Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Local 36, International Association of Firefighters, AFL-CIO,	
Petitioner,	PERB Case No. 13-N-04
v.	Opinion No. 1445
District of Columbia Department of Fire and Emergency Medical Services,	
Respondent.	

DECISION AND ORDER ON NEGOTIABILITY APPEAL

I. Statement of the Case

On March 5, 2013, the negotiator for the D.C. Department of Fire and Emergency Medical Services ("Agency" or "Respondent") sent to Local 36, International Association of Firefighters, AFL-CIO ("Union" or "Petitioner") a letter asserting the nonnegotiability of proposals made by the Union. The Union filed a negotiability appeal ("Appeal") with respect to those proposals. The proposals concern (1) polygraph testing, (2) promotions, (3) selection of technicians, and (4) hours of work, schedule, and leave. The Respondent filed an answer.

At the request of the Petitioner, the Acting Director pursuant to Rule 532.5(a) directed the parties to submit written briefs regarding the Appeal.

On October 28, 2013, the Agency filed a motion for expedited decision. The motion stated that a decision by December 18, 2013, on the proposal regarding hours of work would allow an arbitrator to consider the ruling in a related interest arbitration. Yet the motion's prayer requested a ruling before November 11, 2013. On November 5, 2013, the Union filed an opposition to the motion, asserting that the interest arbitration is separate and should impose no deadline on the Board's decision-making process.

II. Discussion

To the extent the motion for expedited decision sought a decision by November 11, 2013, merely one week after the opposition to the motion was due, a period in which the Board was not scheduled to meet, the motion is denied. To the extent the motion requested a decision by December 18, 2013, the motion is granted.

There are three categories of collective bargaining subjects: (1) mandatory subjects over which 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. Nurses Ass'n v. D.C. Dep't of Pub. Health*, 59 D.C. Reg. 10,776, Slip Op. No. 1285 at p. 4, PERB Case No. 12-N-01 (2012) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1975)). Management rights are permissive subjects of bargaining. *See NAGE Local R3-06 and D.C. Sewer & Water Auth.*, 60 D.C. Reg. 9194, Slip Op. No. 1389 at p. 4, 13-N-03 (2013); *D.C. Fire & Emergency Med. Servs. Dep't and AFGE, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at p. 9, PERB Case No. 06-N-01 (2007).

The Union indicates that the Agency has chosen to bargain over management rights. The Union asserts that many of its proposals retain existing contract language and appear in the Agency's proposal in this round of bargaining. (Appeal at 2-3; Br. for Pet'r at 3, 9-11). The Agency responded that "the parties' bargaining history on a subject is irrelevant to a negotiability determination." (Br. for Resp't at 15).

Past proposals that become part of an existing contract do not waive a management right not to bargain on a subject, but current proposals do. The Board has summarized the state of the law regarding waivers of permissive subjects of bargaining as follows:

> (1) if management has waived a management right in the past (by bargaining over that right) this does not mean that it has waived that right (or any other management right) in any subsequent negotiations;
>
> (2) management may not repudiate any previous agreement concerning management rights during the term of the agreement;
>
> (3) nothing in the statute prevents management from bargaining over management rights listed in the statute if it so chooses; and
>
> (4) if management waives a management right currently by bargaining over it, this does not mean that it has waived that right (or any other management right) in future negotiations.

AFGE, Local 631 and D.C. Pub. Works, 59 D.C. Reg. 4968, Slip Op. No. 965 at p. 2, PERB Case No. 08-N-02 (2009). As the fourth principle in that list implies, management may waive a management right in a round of bargaining by choosing to bargain in that round over an issue

where it has no duty to do so. *D.C. Fire & Emergency Servs. Dep't and AFGE, Local 3721*, 51 D.C. Reg. 4158, Slip Op. No. 728 at p 2 n.6, PERB Case No. 02-A-08 (2003).

We turn now to the proposals in dispute and separately address each in light of these principles, relevant cases, and statutory dictates.

A. Polygraph Examinations

Proposal 1: The Union proposes the following as Article 8, Section C(5) of the agreement.

