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

In the Matter of:)	
American Federation of Government Employees, Local 3721)	PERB Case No. 17-N-05
Petitioner)	Opinion No. 1656
and)	
District of Columbia Fire and Emergency Medical Services Department)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On August 18, 2017, the American Federation of Government Employees, Local 3721 (“Union”) filed this Negotiability Appeal (“Appeal”). The Appeal concerns three proposals made by the Union and declared nonnegotiable by the District of Columbia Fire and Emergency Medical Services Department’s (“Department”). The Union and the Department are engaged in bargaining concerning noncompensation matters. The Department filed a timely Answer to the Appeal.

For the reasons stated below, the Board finds Article 31, Section A.2 to be improperly before the Board; Sections 3 and 4 of the Union’s “Performance Evaluation” Article nonnegotiable; and Article 29, Section 4.D.2 nonnegotiable.

II. Standard of Review

Under sections 1-605.02(5) and 1-617.02(b)(5) of the D.C. Official Code, the Board is authorized to make determinations concerning whether a matter is within the scope of bargaining. The Board’s jurisdiction to decide such questions is invoked by the party presenting a proposal that has been declared nonnegotiable by the party responding to the proposal.¹

¹ See PERB Rule 532.1.

The Board applies the U.S. Supreme Court's standard concerning subjects for bargaining established in *National Labor Relations Board v. Borg-Warner Corp.*² 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."³

Section 1-617.08(b) of the D.C. Official Code provides that "[a]ll 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.⁴ The subjects of a negotiability appeal and the context in which their negotiability is appealed are determined by the petitioner, not the party declaring the matters nonnegotiable.⁵ The Board reviews the disputed proposals and addresses each in light of the statutory dictates and relevant case law.⁶

III. Analysis of Proposals

Article 31, Section A.2 of Grievance Procedure

A grievance means a complaint by Management, the Union or an employee(s) that:

(2) There has been a violation, misapplication or misinterpretation of a Department rule, regulation, or order, or applicable District law, rule or regulation which affects a term(s) or condition(s) of employment, permitted that grieving the matter is not prohibited by law.

Department: This proposal is not properly before the Board because it is either untimely or premature.⁷ PERB Rule 532.4 states that a negotiability appeal shall be filed within thirty-five (35) days after a written communication from the other party to the negotiation asserting a proposal is nonnegotiable or otherwise not within the scope of collective bargaining under the CMPA. The Union claims that the Department declared this proposal nonnegotiable on July 25, 2017. However the Department claims that on this date it did not make a statement of nonnegotiability, but simply reiterated to the Union its failure to file a negotiability appeal

² 356 U.S. 3342 (1975).

³ *Univ. of D.C. Faculty Ass'n/NEA v. Univ. of D.C.*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982).

⁴ See *Int'l Ass'n of Firefighters, Local 36 v. D.C. Fire & Emergency Med. Servs. Dep't*, 51 D.C. Reg. 4185, Slip Op. No. 742, PERB Case No. 04-N-02 (2004).

⁵ *Int'l Ass'n of Firefighters, Local 36 v. D.C. Fire and Emergency Med. Servs. Dep't*, 45 D.C. Reg. 4760, Slip Op. No. 515, PERB Case No. 97-N-01 (1997).

⁶ *F.O.P./Protective Servs. Police Dep't Labor Comm. v. Dep't of Gen. Servs.*, 62 D.C. Reg. 16505, Slip Op. No. 1551 at p. 2, PERB Case No. 15-N-04 (2015).

⁷ Answer at 7.

concerning an earlier declaration of nonnegotiability.⁸ The appeal is untimely as it relies on the Department's statements regarding a nonnegotiability declaration made in February 2017.

Alternatively the Department states that the appeal is premature to the extent that the Union cannot identify any writing on July 25, 2017 declaring the instant proposal as nonnegotiable.⁹ The Department demands that the Union provide strict proof of such written communication and in its absence requests that PERB find the Appeal to be premature.

Union: The Department's declaration lacks merit because the proposal states that matters may be grieved "permitted that grieving the matter is not prohibited by law."¹⁰ If exclusive jurisdiction is granted to an administrative agency, court or other authority by law, that exclusive grant of jurisdiction will be followed by the parties under this proposal.¹¹ The Department's declaration merely speculates about unidentified authorities, it does not cite any specific law, regulation or other authority that may be violated.

The Union also states that this proposal is appropriate for negotiations because it was not proposed to the Department when the Department declared an earlier proposal to be nonnegotiable.¹² The Union withdrew a previous version of the proposal and then submitted a subsequent proposal, which was timely appealed.

