GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Washington Teachers' Union, Local 6, AFT, Petitioner,	PERB Case No. 95-N-01 Opinion No. 450
and	
District of Columbia Public Schools, Respondent.	

DECISION AND ORDER ON NEGOTIABILITY APPEAL

On April 20, 1995, the Washington Teachers' Union, Local 6, AFT, AFL-CIO (WTU) filed a Negotiability Appeal (Appeal or App.) in the above-captioned proceeding.[1/] The Appeal concerns the negotiability of several proposals submitted by WTU which were declared nonnegotiable by the District of Columbia Public Schools (DCPS) during the parties' negotiation for a successor collective bargaining agreement.

The relevant facts underlying this appeal are not in dispute.[2/] The parties commenced negotiations in April 1994. In

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[1/] WTU's initial filing did not meet the minimum filing requirements for negotiability appeals prescribed under Board Rule 532. Pursuant to Board Rule 501.13, WTU cured these deficiencies on May 18, 1995. Once cured, the initial filing date of the deficient document is deemed the date the Appeal was filed.

[2/] Petitioner requested that a hearing be held so that it could provide additional detail of its position. The determination of whether or not a matter is outside the scope of collective bargaining, i.e., nonnegotiable, under the Comprehensive Merit Personnel Act (CMPA) is, in the main, a matter of law. Under the CMPA, the Petitioner in a negotiability appeal enjoys a presumption that the disputed matters are negotiable. See D.C. Code § 1-618.8(b). Board Rule 532 provides the parties the opportunity to present their position and any supporting argument they wish to make. A party may request an opportunity to file additional pleadings to respond to unaddressed arguments made by the other

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response to proposals submitted by WTU, DCPS notified WTU by letter dated May 12, 1994, that certain proposals were nonnegotiable. Following that notice, DCPS sent a second letter dated June 30, 1994, in which DCPS: (1) reiterated that the proposals set forth in its May 12, 1994 letter were nonnegotiable; (2) provided an additional reason why one of those proposals was not negotiable; and (3) declared another proposal to be nonnegotiable. (App.; Attach. A & B.)

In August 1994, WTU elected new union officers who took over the negotiations. The new administration resumed negotiations with DCPS in late October 1994, "using the proposals made by the previous union negotiating team." (App. at 2.) WTU acknowledges that it was "aware of two previous claims of nonnegotiability made by the employer which had not been appealed by the previous leadership." Id.

On November 1, 1994, the parties exchanged letters concerning their respective positions on the disputed proposals. (Attach. to DCPS' Resp. to App.) Among other things, WTU expressed its disagreement with the legal basis of DCPS's assertions of nonnegotiability; asserted that DCPS must respond in writing to any new or counter proposals made by WTU whereupon WTU would have "a new 30 day clock to appeal [DCPS'] position"; and stated that WTU's new administration intended to "recast" many of the proposals it had "inherited" from its predecessors. DCPS reiterated that it would not negotiate with respect to the proposals declared nonnegotiable in its letters of May 12 and June 30, 1994, and would engage only in "clarifying discussions" for the purpose of providing WTU's new negotiating team a clear understanding of its basis for asserting that the proposals are nonnegotiable.

On January 25, 1995, WTU submitted "a package of revised proposals (Appendix B) to [DCPS] dealing with all of those remaining issues which [DCPS] contended still remained outside the scope of negotiability." (App. at 2.) The parties continued negotiations over the next month and a half. They reached tentative agreement on some items --not the subject of DCPS' initial nonnegotiability declaration-- before negotiations stalled once again. During a March 21, 1995 negotiation session, DCPS hand-delivered a letter declaring WTU's January 25th "package of

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party, which WTU has done. Given the issues presented by this Appeal and the absence of disagreement on material facts (discussed in the text), the Board finds that the pleadings and exhibits provide an adequate record upon which to render our decision. Therefore, WTU's request for a hearing is denied.

revised proposals" to be nonnegotiable. (App.; Attach. E.) On March 23, 1995, DCPS added an additional proposal to its declaration. (App.; Attach. F.) This Appeal ensued on April 20, 1995.

DCPS raises an issue of timeliness with respect to certain proposals contained in WTU's Appeal. Board Rule 532.3 provides that "a negotiability appeal shall be filed within thirty (30) days after a written communication from the other party to the negotiations asserting that a proposal is nonnegotiable."[3]/ Since this rule governs the initiation of a proceeding before the Board, it is jurisdictional and, therefore, mandatory, Teamsters Local Union No. 639 and 730, a/w IBTCWHA, AFL-CIO and D.C. Public Schools, 39 DCR 5992, Slip Op. No. 299, PERB Case No. 90-N-01 (1991), and cannot be extended or waived by the parties. Board Rule 501.1 and 501.3. Once the 30-day period has expired, a negotiability appeal cannot be maintained unless the proposal is changed in some significant way and is declared nonnegotiable as thus changed. If the change is merely superficial, it remains subject to the initial declaration of nonnegotiability for purposes of determining the timeliness of a negotiability appeal.[4]/

We shall address DCPS' claims of untimeliness as a threshold jurisdictional matter as we consider each proposal that has been made the subject of this Appeal. We note at the outset that D.C. Code § 1-618.8(b), which provides that "[a]ll matters shall be deemed negotiable except those that are proscribed by this subchapter", establishes a statutory presumption of negotiability.

