

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 to their employer for their negligent harm to its 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 statutory 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.

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: 1/4-224 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. It is understood that should a vacancy occur on or before the expiration date of eligibility, members shall be promoted from the existing list.

(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 § 5-402³ 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 AFGF, 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

³Section 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

language” held to be nonnegotiable in *D.C. Public Schools v. Teamsters Local Unions No. 639 and 730*, 38 D.C. Reg. 2483, Slip Op. No. 273, PERB Case No. 91-N-01 (1991), in which the union proposed that certain promotions “shall be on the basis of strict seniority.” *Id.* at p. 5. However, even if Proposal 3 did infringe on the management right to promote, the Agency waived that management right by making a proposal that differed only in a few details from the Union’s proposal. (Appeal Ex. 4 at 5). The differences between the Union’s and the Agency’s proposals do not make either proposal more or less procedural than the other. Therefore, Proposal 3 is negotiable.

Proposal 4 is ambiguous. It uses mandatory language in providing that under a certain circumstance “members shall be promoted from the existing list.” In the Respondent’s view, this mandatory language forecloses the options of leaving the post vacant or detailing someone to fill the vacancy temporarily. As interpreted by the Respondent, Proposal 4 would infringe management’s right to promote. The Union explains that the proposal was intended to specify which list is to be consulted when a vacancy is to be filled by promotion and not to mandate promotions. In other words, what the Union meant to say is: It is understood that should a vacancy occur on or before the expiration date of eligibility and the Department chooses to fill that vacancy by promotion, the promotional register to be used in making that promotion shall be the promotional register existing at the time the vacancy was created.

Where a union’s interpretation of an ambiguous proposal renders the proposal negotiable and the proposal is susceptible of that interpretation, the Federal Labor Relations Authority has adopted the union’s interpretation and held the proposal negotiable as interpreted. See *Nat’l Fed’n of Fed. Employees Local 2015 and U.S. Dep’t of Interior Nat’l Park Serv.*, 41 F.L.R.A. 1158, 1191 (1991); *Nat’l Treasury Employees Union and Internal Revenue Serv.*, 7 F.L.R.A. 275, 281 (1981). The Board will follow that approach here, adopt the Union’s interpretation, and find that Proposal 4 does not infringe a management right and thus is negotiable. Notwithstanding, the cautionary words of a member of the Federal Labor Relations Authority bear repeating:

I question why, if clarification/interpretation of an ambiguous or contradictory proposal can be readily presented to the Authority, the language of the proposal was not appropriately revised and presented to management for negotiation at the bargaining table. If the parties would say what they mean to each other in negotiations, rather than to the Authority in litigation, many negotiability cases would never arise. . . .

AFGE, Council of Soc. Sec. Dist. Office Locals and Dep’t of Health & Human Servs., Soc. Sec. Admin., 11 F.L.R.A. 608, 614 (1983) (Member Frazier, concurring).

C. Selection of Technicians

The proposals at issue with regard to selection of technicians, Article 21 of the agreement, are set out specifically in the Respondent's letter asserting nonnegotiability (Appeal Ex. 1) and discussed collectively in the parties' pleadings and briefs.

Proposal 5: The Union proposes the following as Article 21, Section A(8)(b)(i) and (ii) of the agreement.

(b) (i) Except as provided in (ii) below, the selection of technicians, temporary technicians and temporary additional technicians shall be completed not later than ninety (90)~~sixty (60)~~ days after the position becomes vacant.

(ii) For positions in the Hazardous Materials Unit, Air Units and Foam Unit the requirement in (i) above shall not apply. However, the time limits set forth in Sections C(1) and C(2) for providing notification to members of actual or anticipated vacancies in these units, and for receiving applications, shall apply; and the position shall be filled immediately upon completion of the selection process described in Section G, Hazardous Materials Unit.

(Appeal Ex. 3 at 9).

Proposal 6: The Union proposes the following as Article 21, Section B(3)(a) of the agreement.

General: To be eligible for consideration for any technician, temporary technician or temporary additional technician position, except as provided for in this Agreement(3)(b), below, a member must have at least three (3) years service from the date of the vacancy (continuous or cumulative) in the Operations Fire-Fighting Division.

