

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.” D.C. Official 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 April 2005, the Council of the District of Columbia amended D.C. Official Code § 1-617.08 to include subsection (a-1), which states: “An act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section.” 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, PERB Case No. 06-N-01 (2007), the Board considered one of the first negotiability appeals filed after the April 2005 amendment to D.C. Official Code § 1-617.08. 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 Council of the District of Columbia. *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. Proposals and Analysis

Article 2: Management Rights and Responsibilities

Section A

Management's rights shall be recognized in accordance with the Comprehensive Merit Personnel Act (CMPA) D.C. Official Code Section § 1-617.08 of CMPA established management's rights.

Section B

All matters shall be deemed negotiable except those that are proscribed by D.C. Official Code § 1-617.08.

Section C

This article shall not preclude the Union's rights to bargain over the Impact and Effect of decisions made pursuant to D.C. Official Code § 1-617.08.

HSEMA asserts that it has no duty to bargain with NAGE over management's rights, which D.C. Official Code § 1-617.08 places solely within the discretion of management. (Response at 4). Additionally, HSEMA contends that NAGE's proposal has no direct impact on mandatory subjects of bargaining, and thus does not trigger the duty to bargain. (Response at 4-5). HSEMA calls NAGE's reliance on other union contracts that include management rights language misplaced, as HSEMA is not bound by the conduct of other District agencies. (Response at 5). Further, HSEMA notes that the Board has held that even if parties previously agree to negotiate over management rights, the rights revert to management after the CBA's expiration. *Id.* Finally, HSEMA contends that NAGE's proposal seeks to force HSEMA to "contractually agree to matters that are statutorily mandated by law." *Id.*

NAGE alleges that its proposal "merely provides a citation to management rights as outlined in the D.C. Code, and clarifies the extent of these rights vis-à-vis the Union's right to negotiate over all other issues not identified in the Code." (Appeal at 4). Additionally, its proposal seeks to incorporate the "clearly established principle that a labor union has a right to bargain over the Impact and Effect of the exercise of management rights that are not *de minimis*." *Id.* NAGE maintains that the D.C. Official Code does not prohibit negotiations over whether to cite management rights in a CBA, but instead defines the rights reserved exclusively to management. *Id.* NAGE contends that because its proposal "does not attempt to override, interpret, or address any management right outlined in the Code," the proposal is negotiable. (Appeal at 5).

The Board finds that the proposal is negotiable. D.C. Official Code § 1-617.08(a) protects management's sole right, in accordance with applicable laws, rules, and regulations, to:

- (1) Direct employees of the agencies;

- (2) Hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees for cause;
- (3) Relieve employees of duties because of lack of work or other legitimate reasons;
- (4) Maintain the efficiency of the District government operations entrusted to them;
- (5) Determine:
 - a. The mission of the agency, its budget, its organization, the number of employees, and to establish the tour of duty;
 - b. The number, types, and grades of positions of employees assigned to an agency's organization unit, work project, or tour of duty;
 - c. The technology of performing the agency's work; and
 - d. The agency's internal security practices; and
- (6) Take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

NAGE's proposal does not impact HSEMA's sole right to perform any of the activities listed above, nor to seek redress from the Board when it believes its management rights have been violated. *See* D.C. Official Code § 1-605.02(3). Instead, Sections A and B merely restate the rights guaranteed by D.C. Official Code § 1-617.08(a) and (b), and Section C recognizes longstanding Board precedent that an exercise of management rights does not relieve the employer of its obligation to bargain over impact and effect of, and procedures concerning, the implementation of those rights. *See Int'l Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994); *see also American Federation of Government Employees, Local 383 v. D.C. Dep't of Disability Services*, 59 D.C. Reg. 10771, Slip Op. No. 1284, PERB Case No. 09-U-56 (2012).

Article 23: Reduction in Force

Section A

A reduction-in-force will be conducted in accordance with the provisions set forth in the D.C. Official Code § 1-624.02 and Chapter 24 of the DPM.

Section B

The Agency shall provide the Union with a thirty (30) day advance notice when a reduction-in-force includes members of the bargaining unit. The Agency further agrees to, upon request, participate in impact and effects bargaining with the Union concerning the reduction in force.

HSEMA alleges that it is not required to negotiate over RIFs or to include language in the CBA that merely restates the law. (Response at 3). In support of its contention, HSEMA cites to the Omnibus Personnel Reform Amendment Act of 1997 ("Abolishment Act") codified in D.C. Official Code § 1-624.08(a), which in pertinent part states that "notwithstanding any other provision of law, regulation, or collective bargaining agreement, either in effect or to be negotiated while this legislation is in effect...each agency head is authorized, within the agency

head's discretion, to identify positions for abolishment." (Response at 3). HSEMA states that the purpose of the Abolishment Act was to "eliminate the provision allowing RIF policies and procedures to be appropriate matters for collective bargaining," thus allowing DC Government agencies to avoid legal and contractual restrictions on terminations when seeking to abolish a position. (Response at 3; Response Ex. 1). Further, HSEMA points out that D.C. Official Code § 1-624.08(j) states: "Notwithstanding the provisions of § 1-617.08 or § 1-624.02(d), the provisions of this chapter shall not be deemed negotiable." (Request at 3). HSEMA contends that it cannot "bypass the laws of the District of Columbia to meet its own ends or the ends of the Union," and that the Board has previously ruled a proposal nonnegotiable based upon violation of the D.C. Code. (Request at 3; citing *American Federation of Government Employees, Local 3721 v. D.C. Fire and Emergency Medical Services Dep't*, 46 D.C. Reg. 7613, Slip Op. No. 390, PERB Case No. 94-N-04 (1999)).

