

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
)	
Teamsters Local Union No. 639)	
a/w International Brotherhood of)	
Teamsters, Chauffeurs,)	
Warehousemen and Helpers of)	
America, AFL-CIO,)	
)	PERB Case No. 90-N-02,
Petitioner,)	90-N-03 and 90-N-04
)	Opinion No. 263
and)	
)	
District of Columbia)	
Public Schools,)	
)	
Respondent.)	

DECISION AND ORDER

Pursuant to an Order issued by the Public Employee Relations Board (Board) on September 25, 1990, the above-captioned cases were consolidated for purposes of investigation and decision. All three of these appeals filed by Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Teamsters) arose out of the same negotiations between it and the District of Columbia Public Schools (DCPS) for an initial collective bargaining agreement covering a unit of approximately thirty (30) attendance counselors. The Board's Order requested the parties to submit briefs addressing all issues concerning the twenty-two proposals declared nonnegotiable by DCPS. Briefs were timely filed by both parties on October 25, 1990.

Having concluded our investigation and reviewed the parties' pleadings and supporting briefs, we make the following conclusions with respect to the negotiability of those proposals in dispute.

Preliminarily, we note that D.C. Code Section 1-618.8(b) provides that the right to negotiate over terms and conditions of employment extends to "[a]ll matters...except those that are proscribed by this subchapter, [i.e., the Labor-Management Relations section of the Comprehensive Merit Personnel Act (CMPA)]." The same section of our law lists six specific actions (or sets of actions) that are reserved solely to management, see Subsec. (a). In this situation, as pointed out in our first negotiability opinion, the Board must be careful in assessing

proffered broad interpretations of either subsection (a) or (b), since the former "would vitiate collective bargaining, and would nullify other provisions of the Act" and the latter "would deny [subsection (a)] its clearly intended effect, i.e., to permit management to manage the agencies and direct their employees." (Univ. of the District of Columbia Faculty Ass'n and Univ. of the District of Columbia, 29 DCR 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982), Slip Op. at 3.) Notwithstanding the CMPA's expressed reservation of these listed actions in the management's rights provisions under D.C. Code Section 1-618.8(a), a right to negotiate nevertheless exists with respect to matters concerning the exercise of these management actions. We have previously articulated that this negotiation right extends to matters addressing the impact and effect of these management actions on bargaining-unit employees as well as procedures concerning how these rights are exercised. Teamsters, Local Unions No. 639 and 730 a/w Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools, _____ DCR _____, Slip Op. No. 249, PERB Case No. 89-U-17 (1990); American Fed. of State, County and Municipal Employees, Council 20, AFL-CIO and District of Columbia General Hospital and Office of Labor Relations and Collective Bargaining, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989). Int'l. Assoc. of Firefighters, Local 36 and District of Columbia Fire Dep't, 34 DCR 118, Slip Op. No. 167, PERB Case No. 87-N-01 (1988) and Univ. of the District of Columbia Faculty Assoc. and the Univ. of the District of Columbia, supra.

Turning now to the proposals here in dispute, we shall address each separately.

Proposal No. 1:

ARTICLE V. - SENIORITY

- A. Principle of Seniority - The principle of seniority shall prevail at all times. Everything being equal, seniority shall prevail but fitness and ability shall be considered at all times. Seniority is defined as total length of service with the employer. Discharge or resignation shall constitute a break in service. The last employee hired shall be the first employee laid off, and in rehiring, the last employee laid off shall be the first employee rehired.

For the purpose of application under this Agreement, Seniority shall be maintained on an

occupational unit basis. The occupational unit established for this purpose is as follows:
Attendance Counselors EG-09

The subject matter of seniority has not been expressly removed from the (CMPA)'s presumption in favor of negotiability by the reserved management's rights set forth in D.C. Code Section 1-618.8(a). Moreover, the very D.C. Code Section on which DCPS relies in objecting to this proposal (Sec. 1-625.2) provides in its subsection (d) that "Policies and procedures developed under the authority of this subchapter are appropriate matters for collective bargaining with labor organizations..." (emphasis added). DCPS objects to the language of the proposal's first sentence and that of the sentence referring to order of lay-off and rehiring as making seniority the sole criterion for action and thus running headlong into the reduction-in-force specifications of D.C. Code Section 1-625.2(a)(1). We need not, however, determine the negotiability of those sentences as initially proposed since the Teamsters in its brief (p.6) supplemented its proposal with a clause stating that the proposal "shall not be interpreted or applied in any way inconsistent with federal law and/or D.C. law." With this additional language, and noting also that the second sentence of the proposal modifies the absolute statement of the first sentence as initially proposed, we find that the proposal adequately takes account of the specifications in Section 1-625.2(a)(1), and is negotiable.

Proposal No. 2:

ARTICLE VII. - SENIORITY FOR STEWARDS

Notwithstanding his position on the seniority list, a Steward, in the event of a layoff of any type, shall continue to work as long as there is a job in his unit which he can perform and shall be recalled to work in the event of a layoff on the first open job in his unit which he can perform. If an alternate is serving in place of the regular Steward, he shall be the last person laid off until the Steward returns. Upon return of the Steward, the alternate will be laid off.

As we have ruled above, seniority is a negotiable matter limited only by specific requirements of D.C. law with which a particular proposal would conflict. DCPS asserts that this proposal giving super seniority to stewards for lay-offs and return to work violates the specification in D.C. Code Section 1-625.2 (a)(1) of factors to be considered in the event of reductions in force, factors that do not include status as a

union steward. Again, we do not find it necessary to rule on that argument since we find this superseniority proposal nonnegotiable under the proviso to Section 1-625.2's subsection (d), which is set forth in footnote 1.^{1/} A bargaining agreement containing the proposed provision would provide unit members other than the steward(s) "benefits or procedures of less employee protection than those contained in this subchapter" were such unit member(s) displaced for protection from layoff or displaced for recall to which the unit member was otherwise entitled by a steward entitled to the protection of this proposal.

Proposal No. 3:

ARTICLE XXII. - NO STRIKES AND NO LOCKOUTS

During the life of this Agreement, the Union shall not cause or engage in, support, encourage or authorize any employee covered by this Agreement to participate in any cessation of work through slowdowns, strikes, work stoppages, or otherwise, nor will the Board engage in any lockouts against any employee covered by this Agreement.

This provision claims no right barred by statute but only disavows any union right to engage in conduct that is prohibited by law. DCPS contends that the initial phrase, "During the life of this Agreement" is intended to establish a right to strike after the Agreement's expiration. The argument is without merit as a matter of contractual interpretation (the proposal says nothing at all about any period other than that covered by the Agreement) and there is no question but that the D.C. Code strike prohibition prevails at all times. The proposal is negotiable.

^{1/} D.C. Code Section 1-625.2(d) provides:

(d) Policies and procedures developed under the authority of this subchapter are appropriate matters for collective bargaining with labor organizations: Provided, however, that no such bargaining agreement may provide benefits or procedures of less employee protection than those contained in this subchapter.

Proposal No. 4:

ARTICLE XXIII. - PROTECTION OF RIGHTS

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement.

Teamsters asserts that, notwithstanding the CMPA's prohibition of strikes by District employees, "it does not follow that one of the Public Schools' employees, in the course of its duties, must be forced to cross a primary picket line established by non-unit employees." Furthermore, DCPS "has considerable freedom to negotiate grounds for disciplining its employees." DCPS counters that the proposal contravenes the CMPA's prohibition of strikes under D.C. Code Section 1-618.4 and plainly infringes upon management's right to discipline employees for cause under D.C. Code Section 1-618.8(a)(2).