(Appeal Ex. 3 at 10).

Proposal 7: The Union proposes the following as Article 21, Section B(3)(b), (c), and (d) of the agreement.

(b) Fire Prevention Division:

i) For positions in the Fire Prevention Division, a member must have at least five (5) years service (continuous or cumulative) in the Department on the date of the announcement of the vacancy, and have been assigned to the Fire Prevention Division for at least one (1) year (continuously or cumulatively). Furthermore, the

member must be assigned to the Fire Prevention Division at the time the vacancy occurs; provided, however, that the member need not be so assigned at the time the vacancy occurs if he/ she was so assigned within two (2) years immediately preceding the vacancy and was involuntarily transferred from the Division.

ii) To be eligible for consideration as a Fire/Arson Investigator a member must have at least five (5) years service (continuous or cumulative) in the Fire Fighting Division on the date of the announcement of the vacancy. The requirements for technician positions in the Fire Investigation Unit, which require police powers, shall be outlined by Fire Department Memorandum.

(c) Fireboat Operator: For the Fireboat Operator position, a member must, in addition to the provisions of 3(a), above, satisfy the following prerequisites:

i) Have been assigned to the fireboat for at least one (1) year (continuously or cumulatively);

ii) Be assigned to the fireboat at the time the vacancy occurs; provided, however, that the member need not be so assigned at the time the vacancy occurs if he/she was so assigned within two (2) years immediately preceding the vacancy and was involuntarily transferred from the fireboat.;

iii) Possess a United States Coast Guard license as "Operator, Uninspected Passenger Vessel";

iv) Meet all other requirements for assignment at the Fireboat;

v) Have performed successfully as a fill-in operator.

(d) Positions in an Engine Company or Truck Company, Drivers in Hazardous Materials Unit or Rescue Squad:

For positions in an engine company, or truck company, and for driver positions in a hazardous materials unit or rescue squad, a member must, in addition to the provisions of 3(a) above, be assigned to the unit in which the vacancy occurs at the time the vacancy occurs; provided, however, that the member need not be so assigned at the time the vacancy occurs if he/she was so assigned within two (2) years immediately preceding the vacancy and was involuntarily transferred from the unit.

(Appeal Ex. 3 at 10-11).

Proposal 8: The Union proposes the following as Article 21, Section B(4)(a)(v) of the agreement.

Whenever the procedures set forth in this paragraph 4 involve the administration of any written and/or practical examination, a candidate must receive a grade of at least seventy percent (70%) on each such examination in order to remain eligible for the position.

After such examinations have been graded, candidates shall be entitled to review their examination pages and grading sheets.

(Appeal Ex. 3 at 12).

Proposal 9: The Union proposes the following as Article 21, Section C(1) of the agreement.

(1) Examinations:

(a) Candidates shall be examined on their knowledge of ~~their~~the box alarm district, ~~and~~their knowledge of hydraulics, ~~and~~ operation and maintenance of apparatus and equipment, as provided herein, utilizing the requirements and guidelines set forth in Fire Department Bulletin 32 and 56.

(b) Knowledge of Box Alarm District:

i) This examination shall be prepared and administered by the Captain and the Lieutenants of the unit concerned, or those acting in their stead, acting jointly, using guidelines established by the Training Academy. The examination shall utilize materials that are make use of material in the unit's quarters that is available to all applicants. Any on-duty members and/or administering officers shall be excused from duty to participate in the examination. Two officers shall be present to administer the examination.

ii) ~~In engine companies, the responsible officer shall administer a single joint examination for Wagon Driver and in~~ In truck companies the responsible officers shall administer a single joint examination for Truck Driver, Tillerman and Platform Operator positions.

(Appeal Ex. 3 at 13-14).

Proposal 10: The Union proposes the following as Article 21, Section C(2) of the agreement.

(2) Ratings:

All eligible candidates will be rated on a one hundred point (100) scale, with the points to be determined as follows:

(a) Knowledge of Box Alarm District, as determined by the examination administered pursuant to part (1)(b) of this Section: 0-40 points.

(b) Knowledge of Hydraulics and Operation and Maintenance of Apparatus and Equipment, as determined by the examination administered pursuant to part 1(c) of this Section: 0-35 points.

