Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 631,	
Complainant,	PERB Case No. 13-N-05
v.	Opinion No. 1435
District of Columbia Water and Sewer Authority,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On April 15, 2013, the American Federation of Government Employees, Local 631 ("AFGE" or "Union") filed a Negotiability Appeal ("Appeal"), pursuant to Board Rule 532. AFGE and the District of Columbia Water and Sewer Authority ("WASA" or "Agency") are currently negotiating a successor collective bargaining agreement ("CBA") on working conditions. AFGE filed its Appeal in response to WASA's written communication of non-negotiability concerning five provisions in the proposed CBA. (Appeal at 1).

AFGE requests that the Board order WASA to commence negotiations on Article 21, Article 23, Article 34, Article 35, and Article 57, asserting that the topics found in the articles "are negotiable in accordance with law." (Appeal at 6).

On May 6, 2013, WASA filed an Answer to the Union's Appeal ("Answer"), asserting that it declared portions of Articles 21, 23, 34, 35, and 57 nonnegotiable because the provisions infringed upon the Agency's management rights. (Answer at 1). Further, WASA noted that the Union's appeal regarding Article 21 is now moot because the parties reached a tentative agreement on April 10, 2013. Similarly, WASA stated that on May 2, 2013, it rescinded its declaration of nonnegotiability pertaining to Article 23, section A, and that the portion of the Appeal related to Article 23, section A is moot. (Answer at 2).

II. Discussion

In *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, the Board adopted the U.S. Supreme Court's standard concerning subject for bargaining established in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 3342 (1975): "Under this standard, the three categories of bargaining subjects are as follows: (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." 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982). D.C. Code § 1-617.08(b) provides that "all matters shall be deemed negotiable, except those that are proscribed by this subchapter." The Board has held that this language creates a presumption of negotiability. *Int'l Ass'n of Firefighters, Local 36 v. D.C. Dep't of Fire and Emergency Services*, 51 D.C. Reg. 4185, Slip Op. No. 742, PERB Case No. 04-N-02 (2004).

In *District of Columbia Dep't of Fire and Emergency Medical Services v. American Federation of Government Employees, Local 3721*, the Board considered one of the first negotiability appeals filed after the April 2005 amendment to D.C. Code § 1-617.08. 54 D.C. Reg. 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007). In that case, the Board stated:

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

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

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

Id.

III. Positions of the Parties

The Union's proposals are set forth below. The proposals are followed by: (1) WASA's arguments in support of nonnegotiability; (2) AFGE's arguments in support of negotiability; and (3) the findings of the Board.

Article 21: Job Changes and Placement

Section A – Internal Job Postings

> 2. During this period, employees who wish to apply for the open position or job may do so. The application shall be in writing, and it shall be submitted to the Human Resources Department. A review of an applicant's minimum qualifications shall be made by a representative of the Human Resources Department. An applicant covered by this Agreement who is not selected to fill the vacancy shall be notified in writing. Internal applicants shall be given preference over external applicants provided the internal applicants are equally qualified candidates to perform the job.

Agency: WASA states on that on April 10, 2013, the parties reached tentative agreement on Article 21, and attaches an exhibit showing the text of Article 21, which purports to be signed by each party's negotiators and dated April 10, 2013. (Answer at 2; Answer Ex. 1).

Union: AFGE notes that when the parties exchanged bargaining proposals on March 15, 2013, WASA declared the final sentence in Article 21, Section A(2) nonnegotiable. (Appeal at 2). On April 10, 2013, the Union proposed a counter offer retaining the sentence. *Id.*

Board: Answer Ex. 1 retains the final sentence in Article 21, Section 2(A), and was initialed by negotiators Barbara Hutchinson and Clifford Dozier. (Answer Ex. 1). The Board finds that the parties reached a tentative agreement on this proposal, and the Union's appeal of this proposal is moot.

