GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
UNIONS IN COMPENSATION UNIONS 21, i.e., AFSCME LOCAL 2097,and IBPO LOCAL 446,	)	PERB Case No. 02-N-02
	)	Opinion No. 674
Petitioners,	)	
v.	)	
DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH (formerly the HEALTH AND HOSPITALS PUBLIC BENEFIT CORPORATION),	)	
Respondent.	)	

DECISION AND ORDER

On November 5, 2001, the Unions in Compensation Unit 21[1]("Unions") filed a Negotiability Appeal in the above captioned proceeding. The Appeal concerns the negotiability of

[1]Compensation Unit 21 consists of the three following unions:

- International Brotherhood of Police Officers, Local 446 - security guards;
- American Federation of Government Employees, Local 631 - skilled trade wage grade employees; and
- American Federation of State, County, and Municipal Employees, Local 2097- non-skilled trade wage grade employees.

These three units were established as a single compensation unit pursuant to the Board's decision in District of Columbia Health and Hospitals Public Benefit Corporation and all Unions..., 45 DCR 6743, Slip Op. No. 559, PERB Case Nos. 97-UM-06 and 97-CU-02 (1998).

two compensation proposals submitted by the Unions. The proposals were declared non-negotiable[2] by the D.C. Department of Health[3] (DOH) during impact and effects bargaining over the elimination of the Health and Hospitals Public Benefit Corporation (PBC) and the resulting RIFs. (Appeal at p.3). The Petitioners are requesting that the Board order DOH to bargain over two proposals which concern wages and bonuses. These wages and bonuses are to be paid to its members who are currently or will be separated as a result of the dissolution of the PBC. [4]

Those two proposals are described below.
Pursuant to the Petitioners' two proposals, DOH would be required to do the following:

1. Implement the Compensation Agreement approved by the PBC Board retroactive to February 28, 1999; with statutory 4% interest if not paid by a date certain; Unions will waive adjustments to premium pay and overtime. (Proposal 2, Appeal at p.5).

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[2]Petitioners assert that the proposals were declared non-negotiable in the Agency's response to a Notice of Impasse in PERB Case No. 01-I-06, a separate, but related matter which the Petitioners filed with the Board on July 13, 2001. In that matter, the Petitioners alleged that the parties had reached an impasse in their impact and effects bargaining concerning the abolishment of the Health and Hospitals Public Benefit Corporation and the subsequent termination of the majority of former PBC employees on July 14, 2001. (Exhibit A, Response to Notice of Impasse) . The Executive Director determined that the parties were at impasse. As a result, the parties are currently in mediation before mediator Hugh Jascourt.

[3] In April 2001, the PBC was abolished. As a result, the Department of Health is the successor to the D.C. Health and Hospitals Public Benefit Corporation (PBC). Pursuant to §4 of the Health Care Privatization Amendment Act of 2001 ("HCPAA" or "Act"), approximately 1600 former PBC employees were transferred to the Department of Health ("DOH") on April 30, 2001, and assigned to a division called the Health Care Safety Net Administration. See also, Compensation Unit 21 v. D.C. Health and Hospitals Public Benefit Corporation, 48 DCR 8547, Slip Op. No. 659 at footnote 6, p.3, PERB Case No. 99-U-37 (2001).

[4]One proposal concerns wages which are to be implemented in accordance with a collective bargaining agreement that was negotiated between the Unions in Compensation Unit 21 and DOH's predecessor (the Health and Hospitals Public Benefit Corporation); however, the wages were never approved for implementation by the Financial Responsibility and Management Assistance Authority (Control Board). The other proposal concerns a request for a bonus to be paid to Compensation Unit 21 employees in the same manner it was paid to employees of Compensation Units 1 and 2. The Petitioners claim that the purpose of the bonus is to compensate workers for losses due to furloughs and years without pay increases.

2. Pay bargaining unit members a $1, 700 lump sum bonus, as received by members of Compensation Units 1 and 2. (Proposal 2, Appeal at p. 5).

The Petitioners claim that the two proposals noted above are proper subjects for impact and effects bargaining. Specifically, the Unions assert that Proposal 1 would increase an employees' base pay and relates to the impact and effects of a RIF. Therefore, the Petitioners argue that the proposal is negotiable. (Appeal at p.6). The Petitioners support this contention by asserting that the "level of base pay at the time of separation affects the amount of one's severance and retirement annuity."[5] (Appeal at p. 6). In addition, the Petitioners claim that Proposal 2 is a proper subject of bargaining because the bonus funds could be used to help unemployed workers meet expenses such as health care insurance, job search costs, or other expenses resulting from the RIF. (Appeal at p. 6). In view of the above, the Petitioners contend that the Board should find that both proposals are proper subjects for impact and effects bargaining. (Appeal at p. 7).