The unqualified prohibition of any discipline in any situation where a unit employee refuses to enter the site of any primary labor dispute or to work behind any primary picket line infringes upon the management right "to take disciplinary action against employees for cause" that is protected by D.C. Code Section 1-618.8(a)(2). We therefore find this proposal nonnegotiable. This is not, however, to be taken as a ruling by the Board that every picket line clause, no matter how tailored, is nonnegotiable.

Proposal No. 5:

ARTICLE XXV. - SAFETY AND HEALTH

Section 2 - Employees Working Alone

Employees shall not be required to work alone in areas beyond the call, observation or periodic check of others where dangerous chemicals, explosives, toxic gases, radiation, laser light, high voltage or rotary machinery are to be handled, or in known dangerous situation when ever the health and safety of an employee would be endangered by working alone.

DCPS contends that the proposal violates management's rights under D.C. Code Section 1-618.8(a)(5) by restricting its rights "to determine...the number of employees...assigned to an organizational unit, work project or tour of duty...." Teamsters argue that the proposal does not mean that two employees must work side-by-side on a job that management determines requires one person. Rather, says the Teamsters, this provision says only that at least one other person must be near enough to obtain any needed help for an employee assigned to work on a job under certain hazardous conditions. We do not believe that the proposal can be read as dictating, or otherwise limiting management's freedom to determine, the number of employees to be assigned to "an organizational unit, work project or tour of duty." The proposal does not speak to employee assignment (indeed, the person in a position to summon aid need not even be an employee). In terms, the proposal simply requires that in certain specified dangerous situations, someone must be within call, or able to observe or check periodically. The proposal is negotiable.

Proposal No. 6:

ARTICLE XXVII. - LOSS OR DAMAGE

Employees 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. No deduction of any kind shall be made without a hearing with the Local Union.

- A. Employees shall report any loss, damage, or destruction of property to the supervisor immediately upon becoming aware of such loss, damage or destruction.

Teamsters argue that since D.C. Code Section 1-617.1 concerning "causes" for taking enumerated adverse actions does not address charging "employees with loss or damage to District government property, "it does not preclude the parties from negotiating over it. The Teamsters assert that the proposal "merely sets forth standards to be met when charging the employee for such loss or damage, and affords an employee so charged its due process rights (i.e., a hearing). Finally, [the Teamsters assert] the provision ensures against charging an employee for loss or damage to equipment under any circumstances (thus limiting charges to the employee under appropriate circumstances)." The Teamsters note that its proposal is not

contrary to the provisions of D.C. Code Section 1-1216 ^{2/} but "merely adds the requirement that before charging the employee for damages to District property, that clear proof of gross negligence be established."

DCPS contends that the proposal restricts its statutory authority under D.C. Code Section 1-1215(c) to impose "appropriate disciplinary action...against any employee for a negligent act or omission." Furthermore, the proposal contravenes the employee liability standard for damage to District property statutorily established under D.C. Code Section 1-1216 from "negligent" to "gross negligence."

At the outset, D.C. Code Section 1-617.1 entitled "Adverse actions" and D.C. Code Section 1-1215(c) addressing disciplinary action by the District of Columbia has no relevance to the determination of the negotiability of a proposal concerning employee responsibility for the cost or expense resulting from loss or damage to District property. We therefore reject the parties' discussions with respect to the applicability of these statutory provisions. However, we find that the proposal directly encoaches upon the employee liability standard set forth in D.C. Code Section 1-1216.

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. This 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-a-vis, the "gross negligence" standard. To this extent the proposal directly contravenes D.C. Code Section 1-1216 and is therefore, nonnegotiable.

^{2/} D.C. Code Section 1-1216 provides:

Liability of employee to District for negligent damage to its property.

Nothing 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. (July 14, 1960, 74 Stat. 520, Pub. L. 86-654, Section; 1973 Ed.,)

We further note, with respect to our dissenting members, that the preface in Section 1-1216, "Nothing in Sections 1-1211 to 1-1216 shall be construed so as to relieve any District employee from liability to the District," affords no greater latitude to the negotiability of this proposal. In this regard, we agree with the dissenting opinion that this clause merely provides a statutory interpretation that Sections 1-1211 to 1216 do not relieve "District employees from liability to the District." We disagree however, that this lack of relief from liability under D.C. Code Sections 1-1211-1216 leaves open to negotiation the statutorily established standard for employee liability in Section 1-1216. We note that Section 1-1216 itself is among the D.C. Code Sections that is not to be construed as relieving liability for such negligent damage or loss. To interpret Section 1-1216 differently would render the second half of this statute, i.e., "for negligent damage to or loss of District property," meaningless.

Members Kohn and Danowitz dissent from this ruling in an opinion that is attached hereto.

Proposal No. 7

ARTICLE XXVII. - INCLEMENT WEATHER WORK

Section 2 - Reporting Time

During inclement weather where the District Government has declared an emergency, employees (other than those designated essential employees) will be given a reasonable amount of time to report for duty without charge to leave. Those employees required to remain on their post until relieved will be compensated at the appropriate overtime rate or will be given compensatory leave for the time it takes his/her relief to report for duty.

The Employer agrees to dismiss all non-essential employees when early dismissal is authorized by higher officials during inclement weather.

The Teamsters revised this proposal in its brief by substituting "Superintendent of Schools" for "District Government" in the first line. DCPS has contended that to the extent the proposal in its original form usurped the Board of Education's independent personnel authority as an independent agency under D.C. Code Section 1-603.1(13), it is nonnegotiable. Furthermore, DCPS makes the general assertion that the proposal

violates its rights under D.C. Code Section 1-618.8(a)(6) "[t]o take whatever actions may be necessary to carry out the mission of the District government in emergency situations."

Any basis for DCPS' objection with respect to infringement upon its personnel authority has been eliminated by the revision. As for its second objection, we find nothing in the proposal that contravenes management's authority in emergency situations. The proposal only addresses employee accommodations under inclement weather conditions. As such, the proposal is clearly negotiable.

Proposal No. 8

ARTICLE XXX. - PROMOTION PROCEDURES

- A. All attendance counselors are entitled to have knowledge of promotion policies and procedures. A copy of promotion policies shall be maintained in the business office in each school and shall be available for use by attendance counselors.
- B. All vacancies in higher positions to be filled competitively shall be advertised throughout the school system by announcements which will set forth the grade level, application procedures and the deadline date for submission of application. Additional information concerning positions may be secured from the Division of Human Resources Management.
- C. Announcements shall be posted in a conspicuous place on the business office bulletin board in each school or office by the responsible officer in charge. Copies shall be sent to the Union.
- D. Every attendance counselor applicants [sic] for a higher position who is not selected will be so advised in writing within 20 school days after the position has been filled. Such applicants shall have the right to go through the grievance procedure.

This proposal would provide bargaining-unit employees information on vacancies that would represent promotional opportunities. It also provides the Teamsters copies of this information. DCPS's only contention is that the proposal would provide information on positions outside the bargaining unit, which the Teamsters do not represent. DCPS asserts that the promotion procedures therefore "do not vitally concern" bargaining-unit employees' terms and conditions and so the proposal is nonnegotiable.

