thereafter, the Union withdrew several proposals and OSSE withdrew its declaration on non-negotiability of at least one previously disputed proposal.<sup>3</sup>

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<sup>1</sup> The Union filed an Amended Negotiability Appeal on August 7, 2017, to correct a misquoted section of its annual leave proposal. The Union filed a Second Amended Negotiability Appeal on August 9, 2017 to add the names and contact information of the parties’ chief negotiators.

<sup>2</sup> Appeal, Exhibit: Declaration of Non-Negotiability

<sup>3</sup> Appeal at 1.

Following these withdrawals, the Union timely filed the instant Appeal, asserting that the eleven remaining proposals were negotiable. In OSSE's "Answer to Negotiability Appeal" ("Answer") filed on August 18, 2017, OSSE asserts the non-negotiability of the proposals and responds to arguments made by the Union in its Appeal. OSSE also withdrew its opposition to one proposal.

The Union's Appeal and the Department's Answer are before the Board for disposition.

## II. Standard of Review

There are three categories of collective bargaining subjects: (1) mandatory subjects over which the parties must bargain; (2) permissive subjects over which the parties may bargain; and (3) illegal subjects over which the parties may not legally bargain.<sup>4</sup> A permissive subject of bargaining is nonnegotiable if either party declines to bargain on the subject.<sup>5</sup>

Management rights are permissive subjects of bargaining.<sup>6</sup> Section 1-617.08(a) of the D.C. Official Code sets forth management rights and management retains the "sole rights" to undertake actions listed therein.<sup>7</sup>

Matters that do not contravene section 1-617.08(a) or other provisions of the Comprehensive Merit Personnel Act ("CMPA") are negotiable.<sup>8</sup> Section 1-617.08(b) of the D.C. Official Code provides that the right to negotiate over terms and conditions of employment extends to all matters except those that are proscribed by the CMPA.<sup>9</sup>

Pursuant to section 1-605.02(5) of D.C. Official Code, the Board is authorized to make a determination in disputed cases as to whether a matter is within the scope of collective bargaining. The Board's jurisdiction to decide such questions is invoked by the party presenting a proposal that has been declared nonnegotiable by the party responding to the proposal.<sup>10</sup> The Board will separately consider the negotiability of each of the matters in a dispute.<sup>11</sup>

## III. Analysis

There remain ten proposals that OSSE alleges concern nonnegotiable subjects of bargaining. Those ten subjects, which are discussed below, are: (A) Disciplinary Records, (B)

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<sup>4</sup> *D.C. Nurses Ass'n v. D.C. Dep't of Pub. Health*, 59 D.C. Reg. 10,776, Slip Op. No. 1285 at p. 4, PERB Case No. 12-N-01 (2012) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1975)).

<sup>5</sup> *Univ. of D.C. Faculty Ass'n v. Univ. of D.C.*, 64 D.C. Reg. 5132, Slip Op. 1617 at 2, PERB Case No. 16-N-01 (2017).

<sup>6</sup> *NAGE Local R3-06 v. D.C. Sewer & Water Auth.*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at 4, 13-N-03 (2013); *D.C. Fire & Emergency Med. Servs. Dep't and AFGE, Local 3721*, 54 D.C. Reg. 3167, Slip Op. 874 at 9, PERB Case No. 06-N-01 (2007).

<sup>7</sup> D.C. Official Code § 1-617.08(a).

<sup>8</sup> *Univ. of D.C. Faculty Ass'n*, Slip Op. 1617 at 2.

<sup>9</sup> D.C. Official Code § 1-617.08(b).

<sup>10</sup> *Fraternal Order of Police/Protective Serv. Police Dep't Labor Comm. v. Dep't of Gen. Serv.*, 62 D.C. Reg. 16505, Slip Op. 1551 at 1, PERB Case No. 15-N-04 (2015).

<sup>11</sup> *Univ. of D.C. Faculty Ass'n*, Slip Op. 1617 at 2-3.

Safety and Health, (C) Work Force Changes, (D) Leave, (E) Compensation, (F) Contracting Out, (G) Overtime, (H) Uniforms, (I) Run/Bid Procedure, and (J) Department of Transportation Physicals. The Union's proposals that were declared nonnegotiable by OSSE are set forth below. The proposals are followed by: OSSE's arguments in support of non-negotiability; the Union's arguments in support of negotiability; and the conclusions of the Board.

### **A. Article V: Discipline & Adverse Action**

#### Section H. Disciplinary Records

Disciplinary actions shall be removed from an employee's personnel file not later than two (2) years after the effective date of the final decision and may not, thereafter, be relied upon in support of subsequent disciplinary action.

#### **Agency's Position**

OSSE argues that the proposal conflicts with section 1-631.05(c) of the D.C. Official Code and is therefore, nonnegotiable.<sup>12</sup> Section 1-631.05(c) of the D.C. Official Code provides that "information other than a record of official personnel action is untimely if it concerns an event more than 3 years in the past upon which an action adverse to an employee may be based."<sup>13</sup> Accordingly, OSSE asserts, this proposal alters the terms set forth in the statute and denies management its statutory right to consider disciplinary actions within a three-year period.<sup>14</sup> Further, citing to *Fraternal Order of Police/Protective Services Police Department v. D.C. Department of General Services*<sup>15</sup> and *Washington Teachers' Union, Local 6 v. D.C. Public Schools*,<sup>16</sup> OSSE argues that PERB has consistently declared nonnegotiable proposals that alter the criteria set forth in D.C. Official Code § 1-631.05(c).<sup>17</sup>

#### **Union's Position**

The Union contends that OSSE's declaration of non-negotiability fails to explain how the proposal violates section 1-631.05(c) of the D.C. Official Code.<sup>18</sup> The Union states that it cannot envision any conflict between the cited statute and the Union's proposal.<sup>19</sup> The Union notes that the statute does not preclude a negotiated provision that would allow records to be deemed untimely after less than three years.<sup>20</sup>

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<sup>12</sup> Answer at 2-3.