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[3]/ All that Board Rule 532 requires to trigger the time period for filing a negotiability appeal is a written declaration communicated from one party to the other party that the proposal is nonnegotiable, i.e., not within the scope of matters subject to collective bargaining under the CMPA. A subsequent reassertion of nonnegotiability or change in the stated reasons for the declaration does not alter the date of the initial declaration for purposes of the filing of a negotiability appeal. Teamsters Local Union No. 639 and 730, a/w IBTCWHA, AFL-CIO and D.C. Public Schools, ___ DCR _____, Slip Op. No. 377, PERB Case No. 94-N-06 (1994)

[4]/ See, Teamsters Local Unions No. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools, __ DCR _____, Slip Op. No. 377, PERB Case 94-N-02 (1994). (The Board will not consider a revision to a proposal over which it has previously made a negotiability determination, when the "so-called revision to a proposal is merely superficial".)

International Association of Firefighters, Local 36 and D.C. fire Department, 35 DCR 118, Slip Op. No. 167, PERB Case No. 87-N-01 (1988). While we start with this presumption, we have stated that in view of specific rights reserved solely to management under this same provision, i.e., D.C. Code § 1-618.8(a), "the Board must be careful in assessing proffered broad interpretations of either subsection (a) or (b)." Teamsters Local Union No. 639 and 730, a/w IBTCWHA, AFL-CIO and D.C. Public Schools, 38 DCR 1586, Slip Op. No. 263 at 2-3, PERB Cases Nos. 90-N-02, 90-N-03 and 90-N-04 (1991)(hereinafter PERB Case No 90-N-02, et al.). Notwithstanding the rights reserved to management, a limited right to bargain nevertheless exists with respect to matters concerning the exercise of management rights, i.e., its impact and effect on terms and conditions of employment, and procedures concerning how these rights are implemented. Id. We are mindful of these competing statutory rights and interests as we consider the negotiability of the proposals that are the subject of this appeal.

1. **ARTICLE I. RECOGNITION; OTHER ORGANIZATIONS; DUES DEDUCTION**
   A. The Board recognizes the Union as the sole bargaining representative for the purpose of [negotiating wages, hours, and working conditions] collective bargaining pursuant to D.C. Code § 1-618 for employees in the occupational bargaining units and job classifications hereinafter defined, and sometimes collectively referred to as "teachers".

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Sec. 3. D.C. Code § 1-618.17(b) requires good faith negotiation "...with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours and any other compensation matters".

DCPS contends that by replacing the bracketed phrase "negotiating wages, hours, and working conditions with", with the partially quoted section of D.C. Code § 1-618.17(b) above, WTU's revised proposal "has the same effect" as the original proposal first declared nonnegotiable in May 1994, and that accordingly the negotiability appeal is untimely. We do not find the revised language to be to the "same effect" as the earlier proposal. The fact that the revision uses statutory language, partial or otherwise, to replace a party's own language is more than a superficial change. The use of statutory language imbues the proposal with certain meaning that is governed by the agencies responsible for administering it. This is not necessarily the case with the nonstatutory provisions or wording devised by a party to the negotiations. We therefore find this proposal to be timely appealed.

On the merits, DCPS claims that the partial quoting of D.C. Code § 1-618.17(b) has the effect of making "hours" a subject over which DCPS would have a duty to bargain. We disagree.[5]/ While we have held that a party cannot change through negotiations that which is statutorily established, WTU's proposal does not distort, alter or change the context of the statutory provision quoted. D.C. Public Schools and Teamsters Local Union No. 639 and 730, a/w IBTCWHA, AFL-CIO, 38 DCR 2483, Slip Op. No. 273, PERB Case No. 91-N-01 (1991). The proposal expressly makes reference to D.C. Code § 1-618.17(b) as the source of the quoted provision. Therefore, the intent or meaning of the proposal is limited to the statutory provision quoted. For the reasons stated, we find the inclusion of this statutory language in a negotiated agreement to be negotiable.

> **A. Sec. 5. The Board agrees that it will not enter into other agreements, understandings or contracts with any organizations, associations, groups of employees, or union concerning any matter affecting members of the bargaining unit which is a legal subject of collective bargaining negotiations under D.C. Code.[6]/**

DCPS contends that the proposal would alter its statutory collective bargaining rights and obligations under the CMPA.

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[5]/ DCPS' argument stems from our Decision and Order in PERB Case No. 90-N-02, 03 and 04, where we held that "[w]hile the proviso in D.C. Code § 1-613.1(a)(2) supra stipulates that 'work scheduling for all employees shall be subject to collective bargaining,' we conclude that scheduling, a bargainable subject, is distinguishable from the establishment of the 'basic workweek' and 'hours of work' - matters reserved to management." Slip Op. No. 263, Proposal 13. The proviso makes negotiable proposed work schedules during hours of work established by, among others, DCPS. PERB Case No. 91-N-01, Slip Op. No. 273, Proposal No. 4.

[6]/ The Petitioner claims that DCPS has failed to meet the Board's standard for invoking a negotiability appeal with respect to this proposal since DCPS does not contend that the proposal is contrary to law, regulation or controlling agreement as we held in D.C. Fire Department and AFGE, Local 3721, AFL-CIO, 35 DCR 6321, Slip Op. 188, PERB Case No. 88-N-02 (1988). The case cited by Petitioner makes reference to language contained in our Interim Rules. Our Interim Rules were superseded by our Final Rules in August 1990. We state for this as well as other proposals where this argument is made, that our Final Rules, i.e., Board Rule 532.3, require only "a written communication from the other party to the negotiations asserting that a proposal is nonnegotiable."

Unlike its previous proposal, WTU's proposal as drafted does not attempt to articulate bargaining rights and obligations established by statute. The proposal merely preserves the integrity of the parties' collective bargaining agreement. DCPS' concern that it will alter its rights with respect to its duty to bargain under the CMPA is unfounded since its management rights under D.C. Code § 1-618.8(a) are not "legal subject[s] of collective bargaining under the D.C. Code." Therefore, for the reasons previously stated, we find the proposal to be negotiable.