(c) Seniority in the Department: 1/12 point for each month of service (continuous or cumulative) in the Department, up to a maximum of 15 points.

(d) Seniority in the Unit: 1/12 point for each month of service (continuous or cumulative) in the Department, up to a maximum of 10 points. In applying this provision:

i) An applicant shall only be allowed credit for service in a unit if he/she is currently assigned to that unit, except that any member who has been involuntarily transferred from one unit to another shall be entitled, at his/her option, for a period of two (2) years after the transfer, to receive credit for service in either the unit to which he/she is currently assigned or the unit from which he/she was involuntarily transferred, but not both. The Captains of companies, or those acting in their stead, shall be responsible for keeping an ongoing list of members who have been involuntarily transferred from the unit within the past two (2) years;
and

ii) The period of time served by members of the Fire Fighting Division in an assignment as a technician in the Emergency Medical Service shall be credited to seniority in the unit, either at the unit from which the member entered his/her assignment as a technician or at the unit to which the member is assigned immediately upon leaving the Emergency Medical Service, at the option of the member concerned. Once an election is made and the time is credited, it cannot be shifted toward credit in another unit.

iii) The period of time served by members, whose positions have been eliminated as a result of action undertaken by the District of Columbia Fire and Emergency Medical Services Department, shall be credited to seniority in the unit, either at the unit to which the member is re-assigned or at the former unit, should it be reestablished, at the option of the member concerned. Once an election is made and the time is credited, it cannot be shifted toward credit in another unit.

(e) Prior Satisfactory Service as a Technician, Temporary Technician and/or Temporary Additional Technician in any Unit: 5/12 point per month (continuous or cumulative), up to a maximum of 5 points.

(Appeal Ex. 3 at 14-15).

Proposal 11 is the Union's proposal for Sections D, E, and F of Article 21 of the agreement. (Appeal Ex. 3 at 15-18). It is reproduced in the appendix of this opinion.

Proposal 12 is the Union's proposal for a new article of the agreement, Article XX. (Appeal Ex. 3 at 26-27). It is reproduced in the appendix of this opinion.

Respondent: In its brief, Respondent observes that the Board affirmed a hearing examiner's determination that if "the qualifications for the new positions [are] an integral or 'substantive' part of [management's] decision as to how it will utilize its employees to perform [management's] work . . . [, then management] need not bargain over those qualifications." (Br. for Resp't at 10) (quoting *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)). The Respondent contends that the Petitioner's proposals with regard to selection of technicians set position qualifications for certain personnel that are a substantive and integral part of the Department's decision as to how it will utilize said personnel. As a result, the Respondent concludes, the proposals are nonnegotiable. (Br. for Resp't at 10-11; Answer at 3).

The Respondent's letter asserting nonnegotiability indicates more specifically how some of the proposals set qualifications. Proposal 6 mandates three years of service. Proposal 7 sets a standard for eligibility. Proposal 8 sets the pass threshold for examinations. Proposal 9 sets qualifications for drivers. Proposal 10 assigns points to various examination areas. Proposal 11 contains sections entitled "Selection Criteria" and is therefore nonnegotiable. Proposal 12 assigns examination points and establishes the passing score. The letter also inquires whether the Union has withdrawn Proposal 12. (Appeal Ex. 1).

The letter's objection to Proposal 5 does not involve setting qualifications. The letter asserts that Proposal 5 takes away management's discretion not to promote. The Agency does not raise this objection in its answer or in its brief.

Union: All of the Union's proposals appear in the Agency's proposals except Proposal 5, and the Agency has abandoned its objection to Proposal 5. Section J(2) of the Union's proposal addresses the Agency's objections regarding the setting of qualifications "and fully preserves its right to set substantive criteria for these positions." (Br. for Pet'r at 10).

Board: PERB Rule 532.3 provides: "An answer to a negotiability appeal shall state in short and plain terms the party's position on each negotiability issue raised in the appeal." The Appeal raises the issue of the negotiability of Proposal 5, which is the Union's proposed Article 21, Section A(8)(b)(i) and (ii). (Appeal ¶ 5). The Agency does not allege in the answer (or its brief) that Proposal 5 takes away management's discretion not to promote. As a result, the Agency has abandoned that claim. The only position that the Agency takes in its answer and brief that is applicable to Proposal 5 is that it, like the other proposals for Article 21, sets qualifications. The Agency's answer states that articles including "Article 21(A)(b)(i) and (iii) [*sic*] . . . are nonnegotiable because they set forth the qualifications for certain positions." (Answer at 3). Proposal 5 does not set any qualifications. Therefore, Proposal 5 is negotiable.