Board: The proposal is not properly before the Board. The Union conceded in an email dated August 1, 2017 (Exhibit B, p. 2) that the Department declared the Union's original proposal on this subject nonnegotiable in February. The Union did not file a negotiability appeal at that time. This appeal would be untimely if it related to the original proposal. The Union claimed to have submitted a new proposal. The Department did not declare this proposal nonnegotiable. In the same email from the Union to the Department on August 1, 2017 cited above, the Union asks the Department if it is "now declaring the Union's new proposal nonnegotiable?"¹³ The Union has not presented any response given by the Department declaring the new proposal nonnegotiable. Assuming this is a new proposal, as the Union states, the Department has not declared the proposal nonnegotiable. Therefore it is not properly before the Board.

Section 3 and 4 of Union's Performance Evaluation Article

Section 3

The Agency shall provide conferences at the beginning of the year to discuss goals and objectives to be met. This will occur at the beginning of the calendar year. The Agency shall provide mid-year reviews to all bargaining unit employees. The Agency shall also

⁸ Answer at 8.

⁹ Answer at 8.

¹⁰ Appeal at 4.

¹¹ Appeal at 4.

¹² Appeal at 4.

¹³ Exhibit B at 2.

provide a rating of record within two (2) months after the conclusion of the performance year.

Section 4

In an event the performance falls below acceptable, the Agency shall notify the employee as soon as possible. The Agency shall provide a performance improvement plan for the employee. The performance plan will be evaluated every three months. Employees on a performance improvement plan shall be continually provided feedback to obtain goals.

Department: The Union's proposals are contrary to the implemented regulations set forth in 6-B DCMR 1400 *et seq.* and thus nonnegotiable.¹⁴ The Mayor is statutorily authorized to issue performance evaluation regulations under section 1-613.53(a) of the D.C. Official Code and the implementation is a nonnegotiable subject for collective bargaining notwithstanding any provision of law.¹⁵ In accordance with this statute, the Mayor implemented the performance evaluation regulation as 6-B DCMR 1400 *et seq.* The proposal alters the criteria for performance evaluation periods, conflicting with 6-B DCMR 1405.3 and 6-B DCMR 1407.5.¹⁶ The regulations require conferences to be held at the beginning of the performance management period which will be established by the appropriate personnel authority. The Department is not a personnel authority and therefore cannot lawfully contract for a different performance management period. The proposal is also irreconcilable with both 6-B DCMR 1405.3 and 6-B DCMR 1407.5 which prescribe dates other than the beginning of the calendar year. As a result, the first two sentences of section 3 are nonnegotiable.

The Union's proposal also requires the Department to provide mid-year reviews to all bargaining unit employees, but 6-B DCMR 1409.2 only makes mid-year reviews mandatory for probationary employees. Therefore, the third sentence of section 3 is nonnegotiable as it requires management to conduct additional performance evaluation reviews not mandated by law.¹⁷

The final sentence of section 3 states that the Department shall provide a rating of record within two months after the conclusion of the performance year which would restrict management's rights under 6-B DCMR 1412.1. The regulation states that an annual performance evaluation shall be issued to each eligible employee within three months of the end of the performance management period, the exact date of which will be established by the appropriate personnel authority. The last sentence of section 3 is nonnegotiable as it contravenes 6-B DCMR 1412.1.¹⁸

Section 4 of the proposal alters criteria set forth in 6-B DCMR 1410. The proposal requires that a performance improvement plan (PIP) be evaluated every three months. 6-B

¹⁴ Answer at 4.

¹⁵ Answer at 4.

¹⁶ Answer at 4.

¹⁷ Answer at 5.

¹⁸ Answer at 5-6.

DCMR 1410.3 provides that a PIP shall last for a period of thirty (30) days to ninety (90) days and that supervisor's evaluations must come within ten (10) calendar days of the end of the PIP period.¹⁹ 6-B DCMR 1410.3 also provides that the last date on which a PIP may be issued is June 30 of each year. Section 4 is nonnegotiable as it contravenes 6-B DCMR 1410.3.

Section 4 also prohibits the Department from taking disciplinary action as authorized by section 1-617.08(a)(2) of the D.C. Official Code and 6-B DCMR 1605. The Union's proposal prevents the Department from discharging (or otherwise disciplining) an employee by requiring the Department to notify an employee and providing continual feedback and quarterly performance evaluations to obtain goals.²⁰

Union: The Union's proposal in sections 3 and 4 are appropriate regarding the impact and effect of the Department's performance evaluation system. The Union's proposal in no way implements, executes, or attempts to establish the Department's performance evaluation system.²¹ Section 1-613.53(b) of the D.C. Official Code limits bargaining over implementation of a Department performance evaluation system, but in this case the proposal is about mitigating the impact of the Department's performance evaluation system by ensuring that employees have pertinent information concerning how they will be evaluated and have a timely copy of their evaluation.²² The proposal is negotiable because it does not concern the establishment of, or execution of the Department's performance evaluation system.²³