**2. ARTICLE I.A. ET TEACHERS' BARGAINING UNIT
EG TEACHERS' BARGAINING UNIT[7]/**

This proposal lists employees, by job classifications, comprising the two bargaining units that would be covered by the negotiated collective bargaining agreement. DCPS contends that this proposal unilaterally adds specific job classifications to the ET and EG bargaining units and expressly leaves open other classifications that could be added in the future. DCPS argues that the addition of classifications and/or employee positions to an existing bargaining unit is exclusively within the purview of the Board pursuant to PERB Rule 504 Modification of Units. WTU contends that it is merely seeking to update job titles due to changes by DCPS in the nomenclature of job titles since the unit was established and is not attempting to alter the scope of the bargaining unit.

Under Board Rule 504.1, a unit modification may be sought to "add to an existing unit unrepresented classifications or employee positions created since the recognition or certification of the exclusive representative." A proper petition for unit modification does not give rise to a question concerning representation. Under the above standard, a unit modification adds to an existing unit of employees job classifications encompassed by the bargaining unit description that did not exist at the time the unit was established.

DCPS denies that the listed job classifications merely update the titles of classifications that existed at the time the unit was established. Since the Board has established by Rule the method and means by which such determinations are made, WTU's intent in making the proposal is preempted by the Board's Rules promulgated pursuant to our authority under the CMPA as codified under D.C. Code § 1-618.2(a). To the extent that the proposal (1) lists job classifications that the parties cannot agree existed at the time the unit was established and (2) leaves open the scope of

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[7]/ The proposal is appended to this opinion.

classifications included in the ET and EG unit, the proposal is nonnegotiable.

3. **ARTICLE I.**

D. FAIR SHARE

1. In recognition that all employees benefit by the Agreement and the representation services provided by the Union, effective upon ratification and implementation of this Agreement the Board shall cause to be deducted from the bi-weekly pay of each member of the bargaining unit who is currently not paying membership dues to the union, a sum equal to 85% of the amount of membership dues as certified by the Union. Such amounts shall be remitted to the Union in the same manner, and at the same time, as the amounts collected under C. (above). No written authorization from the employees shall be required.

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3. The Union shall maintain an internal procedure under which employees affected by this provision may appeal those amounts which they believe are not associated with the legitimate collective bargaining and representation functions of the Union.

DCPS contends that this proposal providing for uniform fee assessments on non-dues paying members of the collective bargaining unit, fails to meet standards for safeguarding the constitutional rights of such employees established by the United States Supreme Court in AFT, Local 1 v. Hudson, 475 US 292 (1986). We disagree. D.C. Code § 1-618.7 provides that uniform assessments on represented bargaining unit employees shall be the proper subject of collective bargaining. Paragraph 1 merely proposes the assessment of such a fee, while paragraph 3 states that WTU will provide an internal procedure for affected employees to appeal the use of these fees for purposes alleged to be inconsistent with legitimate representational functions. No procedure is actually proposed. We find nothing contained in this proposal rendered nonnegotiable by AFT, Local 1 v. Hudson. Therefore, this proposal is negotiable.

4. ARTICLE IV. TEACHER TRANSFER POLICY

C. INVOLUNTARY TRANSFERS

1. Involuntary transfers shall be made for just cause including but not limited to: reduction in staff due to loss

in enrollment, reduction or elimination of programs, loss of funds, failure to meet minimum class size, or closing of buildings. Involuntary transfers shall not be made for disciplinary reasons.

DCPS asserts that this provision was originally declared nonnegotiable in its May 12, 1994 letter as Article IV.B.2 and is therefore untimely. While the last line of Article IV.C.1 repeats verbatim the original proposal declared nonnegotiable, the proposal has been significantly modified by the addition of a new provision. While we find the last line of this proposal to be untimely appealed, we shall consider the remainder of the proposal on the merits. We note, however, that the basis for DCPS' assertion that the last line of this proposal was nonnegotiable is similar in nature to the remainder of the proposal discussed below.

We have held that management's decision to exercise its sole right under D.C. Code § 1-618.8(a)(2) to transfer employees is not compromised when the proposal is limited to procedures that place no limitations on the right to transfer or to accommodations for employees transferred. PERB Case No. 90-N-02, 03 and 04 (Proposal 9). Notwithstanding the proposed open-ended list of "just cause[s]" as a basis for transferring an employee, the proposal limits this management right by establishing any standard at all where no standard exists. See, PERB Case No 90-N-02, et al. (Proposal 9).

Petitioner asserts that the parties' inclusion of such transfer provisions in prior agreements has made the subject of the proposal a mandatory subject of bargaining as between the parties. While an employer may bargain and reach agreement on matters over which it has no duty to bargain under the CMPA, the statutory right remains reserved to management once the agreement has expired. We have looked to the parties' current and prior agreements when it is a close question whether a matter is a required subject of bargaining. See, e.g., International Brotherhood of Police Officers, Local No. 445, AFL-CIO v. D.C. Dep't of Administrative Serv., ____ DCR _____, Slip Op. No. 401, PERB Case 94-U-13 (1994)(union office space). We find no close question in considering this proposal, and find it to be nonnegotiable.

C. INVOLUNTARY TRANSFERS

5. Teachers who are to be involuntarily transferred may express a preference for existing vacancies for which they are certified. Teachers will be assigned to the vacancy for which a preference has been indicated based on seniority. Teachers being involuntarily transferred shall be assigned before teachers seeking voluntary transfers are assigned.

8.b. Teachers shall be excessed (sic) according to their building seniority.

i. Properly certified teachers who volunteer for transfer in an excess situation shall be accorded all rights of teachers who would be involuntarily transferred. Such volunteers shall be transferred first.

ii. Properly certified teachers will be those individuals whose certification(s) is/are on the district record at the time the reduction decision is determined.