> Polygraph Examinations:
>
> (a) Polygraph tests shall be administered only with the consent of the employee, except where in the context of an investigation, the Department reasonably believes the test is necessary to discover or alleviate an immediate threat to the integrity of government operations or an immediate hazard to the Agency, to other District employees or to the employee himself or herself or to public health, safety or welfare. The Department shall promptly notify the Union whenever a polygraph test is administered without employee consent.
>
> (b) Except in those limited exigent circumstances identified in Section (a) where a polygraph examination may be necessary, any person who refuses to submit to a polygraph test shall not be subject to discipline or other adverse action as a result of that refusal.

(Appeal Ex. 3 at 2).

Respondent: In opposing the negotiability of this proposal, the Respondent relies upon D.C. Code § 32-902 and management rights. With regard to the former, the Respondent argues:

> D.C. Code § 32-902(b) sets a mandatory legal standard under which the Department may use lie detector tests. The Union's proposal alters that standard by requiring the Department to obtain employee consent before its use of lie detector tests. Moreover, the Union's proposal alters the statutorily prescribed circumstances under which the Department may use lie detector tests; specifically, the proposal excludes pre-employment and disciplinary investigations as permissible circumstances. Accordingly, the Union's proposal directly contravenes D.C. Code § 32-902(b) and § 32-903(b), which outlaws contracts in

> contravention of D.C. Code § 32-902(b). Therefore, the Union's proposal is nonnegotiable.

(Br. for Resp't at 6). The Agency argued that *Teamsters Local Union No. 639 and D.C. Public Schools*, 38 D.C. Reg. 6693, Slip Op. No. 263, PERB Case Nos. 90-N-02 and 90-N-04 (1990), is analogous as that case held a proposal to be nonnegotiable because it contravened a "statutory standard":

> In the foregoing case, the PERB analyzed the Union's proposal that provided that "[e]mployees shall not be charged for loss or damage unless clear proof of gross negligence is shown. This Article is not to be construed as permitting charges for loss or damage to equipment under any circumstances." Id. at 6 (Emphasis added). However, the PERB was confronted with then D.C. Code § 1-1216, which provided that "[n]othing in Sections 1-1211 to 1-1216 shall be construed so as to relieve any District employee from liability to the District for negligent damage to or loss of District property." Id. at 7 (Emphasis added). . . .The PERB concluded that "the proposal directly en[c]roaches upon the employee liability standard set forth in D.C. Code Section 1-1216." Id. Reaching this conclusion, the PERB reasoned that "Section 1-1216's express statutory standard, i.e., 'negligence,' is directly undermined by the proposal's second sentence which provides a 'gross negligence' standard." Id. The PERB added that "[t]his would alter the statutorily established circumstances, i.e., 'negligent damage to or loss of District property,' under which the District may charge employees by placing a heavier burden on it, vis à vis, the 'gross negligence' standard." Id. For these reasons, the PERB held that "the proposal directly contravenes D.C. Code Section 1-1216 and is therefore, nonnegotiable."

(Br. for Resp't at 5-6).

Another alleged conflict between the Union's proposal and the law is that the "proposal prohibits the use of polygraph results for pre-employment and disciplinary purposes" whereas the "statute specifically allows the Department to use polygraphs in an 'internal disciplinary investigation, or pre-employment investigation.'" (Br. for Resp't at 6) (quoting D.C. Code § 32-902(b)). Contracts in violation of section 32-902 are prohibited by section 32-903(b).

In addition, the Agency contends that the proposal is nonnegotiable because it requires employee consent to the exercise of the management right to hire and discipline. The Agency argues that it does this by requiring employee consent to the use of polygraph examinations. (Br. for Resp't at 4).

Union: The Union contends that the Agency's position that D.C. § 32-902 "provides a carte blanche for the Department to determine when, and under what conditions, it will test employees . . . rests on a gross overreading of the law." (Br. for Pet'r at 4). The Union explains that subsection (a) of the statute prohibits employers from using lie detector tests in connection with the employment of any employee under any circumstances. Subsection (b) excludes from this prohibition criminal or internal investigations by the Metropolitan Police, the Fire Department, and the Department of Corrections. The Union avers that "[t]he Department's theory would transform the law's *exception* into a *right*." (*Id.*) The Union concludes:

> The law's purpose and effect is to create a statutory "floor" of privacy rights for employees. Although § 32-902(b) sets that floor lower for DCFEMS employees than for others, nothing in that law prohibits the collective bargaining representative for those employees from attempting to negotiate greater rights on their behalf.