<sup>13</sup> Answer at 2-3.

<sup>14</sup> Answer at 3.

<sup>15</sup> 63 D.C. Reg. 8960, Slip Op. 1532 at 2, PERB Case No. 15-N-02 (2015).

<sup>16</sup> 46 D.C. Reg. 8090, Slip Op. 450 at 9-10, PERB Case No. 95-N-01 (1995).

<sup>17</sup> Answer at 3.

<sup>18</sup> Second Amended Appeal at 2.

<sup>19</sup> Second Amended Appeal at 2.

<sup>20</sup> Second Amended Appeal at 2.

### **Analysis**

The Board finds that the issue raised here regarding the timeliness of disciplinary records is negotiable. The proposed article would remove disciplinary action from an employee's record after two years. The proposed article does not interfere with management rights set forth in section 1-617.08(a) of the D.C. Official Code. Contrary to OSSE's contentions, this proposal does not alter section 1-631.05(c) of the D.C. Official Code's three-year limitation on disciplinary records being considered in adverse actions. The proposed time limitation of two years is not more than the three-year limitation in the statute.

Further, the Board finds that the present proposal is not comparable to the proposals presented in the cases cited by OSSE. In both *Fraternal Order of Police/Protective Services Police Department v. D.C. Department of General Service* and *Washington Teachers' Union, Local 6 v. D.C. Public Schools*, the Board concluded that the proposals were nonnegotiable because they allowed for the removal of certain information from employee's personnel files to occur on demand rather than upon a finding by the agency that the statutory criteria for removal had been met. The present proposal does not interfere with the statutory criteria.

### **B. Article VIII: Safety and Health**

#### Section E:

Unless the Safety Committee jointly agrees to an alternative approach, the Agency agrees to provide the following safety measures:

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3. The Department will equip all busses with thermometers to be placed in the back of the bus. Employees will not be required to operate or ride on a bus where the temperature reflected on the thermometer at the back of the bus dips below 60 degrees Fahrenheit or climbs above 80 degrees Fahrenheit for a sustained period of more than five minutes.

4. Employees will be provided training in safe behavioral management techniques with the goal of lessening employee injuries caused by student assault.

#### **Agency's Position**

OSSE objects to Section E, Part 3 of the proposal because it conflicts with its sole right to direct employees and determine its technology.<sup>21</sup> OSSE contends that this section requires it to purchase thermometers, directs OSSE to the placement of the thermometers, and directs employees not to work in certain situations.<sup>22</sup> Additionally, OSSE contends that Section E, Part 4

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<sup>21</sup> Answer at 4.

<sup>22</sup> Answer at 4.

of the proposal requires that it provide employees with certain training that “requires action by OSSE and leaves no discretion or determination by OSSE as to the provision or nature of employee training.”<sup>23</sup>

Further, OSSE contends that the Union’s proposal is “problematic” because management rights would be impeded unless the Safety Committee jointly agrees to an alternative approach.<sup>24</sup> OSSE explains that Section D, which was omitted from the Union’s negotiability appeal, provides that “the parties agree to establish a Safety Committee comprised of one Union representative from each lot, the Union’s president, and an equal number of representatives from Management.”<sup>25</sup> OSSE argues that Sections E, Part 3 and Part 4 of the Union’s proposal grant this Safety Commission the authority to make decisions regarding the equipment on busses and nature of employee training.<sup>26</sup> Therefore, OSSE requests that PERB declare the proposed Sections E, Part 3 and Part 4 nonnegotiable.

### **Union Position**

The Union counters that OSSE’s declaration that Part 3 of the proposal is nonnegotiable is a “gross over-reading of the concept of technology.”<sup>27</sup> Citing to *International Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*,<sup>28</sup> the Union argues that the Board has stated that the concept of determining technology as a management right should be read narrowly as pertaining only to the technology used to perform the agency’s mission.<sup>29</sup> The Union argues that installing thermometers on busses as a safety measure falls short of the agency’s mission of transporting students.<sup>30</sup>

The Union disagrees with OSSE’s declaration that Part 4 of the proposal is nonnegotiable.<sup>31</sup> The Union contends that safety training is a mandatory subject of bargaining.<sup>32</sup> Citing to *Teamsters Local Union No. 639 v. D.C Public Schools*,<sup>33</sup> the Union argues that the Board has determined that other proposals involving training are negotiable.<sup>34</sup>

### **Analysis**

The Board finds that the first sentence of Part 3 is negotiable. The proposed thermometer installation does not impede the management right to determine the technology of performing its work. OSSE’s assertion that the proposal conflicts with management rights is an overbroad

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<sup>23</sup> Answer at 4.

<sup>24</sup> Answer at 4.

<sup>25</sup> Answer at 4.

<sup>26</sup> Answer at 4.

<sup>27</sup> Second Amended Proposal at 3.

<sup>28</sup> 42 D.C. Reg. 5482, Slip Op. No. 336 at 3-4, PERB Case No. 92-N-05 (1992).

<sup>29</sup> Second Amended Proposal at 3.

<sup>30</sup> Second Amended Proposal at 4.

<sup>31</sup> Second Amended Proposal at 4.

<sup>32</sup> Second Amended Proposal at 4.

<sup>33</sup> 38 D.C. Reg. 6693, Slip Op. No. 263 at 24, PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04 (1990).

<sup>34</sup> Second Amended Proposal at 4.

reading of the applicable case law.<sup>35</sup> The Board finds the second sentence of Part 3 is nonnegotiable. The proposal's stipulation that employees must not work in certain temperatures contravenes the management right to direct employees.