WTU argues that these proposals are similar in nature to a proposal we found negotiable in Teamsters Local Union Nos. 639 and 730, supra, Slip Op. No. 263 (Proposal 1). There, in finding negotiable a proposal using seniority as a basis for implementing a layoff, we noted that the principle of seniority had not been removed from the CMPA's presumption in favor of negotiability by the management rights provisions of Section 1-618.8(a). However, we specifically based our determination that the proposal was negotiable on provisions of the proposal which invoked the principle of seniority only when all other factors, as determined by management, were equal and its application was not inconsistent with law. No such qualifications are contained in the instant proposal. While the principle of seniority is not expressly preempted by Section 1-618.8(a), without the noted qualifications, limiting management's right to transfer to this criteria places an improper restraint on management. The remainder of both proposals place further limitations on DCPS' right to transfer. The last sentence of Article IV, Sec. C.5 and C.8.b.i, and C.8.b mandate that a transfer be based on certain criteria defined therein. With the exception of the first sentence of Article IV.C.5 and C.8.b.ii, which we find negotiable, we find the remainder of Article IV.C.5 and C.8.b to be nonnegotiable.

5. ARTICLE V. PERSONNEL FILES

D. Exclusions

5. No adverse investigative report, evidence of an incident, or action more than sixteen months old may be used in determining any disciplinary action. Immaterial, irrelevant or untimely information shall be removed from the files on demand.

G. A teacher shall be permitted to reproduce or copy any material in the teacher's own file.

DCPS asserts that the first sentence of Article V.D.5 was originally declared nonnegotiable as Article V.J.3.e., in its May 12, 1994 letter and is therefore untimely appealed. A review of Article V.J.3.e. reveals that the proposal is indeed identical to Article V.D.5. which DCPS declared nonnegotiable on May 12, 1994. We therefore dismiss this portion of Article V.D.5 as untimely filed.

The additional sentence in Article V.D.5., partially quotes a provision contained in D.C. Code § 1-632.5(c). The provision states as follows:

> For purposes of this subchapter, 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. Immaterial, irrelevant or untimely information shall be removed from the official record upon the finding by the agency head that the information is of such a nature.

DCPS contends that the proposal is inconsistent with this statutorily established basis for removing information from an employee's personnel file. WTU's proposal would allow the removal of certain information from employee personnel files to occur on demand rather than upon a finding by the agency head that the statutory criterion for removal has been met. We have held that to the extent a proposal alters a statutorily established criteria affecting otherwise negotiable terms and conditions of employment, as does this proposal, the proposal is contrary to law and therefore nonnegotiable. See, PERB Case No. 90-N-02, et al.(Proposal No. 6) and D.C. Public Schools and Teamsters Local Union No. 639 and 730, a/w IBTCWHA, AFL-CIO, ___ DCR _____, Slip Op. No. 403, PERB Case Nos. 94-N-06 (1994).

DCPS contend that Article V.G is also inconsistent with D.C. Code § 1-632.5. Specifically, Section 1-632.5(2)(A) lists certain "information which may be in an official personnel record that shall not be disclosed to any employee". To the extent Article V.G allows employees to make copies of information in their official personnel record that is made not disclosable by D.C. Code § 1-632.5(2)(A), the proposal is contrary to law and nonnegotiable.

6. ARTICLE VII. DISCIPLINARY ACTION

> **A. No employee shall be subject to disciplinary action without just cause. Employees shall be afforded progressive discipline whereby increasingly severe consequences attach to recurring behavior, acts or omissions.**

DCPS objects to the first line of the proposal because it would extend the coverage of the just cause standard for imposing discipline to probationary employees. It argues that by requiring cause for adverse action against probationary employees, the proposal contravenes D.C. Code § 1-617.1(b), which in pertinent part provides that "[a] permanent employee in the Career and Educational Service who is not serving a probationary period or an employee appointed under the authority of § 1-610.4(2) and serving for at least 1 year with average performance may be suspended only for cause and only in accordance with the provision of this subchapter and subchapter VI of this chapter."

WTU agrees that the effect of its proposal is to afford just cause protection to probationary employees, and argues that it "has every right to bring proposals to the table to grant rights to employees above and beyond the statutory levels." (Supp. Subm. at 19.) As a general proposition, all matters are negotiable that are not expressly fixed by law or otherwise removed by the CMPA from matters subject to collective bargaining.[8]/ While D.C. Code § 1-617.1(b) provides that non-probationary permanent employees cannot be subjected to certain adverse actions except for cause, it is silent as to adverse actions against probationary employees.

D.C. Code § 1-618.8(a)(2) provides as a sole management prerogative, the right to "suspend, demote, discharge or take other disciplinary action against employees for cause". (Emphasis added.) WTU's proposal does not undermine this right accorded management since the management right and the proposal afford all employees the same standard for imposing discipline, i.e., cause.[9]/ The

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[8]/ We have held that the fact that a statutorily provided right or benefit for certain employees may not be expressly provided to another classification of employees does not preclude their bargaining representative from seeking to attain the right or benefit through bargaining, provided that no law excludes the matter from conditions of employment or prohibits negotiations on such matters. American Federation of State, County and Municipal Employees, Council 20, Local 1959, AFL-CIO and D.C. Public Schools, 34 DCR 3623, 3627, Slip Op. No. 159 at 5, PERB Cases No. 85-N-01 (1991). We do not understand that WTU challenges those limitations.

[9]/ We read the standard "just cause" as not inconsistent with management's general right under D.C. Code § 1-618.8(a)(2) to take adverse action against employees only for "cause".

