Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Local 36, International Association of Firefighters, AFL-CIO,	
Petitioner,	PERB Case No. 13-N-04
v.	Opinion No. 1466
	Motion for Reconsideration
District of Columbia Department of Fire and Emergency Medical Services,	
Respondent.	

DECISION

Local 36, International Association of Firefighters, AFL-CIO ("Union" or "Petitioner") seeks reconsideration, in part, of the Board's decision and order in *Local 36, International Association of Firefighters v. District of Columbia Department of Fire and Emergency Medical Services*, 60 D.C. Reg. 17359, Slip Op. No. 1445, PERB Case No. 13-N-04 (2013) ("Opinion No. 1445") on the grounds that the Board (1) erroneously made a decision on a proposal addressing the selection of technicians that was not before it and (2) erred in finding nonnegotiable the Union's proposal that "The basic workweek for members working in the Fire Fighting Division shall be 42 hours averaged over a 4-week period" and "[t]he 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.)

I. Statement of the Case

During negotiations for a successor collective bargaining agreement ("CBA"), the negotiator for the D.C. Department of Fire and Emergency Medical Services ("Agency" or "Respondent") sent his counterpart at the Union a letter asserting the nonnegotiability of proposals made by the Union. The Union filed with the Board a negotiability appeal ("Appeal") with respect to the thirteen proposals that the Agency had asserted were nonnegotiable. The Agency filed an answer. At the request of the Petitioner, the Acting Director, pursuant to Rule 532.5(a), directed the parties to submit written briefs regarding the Appeal. The parties filed their respective briefs July 8, 2013.

The Board issued a decision and order finding all proposals except Proposal 12 and Proposal 13 negotiable. Opinion No. 1445. The Union filed a Motion for Reconsideration with respect to the proposals that the Board found nonnegotiable. The Union requested that the two proposals be found negotiable for the reasons stated in the motion and the Union's July 8, 2013, brief. (Mot. for Recons. 9-10.) The Agency filed an opposition and requested a decision on the motion before April 21, 2014, the deadline by which the Agency was required to transmit a related arbitration award to the City Council. In view of that deadline, the Board issued its order on April 17, 2014, denying the motion for reconsideration and noting that a decision would follow. *Local 36, Int'l Ass'n of Firefighters v. D.C. Dep't of Fire & Emergency Med. Servs.*, Slip Op. No. 1461, PERB Case No. 13-N-04 (2014). The Board's decision and the reasons therefor are as follows.

II. Discussion

A. Proposal 12

Eight of the Union's thirteen proposals concerned the selection of technicians. The Union discussed the proposals concerning the selection of technicians collectively at pages 8-10 of its brief. Opinion No. 1445 reproduced the text of each of the Union's proposals, including those concerning selection of technicians, and assigned to the proposals individual numbers, which the Motion for Reconsideration declines to use. One of the Union's proposals regarding selection of technicians, Proposal 12, was a new article XX of the CBA entitled "Selection Criteria of Special Operations Companies (Rescue Squads, Hazardous Materials Unit, Fireboat)." The Board held Proposal 12 to be nonnegotiable. The Motion for Reconsideration claims that the Union was referring to that proposal when it stated in the introduction to its brief:

> The Department's March 5 letter declared non-negotiability as to multiple issues contained in five separate articles under discussion in the parties' negotiations. The Union has since withdrawn one of the proposals, Special Operations Selection, and the issues relating to that proposal are therefore no longer before the PERB.

(Br. for Union at 2.) On that ground, the Motion for Reconsideration asserts that "PERB should vacate that portion of its Opinion relating to this proposal." (Mot. for Recons. 2.) The Agency responds that Proposal 12 was squarely before the Board, not removed from the Board's consideration, and remained before the Board until the decision. (Opp'n 11-12.)

The issue of the negotiability of the proposed article XX was joined as a result of the Agency's letter asserting nonnegotiability (Appeal Ex. 1 at 2), the Union's Appeal (Appeal ¶ 6), and the Agency's answer (Answer at 3). The Agency's letter asserting nonnegotiability inquired, "The Union had withdrawn Article XX (new article) Selection Criteria for Special Operations Companies – and has now revived it, I believe based on my October 26 letter. Is that correct?" (Appeal Ex. 1 at 2). The Appeal responded by presenting to the Board the issue of the negotiability of that proposal. (Appeal ¶ 6.) If the Union, having revived the proposal, withdrew

it again after filing the Appeal, it appears the Agency was not informed. The Agency's brief, filed the same day as the Union's, addresses the proposal and contends that it is nonnegotiable. (Br. for Agency at 10-11.)