Article 23: Job Descriptions

Section A – Copy of Job Description

> Each employee covered by this Agreement shall be supplied with a copy of his/her job description. The Union shall be supplied with a copy of each job description upon request. The Union shall be given the opportunity to review substantial changes in job descriptions prior to implementation.

Board: In its Answer, WASA states that on May 2, 2013, it notified the Union that it rescinded its declaration of nonnegotiability pertaining to Article 23, Section A. (Answer at 2, Answer Ex. 2). Therefore, the Board finds this issue moot.

Section B – Other Related Duties

> The clause found in the job descriptions, "performs other related duties as assigned," shall be construed to mean employees may be assigned to other related duties. Management recognizes that job assignments should be commensurate with job descriptions. The Union recognizes that at times Management must make exceptions to this policy. When such exceptions are necessary, the Authority shall make every effort to assign employees whose normal duties and pay level are most nearly associated with those of the temporary assignment. In all cases, such assignments shall be kept to a minimum, and an attempt shall be made to meet those needs on a voluntary basis. Management further agrees to take into consideration when making such assignments the employee's ability to perform the assignment.

Agency: WASA asserts that Article 23, Section B defines "other related duties" in a manner that infringes upon the Agency's management rights. (Answer at 2). WASA contends that in 2005, the Board declared other portions of Article 23 nonnegotiable, but did not consider Section B. *American Federation of Government Employees, Local 631 v. D.C. Water and Sewer Authority*, 54 D.C. Reg. 3210, Slip Op. No. 877, PERB Case No. 05-N-02 (2007) ("Slip Op. No. 877"). (Answer at 2). According to the Agency, AFGE now asserts that its position should be granted because WASA did not declare Section B nonnegotiable in 2005, but this position is not supported by the 2005 amendment to D.C. Code § 1-617.08(a-1), or the subsequent rulings of the Board interpreting that amendment. *Id.* Specifically, WASA notes that in Slip Op. No. 877, the Board held that "under D.C. Code § 1-617.08(a-1), the Board may no longer rely on the bargaining history of the parties in determining the issue of negotiability 'when there is a close question of whether or not a particular matter is a proper subject of bargaining.'" *Id.* WASA alleges that the Union's proposed language limits WASA's ability to "direct" and "assign" work to its employees, and uses the word "shall" four times. (Answer at 3). WASA notes that "[e]stablished principles of legal writing and contract interpretation both treat the word 'shall' as a mandate," and thus in four portions of Section B there is an unconditional mandate placed upon the Agency to: (1) interpret the phrase "other related duties" in a manner contrary to the CMPA; (2) make assignments based on the employee's level of pay and normal duties; (3) that work assignments be kept to a minimum; and (4) that WASA first seek volunteers before making assignments. (Answer at 3-4). Therefore, the Agency argues that these mandatory limitations on its ability to direct and assign its employees are contrary to the CMPA and should be deemed nonnegotiable. (Answer at 4).

Union: AFGE notes that the proposed language of Article 23, Section B is unchanged from the parties' current CBA, and that this article was the subject of the Board's decision in Slip Op. No. 877. (Appeal at 2-3). AFGE states that while the Board's decision in Slip Op. No. 877 declared the Union's proposal nonnegotiable because the Union wanted to bargain over changes in job descriptions, the Union's current proposal does not contain language impinging on management rights to assign or direct the work of employees by requiring bargaining over changes in job descriptions. (Appeal at 3). AFGE alleges that Article 23, Section B was reviewed by the Board

in Slip Op. No. 877, and that WASA did not challenge Section B in that case. *Id.* Further, AFGE contends that the language in Section B does not require the Agency to assign duties, interfere with its right to assign duties or work, and does not restrain the Agency in its right to direct employees in the performance of their duties; it reflects the parties' understanding of the term "other related duties" contained in job descriptions. *Id.*

Board: The proposal is nonnegotiable. In Slip Op. No. 877, considered the impact of the 2005 amendment to D.C. Code § 1-617.08. AFGE Local 631, Slip Op. No. 877 at p. 7-9. After examining the legislative history of the amendment, the Board made the following conclusions:

> (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.