We note, however, that we have held that in certain
(continued...)

proposed establishment of this standard for adverse actions against probationary employees is within the scope of matters subject to the collective bargaining provisions of the CMPA, and not contrary to law. It is therefore negotiable.

> **DISCIPLINARY ACTION**
> **J. If all efforts at remediation fail, an employee may be terminated for just and legal cause. Termination shall be subject to due process review through the arbitration procedure contained in this agreement. Pending the outcome of the arbitration appeal the employee shall be relieved of duty with pay.**

DCPS asserts that this proposal violates management's right under D.C. Code § 618.8(a)(2) to take disciplinary action against employees for cause. DCPS further states that the proposal would prevent management from enforcing disciplinary action it has determined is appropriate for an employee. With respect to management's right to discipline, we have held that procedural matters concerning the implementation of levels of discipline are negotiable. PERB Case No. 90-N-02, 03 and 04, (Proposal 19).

While the first sentence of the proposal appears to be procedural in nature, its effect is not. Conditioning management's right to discipline, e.g., terminate, for cause on exhausting all efforts to remediate the employee, unduly infringes management's right to discipline. The exhaustion of all, yet undetermined, remedial efforts is vague and can have the effect of preventing management from ever disciplining the employee. We therefore find this sentence nonnegotiable.

The second and last sentences of the proposal are procedural in nature. The second sentence does not concern management's right to terminate, but subjects the propriety of that decision, once made, to the parties' grievance arbitration process. We find this

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circumstances the standard for exercising a management right is so integrally a part of the decision to exercise that right that it too is not a mandatory subject of bargaining. PERB Case No. 90-N-02, 03 and 04 (Proposal 22). In that case, we addressed management's right to decide to drug test, and noted that critical to our decision was the fact that the policy considerations of drug testing school bus drivers are so great that we should not declare the matter to be in the control of a third-party decision maker, i.e., arbitrator, without a clear direction to do so in the governing statute.

part of the proposal negotiable. The last sentence does not encroach on management's decision to terminate but rather delays one feature of termination, i.e., placing the employee in a non-pay status, pending the outcome of the arbitration appeal. We find this proposal negotiable.

7. ARTICLE XX. MAINTAINING STUDENT DISCIPLINE

> **E. Recognizing that actions taken to resolve student difficulties should be those which are intended to return the student to a profitable and acceptable learning situation, before the student is returned to the classroom there shall be a conference arranged by the supervisor or his designee which shall include but not be limited to the teacher, the student, the parent or guardian and the supervisor and his designee.**

DCPS contends that this proposal is inconsistent with its unilateral right to determine educational policy. WTU counters that its proposal does not differ significantly from DCPS' proposal on this subject. The negotiability of a subject is not determined by one party's willingness to submit a matter to collective bargaining during the course of a particular set of negotiations, but rather whether or not it is a matter over which management must bargain under the CMPA. See, University of the District of Columbia Faculty Association/NEA and University of the District of Columbia, 29 DCR 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982).

The Board has held that DCPS' authority to establish educational policy is a management right. Washington Teachers' Union, Local 6, AFL-CIO v. D.C. Public Schools, Slip Op. No. 144, PERB Case No. 85-U-28 (1986). This right derives from D.C. Code § 1-618.8(a)(5), which accords management the sole right "[t]o determine the mission of the agency", and, to a lesser extent, Section 1-618.8(a)(4), which accords management the right to "maintain the efficiency of the District government operations". While issues generated by educational policy may in some instances have an impact on negotiable terms and conditions of employment, in our view this proposal clearly concerns the former. This proposal concerning the manner in which a mission objective will be achieved, i.e., student discipline, extends not only to bargaining unit employees but to management's responsibility as well as non-employees, i.e., students and parents. We, therefore, find that the proposal is nonnegotiable.

> MAINTAINING STUDENT DISCIPLINE
> G. Rules governing discipline are set forth in the District of Columbia Municipal Regulations Title 5: School Board Rules, Chapter 25, "Student Discipline"; and, except to the extent modified herein are made part of this Agreement by reference.

Each school year teachers shall be given copies of the disciplinary rules of the school.

DCPS' objections to this section are the same as its objections to Section E. DCPS also states that the practical effect of this proposal is to subject student disciplinary policy to the contractual grievance arbitration procedure. While this proposal may indeed subject student disciplinary policy to the parties' grievance arbitration process, nothing contained in the proposal purports to establish student disciplinary policy. We find the proposal negotiable for the reasons we stated for the second sentence of Article VII, Sec. J. The second sentence of this proposal does not impinge on a management right. It merely provides an accommodation to bargaining unit employees and is therefore negotiable.

MAINTAINING STUDENT DISCIPLINE
K. The parties commit themselves to a policy of "Zero Tolerance" on matters of student misbehavior, acts of violence or threatened acts of violence, and assault and battery on school personnel. It is recognized that it is the employer's responsibility to summon law enforcement authorities and to pursue the prosecution of perpetrators of such acts.

DCPS maintains that the proposal infringes its right to determine its educational policy. While this proposal may impact upon DCPS' educational policy, its primary purpose and effect is to address employees' safety and welfare while performing their job. As such, it concerns an impact and effect on employees' terms and conditions of employment not proscribed by the CMPA. We find the proposal negotiable.

MAINTAINING STUDENT DISCIPLINE
M. The Union shall be notified of each case of assault, battery, or the threatened or actual use of force to inflict bodily harm committed on or toward members of the bargaining unit. The Union shall have the right to be present in any hearing conducted under the Board Rules regarding the suspension, exclusion, expulsion or reinstatement of the perpetrators of such acts and shall have the right to be heard on behalf of the individuals involved and the bargaining unit at-large regarding the disposition of all such matters prior to a decision being made.