The Board also finds that the issue raised in Part 4 regarding safety training is a negotiable subject of bargaining. Training does not interfere with management rights set forth in section 1-617.08(a) of the D.C. Official Code.

Regarding OSSE's argument that the omitted section establishing a "Safety Committee" impedes management rights, the Board notes that this section is not part of the Union's Negotiability Appeal. Therefore, this matter will not be addressed in this opinion.

### **C. Article XII: Work Force Changes**

#### Section A: Involuntary

3. Involuntary transfers shall not be made for reasons of disciplinary action.

4. Involuntary transfers shall be made in accordance with seniority. The least senior employee will be the first to be subject to an involuntary transfer, provided however, that if an employee has been subject to an involuntary transfer, he or she shall be removed from the pool of employees eligible to be involuntarily transferred for a period of ninety (90) calendar days. If the need arises for additional involuntary transfers during that time period, the next most junior employee will be transferred and then afforded the same ninety day (90) protection from involuntary transfer.

#### **Agency's Position**

OSSE contends that the proposals are contrary to section 1-617.08 of the D.C. Official Code, particularly the management right to transfer, assign, and discipline employees. OSSE notes that in *Washington Teachers' Union, Local 6 v. D.C. Public Schools*<sup>36</sup> and *Teamsters, Local Union 639 et al v. D.C. Public Schools*,<sup>37</sup> the Board declared nonnegotiable similar proposals regarding involuntary transfers because the proposals limited the management sole right to transfer pursuant to section 1-617.8(a)(2) of the D.C. Official Code.<sup>38</sup> Additionally, OSSE notes that the Board has declared nonnegotiable a proposal that required an involuntary transfer to be made in accordance with seniority. In *Washington Teachers' Union, Local 6, supra*, the Board held that limiting the management right to transfer employees according to

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<sup>35</sup> See *International Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 42 D.C. Reg. 5482, Slip Op. No. 336 at 3-4, PERB Case No. 92-N-05 (1992).

<sup>36</sup> 46 D.C. Reg. 8090, Slip Op. 450, PERB Case No. 95-N-01 (1995).

<sup>37</sup> 38 D.C. Reg. 6693, Slip Op. 263, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990).

<sup>38</sup> Answer at 5-6.

seniority places an improper restraint on management.<sup>39</sup> For the same reasons as the cited case, OSSE contends that the Union's proposals here are nonnegotiable.<sup>40</sup>

### **Union's Position**

The Union contends that the language in the proposed Section A, Part 3 has been in the parties' agreement and that both Part 3 and 4 do not interfere with management rights.<sup>41</sup> The Union also notes that the Board has held that procedures for using seniority to transfer employees to vacant positions for which they are qualified is negotiable.<sup>42</sup> Further, the Union states that in the federal sector, the subject of bidding procedures based on seniority is treated as a mandatory subject of bargaining that may ultimately be resolved through impasse.<sup>43</sup> The Union notes that according to the Federal Labor Relations Authority, a proposal requiring selection based on seniority does not affect the management right to assign work or assign employees, where management determines that the employees are equally qualified.<sup>44</sup> The Union argues that because managers retain the right to define the qualifications for all bus drivers and attendants, the proposal is not an interference in management rights.<sup>45</sup>

### **Analysis**

The Board has held that management's decision to exercise its sole right under section 1-617.08(a)(2) of the D.C. Official Code to transfer employees is not compromised when the proposal is limited to procedures that place no limitations on the right to transfer.<sup>46</sup> Accordingly, where the proposal limits the management right to transfer, the proposal is nonnegotiable. Therefore, Part 3 of the Union's proposal is nonnegotiable. The proposal is incompatible with the management right to transfer and assign employees in positions within the agency and to take disciplinary action against employees. Part 4 of the Union's proposal is also nonnegotiable. The proposal interferes with the management right to transfer by requiring that involuntary transfers be made based on seniority. Part 4 also impedes the management right to transfer employees by limiting the period during which an employee is eligible to transfer.

Regarding the Union's assertion that the inclusion of such transfer provision in prior agreements has made the subject negotiable, PERB has held that 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 in any subsequent negotiations.<sup>47</sup>

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<sup>39</sup> Answer at 6.

<sup>40</sup> Answer at 6-7.

<sup>41</sup> Second Amended Appeal at 4-5.

<sup>42</sup> Second Amended Appeal at 5 (citing *Teamsters Local Union No. 639 v. D.C. Pub. Sch.*, Slip Op. 263 at 10-11, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990)).

<sup>43</sup> Second Amended Appeal at 5.

<sup>44</sup> Second Amended Appeal at 5.

<sup>45</sup> Second Amended Appeal at 5.

<sup>46</sup> *Teamsters Local Union No. 639 v. D.C. Pub. Sch.*, Slip Op. 263 at 10-11, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990).

<sup>47</sup> *AFGE, Local 631 v. D.C. Pub. Works*, 59 D.C. Reg. 4968, Slip Op. 965 at 2, PERB Case No. 08-N-02 (2009).

**D. Article XVI: Leave**

1. Starting on the first full pay period of their employment employees covered by the terms of this agreement shall accrue annual leave as follows:
  - a. Less than three (3) full-time equivalent years of service: Two (2) hours annual leave earned for every twenty (20) hours of work;
  - b. Three (3) years full-time-equivalent years of service but fewer than ten (10) full-time-equivalent years of service: One and one half (1 and ½) Three (3) hours annual leave earned for every twenty (20) hours of work;
  - c. Ten (10) or more full-time-equivalent years of service: Four (4) hours annual leave earned for every twenty (20) hours of work.
2. Request for annual leave shall be submitted by the employee, on a form provided by the Department, to the employee's Assistant Terminal Manager. The Assistant Terminal Manager shall approve or disapprove, pursuant to Section C. of this Article, prior to the date such leave is to begin.
3. The rate of annual pay shall be the employee's regular straight time rate of pay at the time the leave is earned.
4. Annual leave that is not used by an employee shall be accumulated from year to year for use in succeeding year. The maximum allowable leave balance shall not exceed three hundred twenty (320) hours.
5. Upon the execution of this agreement, an employee's "use or lose" annual leave balance will not be reduced to the maximum number of carryover hours until the beginning of the first full pay period after the pay period that includes January 10 of each year.