Proposals 6 through 11 do establish qualifications for positions, but each of Proposals 6 through 11 is the same as, or not significantly different from, the Agency's proposals for Article 21 in this round of bargaining. (Appeal Ex. 4 at 9-16). The Agency waived the management right it claims by bargaining over it in the current bargaining round. Therefore, Proposals 6 through 11 are negotiable.

Proposal 12, in contrast, is a new article with no counterpart in the Agency's proposals. The Agency's letter asserting nonnegotiability questioned whether the proposal had been withdrawn. The Appeal includes the negotiability of Proposal 12 among the issues it presents (Appeal ¶ 6), but the Petitioner's brief does not refer to the proposal. Proposal 12 establishes numerous substantive qualifications for special operations companies. The Petitioner does not deny that it does so but relies upon Article 21, Section J(2) for the negotiability of its Article 21 proposals. Section J(2) provides:

If at any time the Department determines that the criteria for selection or removal of a Techniciantechnicians, or of any category or categories of Technicianstechnicians, set forth in this Article should be changed, the Department shall have the right, subject to the procedures of Article 6 of this Agreement (Existing Rights and Benefits), to institute such a change; provided, however, that nothing in this section shall authorize the Department to institute changes in any provisions of this Article other than those establishing substantive criteria for selection or removal of Technicians, unless the Union so agrees.

(Appeal Ex. 3 at 23). This provision is too qualified to ameliorate Proposal 12's infringement on the management right "[t]o hire, promote, transfer, assign, and retain employees in positions within the agency. . . ." D.C. Code § 1-617.08(a). Therefore, the Board finds that Proposal 12 is nonnegotiable.

D. Hours of Work, Schedule, and Leave

Proposal 13: The Union proposes the following as Article 45, Section B of the agreement.

- (1) The basic workweek for members working in the Fire Fighting Division shall be 42 hours averaged over a 4-week period.
- (2) The work schedule for members working in the Fire Fighting Division shall be 24 hours on duty and 72 hours off duty.

(Appeal Ex. 3 at 24).

Respondent: The Respondent contends that Proposal 13 is nonnegotiable on two grounds. First, the D.C. Code defines "basic workweek" as "an average workweek of 48 hours in the case of officers and members of the Firefighting Division of the District of Columbia Fire Department." D.C. Code § 5-1304(a)(3). "[T]he Union's proposal replaces the codified standard of 'an average workweek of 48 hours' to '42 hours averaged over a 4-week period.' . . . Accordingly, the Union's proposal regarding the basic workweek is *per se* nonnegotiable." (Br. for Resp't at 12).

Second, management has the sole right “to establish the tour of duty.” D.C. Code § 1-617.08(a)(5)(A). Tour of duty refers to the hours an employee works. (Br. for Resp’t at 13) (citing D.C. Code §§ 1-611.03, 1-612.01, 5-501.02). Accordingly, “the Board has held and the D.C. Court of Appeals has affirmed that management has the right under the CMPA to determine an employee’s Hours of Work, and that proposals by a union which seek to abrogate that right are non-negotiable.” *D.C. Fire & Emergency Servs. Dep’t and AFGÉ, Local 3721*, 51 D.C. Reg. 4158, Slip Op. No. 728 at p. 4 n.11, PERB Case No. 02-A-08 (2003). The Respondent also claims that the D.C. Court of Appeals held that the basic work week is not negotiable in *Drivers, Chauffeurs & Helpers Local Union No. 639 v. District of Columbia*, 631 A.2d 1205, 1216 (1993). “As the Department has not waived its exclusive rights to not bargain over this issue, the Union’s proposal is nonnegotiable under PERB case law.” (Br. for Resp’t at 14).