(*Id.* at 5).

The Union does not deny that the proposal involves a management right but notes that the same language as the proposal "was included in the Department's own proposal at impasse." (*Id.* at 3).

Board: The Agency's argument, in effect, is that D.C. Code § 32-902 makes the proposal an illegal subject of bargaining. *See Teamsters Local Union No. 639 and D.C. Public Schools*, 38 D.C. Reg. 6693, Slip Op. No. 263 at pp. 27, 28, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990) (Member Kohn, dissenting). Section 32-902 provides:

> (a) No employer or prospective employer shall administer, accept or use the results of any lie detector test in connection with the employment, application or consideration of an individual, or have administered, inside the District of Columbia, any lie detector test to any employee, or, in or during any hiring procedure, to any person whose employment, as contemplated at the time of administration of the test, would take place in whole or in part in the District of Columbia.
>
> (b) The provisions of this section shall not apply to any criminal or internal disciplinary investigation, or pre-employment investigation conducted by the Metropolitan Police, the Fire Department, and the Department of Corrections; provided that any information received from a lie detector test which renders an applicant ineligible for employment shall be verified through other information and no person may be denied employment based solely on the results of a pre-employment lie detector test.

As the Union explained, subsection (b) allows the Agency to use lie detector tests under certain conditions notwithstanding *subsection (a)*. The Agency incorrectly reads subsection (b) as empowering the Agency to use lie detector tests notwithstanding any other law. Subsection (b) exempts the Agency from "[t]he provisions of this section," nothing else. It does not exempt the Agency from D.C. Code § 1-617.08(b) (matters subject to collective bargaining) or D.C. Code § 1-617.04(a) (5) (duty to bargain in good faith).

Similarly, in the case cited by the Agency, *Teamsters Local Union No. 639 and D.C. Public Schools*, 38 D.C. Reg. 6693, Slip Op. No. 263, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990), a statute limited the reach of its provisions. That statute, the D.C. Employee Non-Liability Act, which was codified at the time as D.C. Code §§ 1-1211-1216, created a scheme whereby plaintiffs could sue the District for injuries instead of suing District employees, who would be immunized from such suits.[1] The limitation was contained in section 1-1216, which provided, "Nothing in Sections 1-1211 and 1-1216 shall be construed so as to relieve any District employee from liability to the District for negligent damage to or loss of District property." *Teamsters*, Slip Op. No. 263 at p. 7 n.2. The Board held that the "express statutory standard" of negligence rendered nonnegotiable the Teamsters' proposal that "[e]mployees shall not be charged for loss or damage unless clear proof of gross negligence is shown." *Id.* at pp. 6-7.

Candidly, the better analysis is found in the dissenting opinion of Member Kohn (joined by Member Danowitz):

> Section 1216 emphasizes just what a reading of [the] prior sections tells us: none of them address a D.C. Government employees' liability <u>to their employer</u> for their negligent harm to <u>its</u> property. None of them relieves an employee from such liability, nor does any of them require such liability. These statutory provisions, of themselves, simply do not address the subject matter of the Teamsters proposal.
>
> The majority's opinion with respect to D.C. Code Section 1-1216 misunderstands that section. . . . Section 1216 does not establish a standard for employee liability. If there is in the District a <u>statutory</u> standard for employee liability that would govern the situations addressed in this proposal, it must be found elsewhere. . . . Section 1-1216 simply teaches that liability if found in fact (under common law, perhaps), is not to be negated by anything in 1-1211 to 1-1216; that is, none of them provides a defense. Since there is, therefore, nothing in the cited sections that precludes bargaining, we would find the proposal to be a mandatory subject of bargaining.

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[1] *Davis v. Harrod*, 407 F.2d 1280, 1282 (D.C. 1969).

Id. at pp. 28-29.

The Respondent makes the same error that Member Kohn identified. That is, the Respondent disregards (and does not even quote) the text of the statute and abstracts from it a "statutory standard." Then the Respondent uses that "statutory standard" to create a bar to negotiation that is nowhere to be found in the statute.