**Agency's Position**

OSSE contends that the proposed section conflicts with District law that sets forth the accumulation of annual leave. OSSE notes that pursuant to sections 1-612.03(e)(1)(B) and (C) of the D.C. Official Code, employees earn three-fourths of a day of leave each pay period if the employee has more than three but less than fifteen years of service, and a full day of leave each pay period if the employee has at least fifteen years of service.<sup>48</sup> OSSE counters that the Union's proposal contravenes the "preemptory statutory criteria set forth in D.C. Official Code § 1-612.03, which provides that 'all employees shall be entitled to earn annual and sick leave as

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<sup>48</sup> Answer at 7.

provided herein.”<sup>49</sup> Additionally, OSSE contends that the Union’s proposal allowing employees to carry over a maximum balance of 320 hours of leave exceeds the 240 hour limit prescribed in section 1-612.03(h) of the D.C. Official Code.<sup>50</sup> Finally, OSSE objects to the proposed paragraph 5, that alters the date at which the employee’s excess annual leave is reduced from the standard set forth in section 1-612.03(h)(1) of the D.C. Official Code.<sup>51</sup> Under the D.C. Official Code, OSSE notes, excess annual leave is reduced at the beginning of the first full biweekly pay period each year.<sup>52</sup> Accordingly, OSSE requests that PERB declare the Union’s proposal nonnegotiable.

### **Union’s Position**

The Union contends that the proposed Article XVI “sets a floor for the accrual of leave by public employees, but does not preclude a negotiation for a more generous benefit.”<sup>53</sup> The Union argues that unlike other statutory benefits, such as the health care, there is no explicit statutory restriction on the rate at which employees may accrue leave.<sup>54</sup> Therefore, the Union argues that the proposed Article is negotiable.

### **Analysis**

The proposal is negotiable. Section 1-612.03(a) of the D.C. Official Code outlines employee annual and sick leave, and is only applicable to employees first hired before September 30, 1987. All employees hired thereafter are exempt from that section.<sup>55</sup> The District government has not adopted a leave program for employees who were first hired on or after October 1, 1987. Accordingly, there is no explicit statutory restriction on employee leave for all employees. Therefore, the proposal is negotiable.

### **E. Article XVII: Compensation**

#### **Section B:**

Each Motor Vehicle Operator and Bus Attendant covered by this Agreement is guaranteed at least seven (7.0) hours of work at the employee’s regular hourly rate for each regularly scheduled shift.

### **Agency’s Position**

OSSE objects that the proposed section violates its management right to establish tours of duty.<sup>56</sup> OSSE notes that the proposed section is similar to proposals that PERB declared

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<sup>49</sup> Answer at 7.

<sup>50</sup> Answer at 8.

<sup>51</sup> Answer at 8-9.

<sup>52</sup> Answer at 8.

<sup>53</sup> Second Amended Appeal at 6.

<sup>54</sup> Second Amended Appeal at 6.

<sup>55</sup> Section 1-612.03(a)(6).

<sup>56</sup> Answer at 9.

nonnegotiable in *International Association of Firefighters v. D.C. Department of Fire and Emergency Medical Services* (Slip Op. 1445)<sup>57</sup> and *International Association of Firefighters v. D.C. Department of Fire and Emergency Medical Services*<sup>58</sup> (Slip Op. 1466).<sup>59</sup> In Slip Opinion No. 1445, OSSE asserts, PERB explained that tours of duty includes hours of work, work schedules, and shifts.<sup>60</sup> OSSE contends that PERB expressly held nonnegotiable a union proposal that established the number of hours of work for an employee's regularly scheduled shift in Slip Opinion No. 1466. Additionally, OSSE argues that bargaining unit employees are not guaranteed a minimum amount of work, except that their hourly wage must be consistent with the law, as indicated in Union's certification determination by PERB.<sup>61</sup> Therefore, OSSE requests that the Board declare the Union's proposal nonnegotiable.

### **Union's Position**

The Union objects that OSSE's position that the proposed section B violates the management right to establish a tour of duty is incorrect.<sup>62</sup> The Union asserts that a guaranteed minimum number of hours per shift do not require management to schedule particular hours of days of work.<sup>63</sup> The Union notes that a tour of duty, as defined by the District Personnel Manual is: "the period within an administrative workweek, within which employees are required to be on duty regularly."<sup>64</sup> The Union argues that nothing in the existing proposed language interferes with management's ability to set the hours and days of work.<sup>65</sup> The Union states that this proposed section is a matter of minimum compensation and is negotiable.<sup>66</sup>

### **Analysis**

The Board finds that the proposals regarding minimum work hours in a scheduled shift infringes upon the management right to establish the tour of duty provided by section 1-617.08(a)(5)(A). As a result, the proposal is nonnegotiable. Contrary to the Union's position, scheduling a particular minimum hours per shift is squarely within the management right to establish a tour of duty.

## **F. Article XVIII: Contracting Out**

### **Section A: Contracting Out Conditions**

During the term of this Agreement, the Agency shall not contract out work normally performed by employees covered by this Agreement, except

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<sup>57</sup> 60 D.C. Reg. 17359, Slip Op. 1445 at 16, PERB Case No. 13-N-04 (2013).

<sup>58</sup> 61 D.C. Reg. 5632, Slip Op. 1466, PERB Case No. 13-N-04 (2014).