Nothing in the CMPA proscribes the negotiability of the provisions of this proposal. The information is sought for use by bargaining-unit employees and is plainly germane to the terms

and conditions of their employment. We find DCPS's objection to this proposal to be frivolous and the proposal negotiable.

Proposal No. 9:

ARTICLE XXXI. - TEMPORARY APPOINTMENTS, TRANSFERS AND DETAILS

B. Transfers

Paragraph 1.

Employees displaced by the elimination of jobs through job consolidation (combining the duties of two or more jobs), the installation of new equipment or machinery, the curtailment or replacement of existing facilities, the development of new facilities, or for any other reason, shall be permitted to exercise their seniority rights to transfer to any other vacancy for which they are qualified. An employee transferred as a result of the application of this provision may be given reasonable training needed to assume the duties of the job in which he is transferred.

Paragraph 2.

Employees desiring to transfer to other positions shall submit an application in writing to their immediate supervisor for transmittal through supervisory channels with a copy to the division director. The application shall state the reason for the requested transfer. Employees requesting transfers for reasons other than the elimination of jobs shall be transferred to vacancies for which they qualify on the basis of seniority; provided that such transfer shall not adversely affect the operation of the work site from which the employee is leaving. The school system shall respond to the employee's transfer request within twenty (20) work days.

Paragraph 3.

If a transfer is granted in response to an employee's request, such employee shall be

ineligible to request another transfer within a one-year period.

Paragraph 4.

Involuntary transfers or details shall be based on operational requirements and shall be in the inverse order of seniority, except in emergencies and in cases where it would create a hardship on the employee and/or the operations at the work site.

DCPS contends that the proposal interferes with management's sole right to transfer an employee under D.C. Code Section 1-618.8(a)(2) and is thereby nonnegotiable. The Teamsters assert that the proposal merely provides procedures for transferring employees and addresses the impact and effect of management decisions on transferred employees, while leaving in management the ultimate decision to transfer employees.

As to Paragraphs 1, 2 and 3, we agree with the Teamsters' assessment. There is nothing in these paragraphs that violates management's sole right to decide on a transfer. The proposal is limited to transfer procedures and accommodations for those employees transferred.

In reviewing Paragraph 1, we note that the circumstance addressed does not constitute a "transfer" within the meaning of Section 1-618.8(a)(2) but rather describes the use of seniority by an employee whose job is eliminated, so that the employee no longer has a position, which is commonly known as "bumping." The proposal addresses procedures that such employees may exercise for placement in vacant positions for which they are qualified. See discussion of issues number 1 and 2 in University of the District of Columbia Faculty Association and University of the District of Columbia, supra, Slip Op. No. 48 at 3-5. However, Paragraph 4 places absolute limitations on management's sole right to transfer that are incompatible with D.C. Code Section 1-618.8(a)(2).

Therefore we find Paragraphs 1, 2, and 3 to be negotiable and Paragraph 4 to be nonnegotiable.

Proposal No. 10:

ARTICLE XXXI. - TEMPORARY APPOINTMENTS, TRANSFERS AND DETAILS

D. Details

Employees detailed to a higher position for more than sixty (60) days shall be paid at the higher rate beginning with the first full pay period after the sixty (60) days detail. Such detail shall not be extended without the mutual consent of the affected employee. All such details shall be put in writing as soon as possible.

Teamsters describe this proposal as ensuring "that a detailed employee (as a result of a management decision to detail) receives comparable pay for his or her work after a specified period of time." DCPS contends, however, that the proposal interferes with management's sole right to assign employees pursuant to D.C. Code Section 1-618.8(a)(2) to the extent that it requires "mutual consent before a detail can be extended" and thus is nonnegotiable.

We agree with both the Teamsters and DCPS. Though this is presented as a single issue, it contains separate provisions that are severable. To the extent that the proposal addresses compensation during a detail, it is clearly negotiable pursuant to the express provisions of D.C. Code Section 1-618.17 concerning collective bargaining over compensation.

However, we find the extension of details to be a form of assignment. The requirement of the second sentence of the proposal that an employee must consent before management may extend a detail after the first 60 days thus infringes on management's sole right to assign employees under Section 1-618.8(a)(2). Such a provision cannot be seen as procedural or an accommodation as we find the last sentence in the proposal to be. We therefore find the proposals in the first and third sentences here negotiable and that the proposal in the second sentence nonnegotiable.

Proposal No. 11:

ARTICLE XXXI. - TEMPORARY APPOINTMENTS, TRANSFERS AND DETAILS

E. Reduction in Force

Paragraph 1.

In the event of a layoff (reduction in force), employees shall laid off (sic) in the inverse order of seniority and in accordance

with the Military Selective Act (sic) of 1967, as amended. Temporary employees shall be laid off first, probationary employees shall be laid off second, and permanent employees last.

Teamsters describe the proposal as addressing procedures for implementing a reduction-in-force (RIF) and accommodating its impact and effect on employees. DCPS argues that the proposal is inconsistent with D.C. Code Section 1-625.2 because it assigns "control [of] all aspects of reduction-in-force" to the "Military Selective Act of 1967" (sic), though "it is the CMPA, and not the [federal statute] that is the relevant document" here.

We find this proposal to be negotiable. D.C. Code Section 1-625.2 provides minimum criteria that shall be included in any established reduction-in-force procedure. It does not dictate the priority that is to be afforded these minimum criteria nor does it preclude the addition of other criteria. Moreover, we cannot find that a federal law is in conflict with and displaced by a D.C. law without a specific and compelling showing that such a result is unavoidable. DCPS has made no such showing. [Member Johnson dissents]

Proposal No. 12:

ARTICLE XXXIII. - OVERTIME

Time and one-half (1 1/2) shall be paid for all hours worked in excess of forty (40) hours in a week or in excess of eight (8) hours in a day.

DCPS makes the bare and general assertion that the Teamsters' proposal on overtime violates the Fair Labor Standard Act. Our review of the proposal reveals no inconsistency with that law. The burden lies with DCPS to establish its contentions with respect to proposals it declares are nonnegotiable including the allegation herein that it violates the Fair Labor Standards Act. With nothing more from DCPS, we find this proposal negotiable.

Proposal No. 13:

ARTICLE XXXIV. - WORK YEAR

The work year for Attendance Counselor EG-09 shall not exceed the length of the normal work year for

Teachers/Attendance Officers.

A. Hours of Work

The normal workday for Attendance Counselor EG-09 shall be from 8:30 a.m. to 3:30 p.m., inclusive of a duty-free lunch period.

B. All employees shall be granted two (2) fifteen (15) minute breaks during their regular work shift. Whenever possible, it shall be scheduled near mid-morning and mid-afternoon.

C. Extra Duty Pay

1. Extra duty pay activities shall include only those activities performed before and after school, as determined by the Board of Education.
2. Compensatory time for extra duty shall be paid at the overtime rate of one and one-half (1 1/2) times the hourly rate of pay.

The Teamsters assert that the affirmative right to engage in collective bargaining over the subjects contained in the above proposal is found in the following statutory provision:

Section 1-613.1(a)(2)

The basic workweek and hours of work for all employees of the Board of Governors of the School of Law, the Board of Education and the Board of Trustees of the University of the District of Columbia shall be established under rules and regulations issued by the respective Boards: Provided, however, that the basic work scheduling for all employees in recognized collective bargaining units shall be subject to collective bargaining, and collective bargaining agreements shall take precedence over the provisions of the subchapter.