Section 4 does not violate 6B DCMR section 1410. The regulation and the Union proposal provide that employees whose performance is not at an acceptable level be provided with the opportunity to improve consistent with applicable law, rule and regulation. Both the regulation and the proposal also provide that the Department will periodically review the PIP within three months. Both also provide for feedback for employees to achieve measurable goals. The Union's proposal is consistent with and in no way violates the regulation cited by the Department.²⁴

Board: Sections 3 and 4 are nonnegotiable. Both sections outline actions to be taken by the Department regarding performance evaluations. Section 1-613.53(b) of the D.C. Official Code states, "Notwithstanding any other provision of law or of any collective bargaining agreement, the implementation of the performance management system established in this subchapter is a nonnegotiable subject for collective bargaining."²⁵ The Board has held that a proposal that sets forth the purpose of a performance evaluation system or that contains criteria for the agency to consider for performance evaluations is nonnegotiable under section 1-

¹⁹ Answer at 6.

²⁰ Answer at 7.

²¹ Appeal at 6.

²² Appeal at 6.

²³ Appeal at 7.

²⁴ Appeal at 7.

²⁵ See *AFGE, Local 631, and Dep't of Public Works*, 59 D.C. Reg. 15175, Slip Op. No. 1334, PERB Case No. 09-U-18 (2012).

617.08(a) of the D.C. Official Code.²⁶ The Union argues that this proposal only concerns impacts and effects of the performance evaluation system. However the language in the proposal does not support this contention. The Board has also held that although the implementation of a performance evaluation system is a nonnegotiable subject of collective bargaining, agencies are still obligated to bargain in good faith over the adverse impact a performance evaluation may have on the terms and conditions of an employee's employment.²⁷ Although the Union has the right to impact and effects bargaining concerning a management rights decision, Sections 3 and 4 concern the execution of the performance evaluation system by specifying deadlines and actions that must be met by the Department, not its impacts and effects. Sections 3 and 4 are nonnegotiable.

Article 29, Section 4.D.2 Transfers, Reassignments, Details and Staffing Guidelines

An employee detailed or assigned to perform duties at a higher-graded position for more than ~~sixty (60)~~ fourteen (14) consecutive days shall receive the higher rate of pay beginning for the first full pay period following the ~~60-day~~ fourteen (14) day period retroactive to the start of the first full pay period after the first date of the detail assignment and continuing until the detail is terminated. The Department shall not terminate a detail which otherwise would have continued for ~~sixty (60)~~ fourteen (14) or more calendar days to avoid the obligation of paying the higher-ranked pay to the acting employee.

Department: This proposal is nonnegotiable because current negotiations between the Department and Union concern working conditions and this proposal concerns wages. Since the Board has ruled that attempting to mix compensation matters in noncompensation bargaining is prohibited, this proposal is nonnegotiable as a working condition and should be addressed in compensation negotiations.²⁸

Union: The Union's proposal does not and is not an attempt to negotiate over wages, benefits or other compensation matters. It seeks to clarify the circumstances under which the Department must recognize and provide benefits flowing from an employee performing work at a higher grade. Furthermore, the only difference between the Union's proposal and the Department's proposal is that the Department proposed that it would recognize the higher graded work after sixty (60) days and fulfill any obligations thereafter. The Union proposed the same recognition after fourteen (14) days.

²⁶ *AFGE, Local 1403 v. D.C. Office of the Corp. Counsel*, Slip Op. No. 709 at p. 6, PERB Case No. 03-N-02 (2003), *SEIU Local 500, v. Univ. of D.C.*, 2162 D.C. Reg. 14633, Slip Op. No. 1539 at p. 12-14, PERB Case No. 15-N-01 (2015).

²⁷ *See AFSCME, District Council 20 and Local 2091 v. Dep't of Public Works*, 62 D.C. Reg. 5925, Slip Op. No. 1514, PERB Case No. 14-U-03 (2015). *See also AFGE, Local 631, and Dep't of Public Works*, 59 D.C. Reg. 15175, Slip Op. No. 1334, PERB Case No. 09-U-18 (2012)

²⁸ Answer at 2.

Board: This proposal is nonnegotiable in noncompensation bargaining. Section 1-617.17(b) of the D.C. Official Code dictates that management and labor organizations “negotiate in good faith with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours and any other compensation matters.” The proposal concerns wages and should be addressed during compensation negotiation. The proposal is nonnegotiable as a working condition and should be addressed in compensation negotiation.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Union’s proposal for Article 31, Section A.2 is not properly before the Board.
2. The Union’s proposal for Section 3 and 4 of Union’s Performance Evaluation Article is nonnegotiable.
3. The Union’s proposal for Article 29, Section 4.D.2 is nonnegotiable in a working conditions agreement.
4. Pursuant to Board Rule 559.1 this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

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

Washington, D.C.

February 21, 2018

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 17-N-05, Op. No. 1656 was sent by File and ServeXpress to the following parties on this the 27th day of February, 2018.

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