<sup>59</sup> Answer at 9.

<sup>60</sup> Answer at 9.

<sup>61</sup> Answer at 10.

<sup>62</sup> Second Amended Appeal at 7.

<sup>63</sup> Second Amended Appeal at 7.

<sup>64</sup> Second Amended Appeal at 7; 6B DCMR § 1299.1.

<sup>65</sup> Second Amended Appeal at 7.

<sup>66</sup> Second Amended Appeal at 7.

where the Director of the Division determines that manpower or equipment in the Agency is not available to perform such work on a regular or overtime basis; provided the total cost to the Agency shall not be more than the cost of contracting out or when it is determined by the Director of the Division that emergency condition do not exist, the Agency agrees to inform the Union of its proposed contracting out and consult with the Union regarding any adverse impact (and effects) of such contracting out on employees covered by this Agreement and shall give the Union simultaneous notice of invitations to bids or request for proposals to contract out.

#### Section B: Employee Rights

The Agency agrees to place employees who have been displaced by such action in other available vacant positions within the Agency for which they are qualified and able to perform with minimum training. The Agency agrees that prior to the Agency's contracting out or privatizing a service or activity performed by employees of the Agency, through established standards developed by rules and regulations, the Agency shall establish that the contracting out shall achieve increased efficiencies and cost savings to the Agency; provided further, that any contractor who is awarded a contract that displaces any employees of the Agency shall offer any displaced employee a right-of-first-refusal to employment by the contractor, in a comparable available position for which the employee is qualified, for at least a six (6) month period during which time the employee shall not be discharged without cause. If the employee's performance during the six (6) months' transition employment period is satisfactory, the new contractor shall offer the employee continued employment under the terms and conditions established by the new contractor. Any employee of the Agency who is displaced as a result of a contract and is hired by the contractor who was awarded the contract which displaced the employee shall be entitled to the benefits provided by the Service Contract Act of 1965, 41 U.S.C. §§ 351 et seq., notwithstanding any exclusion of applicability of the Service Contract Act of 1965 to the employee. Non-displaced employees covered by this Agreement shall not be under the supervision of a contractor employee in the event work is contracted out.

#### Section C: Analysis

Prior to contracting out any bargaining unit work, the Agency shall conduct a cost analysis to determine any possible savings. The assessment of the cost of retaining the function in-house versus the cost of contracting shall be based upon a reasonable and realistic assessment of the costs related to both. The Agency shall include the costs of quality control and

contract administration in assessing the cost of the contractor. The Agency shall give appropriate consideration to the impact and effects of loss of continuity and institutional knowledge in contracting out bargaining unit work.

#### Section D: Union Notification

In any case in which the Agency wishes to contract out, in accordance with Section A of this Article, it shall notify the Union ninety (90) calendar days prior to implementation of such contract. Such notification shall set forth the purpose of contracting out the work and shall include the information, data, calculations, and other material relied upon by the Agency, and an evaluation of the following:

1. The financial savings to be realized by the Agency, to be provided after the receipts of all bids and prior to the awarding of the contract;
2. The impact and effects of the action on the unit employees, including job loss;
3. The actual and potential skills of the employees presently doing the work;
4. The equipment, facilities and/or machinery needed for the work;
5. The likelihood that the work shall have to be done on a long-term or recurrent basis; and/or
6. Such other factors as may be deemed applicable by the Agency or by the Union, per their request, as a result of a need for clarification related to the notification to contracting out

#### Section E: Union-Management Meeting

Upon being provided the information required in Section D, and at the request of the Union, the Agency shall meet with the Union within eight (8) calendar days to discuss, clarify, and respond to the questions regarding the contents of the contracting out notification.

#### Section F: Bargaining

Thereafter, the Union shall be permitted to bargain over any contracting out to the full extent allowed by law.

#### Section G: Employee Impact

Any employee covered by the Agreement who is involuntarily reassigned or laid off, as a result of contracting out, shall be involuntarily reassigned or laid off in accordance with the provisions of this Article.

### **Agency's Position**

OSSE objects to Section A of the Union's proposal because it is nearly identical to a proposal the Board determined to be nonnegotiable in *AFGE, Local 631 v. D.C. Department of Public Works et al.*<sup>67</sup> In that case, OSSE contends that the Board concluded that the proposal contravened the management right to "maintain the efficiency of the District government operations" under section 1-617.08 of the D.C. Official Code.<sup>68</sup>

Additionally, OSSE objects to Section B of the Union's proposal because it requires that OSSE establish that contracting out will achieve increased efficiencies. OSSE asserts that this requirement exceeds the criteria set forth in section 2-352.05 of the D.C. Official Code.<sup>69</sup> OSSE notes that District law only requires that contracting out will achieve cost savings.<sup>70</sup> Moreover, OSSE contends that Section B alters the statutory requirement regarding a displaced employee's entitlement to benefits by giving the employee an entitlement to benefits "notwithstanding any exclusion of applicability to the Service Contract Act of 1965."<sup>71</sup> OSSE argues that this proposal alters the statutory criteria and "creates a contractual exception to federal law even though no such exception is authorized."<sup>72</sup> Lastly, OSSE contends that Section B of the Union's proposal providing that "non-displaced employees covered by this Agreement shall not be under the supervision of a contractor employee in the event work is contracted out" violates OSSE's statutory right under section 1-617.08(a) of the D.C. Official Code to direct employees.<sup>73</sup>

Further, OSSE counters that Section C of the Union's proposal is "word-for-word" identical to a proposal the Board previously rejected in *AFGE, Local 631*.<sup>74</sup> OSSE notes that the Board concluded that the proposal in that case infringed on the management rights to maintain the efficiency of the governmental operations and was therefore, nonnegotiable.<sup>75</sup> Similarly, OSSE contends that Union's proposed Section E is also identical to a proposal regarding contracting out that that Board declared nonnegotiable *AFGE, Local 631*.<sup>76</sup> OSSE objects that Section D of the Union's proposal is nonnegotiable inasmuch as the proposal relates to Section C.<sup>77</sup> OSSE also notes that this proposal is identical to a proposal that the Board previously determined was nonnegotiable in *AFGE, Local 631*.