In its response to the Negotiability Appeal, DOH claims that Proposals 1 and 2 are contrary to law and concern matters that are not within the limited scope of impact and effects bargaining. (Response at pgs. 4 and 5). Specifically, DOH argues that the proposals inappropriately attempt to negotiate basic compensation for union members in the context of impact and effects bargaining. (Response at p.5). In addition, DOH asserts that the Petitioners' attempt to bargain over compensation in this manner is inconsistent with the guidelines set forth for compensation bargaining in D.C. Code §§1-617.16 and 1-617.17 (2001 ed.).[6] Furthermore, DOH claims that by submitting these proposals, the Unions are now attempting to implement the terms of a previously negotiated agreement between the Unions and DOH's predecessor. (Response at p.5). [7]

Finally, DOH contends that the subject matter is preempted by the Health Care Privatization Amendment Act of 2001 ("HCPAA" or "Act"). Specifically, DOH claims that the HCPAA preempts bargaining over compensation because it mandates that former PBC employees be placed permanently in a non-pay and non-duty status. DOH bases its contention on language in the HCPAA which requires that the PBC health care delivery system be dissolved and restructured, in accordance with the recommendations made in the Financial Responsibility Management Assistance Authority's (Control Board) Resolution, Recommendations and Orders Concerning the Public

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[5]Petitioners claim that severance pay is calculated based on the base pay at the time of an employee's termination. (Appeal at p. 6).

[6]D.C. Code §§1-617.16 and 1-617.17 (2001ed.) outline the statutory procedures for collective bargaining concerning compensation. These two sections do not address compensation bargaining in the context of bargaining over the impact and effects of a management decision.

[7]This negotiated agreement failed to be implemented prior to the dissolution of the PBC. (Response at p. 5).

Benefit Corporation (Resolution) and its Restructuring Plan.[8] (Response at p. 6). In view of the above, DOH asserts that a pay raise and a bonus are inconsistent with the Control Board's mandate. (Response at p.6).

The Board has the authority to consider the negotiability of the proposals pursuant to Board Rules 532.1[9] and 532.4[10].

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[8]As recommended by the Control Board in its Resolution of December 4, 2000 and in accordance with its Restructuring Plan of December 15, 2000, the HCPAA authorized the implementation of an alternative publicly-financed health care delivery system to deliver the health care services formerly provided by the PBC. (Response at p. 6 and §2(5) of the HCPAA). The Control Board Resolution and Restructuring Plan requires the privatization of certain PBC services, the closure of D.C. General Hospital and the reduction of personnel. (Response at p. 6; Control Board Resolution at pgs. 2 and 4; Restructuring Plan at p. 1.).

[9]Board Rule 532.1 provides as follows: If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board. If the Board determines that an impasse occurred regarding non-compensation matters, and an issue of negotiability exists at the time of such impasse determination, the negotiability issue must be withdrawn or a negotiability appeal filed within five (5) days of the Board's determination as to the existence of an impasse.

[10] Board Rule 532.4 provides as follows:

> Upon the expiration of the period for filing the appeal and answer with the Board, the Executive Director shall refer the matter to the Board which shall expeditiously:
> (a) Issue a written decision on appeal and the answer, if any;
> (b) Order the submission of written briefs and/or oral argument within no more than fifteen days and promptly thereafter issue a written decision;
> (c) Order a hearing, which may include briefs and arguments; or
> (d) Direct the parties to an informal mediation or

(continued...)

The Board has held that management is required to bargain, upon request of the exclusive representative, over the "effects or impact of a non-bargainable management decision upon terms and conditions of employment." Teamsters Unions No. 639 and 730- a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools, 38 DCR 96, 100, Slip Op. No. 249, PERB Case No. 89-U-17 (1991). (Teamsters v. DCPS). " Included within this limited scope of bargaining is the obligation to bargain over procedures for implementing that decision when it is made." Id.

The specific issue presented in this Negotiability Appeal concerns whether the Petitioners' wage and bonus payment proposals are proper subjects for impact and effects bargaining concerning the closure of the PBC, transfer of its employees to DOH, and the eventual separation of those employees through a RIF.

The Board has held that compensation, whether in the form of regular or overtime pay, is generally a negotiable matter under the Comprehensive Merit Personnel Act (CMPA). International Association of Fire Fighters, Local 36 and D.C. Fire and Emergency Management Service, 45 DCR 8080, Slip Op. No. 505, PERB Case No. 97-N-01 (1998). However, the Board has not previously decided whether compensation, in the context of these facts, is a proper subject for impact and effects bargaining. The specific issue that is before the Board in this case is whether the Health Care Privatization Act of 2001,[11] addresses compensation in such a way that bargaining over the issue of compensation is precluded. In D.C. Council 20, American Federation of State, County and Municipal Employees, AFL-CIO, Local 709, et.al v. Government of the District of Columbia, et.al.[12] the Board held that compensation was not a proper subject for impact and effects bargaining because the Omnibus Budget Support Temporary Act of 1992 (OBSTA) had already addressed the subject. See, 42 DCR 3430, Slip Op. No. 330, at page 5, note 2 , PERB Case No. 92-U-24 (1992); (D.C. Council 20, et.al. v. GDC,et. al.). As a result, the Board concluded that impact and effects

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[10](...continued)
conference with the Executive Director or any staff members or agents empowered to conduct informal mediation on the Board's behalf.