The Teamsters argue that all of their proposed provisions are within this negotiable framework. Any contention by DCPS that the proposal violates management's right under Section 1-618.8(a)(5) is qualified by Section 1-613.1(a)(2). Furthermore, the Teamsters contend that establishing the length of the work

year for attendance counselors does not establish the starting date of the school year and therefore does not impact on the D.C. Board of Education's authority to determine education policy pursuant to D.C. Code Section 31-102, and is therefore not governed by the Board's decision in Washington Teachers' Union, Local 6, AFL-CIO and the District of Columbia Public Schools, DCR _____, Slip Op. No. 144, PERB Case No. 85-U-28 (1986), aff'd, Public Employee Relations Board, et al. v. Washington Teachers' Union, Local 6, AFT, 556 A. 2d 206 (D.C. Ct. App.) (1989).

We disagree. In our view the length of the work year is not reasonably distinguishable from the opening day issue that we found nonnegotiable in Washington Teachers' Union, Local 6, AFL-CIO and D.C. Public Schools, supra.

In that case we concluded that "the opening day" and "the determination of duty days during the school year" were "subjects that have such high policy implications" as not to subject DCPS to the CMPA's requirement to engage in collective bargaining with respect to them. This introductory paragraph would determine the number of duty days for attendance counselors by tying them to the length of the work year for teachers/attendance officers. To this extent we find the proposal nonnegotiable.

We find that Section "A" of the proposal is nonnegotiable for the same reasons that the introductory paragraph is outside the scope of bargaining. While the proviso in D.C. Code Section 1-613.1(a)(2) supra stipulates that "work scheduling for all employees shall be subject to collective bargaining," we conclude that scheduling, a bargainable subject, is distinguishable from the establishment of the "basic workweek" and "hours of work" - matters reserved to management. Proposing the hours of a "normal workday" directly contravenes the Board of Education's right under Section 1-613.1(a)(2) to establish the hours of work.

With respect to Sections B and C, we find both of these proposed provisions to be negotiable.

Proposal No. 14

ARTICLE XXXVI. - ANNUAL LEAVE - ATTENDANCE COUNSELOR

ANNUAL LEAVE

Paragraph 5.

Employees on vacation shall not be subject to call-back in case of emergency.

DCPS simply asserts, without explanation, that this proposal "violates the plain meaning of D.C. Code Section 1-618.8(a)(6) which retains in management the sole right '[t]o take whatever action may be necessary to carry out the mission of the District in emergency situations'." (emphasis in original) But the collective bargaining authorization of Section 1-613.3(a)(5) (see footnote ^{3/}) is an explicit exception to the application of Section 1-618.8(a) to provisions for leave.

Why these explicit words should be ignored, and why the usual construction canon that specific provisions are to take precedence over general ones should here be ignored, DCPS does not say. We know of no reason to ignore either source of instruction and therefore believe that the governing statute instructs us that matters of leave are bargainable. The proposal here concerns just such a matter and is, therefore, a mandatory subject of bargaining under the law that governs us.

Member Squire dissents from this ruling in an opinion appended hereto.

Proposal No. 15:

ARTICLE XLVII. - HOLIDAYS RECOGNIZED AND OBSERVED

The following days shall be recognized and observed as paid holidays:

-- New Year's Day
Martin Luther King's Birthday
Washington's Birthday
Memorial Day
Independence Day
Labor Day
Columbus Day
Veteran's Day

^{3/} D.C. Code Section 1-613.3(a): "All employees shall be entitled to earn annual and sick leave as provided herein, except:

* * *

Provided, however, that leave for all employees included within recognized collective bargaining units shall be subject to collective bargaining and collective bargaining agreements shall take precedence over the provisions of this subchapter."

Thanksgiving Day
Christmas Day
One Personal Holiday
Birthday Personal Holiday
Inauguration Day (every four years)
Any other legal holidays declared by the
District Government

Eligible employees shall receive one (1) day's pay for each of the holidays listed above on which they perform no work. Whenever any of the holidays listed above shall fall on Saturday, the preceding Friday shall be observed as the holiday. Whenever any of the holidays listed above shall fall on Sunday, the succeeding Monday shall be observed as the holiday.

Teamsters assert that nothing in the CMPA restricts the negotiations of holidays. They point out that the management's right clause under D.C. Code Section 1-618.8(a) does not state that the determination of holidays is an area over which management retains the sole authority. Moreover, D.C. Code Section 1-613.2 which lists public holidays is not exclusive with respect to negotiations over the subject of holidays. Most importantly, the proposal here is more appropriately governed by D.C. Code Section 1-613.3(a) which provides "that leave for all employees included within recognized collective bargaining units shall be subject to collective bargaining and collective bargaining agreements shall take precedence over the provisions of this subchapter." The two additional "holidays" proposed are actually personal leave days and should not be found nonnegotiable simply by their characterization as "holidays." ^{4/}

^{4/} DCPS argues that D.C. Code Section 1-613.2 is an exclusive list of public holidays and cites to the legislative history of this provision which states:

Section 1202 establishes the legal public holidays. The holidays are named in the act so as to be nonnegotiable and to make it clear what they are. Legal support for this action is found in Tulsa Theatrical Stage Employees Union Local No. 355 v. Broadway Theatre League of Tulsa, Okla. _____, 550 P. 2d 922 (1976) cert. den. 97 S. Ct. 386 (U.S. 1976).

This proposal is not controlled by our decision in Washington Teachers Union, Local 6, AFL-CIO and District of Columbia Public Schools, supra. We see substantial and controlling differences between the cases. There, the question was whether the school calendar -- a phenomenon affecting every "citizen" of the schools community in the same way -- was bargainable; specifically, the issue closest to ours here was whether the school board's action in making Good Friday a duty day rather than a school holiday was in violation of its duty to bargain. There, the Board answered "no" and the D.C. Court of Appeals held that the Board's answer was within its zone of decision though not compelled. Slip Op. at 6, 10, 556 A.2d. 206. Here there is no question of the designation of a particular day or days as "holidays" for the entire school system. Instead, we have a proposal that each unit employee be allowed to take off that person's birthday and one other personally-chosen day. The practical effect of this proposal would have nothing like the system-wide consequence of the Good Friday proposal in the earlier case, hence its policy impact is significantly -- and we say, decisively -- less. The Washington Teachers' Union case was not a pronouncement on all issues in which a date figures. We conclude, therefore that the proposal here is negotiable under the CMPA.

Proposal No. 16:

ARTICLE LI. - COMPENSATION ^{5/}

Collective bargaining with respect to compensation is expressly authorized as provided in Sections 1-602.6, 1-618.16 and 1-618.17. DCPS here challenges its duty to bargain compensation for fiscal year 1990. The only argument raised by DCPS incorporates by reference those made in an unfair labor practice proceeding pending before the Board in PERB Case No. 90-U-05 concerning DCPS's alleged refusal to bargain in good faith.

(footnote 4 Cont'd)

In contrast to leave, legal public holidays are established through legislative or other government decisions, not through collective bargaining, and are not limited to a particular employer/employee relationship.

^{5/} The proposal is appended to this Opinion.

The question before the Board in a negotiability appeal is whether or not a particular matter is negotiable. No cognizable issue having been raised by DCPS concerning the negotiability of this proposal, we conclude that the Teamsters' proposal on compensation is clearly negotiable.