DCPS maintains that this proposal infringes its management right to establish educational policy and adds that 5 DCMR, Chapt. 16, § 2404.16 provides that student hearings shall be "closed unless the adult student or student's parent or guardian requests an open hearing". In view of this regulation, we find the

underlined portion of Section M nonnegotiable "in accordance with applicable laws and rules and regulations" pursuant to D.C. Code § 1-618.8(a). However, for the reasons discussed under Section K, we find the remainder of Section M negotiable. Section M addresses the impact and effect of and procedures concerning the implementation of DCPS' management right, i.e., to determine its educational policy with respect to student discipline, all of which we have held to be negotiable.

8. ARTICLE XXIII. ADDITIONAL SCHOOL FACILITIES

> **B. Where conditions permit, each school shall be provided with one lounge for use by teachers. Where space currently exists or is provided under this section, it shall not be converted to other uses unless comparable space, acceptable to the SCAC can be provided.**
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> **E. Facilities for teachers to prepare for their teaching assignments will be provided in each school as conditions permit. Where space currently exists or is provided under this section, it shall not be converted to other uses unless comparable space acceptable to the SCAC can be provided.**

DCPS asserts that these two proposals violate management's right to direct employees and maintain the efficiency of the work place. DCPS claims that the proposals would prevent it from using the referenced teacher spaces to satisfy student needs for space, e.g., for classrooms when it determines a need exists. We find no basis for DCPS' contention.

The proposals do not direct employee duties or work assignments but rather provide accommodations for breaks during the work day, i.e., teacher lounges, and work areas for teachers to prepare their teaching assignments. These matters are clearly negotiable terms and conditions of employment not proscribed under the CMPA. We further note that the first sentence of each proposal removes any absolute requirement that DCPS provide additional space by limiting such space to where or as conditions permit.

DCPS' second contention is based on D.C. Code § 1-618.8(a)(4) which accords management the right "to maintain the efficiency of the District government operations entrusted to them". DCPS provides no specific reason, nor is it apparent, why matters that plainly address employee terms and conditions of employment contravene this management right. We have held that a "general claim ... that the objective of a management decision is '[t]o maintain the efficiency of the District operations', which has no basis in an applicable law, rule or regulations, is not sufficient to support a finding that a proposal contravenes this management

right." American Federation of Government employees, Local 3721 v. D.C. Fire and Emergency Medical Services Department, ___ DCR ____, Slip Op. No. 390 at 5, PERB Case No. 94-N-04 (1994). We find these proposals are negotiable.

9. ARTICLE XXV. POLICIES RELATING TO WORKING CONDITIONS OF TEACHERS

A.1. Work year

a. Compensation for employees in the ET teachers' bargaining unit is predicated on a work year of 192 days of which not more than 185 days shall be teaching days. Any increase in the basic work year shall necessitate a corresponding increase in the compensation paid to employees. In no event shall the compensation of an employee be reduced without just cause.

b. Compensation for employees in the EG teachers' bargaining unit is predicated on a work year of 52 weeks during which annual leave time is accrued as provided in Article XIX. A. 3. In no event shall the compensation of an employee be reduced without just cause.

DCPS asserts that the first sentence of subsection "a" contravenes D.C. Code § 1-613.1(a)(2) which provides that the "basic workweek and hours of work for all employees of ... the Board of Education... shall be established under rules and regulations issued by the ... Board... ." DCPS further asserts that its right to assign employees under D.C. Code § 1-618.8(a)(2) and determine all questions of policy pursuant to D.C. Code § 31-102 are violated.[10]/ We have ruled that determining the number of duty days concerns a matter that has such high policy implications as to preclude a requirement that DCPS engage in collective bargaining. WTU, Local 6, AFL-CIO v. D.C. Public Schools, Slip Op. No. 144, supra. In this regard, we held that a proposal which fixed the length of the work year is nonnegotiable. PERB Case No. 90-N-02, et al., Slip Op. No. 263 (Proposal No. 13).

DCPS makes no objection, and we do not find any, concerning the negotiability of the second sentence of subsection "a" and the first sentence of subsection "b". With respect to the last sentence of both subsection "a" and "b", DCPS claims that it violates its right to "relieve employees of duties because of lack

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[10]/ In view of our disposition we do not reach these contentions by DCPS.

of work or other legitimate reasons" pursuant to D.C. Code § 1-618.8(a)(3). This provision ostensibly concerns reductions in employee compensation, a negotiable matter, rather than the termination of an employee's duties or employment. However, relieving employees of certain or all duties may necessarily include placing the employee in a reduced or non-pay status. To the extent this provision subjects to negotiations management's right to reduce or terminate compensation pursuant to its authority to relieve employees of their duties because of lack of work or other legitimate reason, e.g., furloughs, it is inconsistent with management's rights under D.C. Code § 1-618.8(a)(3) and therefore nonnegotiable. (See Proposal 8.)

A.2. Hours of Work

c. Individual teacher schedules and the schedules of groups of teachers in their respective schools may be adjusted only after negotiations between the parties over the impact, effect and procedures to be applied. In no case shall any teacher's schedule exceed the length of the normal work day for teachers specified above without the teacher's consent.

DCPS maintains that the last line of this proposal violates its right under D.C. Code § 1-613.1(a)(2) to establish the basic workweek and hours of work. While we held that the proviso under D.C. Code § 1-613.1(a)(2) makes work scheduling negotiable, as drafted, the word "schedule" in this provision refers to the length of an employee's duty day. In this respect, it is nonnegotiable for the same reasons we found the establishment of the number of "teaching days" in a workyear to be nonnegotiable, see discussion of Section A.1(a) supra. While DCPS' authority to determine the length of the normal workday is not affected by the proposal, WTU's use of the phrase "teacher's schedule" would restrict DCPS authority to determine an employee's total duty time and is thereby nonnegotiable. The first sentence is negotiable pursuant to the proviso in D.C. Code § 1-613.1(a)(2).