Even a statute that removes matters from the collective bargaining process should not be over-generalized. In *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, 38 D.C. Reg. 847, Slip Op. No. 261 at p. 2, PERB Case No. 90-N-05 (1990), the respondent contended that section 47-3601(d) of the D.C. Code removed the union's deferred compensation proposal from the scope of collective bargaining. The Board held that section 47-3601(d) removed from the collective bargaining process only the provisions of sections 47-3601(a)-(c), which established the nature and purpose of the deferred compensation program and eligibility to participate in it. The union's proposal dealt with other aspects of deferred compensation. As in the present case, we rejected the respondent's "overly broad interpretation of this provision as contrary to the plain meaning of the statutory provision." *Id.* at p. 7.

The Respondent also asserts that "D.C. Official Code § 32-903(b) expressly forbids the formation of any contract that disallows the Department's use of polygraphs for discipline and pre-employment purposes." (Br. for Resp't at 6). Section 32-903(b) bars contracts from containing "any provision in violation of § 32-902." As explained above, Proposal 1 is not in violation of section 32-902. As a result, it is not forbidden by section 32-903(b).

While a collective bargaining proposal is unlikely to conflict with a statute's exception to the statute's own provisions, a proposal certainly can conflict with a statute and be preempted by it. For example, a statute provided that holiday pay is determined by the mayor. The Board held that a proposal to give holiday pay to employees from whom the mayor withheld holiday pay was nonnegotiable. *Comm. of Interns & Residents and D.C. Gen. Hosp. Comm'n*, 41 D.C. Reg. 1602, Slip Op. No. 301 at pp. 7-8, PERB Case No. 92-N-01 (1992). In another negotiability case, a statute limited the District's contribution to employee health benefit premiums to 75 percent of the subscription charge. The Board held a proposal that the School Board pay 80 percent of premiums to be nonnegotiable. *Teamsters Local Unions No. 639 & 730 v. D.C. Pub. Schs.*, 43 D.C. Reg. 7014, Slip Op. No. 403 at p. 4, PERB Case No. 94-N-06 (1994). In contrast, nothing in D.C. Official Code section 32-902 conflicts with Proposal 1. Therefore, the proposal is not an illegal subject of bargaining.

The proposal would be a permissive subject of bargaining over which management could refuse to bargain if it infringed a management right. The Agency contends that the proposal's consent requirement infringes management's sole right to hire and discipline under D.C. Code § 1-617.08(a)(1). The Agency observes that the Board held in *Teamsters Local Union No. 639 and D.C. Public Schools*, 38 D.C. Reg. 6693, Slip Op. 263 at p. 12, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990), that requiring an employee to consent to the extension of his or her detail infringes management's right to assign employees. (Br. for Resp't at 4).

Proposal No. 1's alleged infringement of the right to hire and discipline is less direct because consent to be disciplined or denied employment as a result of a polygraph test is not required. However, the proposal directly infringes management's sole right to determine "[t]he agency's internal security practices." D.C. Code § 1-617.08(a)(5)(D). Construing 5 U.S.C. § 7106(a)(1), an identical provision in the Federal Service Labor-Management Relations Act, the Federal Labor Relations Authority has held that a prohibition of the use of polygraphs directly interferes with the management right to determine internal security practices, *AFGE and Department of the Army Sierra Army Depot*, 30 F.L.R.A. 1236, 1240 (1988), and that requiring employee consent to the use of a polygraph is the same as a prohibition. *Nat'l Fed'n of Fed. Employees, Local 1300 and Gen. Servs. Admin.*, 18 F.L.R.A. 789, 797 (1985).

Notwithstanding, the Agency waived this management right by bargaining over it in the current round of bargaining. The Agency's proposal contains a provision on polygraph examinations that is the same, word for word, as the Union's proposal. (App. Ex. 4 at 2). Therefore, Proposal 1 is negotiable.

B. Promotions

Proposal 2: The Union proposes the following as Article 20, Section A(1) of the agreement.