Proposal No. 17:

MEDICAL INSURANCE

Effective November 1, 1989 the current Medical Insurance Plan shall be discontinued and the Teamsters Plan shall replace it. The Board shall remit to the Teamsters Health Trust \$365.73 per month per employee for 12 month employees.

Effective June 1, 1990 the contributions shall be increased by \$32.93 per month for 12 month employees.

When an employee retires she/he shall revert to the same plan coverage as presently afforded to such retirees as under current conditions.

DCPS objects only to the third paragraph of this proposal concerning the reversion of retired employees to the medical insurance plan the employee was afforded prior to November 1, 1989. DCPS contends that it is incapable of providing employees what is sought. However, in its brief, the Teamsters eliminated this paragraph. In view of this action by the Teamsters, no appeal with respect to this proposal is now before us.

Proposal No. 18:

MAINTENANCE OF STANDARDS

The Board agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at no less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

It is agreed that the provisions of this Section shall not apply to inadvertent or bonafide errors made by the Board or the Union in applying the terms and conditions

of this Agreement if such error is corrected within ninety (90) days from the date of error.

This provision does not give the Board the right to impose or continue wages, hours and working conditions less than those contained in this Agreement.

Teamsters assert that its general intent by the proposal is to "preclude the loss of a benefit by the inadvertent failure to expressly incorporate the benefit in a new agreement." DCPS counters that the proposal's broad language in the first paragraph does not take into consideration those matters that are reserved to management under D.C. Code Section 1-618.8(a).

Notwithstanding the Teamsters' representation that the proposal extends only to negotiable "working conditions," the proposal unqualifiedly states "general working conditions." It is overly broad to the extent that it does not make any exception for the management rights given by D.C. Code Section 1-618.8(a). The proposal is therefore nonnegotiable in its present form.

Proposal No. 19:

DISCIPLINE AND DISCHARGES ^{6/}

In Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools, supra, Slip Op. No. 249 at p.8, we held that an obligation to bargain can arise from a nonnegotiable management right decision which extends to "procedural matters concerning the levels of discipline...[.]" We held further that bargaining rights extend also to matters addressing the impact and effect of such management decisions on bargaining-unit employees. See, International Association of Firefighters, Local 36 and District of Columbia Fire Department, supra, and University of the District of Columbia Faculty Association and the University of the District of Columbia, supra. Teamsters argue that the provisions of their progressive discipline and discharge proposal are within the framework established by the Board in these cases and are thus negotiable.

DCPS contends that the proposal is "within the prohibited subjects which are excepted [under D.C. Code Section 1-618.8

^{6/} The proposal is appended to this opinion.

(a)(2)] from the overall obligation to bargain collectively." Specifically, the proposal is alleged to "limit[] incidents for which the penalty of immediate discharge can be assessed against an employee" and accordingly is nonnegotiable. We disagree.

We find that the proposal contains only procedures to govern a progressive disciplinary policy. Nothing in these procedures prevents DCPS from determining cause for discipline. The proposal merely establishes a progressive order under which discipline shall be taken. The proposal does not take away management's right "to suspend, demote, discharge or take other disciplinary actions against employees for cause"; rather, it would delay when a particular disciplinary measure for a specific cause may take effect. For the foregoing reasons, we find this proposal to be negotiable.

Proposal No. 20:

SUBCONTRACTING

For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the Board agrees that no work or services of the kind, nature or type covered by, presently performed, or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plant, person or nonunit employees, unless otherwise provided in this Agreement.

Teamsters contend that notwithstanding the fact that its proposal bars subcontracting completely rather than restricting it to certain circumstances, the proposal is not nonnegotiable since subcontracting is clearly bargainable under the CMPA. DCPS argues that the plain language of the proposal forbids it from subcontracting under any circumstances and thus would violate management's right pursuant to D.C. Code Section 1-618.8(a)(4) "[t]o maintain the efficiency of the District Government operations entrusted to them" and (a)(6) "to take whatever actions may be necessary to carry out the mission of the District government in emergency situations."

Although we agree that not all proposals with respect to subcontracting are nonnegotiable under the CMPA, the presumption of negotiability under D.C. Code Section 1-618.8(b) does not override express proscriptions under other provisions of the CMPA. Because of the absolute and unyielding language of this proposal, it violates the proscriptions of D.C. Code Section 1-

618.8(a)(6). As such, the proposal is nonnegotiable.

Proposal No. 21:

SEPARABILITY AND SAVINGS ^{7/}

The Teamsters have deleted, in their brief, the only provision that DCPS had declared nonnegotiable as sanctioning strike action. In view of this action by the Teamsters, there is no dispute before us with respect to this proposal and therefore no issue with respect to negotiability remains for our determination.

Proposal No. 22:

DRUG TESTING REQUIREMENTS ^{8/}

The Teamsters arguments for finding its proposal negotiable can essentially be summarized as follows. It contends drug testing of these employees (attendance counselors) and the resulting discipline that may be imposed has an impact upon employees that is direct and substantially greater than its impact upon students and parents of students. In this regard, says the Teamsters, drug testing cannot be considered educational policy subject to the exclusive authority of DCPS. Moreover, there are no statutory provisions concerning drug-testing which preempt the matter addressed in its proposal or that proscribed collective bargaining with respect to any aspect of it. Superintendent of Schools' directives, rules and/or regulations do not bar collective bargaining, the Teamsters contend, citing D.C. Code Section 1-604.4(h). Teamsters also incorporated by reference the Union arguments made in Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools, supra, (hereinafter referred to as PERB Case No. 89-U-17) concerning this subject matter.

DCPS raises many of the same arguments it made in PERB Case No. 89-U-17. DCPS asserts that pursuant to D.C. Code Section 31-102 and the Board of Education's statutory authority to issue

^{7/} The proposal is appended to this opinion.

^{8/} The proposal is appended to this opinion.

rules and regulations under D.C. Code Sections 1-609.1(b) and 1-609.1(b)(2) the subject matter of employee-drug testing is within its exclusive authority. DCPS further contends as a general matter that the proposal violates management's right "[t]o maintain the efficiency of the District government operations" and to determine internal security practices under D.C. Code Section 1-618.8(a)(4) and (a)(5).

DCPS specifically objects to the provisions of the proposal concerning employee training, asserting that requiring training during paid-duty hours violates management's right to assign work under D.C. Code Section 1-618.8(a)(2). It also contends that the proposed standard of "probable suspicion" which limits the circumstances under which drug testing may take place interferes with management's right, based on safety concerns for school-age children, to determine its internal security practices pursuant to D.C. Code Section 1-618.8(a)(5). Finally, DCPS contends that the proposal's limitations on management's right to impose discipline when employees test positive violates its rights under D.C. Code Section 1-618.8(a)(2).

DCPS raises no argument that it did not raise in its brief in our recent drug-testing case involving these parties but a different bargaining unit, PERB Case No. 89-U-17 cited supra. In that case, the bargaining unit consisted of bus drivers and attendants; this case concerns attendance counselors. In PERB Case No. 89-U-17 the Board rejected DCPS's arguments that D.C. Code Section 31-102, 1-609.9(b), and 1-609.1(b)(2) vested exclusive authority in DCPS to establish all aspects of a drug-testing program notwithstanding the collective bargaining provisions of the CMPA.