A.7. Class Size

Maximum class size shall not exceed the following:

i. 15 for pre-kindergarten (non-compulsory); or 20 for pre-kindergarten (non-compulsory) with an aide;

ii. 20 for kindergarten through grade 2 with an aide;

iii. 25 for grades 3 through 6;

iv. 25 for secondary academic classes;

v. 10 for remedial classes;

vi. 18 or maximum number of work stations for industrial arts and home economics

vii. 18 for shops in career development;

viii. 10 for classes of students with learning disabilities; [11]/

For the reasons we stated with respect to Article XX.E, we find that this proposal restricts DCPS' decisions as to its educational mission and is nonnegotiable. As we stated above, while issues concerning an agency's mission may in some instances overlap with terms and conditions of employment, this proposal concerns the former.

A.8. Program Assignments

c. Teachers shall have the opportunity to express their preference of assignment to school committees and other extra-curricular activities for which there is no pay based on the seniority of the teacher.

DCPS contends that this proposal would require it to assign employees to these committees and activities based on strict seniority and would thereby violate management's right to assign employees and maintain the efficiency of the District government operations. However, the proposal merely provides that teachers be permitted the opportunity to express their preference for assignment to extra-curricular activities and there is no requirement that DCPS adhere to such expressed preferences. We find that DCPS' management rights are not infringed by this proposal, which merely subjects the exercise of a management right to assign employees to a negotiable employee accommodation.

A.9. Conference with Parents

i. The responsibility of the teacher to be available for

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[11]/ There are seven other subsections which similarly provide for classroom sizes for various types of students with either physical or mental disabilities. For reasons of economy, they are not set forth, since their content does not affect our determination with respect to the negotiability of the entire proposal.

> conferences with parents is recognized as a teacher's professional responsibility and shall be encouraged by the parties. Such contact with parents shall be accomplished by personal appointment, parent-teacher conference meetings, home visits, or telephone conversations. In the case of home visits, no employee shall be required to participate in activities which place the employee in real or perceived physical danger. It shall be the policy when assigning a teacher to conduct home visits that one or more supervisory or administrative personnel shall accompany the teacher at all times.

DCPS' objects to the last sentence of the proposal as a violation of its right under D.C. Code § 1-618.8(a)(5) to "determine...the number, types and grades of positions of employees assigned to an organizational unit, work project or tour of duty...." We agree. By specifically requiring supervisory personnel to accompany teachers on home visits, this proposal, as DCPS observes, not only contravenes the plain meaning of this management right, it proposes to establish the duties of non-bargaining unit employees, i.e., supervisors. We find tat the underlined provision is nonnegotiable. The remainder of the proposal provides for negotiable employee accommodations.

A.9. Conference with Parents

> ii. Teachers shall be required to attend, for the sole purpose of meeting with parents, not more than three parent-teacher conference meetings during the school year. Such parent-teacher conference meetings may be day meetings if the community affected so desires. In order to contact parents, the use of school phones shall be made available for use by teachers. Teachers shall have the right to use such phones without undue restraint to carry out required responsibilities.

DCPS contends that the first line of this proposal violates it right under D.C. Code § 1-618.8(a)(1) to "direct employees of the agencies". The provision establishes the extent of an employee work assignment, i.e., the number of parent-teacher conference meetings an employee must attend. In this respect, it establishes a part of the assignment itself. By establishing the number of conferences an employee is required to attend, the proposal restricts DCPS' authority to direct employees to attend additional parent-teacher conferences. Therefore, we find the first sentence is a nonnegotiable restraint on management rights. The remainder of the proposal provides negotiable employee accommodations.

A.10. Lesson Planning

The Board and the Union agree that effective planning is fundamental to the success of the teaching-learning process. Lesson plans may be required of each teacher and such plans may be reviewed by the principal when there is a stated need. It is understood that lesson plans are used as a guide to the teacher in structuring the learning experiences of pupils, and that, therefore, the teacher should be the judge as to how much detail should be included. However, if it is demonstrated that the teacher is in need of assistance in improving the teaching-learning activities, then supervisory personnel shall be free to make suggestions as to how planning might be improved. In isolation, lesson plans are not meaningful to anyone; hence they are not to be requested by the supervisor for the sole purpose of determining the teacher's classroom effectiveness.

DCPS maintains the same argument with respect to this proposal, i.e., that it violates its right to direct employees. The proposal establishes how a method and means of performing work, "lesson plans", will be used, i.e., "as a guide", and thereby restricts management's right to make this determination. The proposed conditions --"when there is a stated need" and "if it is demonstrated that the teacher is in need of assistance"-- restrict a management prerogative, by providing that "teachers should be the judge", while it vests in employees the discretion to determine the content and use of a means of performing work. We agree, and for the reasons stated in our discussion of Article XXV.A.9, we find this proposal nonnegotiable.

10. ARTICLE XLV. DUTY TO BARGAIN

There will be no modification, alteration or change in the working conditions of employees covered by this Agreement or in other matters properly within the scope of collective bargaining during the term of this agreement without complete negotiation between the parties.

It is recognized that situations not foreseen at the time this Agreement is made may occur during the term of the Agreement. Such situations may have a potential impact on the terms and conditions of employment of employees covered herein. In such cases the Board shall notify the union in sufficient time to permit meaningful negotiation over the decision, or where appropriate, negotiation over the impact, effect and procedures involved in the decision.