> **Section A - Promotional Process:**
> The Promotional Process shall be as follows:
> (1) To be eligible for promotion to the positions of EMS Battalion Supervisor, Sergeant, Lieutenant and Captain, employees shall complete the following:
>
> (a) Application as specified in the examination announcement;
> (b) Qualifying job related examination;
> (c) Evaluation by an assessment center panel;
> (d) Physical examination.

(Appeal Ex. 3 at 5).[2]

[2] The Union did not number the pages of Exhibit 3 or Exhibit 4 consecutively. This reference is to the fifth page of Exhibit 3. Subsequent references will also be to a page of Exhibit 3 or Exhibit 4 as though the exhibit were consecutively numbered. The underscoring and strikethrough formatting in quotations from Exhibit 3 were in the original.

Proposal 3: The Union proposes the following as Article 20, Section A(7) of the agreement.

> (7) After the scores from a promotional qualifying examination and assessment center evaluation are determined by the Department, the Department shall add points to each candidate's scores as follows:
>
> (a) Points for Service: 1/~~12~~24 point, but never more than five (5) points in all, for each completed month ending on the qualifying date of service eligibility over the applicable length of service prerequisite, computed on the basis of the individual's record.
>
> (a)[*sic*] Points for Education: 1/30 point, but never more than four (4) points in all, for each semester hour of a relevant course ~~relevant to Fire Science and Fire Administration~~ which has been successfully completed at a recognized institution of higher learning on or before June 15 of the examination year. Points for credit earned on a quarterly basis shall be computed at 2/3 of value of courses completed on a semester basis. A joint Labor-Management Board shall be established by the Fire Chief to determine course relevancy and whether the credits were earned at a recognized institution of higher learning.
>
> (b) Application procedures for points for education shall be issued by the department and must be strictly adhered to.

(Appeal Ex. 3 at 6).

Proposal 4: The Union proposes the following as Article 20, Section A(9) of the agreement.

> (9) The period of eligibility on the relative standing promotion list shall be for two (2) years commencing October 16 of the examination year and the expiration date of eligibility shall be on the October 15th two (2) years subsequent to such qualifying examination. <u>It is understood that should a vacancy occur on or before the expiration date of eligibility, members shall be promoted from the existing list.</u>

(Appeal Ex. 3 at 6).

Respondent: The Respondent contends that Proposals 2 through 4 "alter the statutory promotion scheme set forth in D.C Code § 5-402[3] and all federal statutes incorporated by reference." (Br. for Resp't at 9). "Furthermore," the Respondent states, "D.C. Code § 1-617.08(a)(2) grants the Department the 'sole right, in accordance with applicable laws and rules and regulations . . . [t]o . . . promote.' Taken together, D.C. Code confers upon the Department the non-bargainable, management right to promote in accordance with the foregoing District and federal statutes." (*Id.* at 8).

In addition, the Respondent raises objections to the individual proposals. The Respondent alleges that Proposal 2 infringes management's sole right to promote by depriving the Respondent of "the management right to identify the instruments by which a person is eligible for an officer position." (Answer at 4). The Respondent alleges that Proposal 3 is nonnegotiable because it sets forth qualifications for certain positions. (Answer at 3) (citing *NAGE, Local R3-06 v. D.C. Water & Sewer Auth.*, 47 D.C. Reg. 7551, Slip Op No. 635 at p. 7, PERB Case No. 99-U-04 (2000).

Finally, the Agency contends that Proposal 4 requires the Agency to fill vacancies by promotion when it may not desire to promote or may prefer to detail employees to vacant positions. (Br. for Resp't at 9-10). The Board has held that a proposal that "requires the Agency to fill a position by promotion rather than by detailing someone to the position" is nonnegotiable. *D.C. Fire & Emergency Med. Servs. Dep't and AFGE, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at 25, PERB Case No. 06-N-01 (2007) (citing D.C. Code § 1-617.08(a)(2)).