Before we can address any of the disputed provisions, we must respond to the underlying question i.e., whether or not DCPS's decision to adopt a drug-testing program is negotiable. As we stated in Teamsters Local Union No. 639 and 730 a/w International Brotherhood of Teamsters, supra, Slip Op. No. 249 at p.4, whether D.C. Code Section 1-618.8(a) exempts from the duty to bargain the decision to implement (or adopt) a drug-testing program is, in our view, based on the facts of the case. We conclude that because these employees' jobs as attendance counselors require their regular contact with students in the D.C. Schools, DCPS's decision to adopt a drug-testing program with respect to them is [like that in PERB Case No. 89-U-17] nonnegotiable under D.C. Code Section 1-618.8(a)(4) and (5).

We further find that establishment of the circumstances under which an employee will be tested (which we refer to hereafter as the "standard" for testing, e.g., testing only upon

reasonable suspicion that an employee is under the influence of a controlled substance or substances, or testing as part of a regularly required physical examination) is so intimately a part of the decision to test at all that it, too, is here not a mandatory subject of bargaining. Critical to this decision is the fact that a proposal on a mandatory subject of bargaining may be selected by an arbitrator or arbitration panel to become part of a collective bargaining agreement. We believe that the policy content of the standard for testing is so great that - with respect to this unit - we should not declare it to be within the control of a third-party decision maker without a clear direction to do so in the governing statute. We therefore find the proposal's establishment of a standard for drug testing of employees, i.e., probable suspicion, to be nonnegotiable.

Turning to the training provision, we find this to be merely an accommodation for employees who will be affected by the drug-testing program. It is not the assignment of work. We find this provision to be negotiable.

With respect to most of the remaining provisions at issue here, we follow our ruling in PERB Case No. 89-U-17 that neither D.C. Code Section 1-618.8(a)(4) nor (a)(5) limits DCPS's duty to bargain over procedures and the impact and effect of a legally unilateral management decision including procedural matters concerning the levels of discipline prescribed thereunder. Most of the Teamsters' proposal falls within these parameters and is therefore negotiable. However, paragraph three under "Consequences of a Positive Test" mandates that a positive test result during a probationary period requires DCPS to discharge the employee immediately. That paragraph would remove management's discretion whether "to suspend, demote, discharge or take other disciplinary action against employees for cause." We therefore find this provision of the proposal to be nonnegotiable.

We find all other provisions of the Teamsters drug-testing proposal to be within the bounds of negotiability discussed above and therefore negotiable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent District of Columbia Public Schools (DCPS) is required to bargain upon request with respect to the proposals of Teamsters Local 639, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO's (Teamsters) concerning:

- a. Article V. - Seniority, Section A.
 - b. Article XXII. - No Strikes and No Lockouts.
 - c. Article XXV. - Safety and Health, Section 2 - Employees Working Alone.
 - d. Article XXVII. - Inclement Weather Work, Section 2 - Reporting Time.
 - e. Article XXX. - Promotion Procedures, Section A., B., C. and D.
 - f. Article XXXI. - Temporary Appointments, Transfers & Details, Section B. - Transfers, Paragraphs 1, 2 and 3.
 - g. Article XXXI. - Temporary Appointments, Transfers & Details, Section D. Details
- first and last sentence of proposal.
 - h. Article XXXI. - Temporary Appointments, Transfers & Details, Section E. Reduction in Force, Paragraph 1.
 - i. Article XXXIII. - Overtime.
 - j. Article XXXIV. - Work Year, Sections B. and C.
 - k. Article XXXVI. - Annual Leave, Paragraph 5.
 - l. Article XLVII. - Holidays Recognized and Observed.
 - m. Article LI. - Compensation.
 - n. Discipline and Discharge.
 - o. Drug Testing Requirements
-With the exception of decision to adopt a program, the standard for drug testing employees and the second to last paragraph [concerning discipline of probationers who test positive].
2. The Respondent DCPS is not required to bargain with respect to the Teamsters' proposals concerning:
- a. Article VII. - Seniority for Stewards.
 - b. Article XXIII. - Protection of Rights.
 - c. Article XXVII. - Loss or Damage.

- d. Article XXXI. - Temporary Appointments, Transfers and Details, Section B. Transfers, Paragraph 4.
- e. Article XXXI. - Temporary Appointments, Transfers & Details, Section D. Details
- second sentence of proposal.
- f. Article XXXIV. - Work Year
- Preface
- Section A.
- g. Maintenance of Standards
- h. Subcontracting
- i. Drug Testing Requirements
- Decision to adopt drug test program
- Standard, i.e., probable suspicion
- Second to last paragraph [concerning discipline of probationers who test positive].

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 24, 1990

Dissenting Opinion of Member Kohn concerning Proposal No. 6 (Loss or Damage Provision)^{9/}

DCPS raises two objections to the negotiability of this proposal. First, DCPS asserts that D.C. Code subsection 1-1215(c) establishes a rule that determination of appropriate disciplinary action against a D.C. Government employee for a negligent act may not be restricted (for example, by a collective bargaining agreement). Thus, says DCPS, the proposal's use of a gross negligence standard makes the proposal illegal. I believe that this is a misreading of subsection 1-1215(c). That subsection, as I read it, is simply a disavowal; it says that nothing "in this section [1-1215]" is to be construed to restrict appropriate D.C. Government disciplinary action against an employee for a negligent act or omission. The subsection says nothing at all about whether any other section of the D.C. Code is to be so read, much less about whether an exclusive representative may require bargaining on such a restriction.

Beyond the words of subsection (c), the purpose and wording of Section 1-1215 as a whole support the proposition that subsection (c) does not establish a standard of conduct for which the D.C. Government may discipline its employees (or even the more limited question of charging those employees for loss or damage). Section 1-1215 is titled "Actions against District employees for negligent operation of vehicles barred; indemnification of medical employees; disciplinary actions." (words especially relevant here underlined). Subsection (a) does the first; it bars suits by third parties against District employees "for loss of or damage to property or for personal injury, including death, resulting from the operation by such employee of any vehicle" if the employee was acting within the scope of his/her employment. In short, subsection (a) was enacted to protect District employees driving vehicles from lawsuits for actions taken within the scope of their jobs. It says nothing at all about what actions the District may take against an employee in this circumstance.

Subsection (b) does the second thing the title refers to, thus giving certain District employees further protection: it provides that in any lawsuit by a private party in which a final

^{9/} Member Danowitz joins in this dissent.

order to pay money damages is entered against a medical employee of the District for personal or property damage caused by the employee's negligence within the scope of his employment, if the District has not bought appropriate insurance for the employee, then the District is to indemnify the employee "in the amount of said money damages." In short, in this situation it is the District, not the employee, that is to bear that cost.

Subsection (c) then follows as a provision underlining that this section of the Code which protects D.C. Government employees against financial obligations for their negligence in certain situations does not itself restrict appropriate disciplinary action against the employee. Medical employees may not be made to pay the costs to third parties of their negligence on the job; subsection (b) tells us that. But otherwise, says (c), Section 1-1215 does not address discipline for negligence. Subsection (c) thus may not be read as DCPS urges.