Union: Regarding the Agency’s first argument, the Union asserts that the adoption of the CMPA in 1979 expressly overrode section 5-1304, passed by Congress in 1950. D.C. Code § 1-632.03(a)(1)(X) (codifying CMPA, D.C. Law 2-139, § 3203, 25 D.C. Reg. 5740 (Mar. 3, 1979)).

The Union responds to the Agency’s second argument by disputing the meaning of “tour of duty” and arguing that the meaning of the term does not include matters in Proposal 13, i.e., work schedule or the length and frequency of shifts. Section 1-617.08(a)(5)(A) and (B)’s reference to “tour of duty” in the singular along with “[t]he mission of the agency, its budget, its organization” suggest to the Union that the Council contemplated a single tour of duty for each agency. The Union argues that because the CMPA also uses the terms hours, hours of work, and basic workweek, those terms cannot be synonymous with tour of duty. The Union asserts that tour of duty denotes something distinctly different from basic workweek and hours of work. (Br. for Pet’r at 19). It states that “[c]onstrued within this framework, the ‘tour of duty’ most sensibly designates the agency’s overall calendar of operation—the general periods during which it will need employees to work. . . .” (*Id.*). Proposal 13, the Union maintains, does not affect the Agency’s calendar of operation and is therefore negotiable.

Board: The Petitioner is correct that the Agency’s claim based upon D.C. Code § 5-1304(a)(3) “is quickly dispatched.” (Br. for Pet’r at 12). Section 1-632.03(a)(1)(X), adopted in 1979, provides prospectively that section 5-1304 shall not apply to police or firefighters. “[I]t is axiomatic that a specific statute enacted later in time is given effect over an earlier law generally covering the same subject matter.” *Speyer v. Barry*, 588 A.2d 1147, 1163 (D.C. 1991).

The Agency’s claim based upon D.C. Code § 1-617.08(a)(5)(A) is more substantial. The Union’s efforts to propose a meaning of tour of duty that does not encompass Proposal 13 has two problems. First, the term is used by D.C. statutes and PERB cases in the senses the Union denies. Tour of duty is used to refer to the tour of duty of an individual employee. See D.C. Code § 1-612.01(b) (“tours of duty shall be established to provide, with respect to each employee . . .”); D.C. Code § 5-501.02(D) & (F) (“[A] biweekly rate shall be divided by the number of hours constituting the biweekly tour of duty in order to derive an hourly rate.”); *FOP/Metro. Police Dep’t Labor Comm. v. Metro. Police Dep’t*, 60 D.C. Reg. 9186, Slip Op. No. 1388 at p. 2, PERB Case No. 11-U-01 (2013) (“Sgt. Horace Douglas . . . was advised that his scheduled tour of duty . . . would be changed from 7:30 a.m. through 4:00 p.m. to 2:30 p.m. through 11:00

p.m.”) *AFGE, Local 3721 (on behalf of Chasin) v. D.C. Fire & Emergency Med. Servs. Dep’t*, 59 D.C. Reg. 7288, Slip Op. No. 1251 at p. 4, 10-A-13 (2012) (“Capt. Hernandez reminded Grievant that the July 25 Letter of Direction specified his tour of duty as 8:15 a.m. to 4:45 p.m.”). And, most importantly for this case, the term includes hours of work, work schedules, and shifts. *D.C. Fire & Emergency Servs. Dep’t and AFGE, Local 3721*, 51 D.C. Reg. 4158, Slip Op. No. 728 at pp. 2-3, 4 n.11, PERB Case No. 02-A-08 (2003). See also *Metro. Police Dep’t and FOP, Metro. Police Dep’t Labor Comm. (on behalf of Dolan)*, 45 D.C. Reg. 1468, Slip Op. No. 394 at p. 2, PERB Case No. 94-A-04 (1994) (“The Arbitrator decided a grievance that challenged MPD’s decision to temporarily alter the tour of duty of . . . staff members . . . by changing their hours of work on Fridays.”).

Second, the meaning the Union proposes as a substitute for the way the term is actually used is implausible. It is difficult to see when one would speak of an “agency’s overall calendar of operation” or why the Council would need to address that subject in several statutes. In view of the above, the Board finds that Proposal 13 infringes on a management right and is nonnegotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. To the extent the motion for expedited decision sought a decision by November 11, 2013, the motion is denied. To the extent the motion requested a decision by December 18, 2013, the motion is granted.