Id. at 8 (emphasis in original).

While the Union is correct that Article 23 is the subject of Slip Op. No. 877, in that decision the Board specifically noted that WASA did not raise any argument regarding subsection B of Article 23, and the Board did not analyze subsection B in its decision and order. *AFGE Local 631*, Slip Op. No. 877 at p. 9. In that case, the Board considered subsections A, D, E, and F only. *Id.* If the language of subsection B pertains to management rights, then subsection B does not become negotiable simply because WASA did not declare the section nonnegotiable in the 2005 negotiability appeal. *Id.* at 8.

The necessary question is whether Article 23, Section B infringes upon management rights under D.C. Code § 1-617.08(a). D.C. Code § 1-617.08(a)(1) grants management the sole right "[t]o direct employees of the agencies," while subsection (a)(2) grants management the sole right "[t]o hire, promote, transfer, assign, and regain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause." The D.C. Court of Appeals has recognized that "verbs such as 'must' or 'shall' denote mandatory requirements... unless such construction is inconsistent with the manifest intent of the legislature or repugnant to the context of the statute." *Leonard v. District of Columbia*, 801 A.2d 82, 84-85 (2002). Taking into account this rule of construction, Article 23, Section B requires WASA to "make every effort to assign employees whose normal duties and pay levels are most nearly associated with those of the temporary assignment," and dictates both the duration of

those temporary assignments ("shall be kept to a minimum"), and the method of filling the temporary assignments ("an attempt shall be made to meet those needs on a voluntary basis."). The CMPA reserves the right to direct and assign employees solely to management. D.C. Code § 1-617.08(a)(1) and (2). Therefore, the Board finds that Article 23, Section B is nonnegotiable.

Article 34: Employee License and Certification

Section A: Authority Required License or Certification

> If it is determined by the Authority that employees holding certain positions should be certified or licensed, the Authority agrees that all employees with a minimum of twenty (20) years in the position and/or a related position at the Authority or its predecessor and an annual satisfactory work performance shall be exempt from licensing and certification requirements and may retain their present position. The Authority agrees to assure that all employees who are employed in such positions at the time this Agreement becomes effective shall be trained and otherwise assisted in satisfying this requirement. To accomplish this, the Authority shall supply and pay for the training of employees for whom such licensing or certification is required as part of their job requirements. Such training shall be available for at least twelve (12) months before any certification or licensing test is required, and any employee subject to this provision shall be allowed to retest at least twice thereafter before being deemed unable to continue in the affected position. If an employee fails the test, the Authority agrees to train the employee for a minimum of six (6) months, prior to the second and third test, in those skill areas in which the employee was deemed deficient. Subject to the rules of the testing agency, employees who wish to take the test again shall only be required to be re-tested in the areas in which they were deemed deficient.

Agency: WASA declared nonnegotiable the portion of the first sentence in Article 34, Section A that exempted employees with twenty years of service from any licensing or certification requirement determined by the Agency. (Answer at 4). WASA asserts that in Slip Op. No. 877, the Board addressed an appeal regarding changes to job descriptions by noting 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 employees to perform its work." *AFGE, Local 631*, Slip Op. No. 877 at p. 10. The Agency states that the same logic applies to any decision by management regarding the licenses or certifications an employee is required to possess, and cites to the Board's finding in Slip Op. No. 877 that it saw "no difference between bargaining over the establishment of qualifications for a new position and bargaining before changing an existing position." *Id.* WASA argues that the language at issue in Article 34, Section A creates a right for an employee to hold a position for which they would qualify due to years of service, without meeting the minimum qualifications established by the Agency – an outcome the Agency asserts is contrary to management rights under the CMPA. (Answer at 4-5).