Finally, OSSE objects to Sections F and G on the grounds that the proposals relate back to nonnegotiable procedural provisions in Sections A through E.<sup>78</sup>

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<sup>67</sup> Slip Op. No 965 at 9, PERB Case No. 08-N-02 (September 30, 2009).

<sup>68</sup> Answer at 11-12.

<sup>69</sup> Answer at 12.

<sup>70</sup> Answer at 12.

<sup>71</sup> Answer at 13.

<sup>72</sup> Answer at 13.

<sup>73</sup> Answer at 13.

<sup>74</sup> Slip Op. 965 at 11, PERB Case No. 08-N-02 (September 30, 2009).

<sup>75</sup> Answer at 14.

<sup>76</sup> Answer at 15.

<sup>77</sup> Answer at 15.

<sup>78</sup> Answer at 15-16.

### **Union's Position**

The Union objects to OSSE's declaration of non-negotiability pursuant to section 2-352.05 of the D.C. Official Code, because the cited statute does not conflict with the Union's proposal.<sup>79</sup> Instead, the Union states that the cited statute establishes requirements for the District in privatizing.<sup>80</sup> The Union contends that it cannot respond to OSSE's declaration of non-negotiability without further explanation of its position.<sup>81</sup> The Union argues that the proposal is negotiable due to the presumption in favor of negotiability.<sup>82</sup>

### **Analysis**

Section 1-617.08 of the D.C. Official Code protects the management right to "maintain the efficiency of the District government operations." The Board concludes that Sections A, C, and E of the Union's proposal are nonnegotiable. The proposals at issue here are identical to the proposals presented before the Board in *American Federation of Government Employees, Local 631 v. D.C. Department of Public Works*.<sup>83</sup> In that case, the Board held that the proposed sections infringed on the management right to maintain the efficiency of government operations. For the same reasons stated in *American Federation of Government Employees, Local 631*, the Board finds that Sections A, C, and E are nonnegotiable. Additionally, the Board finds that Sections D, F, and G are nonnegotiable. Section D is a notice provision that incorporates Sections A and C. Section F and G are nonnegotiable as they relate to Sections A through E.

Finally, the Board concludes that section B regarding employee rights in the event of displacement due to contracting out is negotiable. This provision concerns the impact and effects of a management right and is therefore negotiable.

### **G. Article XXIII: Overtime**

#### **Section C:**

Members of AFSCME's bargaining unit shall be guaranteed access to a minimum of seventy (70%) percent of all overtime hours available to drivers and attendants within the Division.

### **Agency's Position**

OSSE contends that the Union's proposed Section C interferes with OSSE's sole management right to assign employees and to determine the number of employees assigned to an

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<sup>79</sup> Second Amended Appeal at 10.

<sup>80</sup> Second Amended Appeal at 10.

<sup>81</sup> Second Amended Appeal at 10.

<sup>82</sup> Second Amended Appeal at 10.

<sup>83</sup> Slip Op. 965 at 11, PERB Case No. 08-N-02 (September 30, 2009).

agency's work project.<sup>84</sup> Moreover, OSSE contends that the Union's proposal violates a separate collective bargaining agreement approved by the D.C. Council this year between OSSE and the International Brotherhood of Teamsters, which states, in pertinent part:

[F]or the purpose of assigning and awarding overtime, OSSE agrees to maintain, at each terminal, a list of employees represented by the Union. The Employees will be ranked in order of seniority. For each overtime assignment available at a terminal, OSSE agree that every other overtime assignment shall be offered to an employee represented by Local 639.<sup>85</sup>

OSSE contends that the Union's proposal and the foregoing provision directly conflict with one another.<sup>86</sup>

### **Union's Position**

It is the Union's position that the proposed section does not interfere with the management right to assign employees because the proposal does not require OSSE to assign overtime to anyone at all.<sup>87</sup> Rather, the Union contends, the proposal simply says that a certain percentage of available overtime hours shall be made available to the bargaining unit.<sup>88</sup> The Union notes that it represents approximately 90% of the drivers and all of the attendants employed by OSSE.<sup>89</sup>

### **Analysis**

The Board concludes that the proposal is nonnegotiable. Management has the sole right to assign employees within the agency under section 1-678.08(a)(2) of the D.C. Official Code. The proposed section would impede the management right to assign employees to overtime work.

## **H. Article XXXII: Uniforms**

### **Section B:**

A Uniform Labor-Management Committee comprised of equal numbers of labor and management representatives shall determine the types of uniforms and equipment needed.

### **Section F:**

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<sup>84</sup> Answer at 16.

<sup>85</sup> Answer at 17.

<sup>86</sup> Answer at 17.

<sup>87</sup> Second Amended Appeal at 11.

<sup>88</sup> Second Amended Appeal at 11.

<sup>89</sup> Second Amended Appeal at 11.

A Uniform Labor-Management Committee comprised of equal numbers of labor and management representatives shall determine the types of uniforms and equipment needed.