2. The following Union Proposals are *negotiable*.

Article 8, Section C(5) – Polygraph Examinations

Article 20, Section A(1) – Promotional Process

Article 20, Section A(7) – Promotional Process

Article 20, Section A(9) – Promotional Process

Article 21, Sections A(8)(b)(i) and (ii) – Timely Filling of Vacancies

Article 21, Section B(3)(a) – Eligibility

Article 21, Sections B(3)(b), (c), and (d) – Eligibility

Article 21, Section B(4)(a)(v) – Competitive Ratings

Article 21, Section C(1) – Examinations

Article 21, Section C(2) – Ratings

**Article 21, Sections D, E, and F – Technicians in Fire Prevention Division,
Fireboat Operator, and Air Unit Driver and Foam Unit Driver**

3. The following Union Proposals are *nonnegotiable*.

Article XX – Selection Criteria for Special Operations Companies

Article 45, Section B – Hours of Work/Schedule/Leave

4. 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.**

November 26, 2013

CERTIFICATE OF SERVICE


This is to certify that the attached Decision and Order in PERB Case No. 13-N -04 was transmitted via File & ServeXpress to the following parties on this the 3d day of December, 2013.

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APPENDIX

Union Proposal (2/3/12)

in their stead, shall be responsible for keeping an ongoing list of members who have been involuntarily transferred from the unit within the past two (2) years; and

ii) The period of time served by members of the Fire Fighting Division in an assignment as a technician in the Emergency Medical Service shall be credited to seniority in the unit, either at the unit from which the member entered his/her assignment as a technician or at the unit to which the member is assigned immediately upon leaving the Emergency Medical Service, at the option of the member concerned. Once an election is made and the time is credited, it cannot be shifted toward credit in another unit.

iii) The period of time served by members, whose positions have been eliminated as a result of action undertaken by the District of Columbia Fire and Emergency Medical Services Department, shall be credited to seniority in the unit, either at the unit to which the member is re-assigned or at the former unit, should it be re-established, at the option of the member concerned. Once an election is made and the time is credited, it cannot be shifted toward credit in another unit.

(e) Prior Satisfactory Service as a Technician, Temporary Technician and/or Temporary Additional Technician in any Unit: 5/12 point per month (continuous or cumulative), up to a maximum of 5 points.

Section E-D - Selection Criteria: Technicians in Fire Prevention Division:

All eligible candidates for technician positions in the Fire Prevention Division will be rated on a one-hundred (100)-point scale, with the points to be determined as follows:

- (1) Seniority in the Department: 1/12 point for each month of service (continuous or cumulative) in the Department up to a maximum of 15 points
- (2) Seniority in the Division: 1/6 point for each month of service (continuous or cumulative) in the Division up to a maximum of 15 points.
- (3) Prior Satisfactory Service as a Technician, Temporary Technician and/or Temporary Additional Technician in any Unit: 1/12 point per month (continuous or cumulative) up to a maximum of 5 points.
- (4) Completed courses in an Accredited Institution of Higher Learning Which are Job-Related or Necessary for a Job-Related Degree: 1/12 point per semester hour, up to a maximum of 15 points.
- (5) Division Examination: A written examination comprised of matter relevant to the position where the vacancy exists shall be prepared jointly by the Division head and the BFC/FPD, or those Supervisors/Officers above the rank of Sergeant as delegated by the Division Head. Grades on the examination shall count for 0-50 points on the overall rating scale.

Section F-E - Selection Criteria: Fireboat Operator:

All eligible candidates for the Fireboat Operator position will be rated on a one-hundred (100)-point scale, with the points to be determined as follows:

- (a) Seniority in the Department: 1/12 point for each month of service (continuous or cumulative) in the Department, up to a maximum of 5 points.
- (b) Seniority in the Unit: 1/12 point for each month of service (continuous or cumulative) in the Fireboat unit, up to a maximum of 10 points.
- (c) Prior Satisfactory Service as a Technician, Temporary Technician and/or Temporary Additional Technician in a unit: 5/12 point per month (continuous or cumulative) in the Department, up to a maximum of 5 points.
- (d) Written Practical Examinations: Written and practical examinations comprised of matter relevant to the position shall be prepared by the Captain and Lieutenants of the unit, or those acting in their stead. Grades on each of the two examinations shall count for 0-40 points on the overall rating scale.