DCPS then makes a second argument, namely, that D.C. Code Section 1-1216 establishes that an employee "cannot" (DCPS' term) be relieved of liability to the District for negligent damage or loss regarding D.C. property, a restriction that would be violated by the Teamsters' proposal which is, therefore, illegal. Again, the answer to this argument lies in the statutory terms themselves. Section 1-1216 tells the reader that "Nothing in Section 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." Sections 1-1211 through 1214 concern, respectively, "Definitions" (none casting any light on our question); "Governmental immunity for negligent operation of vehicles by District employees" (which is a limited waiver of the District Government's sovereign immunity in certain situations, and casts no light here); "Action against employee barred by judgment against District; notice of claim; administrative disposition of claim as evidence" (likewise irrelevant here); and "Excessive verdicts" (re actions described in 1212, irrelevant here). Section 1-1215 we have discussed. Section 1216 emphasizes just what a reading of those prior sections tells us: none of them address 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 and this dissent. Our point is that Section 1-1216 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, and no other statutory provision has been cited to us. 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.

Dissenting Opinion of Member Squire concerning Proposal No. 14 -
(Annual Leave)

The majority contends that "[D.C. Code Section] 1-613.3(a)(5) is an explicit exception to the application of D.C. Code Section 1-618.8(a)(b)" with respect to the negotiability of leave. That Section 1-613.3(a)(5) provides for an "explicit exception," I agree. However, this "explicit exception" is from, as Section 1-613.3(a)(5) provides, "the provisions of this subchapter." D.C. Code Section 1-613.3 is contained in "Subchapter XIII. Hours of Work; Legal Holidays; Leave." D.C. Code Section 1-618.8(a)(b) is a part of "Subchapter XVII. Labor-Management Relations." As such, D.C. Code Section 1-613.3(a)(5) does not remove the subject of leave from D.C. Code Section 1-618.8(a)(6)'s expressed reservation of management's sole right "to take whatever actions may be necessary to carry out the mission of the District government in emergency situations." emphasis added. Therefore, I find the proposal to be nonnegotiable.

TEAMSTER'S PROPOSAL

ARTICLE LI. - COMPENSATION

The parties agree that any provision of this Agreement requiring legislative action to permit its implementation, by enactment of law or by providing the additional funds in the annual operating budget therefore, shall not become effective until the appropriate body has given approval and provided the additional funds. Upon provision of such additional funds, the following compensation and benefits shall be provided effective upon the dates stated:

A. FISCAL YEAR 1990

Effective the first day of the first pay period beginning on or after October 1, 1989, the Board will increase the rate of pay in effect during the pay period that contained September 30, 1988, of employees covered by this Agreement by thirty-five percent (35%) in accordance with past methods of increasing rates of pay for these employees.

B. FISCAL YEAR 1991

1. Effective the first pay period beginning on or after October 1, 1990, the rate of pay of employees covered by this Agreement shall be adjusted by thirty-five percent (35%) in accordance with past methods of increasing rates of pay for these employees.

C. FISCAL YEAR 1992

1. Effective the first pay period beginning on or after October 1, 1991, the rate of pay in effect on September 30, 1991 for employees covered by this Agreement will be adjusted by thirty-five percent (35%), in accordance with past methods of increasing rates of pay for these employees.
2. Effective the first day of the first pay period beginning on or after April 1, 1992, the then current rate of pay may be further adjusted by a rate not to exceed twenty-five percent (25%) above the Fiscal Year, 1990 rate of pay.
3. Any such rate adjustment shall be determined based on the percentage increase above thirty-five percent (35%) in the Consumer Price Index-W (CPI-W) for the Washington, D.C. Standard Metropolitan Statistical Area between November, 1990 and November, 1991 as reported by the Bureau of Labor Statistics, U.S. Department of Labor, subject to the following limitations:

- (a) Such mid-year rate increase shall be in increments of .5 percent based on each full .5 percent increase in the CPI-W between November 1990 and November, 1991; and,
 - (b) Shall be calculated on the Fiscal Year, 1991 representative rate of pay in accordance with past methods of increasing rates of pay for these employees.
- D. Any employee who has received a pay increase under any other authority and whose position is added to the Recognition Article of this Agreement, shall not be covered by the provisions of this Article for any fiscal year in which they have received a pay increase pursuant to the other authority.
- E. Employees will advance on the pay scale up to and including Step _____ upon receiving a rating of satisfactory or better for the previous year. Employees will advance on the pay scale to Step _____ upon receiving a better-than-satisfactory rating for the previous year. Any employee considered to be unsatisfactory must be given a "Letter of Warning for Unsatisfactory Work Performance," not less than ninety (90) days prior to the end of the rating period or the rating period must be extended so that the employee may be allowed at least 90 days to bring his/her total work performance to an overall level of satisfactory. The letter of warning must contain specific and definitive information concerning:
1. Which job requirements the employee is failing to meet satisfactorily;
 2. What can be done to bring performance up to a satisfactory level;
 3. What efforts will be made to assist the employee to improve performance; and,
 4. That an unsatisfactory rating will be assigned if performance does not improve to meet required standards.

The Board agrees that within ninety (90) days after the signing of this Agreement, the Union and all employees shall receive a written guideline defining what performance criteria must be met in order to receive a better-than-satisfactory rating.

TEAMSTER'S PROPOSAL

April 26, 1990

ARTICLE _____

Discipline and Discharge

A. Discipline measures shall be taken for just cause only and in the following order for each offense of a similar nature:

- Oral reprimand;
- Written reprimand;
- Employee subject to suspension;
- Employee subject to discharge;

Provided, however, that an employee may be subject for immediate discharge for the following:

1. Wilful damage to school Board property;
2. Drunkenness on duty;
3. On duty use of drugs not prescribed or obtained illegally;
4. Theft.

Warnings for one offense cannot be used to pyramid discipline for a different offense.

- (a) Oral reprimand may be cited as a basis only within one (1) year from the date of issuance.
- (b) A written reprimand may be cited as a prior offense only within two (2) years of the effective date of the reprimand; and
- (c) A prior corrective or adverse action may be cited as a prior offense only within three (3) years from the effective date of the action.

B. Any disciplinary action or measure imposed upon an employee must be received by the employee, if hand delivered, or postmarked (if mailed) within fifteen (15) working days of the matter upon which the proposed action is based.

C. If the Board has reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public.

D. For suspension actions of five (5) work days or more, or discharge, an employee shall be notified in writing with a copy to the Union no later than fifteen (15) work days prior to the effective date. The notice shall include the intended action, with reasons for the action so stated. From within five (5) work days of the receipt of the notice, the employee has the

Teamster's Proposal
Discipline and Discharge
Page Two

right to reply in writing, or in person, to all reply. The decision shall go into effect as stated unless, upon consideration by the responsible official of all relevant facts, the action is to be modified, at which time the employee and the Union shall be so notified, in writing of the modification.

E. Any employee found to be unjustly suspended or discharged shall be reinstated with full compensation for all lost time and with full restoration of all other rights and conditions of employment.

F. In the event an employee is suspended pending the outcome of arrest, and is later found not guilty, he shall be entitled to indemnification in accordance with existing law and shall be reinstated with full benefits.

G. In cases involving suspension of less than five (5) days only, no employee shall be suspended without first being given an advance written notice of five (5) work days. A copy of such written notice shall also be sent to the Union.

TEAMSTER'S PROPOSAL

April 26, 1990

ARTICLE _____

Separability and Savings

If any Article or Section of this Agreement hereto be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any Article or Section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this Agreement, hereto, or the application of such Article or Section to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby.