Additionally, WASA contends that the Appeal makes an irrelevant distinction between licenses required by a regulatory body and licenses required by the Agency, stating that the question is not whether there should be different procedural requirements for licensure mandates issued by a regulatory body versus an employer, but whether the Agency should have to bargain over the exercise of its right to determine the qualifications and duties of its employees. (Answer at 5). WASA states that it has "expressed in clear and unambiguous terms that it is prepared to negotiate on procedural matters related to Article 34, Section A," but that it does not consider the language relating the twenty year service exemption to be procedural. *Id.* Further, WASA notes that although the Union states in its Appeal that it has conceded the issue of the twenty year exemption and attempted to bargain over the procedures for persons required to obtain a license or certification, the Agency contends that since filing the Appeal, the Union has refused to discuss Article 34 pending the Board's decision on its appeal of Article 34, Section A. *Id.* WASA states that "[h]aving conceded the issue of the twenty (20) year exemption as an impermissible infringement on management rights, if the Union is prepared to negotiate regarding procedural matters, the Authority is also prepared to do so." (Answer at 6).

Union: In its Appeal, AFGE draws a distinction between the language of Article 34, Section A, which it says applies only to Agency-required licensing and certifications, and the language of subsection B, which involves regulatory licensing. (Appeal at 4). The Union states that it presented a proposal "which removed the language and proposed procedures to provide training and testing" for employees which WASA requires to have licenses or certifications. *Id.* AFGE asserts that procedures for the exercise of management rights are negotiable, citing *University of the District of Columbia Faculty Association/NEA v. 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). (Appeal at 4).

Board: Appeal Exhibit 4 contains the Union and Agency's proposals for Article 34, Section A, dated April 10, 2013. (Appeal Ex. 4). The Agency's proposal strikes the portion of the first sentence exempting employees with twenty years of service from any licensing or certification requirement determined by the Agency. *Id.* The Union's proposal also strikes the portion of the first sentence exempting employees with twenty years of service from any licensing or certification requirement determined by the Agency. *Id.* Therefore, the dispute over this language is moot.

Notwithstanding, the procedures to implement management rights are negotiable. *See Teamsters Local Union No. 639 v. D.C. Public Schools*, 38 D.C. Reg. 1586, Slip Op. No. 263, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1991). Thus, the portions of Article 34, Section A that address procedural matters are negotiable, and the parties may bargain over these portions if they so choose.

Article 35: Leave

Section A: General

> In an effort to provide the Union with an opportunity to counsel employees with attendance issues prior to the issuance of a leave restriction letter or letter of

> warning, Management shall provide the Union President with a list of employees suspected of abusing sick leave, employees with excessive unscheduled emergencies or annual leave, or employees who are continually late for duty. The Union President shall provide Management a current list of the Union Stewards or Union Officials authorized to participate in this activity. Upon receipt of the list, the Union Steward and/or Union Official shall counsel those employees in an effort to minimize or eliminate attendance problems or issues.
>
> The provisions herein are not intended to completely cover all leave issues. In administering the leave, the Authority shall comply with D.C. and Federal FMLA.

Agency: WASA declared nonnegotiable a portion of the first sentence of Article 35, Section A, specifically the portion stating "In an effort to provide the Union with an opportunity to counsel employees with attendance issues prior to the issuance of a leave restriction letter or a letter of warning." (Answer at 6). WASA states that this language violates the management right to "suspend, demote, discharge or take other disciplinary action against employees for cause" guaranteed by D.C. Code § 1-617.08(a)(2). *Id.* Specifically, WASA asserts that the language restricts its ability to administer discipline for cause by requiring that the Union first be given an opportunity to counsel employees with attendance issues, which is a mandate that no action be taken by the Agency, even where cause exists, until the counseling takes place. *Id.* WASA rejects the Union's contention in its Appeal that a letter of leave restriction or warning are not forms of discipline, stating that both are part of the principles of progressive discipline mandated by Article 57 "Discipline" of the parties' CBA. *Id.* Further, the Agency states that Appendix A, Table of Appropriate Penalties, includes a specific charge that references "leave restriction," illustrating that "leave restriction" is considered discipline by the parties. (Answer at 7). According to the Agency, the Table of Appropriate Penalties demonstrates that "leave restriction" is a progressive step in the disciplinary process, and that failure to comply with leave restriction results in more severe sanctions. *Id.* Similarly, WASA notes that the Table of Appropriate Penalties includes a charge demonstrating that a "letter of warning" is considered a progressive step in the discipline process, as a response to excessive tardiness. *Id.* WASA states that any requirement that such a warning letter cannot be issued until the Union is first given an opportunity to counsel the employee is an infringement on its right to discipline an employee for cause. (Answer at 7-8).