Section G-F - Selection Criteria: ~~Hazardous Materials Unit, Air Unit, Driver and, Foam Unit Driver:~~

Timely Filing of Vacancies: For Air Unit Driver and Foam Unit Driver vacancies, the Captain of the station to which the unit is assigned shall, as soon as the definite need there for is determined, but not later than ten (10) days after the position became vacant, notify the Assistant Fire Chief of Operations of the vacancy. Within ten (10) days after the Assistant Fire Chief is notified, but not later than twenty (20) days after the position became vacant, the Assistant Fire Chief shall by Department memorandum notify all members of the Department of the vacancy.

- (1) Rating Panels: The rating and ranking of applicants for technician positions in the ~~Hazardous Materials Unit, Air Units and Foam Unit~~ shall be by rating panels consisting of:
 - (a) the Captain(s) and the three lieutenants of the station to which the unit is assigned;
 - (b) a representative of the Training Division
 - (c) a representative designated by the Fire Chief;
 - (d) an observer designated by Local 36; and
 - (e) (for the Air Units only) a representative of the Apparatus Division
- (2) Selection of Candidates:
 - (a) Each eligible applicant shall be required to submit a written statement listing his/her qualifications relevant to the position, including length of service in the Department and in the relevant unit, job-related education, specific relevant experience, and any additional information which would lead to the selection of the best qualified person for the assignment.

Union Proposal (2/3/12)

- (b) No later than fourteen (14) days after the deadline for filing applications the panel shall review the applications and shall select candidates whom they deem most qualified from among the eligible applicants.
- (c) The panel shall select at least as many candidates as there are anticipated vacancies; and in the case of the Foam Unit or Air Units, the panel shall, whenever possible, select at least two (2) more candidates than the number of anticipated vacancies.
- (d) The selection shall be based upon the statement submitted by the applicant, previous experience in the Department, previous job-related education, and any other job-related criteria that the panel deems appropriate.
- (e) If the panel deems it necessary, the panel may interview eligibles to assist the panel in making its selections.

(3) **Training and Final Selection:**

(a) Hazardous Materials Unit:

~~Not later than fourteen (14) days after the candidate(s) has/have~~ After candidates **have been chosen by the selection panel, he/she/they shall be** detailed to the Hazardous Materials Unit for a period of ninety (90) days for training, during which time ~~he/she/they will be required to become proficient in the use of tools, appliances, equipment and other pertinent materials of the unit, detailed to the Training Academy for a prescribed course of instruction.~~

(b) Once the training course has commenced, if, for any reason, a candidate is unable to complete the course, the process shall continue with the remaining candidates.

(c) Candidates shall be notified in advance of appropriate study material to assist them in preparing for the course.

~~(d) Upon the completion of the prescribed course/90-day training period, the candidates shall be rated on a one-hundred (100)-point scale, with the points to be determined as follows:~~

(i) Seniority in the Department: 1/12 point for each month of service (continuous or cumulative), in the Department up to a maximum of 15 points.-

~~(ii)(a.) Prior Satisfactory Service as a Technician, Temporary Technician and/or Temporary Additional Technician in any Any Unit: 5/12 point per month (continuous or cumulative), up to a maximum of 5 points;~~

~~(iii) b.)~~ **Written and Practical Examinations:** Written written and practical examinations comprised of matter relevant to the position shall be prepared by the Training Academy, Captain and Lieutenants of the unit, or those acting in their stead.

(a.) Grades on the written examination shall count for 0-4540 points on the overall rating scale, ~~and~~

(b.) ~~g~~Grades on the practical examination shall count for 0-5040 points on the overall rating scale.