To the contrary, NAGE asserts that its proposal does not interfere with HSEMA's right to conduct a RIF. (Appeal at 6). Instead, the proposal identifies ways NAGE and HSEMA can "negotiate and collaborate" on the implementation of RIFs. *Id.* Additionally, NAGE alleges that impact and effect bargaining is a clearly recognized legal right and is not prohibited by statute. *Id.*

Article 23, Section A is negotiable. NAGE's proposal merely states that RIFs will be conducted in accordance with the law. The proposal does not impact HSEMA's management rights pursuant to D.C. Official Code § 1-617.08, nor does it attempt to add to or detract from the procedures laid out in D.C. Official Code § 1-624.02. Restating provisions of law in a CBA is not prohibited by the CMPA. Therefore, this portion of the proposal is negotiable.

The first sentence of Article 23, Section B is nonnegotiable. RIFs are a management right under D.C. Official Code § 1-617.08. *Doctors' Council of DC v. DC Dep't of Youth and Rehabilitation Services*, 60 D.C. Reg. 16255, Slip Op. No. 1432 at p. 8, PERB Case No. 11-U-22 (2013). Generally, a management right does not relieve management of the duty to bargain over the impact and effects of, and procedures concerning, the exercise of management rights decisions. *American Federation of Government Employees, Local 1403 v. D.C. Office of the Corporation Counsel*, Slip Op. No. 709 at p. 6, PERB Case No. 03-N-02 (July 25, 2003); *Int'l Brotherhood of Police Officers v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312 at p. 3, PERB Case No. 91-U-06 (1992); *University of the District of Columbia Faculty Ass'n/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 4, PERB Case No. 82-N-01 (1982) (holding that procedures for implementing the decision to conduct a RIF and its impact and effects are negotiable). However, the Abolishment Act narrowed this duty as it relates to RIFs. *Washington Teachers' Union, Local 6 v. D.C. Public Schools*, 61 D.C. Reg. 1537, Slip Op. No. 1448 at p. 2, PERB Case No. 04-U-25 (2014). The Abolishment Act authorizes agency heads to identify positions for abolishment, establishes the rights of existing employees affected by the abolishment of a position, and establishes procedures for implementing and contesting an abolishment. D.C. Official Code § 1-624.08(a)-(i), (k). Further, the Abolishment Act provides: "Notwithstanding the provisions of § 1-617.08 or § 1-624.02(d), the provisions of this chapter shall not be deemed negotiable." D.C. Official Code § 1-624.08(j). As a result, a proposal that would alter RIF procedures is nonnegotiable. *American Federation*

of Government Employees v. D.C. Water and Sewer Authority, 59 D.C. Reg. 5411, Slip Op. No. 982 at p. 6, PERB Case No. 08-N-05 (2009); *Fraternal Order of Police/Dep't of Corrections Labor Committee v. D.C. Dep't of Corrections*, 49 D.C. Reg. 11141, Slip Op. No. 692 at p. 5, PERB Case No. 01-N-01 (2002).

In the instant case, the first sentence of Article 23, Section B of NAGE's proposal imposes additional requirements on the Agency, beyond those required by the Abolishment Act. Section B requires the Union be given 30 days' advance notice before a RIF is carried out. D.C. Official Code § 1-624.02(d) provides for at least 15 days' advance notice of a RIF, to be issued in writing and include information pertaining to the employee's retention standing and appeal rights. The Board finds that NAGE's proposal constitutes an attempt to alter or affect OUC's RIF procedures by requiring an additional 30 day advanced notice to be served on the Union. *AFGE and WASA, supra*, Slip Op. No. 982. Therefore, based on the foregoing, the Board finds that the first sentence of Section B of NAGE's proposal is nonnegotiable.

The second sentence of Article 23, Section B is negotiable. This portion of Section B recognizes longstanding Board precedent that an exercise of management rights does not relieve the employer of its obligation to bargain over impact and effect of, and procedures concerning, the implementation of those rights. See *Int'l Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994); see also *American Federation of Government Employees, Local 383 v. D.C. Dep't of Disability Services*, 59 D.C. Reg. 10771, Slip Op. No. 1284, PERB Case No. 09-U-56 (2012).

ORDER

IT IS HEREBY ORDERED THAT:

1. The following proposals are negotiable:
 - a. Article 2
 - b. Article 23, Section A
 - c. Article 23, Section B, sentence 2
2. The following proposal is nonnegotiable:
 - a. Article 23, Section B, sentence 1
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.**

May 13, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-N-02 was transmitted via File & ServeXpress to the following parties on this the 13th day of May, 2014.

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