Union: AFGE contends that leave restriction is not a disciplinary action, which is covered by a separate section of the CBA. (Appeal at 4-5). The Union states that the parties have negotiated over this language in the past, and that "the subject is a mandatory subject for bargaining since it does not impinge and/or restrain a management right." (Appeal at 5). AFGE asserts that the Board has held that "all subjects are negotiable, including the negotiation of the impact and effect of management rights." *Id*; citing *AFGE, Local 631*, Slip Op. No. 877 at p. 4.

Board: The proposal is nonnegotiable. The Board has previously held that imposing pre-conditions before an agency may discipline an employee for cause "unduly infringes management's right to discipline." *Washington Teachers Union, Local 6 v. D.C. Public Schools*, 46 D.C. Reg. 8090, Slip Op. No. 450 at p. 8, PERB Case No. 95-N-01 (1995). Additionally, the

Board has located Federal Labor Relations Authority ("FLRA") precedent stating definitively that "management's right to discipline includes placing an employee in a restricted leave use category." *National Federation of Federal Employees Local 405 and U.S. Dep't of the Army, Army Information Systems Command*, 42 FLRA 1112, 1131 (1991); *see also National Treasury Employees Union and U.S. De't of the Treasury, Bureau of the Public Debt*, 65 FLRA 509, 516-18 (2011); *National Treasury Employees Union and U.S. Dep't of the Treasury, Internal Revenue Service*, 66 FLRA 809, 812 (2012). Further, the FLRA has held that provisions or proposals that preclude management from imposing a leave restriction in response to a first offense of leave abuse affect management's right to discipline employees. *National Association of Government Employees Local R5-82 and U.S. Dep't of the Navy, Navy Exchange, Naval Air Station Jacksonville, FL*, 43 FLRA 25, 28 (1991); *see also National Federation of Federal Employees Local 858 and U.S. Dep't of Agriculture*, 42 FLRA 1169, 1170-72 (1991) (provision requiring agency to provide counsel and letter of warning prior to placing employees on leave restriction interferes with management's right to discipline employees); *American Federation of Government Employees Local 1156 and U.S. Dep't of the Navy, Navy Ships Parts Control Center*, 42 FLRA 1157, 1160-63 (1991) (preconditions which preclude an agency from imposing sick leave restriction directly interfere with management's right to discipline employees).

When the Board lacks precedent on an issue, it looks to the decisions of other labor relations authorities, such as the National Labor Relations Board ("NLRB") or FLRA for guidance. *See American Federation of Government Employees, Local 2741 v. D.C. Dep't of Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697 at p. 4, PERB Case No. 00-U-22 (2002) (Board used NLRB precedent to reason by analogy in case where Board lacked precedent on a particular issue); *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, Slip Op. No. 1119 at p. 3, PERB Case No. 08-U-38 (Oct. 7, 2011) (Board relied on FLRA precedent to decide question of whether a bargaining unit member has a right to confer privately with a union representative); *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, 48 D.C. Reg. 8530, Slip Op. No. 649, PERB Case No. 99-U-27 (2001) (Board looked to FLRA precedent to determine whether polling employees constituted direct dealing). In light of the fact that the FLRA has held management's right to discipline includes placing an employee on leave restriction, the Board will use this precedent as a guide in finding that this portion of AFGE's proposal is nonnegotiable.

Article 57: Discipline

Section C: Progressive Discipline

> 2. Where practicable, the Union shall be given the opportunity to counsel the employee before a corrective or adverse action is imposed upon an employee.