~~(The candidate(s) so assigned shall then be required to complete successfully a minimum eighty (80) hour Hazardous Materials resident program at the National Fire Academy or other nationally recognized Hazardous Materials Training Facility. If a candidate successfully completes the prescribed Hazardous Materials training course, he/she shall be designated as Technician Hazardous Materials Unit.~~

~~(b) Air Units and Foam Unit:~~

~~i) After candidates have been chosen by the selection panel, they shall be detailed to the Training Academy for a prescribed course of instruction.~~

~~ii) Once the training course has commenced, if, for any reason, a candidate is unable to complete the course, the process shall continue with the remaining candidates.~~

~~iii) Candidates shall be notified in advance of appropriate study material to assist preparation for the course.~~

~~iv) Upon the completion of the prescribed course, the candidates shall be rated on a one hundred (100) point scale, with the points to be determined as follows:~~

~~(a.) Seniority in the Department: 1/12 point for each month of service (continuous or cumulative), in the Department up to a maximum of 20 points in the case of the Air Units and 10 points in the case of the Foam Unit;~~

~~(b.) Satisfactory Service as Technician, Temporary Technician and/or Temporary Additional Technician in any Unit: 5/12 point per month (continuous or cumulative) up to a maximum of 5 points;~~

~~(c.) Written and Practical Examinations: Written and practical examinations comprised of matter relevant to the position shall be prepared by the Training Academy. Grades on the written examination shall count for 0-35 points on the overall rating scale in the case of the Air Units, and 0-10 points in the case of the Foam Unit. Grades on the practical examination shall count for 0-40 points in the case of the Air Units and 0-15 points in the case of the Foam Unit.~~

Section H.G - Temporary/Technician, Temporary Additional Technician:

(1) Definitions:

(a) Temporary Technician: An individual who fills the position of an incumbent Technician when the incumbent is transferred, reassigned or detailed to another salary

[NEW ARTICLE]

ARTICLE XX
SELECTION CRITERIA FOR SPECIAL OPERATIONS COMPANIES
(RESCUE SQUADS, HAZARDOUS MATERIALS UNIT, FIREBOAT)

Section A - Examination:

- (1) A written examination shall be administered on September 15 of each calendar year.
- (2) Notification for the examination shall be issued at least ninety (90) calendar days prior to the date of the examination. The notices of examination shall include a listing of any text and reference materials that may be used for study purposes. The notice shall also set the closing date for receipt of applications. Applications received after such date will not be considered.

Section B - Eligibility:

To be eligible for the testing process, a member must have a minimum of five (5) years of service in the Department on the date the notice of examination is issued.

Section C - Ratings and Points:

Candidates shall be rated on a 100-point scale as follows:

- (1) A candidate's grade on the written examination shall count for 0-80 points on the overall rating scale.
- (2) Points for service, computed on the basis of the individual's record, shall be added to each candidate's grade on the written examination as follows:
 - (i) Service in the Department: 1/12 point, but never more than fifteen (15) points in all, for each completed month, ending on the date the notice of examination was issued;
 - (ii) Prior satisfactory service as a Technician, Temporary/Technician, and/or Temporary/Additional Technician: 1/12 of a point, but never more than five (5) points in all, for each completed month, ending on the date the notice of examination was issued.
- (3) When the final relative standing lists are completed, each candidate will be notified in writing of his/her final score and his/her relative standing. Reasonable efforts will be made to promptly notify the candidates. Members shall be placed in vacancies in the Special Operations Companies in their rank order on the list.
- (4) The period of eligibility on the relative standing list shall be for one (1) year, commencing on October 16 of the examination year, and the expiration date of eligibility shall be on the October 15th one (1) year subsequent to the examination.

Union Proposal (2/3/12)

Section D – Evaluation Period and Practical Examination:

- (1) A member placed in a position from the list will be required to complete a ninety (90) day evaluation period and to pass a practical examination to remain in the position. The member must receive a score of at least 70% to pass the practical examination.
- (2) If a member does not complete the evaluation period or does not pass the practical examination, the next member on the list shall be placed in the position, and shall be required to complete the evaluation period and to pass the practical examination to remain in the unit, as described in (5) above.

Section E - Final Selection:

A member who successfully completes the ninety (90) day evaluation period and passes the practical examination shall be permanently assigned to the Special Operations Company, effective on the last day of his or her evaluation period or on the date that he/she passes the examination, whichever is later.

Section H – Specialist Classification and Pay:

A member shall be classified as a Specialist and entitled to receive Specialist Pay in accordance with this Agreement on the effective date of his/her assignment to the Company, as described in Section E, above.