Union: Citing a different portion of the same case relied upon by the Agency, the Union notes that the Board held in *D.C. Fire and Emergency Medical Services Department*, Slip Op. No. 874 at p. 20, that promotional procedures are negotiable. As such, the Union argues that Proposals 2 and 3 are procedural and thus negotiable. The Union argues that the particular language held to be procedural in *D.C. Fire and Emergency Medical Services Department* was virtually identical to Proposal 2 and was "indeed, modeled on Article 20(A)(1) of the Local CBA." (Br. for Pet'r at 6). Regarding Proposal 3, the Union points out that "[m]anagement's proposal at impasse contained similar language." (*Id.*)

The Union contends that the Agency misreads Proposal 4. The Union's only proposed change to the section is the addition of the last sentence, which reads, "It is understood that

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[3]Section 5-402(a) of the D.C. Code provides: "The Mayor of the District of Columbia shall appoint, assign to such duty or duties as he may prescribe, promote, reduce, fine, suspend, with or without pay, and remove all officers and members of the Fire Department of the District of Columbia, according to such rules and regulations as the Council of the District of Columbia, in its exclusive jurisdiction and judgment (except as herein otherwise provided), may from time to time make, alter, or amend; provided, that the rules and regulations of the Fire Department heretofore promulgated are hereby ratified (except as herein otherwise provided) and shall remain in force until changed by said Council; provided further, that all officers, members, and civilian employees of such Department, except the Fire Chief and Deputy Fire Chiefs, shall be appointed and promoted in accordance with the provisions of §§ 1101 to 1103, 1105, 1301 to 1303, 1307, 1308, 2102, 2951, 3302 to 3306, 3318, 3319, 3321, 3361, 7202, 7321, 7322, and 7352 of Title 5, United States Code, and the rules and regulations made in pursuance thereof, in the same manner as members of the classified civil service of the United States, except as herein otherwise provided. . . ."

should a vacancy occur on or before the expiration date of eligibility, members shall be promoted from the existing list." The Union explains that this sentence

> simply clarifies *which promotional register management should use* when – *and if* – it decides to fill a vacancy, and makes that decision after the register expires. In such a situation, the Union's proposal then prescribes that management look to the register that was in effect at the time the vacancy was created, and not to any new register that may have been created after expiration of the prior register. . . . The modest amendment to Section A(9) aims solely at creating a uniform, clear procedure to apply in those situations in which a vacancy *that management chooses to fill* has existed for some time, bridging two promotional registers.

(Br. for Pet'r at 8).

Board: Section 5-402 of the D.C. Code provides that promotions of members and officers of the Agency are to be made in accordance with rules and regulations of the City Council and with nineteen sections of title 5 of the United States Code in the same manner as members of the U.S. classified civil service are promoted. In contending that Proposals 2 through 4 are nonnegotiable, the Agency argues that the "D.C. Code confers upon the District the non-bargainable, management right to promote in accordance with the foregoing District and federal statutes." (Br. for Resp't at 8). How do the Union's proposals prevent the Agency from promoting in accordance with any of those statutes? The Agency does not say. The Agency asserts only that the proposals alter a statutory scheme (*id.* at 9) but does not say how they alter the statutory scheme. The Agency notes that the Board "has held that when one aspect of a subject matter, otherwise generally negotiable in other respects, is fixed by law, e.g., the CMPA, that aspect is nonnegotiable." (Br. for Resp't at 9) (quoting *AFGE, Local 631 v. D.C. Dep't of Pub. Works*, 59 D.C. Reg. 4968, Slip Op. No. 965 at p. 10, PERB Case No. 08-N-02 (2009)). But the Agency has failed to identify any aspect of the proposals that are fixed by any of the cited laws and failed to establish that any of those laws render the proposals illegal.

The Agency also contends that the laws establish a management right to promote. There are, however, limits to the management right to promote. A proposal that is procedural in nature and neither requires nor prevents the promotion of an employee does not violate section 1-617.08(a)(2), which reserves to management the right to promote. *D.C. Fire & Emergency Med. Servs. Dep't and AFGE, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at 20, PERB Case No. 06-N-01 (2007). Section 5-402 of the D.C. Code does not give the Agency a greater management right to promote than other departments of the District. The proposal that *D.C. Fire and Emergency Medical Services* held to be negotiable under the above standard is almost the same as Proposal 2. Accordingly, that case is controlling, and we find that Proposal 2 is negotiable.

Unlike Proposal 2, Proposal 3 is not almost the same as the proposal at issue in *D.C. Fire and Emergency Medical Services*. On the other hand, Proposal 3 does not have the "absolute