### **Agency's Position**

OSSE objects to the Union's proposed Sections B and F on the grounds that the proposals violate the management right to determine the technology of performing the agency's work pursuant to section 1-617.08(a)(5)(C) of the D.C. Official Code.<sup>90</sup> OSSE contends that by the terms of the proposal, management alone can no longer determine the equipment needed to perform OSSE's work.<sup>91</sup> Instead, OSSE states that it must make such determination jointly with the Union, via a subcommittee in which the Union has an equal number of votes.<sup>92</sup> If effectuated, OSSE warns that Union representative could always create a "deadlocked situation."<sup>93</sup> Accordingly, OSSE contends that this proposed section infringes on the management right to determine the technology of performing its work.<sup>94</sup>

### **Union's Position**

Without addressing the composition of the Uniform Labor-Management Committee, the Union disputes OSSE's assertion of non-negotiability on the ground that uniforms are not technology.<sup>95</sup> Even if uniforms could be considered technology, the Union asserts that a broad reading of "technology" is contrary to the law.<sup>96</sup> The Union contends that the Board has held that technology as a management right should be read narrowly as pertaining only to the technology used to perform the agency's mission.<sup>97</sup>

### **Analysis**

The Board finds that the proposed Sections B and F are negotiable. The proposals do not contravene the management right to determine the technology of performing the agency's work under the D.C. Official Code 1-617.08(a)(5)(C). The composition of the committee does not contravene the management right to determine the technology used to perform the agency's mission.

## **I. Article XXXVII: Run/Bid Procedure**

### **Section A:**

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<sup>90</sup> Answer at 17.

<sup>91</sup> Answer at 17.

<sup>92</sup> Answer at 17-18.

<sup>93</sup> Answer at 18.

<sup>94</sup> Answer at 18.

<sup>95</sup> Second Amended Appeal at 12.

<sup>96</sup> Second Amended Appeal at 12.

<sup>97</sup> Second Amended Appeal at 12.

Bus Routes shall be assigned in accordance with the following procedure and assignments shall be based on bargaining unit seniority as described herein.

#### Section B: Summer Run/Bid

1. Before the end of each school year, the employer shall notify employees of the requirement to state whether it is their preference to work during the summer months or whether they wish to use leave during this time period. After the responses to this inquiry are collected, but not later than the last day of school, the Employer will issue a letter to all employees who did not express a desire to take leave informing those employees of their seniority ranking/bid position. The letter will also inform employees of the time scheduled for them to participate in the run/bid for summer routes.
2. Employees must appear in person to participate in the bidding process, which will be scheduled to take place within five (5) business days of the last day of school. Prior to participating in the bid, employees will be given access to the bid book containing the various routes available for bid. The employees may use this book to rank their most favored routes. The employee will then present to the bid clerk their preferred ranked routes. In accordance with seniority, employees will be assigned their most favored available route and provided written certification of their assignment to the route. Employees who are not assigned a route or whose route is subsequently cancelled shall be placed in a swing status.
3. If a route becomes available during the summer after the summer bid process has been completed, it will be offered to the most senior swing driver available.

#### Section C: Swing-Slot Temporary Bid

1. Between August 1<sup>st</sup> and 15<sup>th</sup>, the Employer shall issue all bargaining unit employees a letter directing them that, regardless of summer leave or assignments, they will be returned to the same lot where they were last assigned at the close of the preceding school year. The letter will also inform employees of their seniority rankings for the purpose of a bid on starting times for a swing status. The letter will notify employees when and where they should appear to bid on their

preferred starting time. This time-slot bid will take place prior to the first day of school.

2. At the time-slot bid, employees will bid on their preferred starting times and will be awarded their preferences in accordance with seniority. Employees shall not bid on particular routes at this time and all employees shall be considered to be in swing status as of the first day of school.
3. During the period between the first day of the school year and the first working day of October, all employees shall be considered swing and management may assign the employees to any route, regardless of seniority, so long as that route accommodates the starting time upon which that employees successfully bid. No employee shall be paid a swing premium during the time period beginning with the first day of school and extending until the first working day of October.

#### Section D: Fall Run/Bid for Regular Yearly Routes

1. By no later than the second week of September, the Employer will send notification to employees providing the employee's seniority ranking for purposes of bidding on regular routes. The notice will also include the scheduled time and place at which the employee must appear in order to participate in the run/bid process. The notice will inform employees when and where the bid book containing available routes will be available for their review. The bid book will be made available no later than five business days prior to the start of bidding in the run/bid process.
2. Employees must appear in person to participate in the bidding process, which will be scheduled to be completed prior to the first working day in October. Prior to participating in the bid, employees may use the bid book to rank their most favored routes. At the appointed time, the employee will then present to the bid clerk their preferred ranked routes. In accordance with seniority, employees will be assigned their most favored available route and provided with certification of their assignment to the route. Employees who are not assigned a route shall be placed in swing status no later than thirty (30) calendar days from the date of the decision to cancel the route.

3. Employees who bid on routes that are scheduled to extend for eleven or twelve months must do so with the expectation and understanding that they are committing to complete the route for its full duration and may not abandon the route in order to participate in the summer run/bid.
4. Employees who are on an approved leave status at the time of the fall bid may designate a Union official to stand as their proxy and submit their bid preference in the employee's absence. Such designation shall be in writing and shall be signed by the employee. The designated Union official may present proxy designation to the bid clerk at the employee's designated time for bidding and shall be permitted to bid on the employee's behalf.

#### Section E: Mid-Year Routes and Mini-bidding

In the event a route becomes available after the fall run/bid for regular routes, such route shall be filled through the conduct of a mini-bid of available swing drivers and attendants. The route shall be awarded based on seniority.

#### Agency's Position

OSSE asserts that the Union's proposed article infringes upon the management right to assign and direct employees.<sup>98</sup> OSSE notes that the Board has held that the principle of seniority is negotiable "only when all other factors, as determined by management, were equal and its application was not inconsistent with law."<sup>99</sup> No such qualification is contained in the instant proposal. Additionally, OSSE contends that Section B is nonnegotiable because OSSE does not "have any discretion in the assignment of bus routes."<sup>100</sup> Similarly, OSSE argues that Section C of the proposed article interferes with management's sole right to assign employees to particular work locations and set forth a tour of duty.<sup>101</sup> OSSE also argues that Section D of the Union's proposal infringes on OSSE's statutory right to assign employees by "dictating the only means by which employee route assignments can be made."<sup>102</sup> Finally, OSSE contends that Section E of the proposed article further prevents OSSE management from determining who may receive newly available routes on any basis other than seniority.<sup>103</sup>

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<sup>98</sup> Answer at 18.