In the event that any Article or Section is held invalid or enforcement of or compliance with which has been restrained, as above set forth, the parties affected thereby shall enter into immediate collective bargaining negotiations after receipt of written notice of the desired amendments by either Employer or Union for the purpose of arriving at a mutually satisfactory replacement of such Article or Section during the period of invalidity or restraint. There shall be no limitations of time for such written notice. If the parties do not agree on a mutually satisfactory replacement within sixty (60) days after receipt of the stated written notice, either party shall be permitted all legal and economic recourse in support of its demands notwithstanding any provisions of this Agreement to the contrary.

TEAMSTER'S PROPOSAL
DRUG TESTING REQUIREMENTS

Employee Education and Employee Assistance Program

Prior to the implementation of a testing program for evidence of substance abuse, the Employer shall conduct substance abuse training for all employees as described below. All training shall take place during normal work hours, or immediately before or after scheduled shifts, on employer-paid time.

Training shall be conducted in groups of not more than 20 employees, by an individual selected by the Employer and approved by the Union who is qualified by training experience to conduct such training and to answer questions which may arise.

Training shall last a minimum of two hours and shall include, a minimum:

- o A description of the Employer's Employee Assistance Program, and how employees may make use of it at no cost, and with a guarantee of strict confidentiality.
- o An explanation of medical insurance coverage for substance abuse treatment.
- o The reasons why the Employer is implementing the drug testing program.
- o What drugs will be tested for, and how long they can be detected in body fluids.
- o The procedures for establishing probable suspicion collecting urine samples, and maintaining the chain-of-custody.
- o The split sample option.
- o The consequences of a positive test, including the suspension period and the probationary period.

Also prior to implementation, the Employer shall put into place, in consultation with the Union, and Employee Assistance Program which includes the opportunity for counseling and for substance abuse evaluation and rehabilitation at no cost to the employee.

Basis for Testing

Testing for evidence of substance abuse shall only be done on the basis of probable suspicion that an employee is under the influence of controlled substances.

Probable suspicion must be based on specific personal observations that employer representatives can describe concerning the appearance, behavior, speech, or breath odor of the employee. Probable suspicion must be based on direct, first-hand observations by at least two employer representatives who shall have received training in substance abuse detection. These observations shall be documented in writing at the time the employee is sent to the clinic. A copy shall be provided immediately to the shop steward or other responsible union representative. Probable suspicion may not be based solely on third party observations or reports.

Procedures

When an employer establishes probable suspicion that the employee is under the influence of a controlled substance, as described above, the employer may require the employee to go to a medical clinic to provide urine samples for laboratory testing.

At the time that the employee is told to report to the clinic, the employer representative shall (in the presence of the union steward) explain to the employee the consequence of refusal to agree to the testing, and the consequences of a positive test result.

An employer representative shall accompany the employee to the clinic.

The employee shall be placed on leave without pay beginning at the moment the employer representative informs him/her of the "probable suspicion." He/she shall remain on leave until the test results are received. If the test result are reported as negative, the employee shall be paid for all lost time, including any missed overtime and other benefits. If the results are reported as positive, the resulting person action (as described herein) shall be made retroactive to the time at which the person was first placed on leave.

Union Representation

Whenever possible, the individual's shop steward or other available union representative shall be summoned by the employee is approached. The steward shall be present when the employee is first told of the probable suspicion, and shall accompany the employee to the clinic.

Refusal

If the employee declines to provide the required samples, he/she shall again be told of the consequences of refusal. An employee's continued refusal to provide the required samples shall be treated in the same way as a positive test result.

Testing and Chain-of-Possession Procedures

Before being required to produce samples, the employee shall have the entire procedure explained by the person responsible for receiving, preparing and shipping the specimen. The explanation shall include the conditions under which the specimen is to be produced, chain-of-possession procedures and the nature in which the test results will be reported.

The employee shall select one sample collection kit at random from a supply of at least ten kits. As an added precaution, these kits shall be shrink-wrapped or the specimen bottles shall be individually sealed as a safeguard against prior contamination.

In this urine collection procedure, urine shall be obtained directly in the two tamper-resistant urine bottles contained in the specimen collection kit. At the employee's option, the urine specimen may be collected in a wide-mouthed "clinic" specimen container, which shall remain in full view of the employee until the urine is transferred to, and sealed and initialed in, the two tamper-resistant urine bottles in the kit. The Employer may request the clinic personnel administering the urine drug test to take such steps as checking the color and temperature of the urine specimens to detect tampering or substitution, provided that the employee's right to privacy is guaranteed, and that no observation takes place while the employee is producing the urine specimens.

The urine containers shall be sealed, labeled, and initialed by the employee without the containers leaving the employee's presence. The specimens must be immediately placed in a transportation container, which shall be sealed and again initialed by the employee, and sent via air courier or other fastest available means to the designated testing laboratory.

The person responsible for collecting the urine specimen from the employee shall initiate a chain of custody form. All handling and transportation of the urine specimen shall be through chain of custody procedures as specified in the Mandatory Guidelines for Federal Workplace Drug Testing Programs (hereinafter referred to as the HHS Guidelines), published by the U.S. Department of Health and Human Services.

through chain of custody procedures as specified in the Mandatory Guidelines for Federal Workplace Drug Testing Programs (hereinafter referred to as the HHS Guidelines), published by the U.S. Department of Health and Human Services.

After producing the sample, the employee shall be escorted home by the employer representative and shop steward.

Laboratory Analysis

The laboratory to which the sample is sent for analysis shall be selected by the Union and Employer for among those laboratories certified by the U.S. Department of Health and Human Services.

The laboratory shall be instructed to handle and test the urine specimen, and to report the results to the Medical Review Officer, according to the test methods, cutoff levels and procedures prescribed in the HHS Guidelines, with the following provision for the split sample procedure.

Split Sample Procedure

When a urine test kit is received by a laboratory, one sealed urine specimen bottle shall be removed immediately for testing. The shipping container with the remaining sealed bottle shall be immediately placed in secure refrigerated storage.

If the first urine specimen is reported by the Medical Review Officer as positive, the employee may, within 24 hours of being notified of the positive report, request that the second urine specimen be forwarded to a different testing laboratory of his/her choice for GC/MS testing. This laboratory shall be agreed upon in advance by the Union and the Employer and must be certified by the U.S. Department of Health and Human Services.

An employee who requests the second laboratory test shall at that time execute a special checkoff authorization to ensure payment for the testing.

If the employee chooses the optional second laboratory test on the "split sample," disciplinary action can only take place if the second laboratory confirms a positive results, based on the GC/MS cutoff levels listed in the HHS Guidelines. If the second laboratory test is negative, the employer shall reimburse the employee for all costs associated with the second test.

Consequences of a Positive Test

Upon a report of a positive test, an employee shall be continued on leave without pay. At the same time, the employee shall be given the opportunity to take advantage of the employee assistance program, and to enter a rehabilitation program if necessary.

If within 90 days of the initial positive test report the employee voluntarily submits to another urine test and the results of that test are reported as negative, the employee shall immediately be reinstated with no loss of seniority. This reinstatement will be subject to a probationary period of 9 months, during which time the employee may be subject to testing at any time without the necessity of establishing probable suspicion. However, in no event shall the employee be subject to more than two such tests during the probationary period. All procedures for specimen collection, chain of possession split sample, laboratory analysis and medical review described herein shall apply to drug testing during the probationary period.

During the probationary period, any positive test result will result in immediate discharge.

If the employee completes the probationary period without a positive drug test, the probation shall be removed and the initial positive test shall not be used in any future discipline or personnel action.