Agency: Similar to its objection to Article 35, Section A, WASA asserts that the language of Article 57, Section C(2) mandates a limitation on the Agency's ability to discipline an employee for cause. (Answer at 8). The Agency notes that in *District of Columbia Dep't of Fire and Emergency Medical Services v. American Federation of Government Employees, Local 3721*, 54

D.C. Reg. 3167, Slip Op. No. 874 at p. 10, PERB Case No. 06-N-01 (2007), the Board held that similar language which required the agency to allow "an insulated period of time for employees... to improve performance and attendance without safeguards allowing management to exercise its right to discipline its employees for cause" was nonnegotiable. (Answer at 8). WASA contends that the language at issue in the present case has the same effect and is likewise nonnegotiable. *Id.* According to WASA, the phrase "where practicable" is not sufficient to safeguard its right to discipline employees for cause because it is vague and undefined, failing to delineate which party decides what is "practicable" or even what standards will be used to determine practicability. *Id.* The Agency alleges that in Slip Op. No. 877, the Board found vague and undefined language nonnegotiable, and that in the instant case, if the vague words "when practicable" are removed, the remaining language would serve as a complete bar to the Agency's right to discipline an employee for cause without first waiting for the Union to counsel the employee. (Answer at 9). Finally, WASA contends that the language creates a standard where one had not previously existed. *Id.*

Union: The Union's proposal is the current language in the parties' CBA, and does not require the Union to have an opportunity to counsel an employee. (Appeal at 5). Instead, the proposal only states that the Union have the opportunity to counsel an employee "when practicable." *Id.*

Board: The proposal is nonnegotiable. In *D.C. Dep't of Fire and Emergency Medical Services v. American Federation of Government Employees, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 847 at p. 10 (2012), the Board held that language which requires an agency to allow an insulated period of time for an employee to recover and improve performance, absent safeguards allowing management to exercise its right to discipline employees for cause, infringes on management's rights under the CMPA. The instant proposal requires that WASA, at least some of the time, allow an insulated period of time for employees to recover and improve their performance prior to the imposition of a corrective or adverse action. The qualifier "when practicable" does not diminish the fact that the proposal limits the Agency's ability to take disciplinary action against employees for cause, and therefore the Union's proposal impermissibly infringes on the Agency's rights under D.C. Code § 1-617.08(a)(2).

Section C: Progressive Discipline

> 5. When an employee has engaged in conduct where he/she is subject to more than one (1) violation, the employee shall be charged with the single most appropriate penalty as set forth in Appendix A of this Agreement.

Agency: WASA asserts that this language clearly forecloses its ability to discipline employees for cause. The CMPA grants the right for management to "suspend, demote, discharge or take other disciplinary action against employees for cause," without precondition or limitation. (Answer at 9; citing D.C. Code § 1-617.08(a)(2)). The Agency rejects the Union's argument in its Appeal that the language is purely procedural, stating that the language serves as an absolute bar to WASA issuing discipline for multiple offenses even when multiple offenses have occurred. *Id.* WASA asserts that by restricting the Agency's right to discipline to only the single most appropriate penalty when multiple charges are warranted is an absolute bar, not a

procedural matter. (Answer at 10). Thus, the Agency contends that language which allows misconduct on the part of the employee, but strictly prohibits management from suspending, demoting, discharging, or taking other disciplinary action is contrary to the CMPA. *Id.*

Union: The Union argues that Article 57, Section C(5) does not interfere with the Agency's right to discipline its employees because the parties may bargain over the impact and effects of management rights. (Appeal at 5). Instead, AFGE asserts that this section provides a procedure for the imposition of discipline, but does not require the imposition of any particular penalty by management. *Id.*

Board: The proposal is nonnegotiable. D.C. Code § 1-617.08(a)(2) grants management the sole right to "suspend, demote, discharge, or take other disciplinary action against employees for cause." On its face, AFGE's proposal prohibits WASA from assigning a penalty for each violation committed by an employee, instead limiting WASA to the "single most appropriate penalty." The Board finds that such a limitation is inconsistent with the management rights enumerated in D.C. Code § 1-617.08(a)(2), which provides that management retains the sole right to "suspend, demote, discharge, or take other disciplinary action against a employees for cause."