<sup>99</sup> Answer at 18 (*citing Wash. Teachers' Union, Local 6 v. D.C. Pub. Sch.*, 46 D.C. Reg. 8090, Slip Op. No 450 at 6, PERB Case No. 95-N-01 (1995) (Emphasis added by OSSE).

<sup>100</sup> Answer at 19.

<sup>101</sup> Answer at 19.

<sup>102</sup> Answer at 20.

<sup>103</sup> Answer at 20.

### **Union's Position**

The Union counters that the proposal does not interfere with management rights and is negotiable. The Union argues that the Board held in *Teamsters Local Union No. 639 and D.C. Public Schools*<sup>104</sup> that procedures for using seniority to transfer employees to vacant positions for which they are qualified are negotiable.<sup>105</sup> Further, the Union contends, in the federal sector, the subject of bidding procedures based on seniority are treated as a mandatory subject of bargaining that may ultimately be resolved through impasse.<sup>106</sup> The Union again notes that according to the Federal Labor Relations Authority, a proposal requiring selection based on seniority does not affect the management right to assign work or assign employees, where management determines that the employees are equally qualified.<sup>107</sup> The Union also again argues that because managers retain the right to define the qualifications for all bus drivers and attendants, the proposal is not an interference in management rights.<sup>108</sup>

### **Analysis**

The Board concludes that the proposal is nonnegotiable. Management retains the sole right to assign and direct employees within the agency under section 1-617.08(a)(1) and (2). The proposal would compel OSSE to assign particular work to certain employees based upon employee input. Therefore, the proposal is nonnegotiable.

### **J. Article [ ]: Department of Transportation Physicals**

The Department shall pay the full costs associated with any and all physical examination required by the U.S. Department of Transportation in order to renew an employee's Commercial Driver's License. This commitment applies to all employees on the Agency's roles regardless of whether the employee's status is active or inactive at the time the examination is due.

### **Agency's Position**

OSSE contends that the Union's proposed article regarding the payment of physical examinations conflicts with the U.S. [Government] Accountability Office's holding that "[f]ees incident to obtaining a license or certificates necessary to qualify a federal employee to perform the duties of his position are considered, generally, to be personal expenses not properly chargeable to agency appropriations."<sup>109</sup> OSSE contends that the District is governed by federal

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<sup>104</sup> 38 D.C. Reg. 6693, Slip Op. 263 at 10-11, PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04 (1990).

<sup>105</sup> Second Amended Appeal at 14-15.

<sup>106</sup> Second Amended Appeal at 15.

<sup>107</sup> Second Amended Appeal at 15.

<sup>108</sup> Second Amended Appeal at 15.

<sup>109</sup> Answer at 20-21.

appropriations law and section 1-206.03(e) of the D.C. Official Code.<sup>110</sup> Accordingly, OSSE argues that the proposed article is in violation of appropriations law and is therefore, nonnegotiable.<sup>111</sup>

### **Union's Position**

The Union asserts that there is no legal support for OSSE's argument that requiring it to pay for employees' annual renewal costs is "impermissible." The Union also notes that the Board has held that procedures for implementing a management right are negotiable.<sup>112</sup>

### **Analysis**

The Board concludes that the Union's proposal is negotiable. The proposal does not impede management rights pursuant to the D.C. Official Code nor does it violate federal appropriations law. The U.S. Government Accountability Office's holding cited by OSSE only specifies that federal employees pay fees incident to obtaining a license. As such, the cited case does not render the Union's proposal nonnegotiable.

## **ORDER**

### **IT IS HEREBY ORDERED THAT:**

1. The following proposals are nonnegotiable
  - a. Article XVII, Section B
  - b. Article XXIII, Section C
  - c. Article XXXVII, Section A, Section B, Section C, Section D, Section E
  - d. Article XII, Section A, Part 3 and Part 4
2. The following proposals are negotiable:
  - a. Article V, Section H: Disciplinary Records
  - b. Article XXXII, Section B, Section F
  - c. Article [ ]: Department of Transportation Physicals
  - d. Article XVI: Leave
3. The following proposals are negotiable in part, and nonnegotiable, in part:
  - a. Article VIII, Section E: Safety and Health
    - i. Section E, Part 3 is nonnegotiable, with the exception of the first sentence: The Department will equip all buses with thermometers to be placed in the back of the bus.

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<sup>110</sup> Answer at 21.

<sup>111</sup> Answer at 21.

<sup>112</sup> Second Amended Appeal at 16 (*citing AFGE, Local 631 v. D.C. Water and Sewer Authority*, Slip Op 1435 at 7, PERB Case No. 13-N-05 (2013)).

- ii. Section E, Part 4 is negotiable.
- b. Article XVIII: Contracting Out
  - i. Section A is nonnegotiable.
  - ii. Section B: Employee Rights is negotiable.
  - iii. Section C is nonnegotiable.
  - iv. Section D is nonnegotiable.
  - v. Section E is nonnegotiable.
  - vi. Section F is nonnegotiable.
  - vii. Section G is nonnegotiable.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of Board Chairperson Charles Murphy and Board Members Ann Hoffman, Mary Anne Gibbons, Barbara Somson, and Douglas Warshof.

Washington, D.C.

March 27, 2018

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 17-N-04, Op. No. 1659 was transmitted to the following parties on this the 3rd day of April, 2018.

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