DCPS contends that the proposal is "overly broad" with respect

to its duty to bargain and thereby requires management to negotiate over nonnegotiable management right decisions. We disagree. While we recognize that management retains the sole right to decide under D.C. Code § 1-618.8(a) certain "working conditions", the first provision expressly and specifically limits the proposal to "working conditions of employees ... or other matters properly within the scope of collective bargaining". "Working conditions" is encompassed under "matters properly within the scope of collective bargaining." Matters which constitute the exercise of a management right under the CMPA are not within the scope of collective bargaining, and are expressly insulated from the duty to bargain, and accordingly from the reach of the proposal.

The second provision must be read in conjunction with the first. In this context, it extends only to the duty to bargain over matters properly within the scope of collective bargaining. Specifically, it provides for notice and opportunity to bargain over situations that occur during the term of the parties agreement that affect employees' terms and conditions of employment and thereby give rise to a duty to bargain. Some of these situations may be (1) management right decisions that create a duty to bargain over the impact and effects of and procedures for implementing that decision or (2) decisions involving matters not otherwise proscribed under the CMPA which would give rise to a general duty to bargain. In this regard we find this proposal to be negotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following proposals are dismissed as untimely appealed.

   a. Article IV. Teacher Transfer Policy, Sec. C.1 (last sentence).

   b. Article V. Personnel Files, D.5 (first sentence).

2. The following proposals are within the scope of collective bargaining:

   a. Article I. - Recognition; Other Organizations; Dues Deduction: Sec. A.3 and D.

   b. Article IV. - Teachers Transfer Policy: Sec. C.5 (first sentence) and C.8.b.ii.

   c. Article VII. _ Disciplinary Action: Sec. A and J.

d. Article XX. - Maintaining Student Discipline: Sec. G (second sentence), Sec. K, Sec. M (first sentence and second part of second sentence).

e. Article XXIII - Additional School Facilities: Sec. B and E

f. Article XXV - Policies Relating to Working Conditions: Sec. A.1.a (second sentence), Sec. A.1.b (first sentence), Sec. A.2.c. (first and last sentence in accordance with this Decision), Sec. A.8., Sec. A.9.i (first, second and third sentences) and Sec. A.9.ii (second, third and forth sentences).

g. Article XLV - Duty to Bargain.

3. The following proposals are not within the scope of collective bargaining:

a. Article I. - Recognition; Other Organizations; Dues Deduction: Sec. A.5, ET Teachers Bargaining Unit and EG Teachers Bargaining Unit.

b. Article IV. - Teachers Transfer Policy: Sec. C.5 (first sentence) and C.1 (first sentence), Sec. C.5 (second and third sentence) and Sec. 8.b.

c. Article V. - Personnel Files: Sec. D.5 (second sentence) and Sec. G.

d. Article VIII. - Disciplinary Action: Sec. J (first sentence).

e. Article XX. - Maintaining Student Discipline: Sec. E, Sec. G, (first sentence) and Sec. M (first part of second sentence).

f. Article XXV - Policies Relating to Working Conditions: Sec. A.1.a (first and third sentence), Sec. A.1.b (last sentence), Sec. A.2.c. (last sentence in accordance with this Decision), Sec. A.7, Sec. A.9.i (last sentences), Sec. A.9.ii (first sentences) and Sec. A.10.

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

September 11, 1995

Appendix

Proposal No. 2

ARTICLE I. RECOGNITION; OTHER ORGANIZATIONS; DUES DEDUCTION

ET TEACHERS' BARGAINING UNIT

All full-time employees and regular part-time employees who work at least one-half time including but not limited to the job classifications listed below:

POSITION TITLE	PAY PLAN/GRADE
Attendance Officer	ET-15
Audio-Visual Coordinator	ET-15
Child Labor Inspector	ET-15
Counselor (elementary school)	ET-15
Counselor (secondary school)	ET-15
Curriculum Development Specialist	ET-15
Hearing Therapist	ET-15
Job Coordinator	ET-15
Librarian/Media Specialist (elementary)	ET-15
Librarian/Media Specialist (secondary)	ET-15
Placement Counselor	ET-15
Pupil Personnel Worker	ET-15
Psychiatric Social Worker	ET-13
Reading Specialist	ET-15
School Based Teacher	ET-15
School Psychologist	ET-15
School Social Worker	ET-15
Speech Language Pathologist	ET-15

Teacher (elementary school)	ET-15
Teacher (secondary school)	ET-15
Teacher (Adaptive Phys. Ed.)	ET-15
Teacher (Aquatic Phys. Ed.)	ET-15

EG TEACHERS' BARGAINING UNIT

All full-time employees who work a forty (40) hour week and fifty-two (52) weeks a year in a temporary-indefinite, probationary, or permanent status, who are rendering educational services and receive compensation pursuant to the 'EG' salary schedule, excluding supervisors, management personnel, confidential employees, employees engaged in personnel work other than a purely clerical capacities, employees in the ET bargaining unit, any other personnel currently represented by a labor organization and employees engaged im administering the provisions of Title 1, Section 618 of the D.C. Code including, but not limited to the job classifications listed below:

POSITION TITLE	PAY PLAN/GRADE
Counselor	EG-09
Education Technician	EG-07
Guidance Counselor	EG-09
Instructor	EG-09
Teacher (adult education)	EG-09
Teacher (bilingual education)	EG-09
Teacher (secondary education)	EG-09
Teacher (special education)	EG-09
Teacher (vocational education)	EG-09
Teacher Coordinator	EG-09

Training Instructor	EG-09
Training Specialist	EG-09
Vocational Rehabilitation Specialist	EG-09

When any such personnel are serving in any capacity other than in the job classifications above, the union will not represent them in that capacity.