Section K: Immediate Administrative Leave

> 4. The following sections of Article 59, Expedited Grievance and Arbitration Procedure, shall apply to Section K of this Article:
>
> ...
>
> (b) Section G, Finality.

Section O: Active Duty Status

> Except in the special circumstances referred to in Section K above, an employee against whom corrective or adverse action has been proposed shall be kept in an active duty status until the arbitrator renders a final decision.

Agency: WASA alleges that the language of Article 57, Section O limits the Agency from imposing discipline on employees by cause, and that any argument that the language is merely procedural is meritless because the Board has previously considered such language and held that it was nonnegotiable. (Answer at 10). The Agency asserts that in *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't Labor Committee*, 54 D.C. Reg. 2895, Slip Op. No. 842, PERB Case No. 04-N-03 (2007), the Board reviewed nearly identical language and found it to be nonnegotiable because the language limited management's right to discipline by establishing a standard where none existed[1]. *Id.* As

[1] The language read: "No discipline shall be implemented pursuant to this article until affirmed on appeal to an arbitrator or the Office of Employee Appeals, if such avenues are available and the employee and/or Union has not waived such appeal..." (Answer at 10).

the proposed language in the instant case "essentially mirrors the language that was prohibited by the Board" in that case, WASA urges the Board to declare the Union's proposal to be nonnegotiable. (Answer at 11).

Union: AFGE contends that Article 57, Section K(4)(b) and Section O do not restrict the Agency's right to impose discipline because they govern procedures, "which are applicable once a grievance has been filed and a disciplinary action is in arbitration." (Appeal at 5-6). The Union reiterates that procedures for the imposition of discipline are negotiable. (Appeal at 6; citing *UDCFA/NEA*, Slip Op. No. 43 at p. 4).

Board: The proposal is nonnegotiable. In *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, 54 D.C. Reg. 2895, Slip Op. No. 842 at p. 5, PERB Case No. 04-N-03 (2007), the Board was asked to consider the following proposal:

> No discipline shall be implemented pursuant to this article until affirmed on appeal to an arbitrator or the Office of Employee Appeals (OEA), if such avenues of appeal are available and the employee and/or Union has not waived such an appeal. The decision of an arbitrator or the OEA shall be enforceable upon issuance and any disciplinary action approved by an arbitrator or the OEA shall be imposed no later than sixty (60) days following that decision. If the Department fails to act to impose discipline within this 60-day period, no discipline shall be imposed.

The Board concluded that the proposal was nonnegotiable because it limited management's right to discipline by establishing a standard where none exists. *Id*; citing *Washington Teachers Union, Local 6 v. D.C. Public Schools*, 46 D.C. Reg. 8090, Slip Op. No. 450, PERB Case No. 95-N-01 (1995). Further, the Board determined that the proposal would interfere with management's statutory right to discipline employees by preventing the agency from imposing disciplinary action under certain circumstances.

In the instant case, AFGE's proposal would require WASA to keep employees in an active duty status pending the final decision of an arbitrator, thus preventing WASA from imposing discipline until an arbitrator has issued an award. AFGE's proposal is substantially similar to the proposal at issue in *FOP/MPD Labor Committee*, and thus the Board will follow its holding in that case and find the instant proposal nonnegotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following proposals are moot:
    a. Article 21, Section A
    b. Article 23, Section A

c. Article 34, Section A

2. The following proposals are nonnegotiable:
   a. Article 23, Section B
   b. Article 35, Section A
   c. Article 57, Section C(2)
   d. Article 57, Section C(5)
   e. Article 57, Section K(4)(b) and Section O

3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

November 4, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-N-05 was transmitted via File & ServeXpress to the following parties on this the 4th day of November, 2013.

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