[11]The HCPAA of 2001 mandates the closure of the PBC and eventual RIF of its former employees.

[12]The complete cite for the case noted above is D.C. Council 20, American Federation of State, County and Municipal Employees, AFL-CIO, Local 709, 877, 1200, 1808, 2087, 2091, 2092, 2095,2096, 2401, 2743, 2776, 3753, et. al. v. Government of the District of Columbia, Board of Trustees, University of the District of Columbia, Board of Trustees of the D.C. Public Library and Agencies under the Administrative Control of the Mayor.

bargaining over the issue was preempted by the Act.[13] See, Id.

By analogy, DOH argues that compensation is not a proper subject of impact and effects bargaining in the present case because compensation has already been addressed by the HCPAA . Specifically, the Agency argues that the HCPAA has already addressed compensation because it requires that employees be separated permanently through a reduction in force, thus placing them in a non-pay status. As a result, the Agency contends that the HCPAA preempts bargaining over compensation.

Notwithstanding our previous holding in D.C. Council 20, et. al. v. GDC, et.al, the Board finds that compensation, including wages and bonuses, is a proper issue for impact and effects bargaining where, in this case, there is no express language in the CMPA or the HCPAA which excludes the subjects from bargaining. In deciding this case, the Board thoroughly examined the HCPAA and did not find any language which mentioned compensation[14] nor did it find language that specifically excluded compensation items, such as wages and bonuses, from being negotiable subjects during impact and effects bargaining.[15] Furthermore, D.C. Code §1-617.08 (2001) provides that "all matters are negotiable, except those that are proscribed by this subchapter." The Board finds no such proscription in this case. Therefore, the Board concludes that the compensation items, such as wages and bonuses, are not subjects that the D.C. Code or previous Board precedent excludes from impact and effects bargaining under these facts. Accordingly, the Board finds that wages and bonuses are bargainable matters pursuant to D.C. Code §1-617.08 (2001) (Matters Subject to Collective Bargaining) and D.C. Code§1-617.16 (2001) ("Collective Bargaining

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[13]Under the facts of D.C. Council 20, et. al. v. GDC, et.al, the Unions alleged that the Respondents refused to bargain over the impact and effects of implementing furloughs pursuant to the Omnibus Budget Support Temporary Act of 1992 (OBSTA). Id. The Board held that by enacting the OBSTA and requiring the furlough, the District of Columbia City Council intended for employees to be placed temporarily and involuntarily in a non-pay and non-duty status. Id. The Board further held that by imposing those requirements, the OBSTA expressly addressed the issue of compensation for the affected employees. Id. Since the Board concluded that compensation had been addressed in the OBSTA, there was no need to address it in the context of impact and effects bargaining. See, Id.

[14]The Board also finds that the HCPAA does not pre-empt the parties from bargaining over compensation, particularly where the language does not express a clear intent to address compensation. In making this determination, we considered the fact that the HCPAA does not expressly use the word compensation. As a result, we conclude that compensation is not a subject that was intended to be excluded from bargaining.

[15]Neither the CMPA nor the Board's precedent makes a distinction between subjects that are bargainable during regular compensation bargaining and those that are bargainable during impact and effects bargaining.

Concerning Compensation). Although the Board has determined that the Unions have the *right* to negotiate over these wage and bonus proposals during impact and effects bargaining, nothing in this decision *obligates* the Agency to agree to the specific terms proposed by the Union. All that is required of both parties is that they bargain in good faith, as the CMPA requires. [16]

On the issue of severance pay, the Board has indicated that severance pay is negotiable in the context of impact and effects bargaining over a RIF. See, National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority, 47 DCR 7222, Slip Op. No. 635 at p. 7, PERB Case No. 99-U-04. Therefore, on this basis, the Board finds that the Unions' proposals are negotiable.

The Board does not find convincing DOH's argument that the Unions are attempting to have the terms of a previously negotiated, but unapproved compensation agreement implemented through impact and effects bargaining. Therefore, the Board rejects this argument.

Finally, the Board finds that the resolution of this negotiability dispute can be summed up in the following language: "Absent express language removing a matter from the scope of all matters otherwise negotiable under the CMPA, the matter shall be deemed negotiable." See, IAFF v. DCFEMS, 45 DCR 8080, Slip Op. No. 505, PERB Case No. 505 (1998). Since no such language in the CMPA removes wages and bonuses from the scope of bargainable subjects in this case, the Board finds that Proposal 1 and 2 are negotiable.

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[16]D.C. Code §1-617.04(a)(5) provides that: "the District, its agents and representatives are prohibited from refusing to bargain collectively in good faith with the exclusive representative."

D.C. Code §1-617.04(b)(3) provides that: "employees, labor organizations, their agents, or representatives are prohibited from refusing to bargaining in good faith with the District..."

ORDER

IT IS HEREBY ORDERED THAT:

The Union's proposals, concerning wages and a bonus, are within the scope of impact and effects bargaining and are; therefore, negotiable.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.
July 11, 2002