Further, the Union did not seek leave to amend the appeal or request to withdraw the appeal regarding any proposal. *See Int'l Ass'n of Firefighters Local 36 v. D.C. Dep't of Fire & Emergency Med. Servs*, Slip Op. No. 754, PERB Case No. 04-N-02 (May 26, 2004) (granting a request to withdraw a negotiability appeal).

The Motion for Reconsideration fails to show if, when, and how Proposal 12 was withdrawn a second time, and the Union cannot claim that the Board granted leave to withdraw the negotiability appeal regarding the proposal. Therefore, the Motion for Reconsideration with respect to the Board's determination regarding Proposal 12 is denied.

B. Proposal 13

Proposal 13 is the Union's proposed section B of article 45 of the CBA. It has two parts as follows:

Section B(1): "The basic workweek for members working in the Fire Fighting Division shall be 42 hours averaged over a 4-week period."

Section B(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.)

Two sections of the Comprehensive Merit Personnel Act ("CMPA") are particularly relevant to the negotiability of Proposal 13. In pertinent part, those sections provide:

> **§ 1-617.08. Management rights; matters subject to collective bargaining.**
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> (a) The respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations:
>
> . . .
>
> (5) To determine:
>
> (A) The mission of the agency, its budget, its organization, the number of employees, and to establish the tour of duty;
>
> (B) The number, types, and grades of positions of employees assigned to an agency's organizational unit, work project, or tour of duty. . . .
>
> . . .

> (b) All matters shall be deemed negotiable except those that are proscribed by this subchapter. Negotiations concerning compensation are authorized to the extent provided in § 1-617.16.
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> **§ 1-617.17. Collective bargaining concerning compensation.**
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> . . .
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> (b) As provided in this section, the Mayor, the Board of Education, the Board of Trustees of the University of the District of Columbia, and each independent personnel authority, or any combination of the above ("management") shall meet with labor organizations ("labor") which have been authorized to negotiate compensation at reasonable times in advance of the District's budget making process to negotiate in good faith with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours, and any other compensation matters. . . .

Based on its interpretation of those sections, the Union contends that Proposal 13 is a mandatory subject of bargaining pursuant either to section 1-617.17(b) because it involves hours or to section 1-617.08(b) because it does not involve a management right. The Motion for Reconsideration asserts that the Board did not fully address these arguments in its opinion. The Respondent's Opposition to the Petitioner's Motion for Reconsideration replies that the Motion for Reconsideration is based on a mere disagreement with the Board's decision. It demonstrates using multiple examples that the Union's arguments in the Motion for Reconsideration were made, considered, and then rejected by the Board (Opp'n 4), as the Union acknowledges by using the phrase "as we noted in our brief" and similar expressions as a refrain throughout its Motion for Reconsideration. (Opp'n 8.)

The outcome the Union desires—retention of existing language in the CBA—would have been permissible but for a 2005 amendment to the CMPA adding to section 1-617.08(a)(5) the management right to establish the tour of duty. In Proposal 13, the Union proposes a tour of duty for members working in the Fire Fighting Division. Therefore, Proposal 13 is nonnegotiable.

The Union argues that the law does not make establishing the tour of duty of employees a management right but instead makes establishing the tour of duty of *an agency* a management right. Proposal 13, the Union argues, involves hours, not tour of duty. These arguments are without merit as will be discussed below. We first address the Union's argument concerning section 1-617.08(a)(5)(A) and tour of duty, and we address second the Union's argument concerning section 1-617.17(b) and hours.

1. The Management Right to Establish the Tour of Duty pursuant to D.C. Official Code § 1-617.08(a)(5)(A)

Since its adoption in 1979, the CMPA has contained a list of management rights, which are permissive subjects of bargaining. The list is codified in the D.C. Official Code at section 1-617.08(a). One of the management rights the CMPA has recognized is the right to determine "[t]he number, types, and grades of positions of employees assigned to an agency's . . . tour of duty." D.C. Official Code § 1-617.08(a)(5)(B). In the Labor Relations and Collective Bargaining Amendment Act of 2004, which became effective April 12, 2005, the D.C. Council added the management right "to establish the tour of duty" (D.C. Official Code § 1-617.08(a)(5)(A)) to the list of management rights. D.C. Law 15-334 (Act 15-747), 52 D.C. Reg. 2012, 2013 (Mar. 4, 2005); *D.C. Fire & Emergency Med. Servs. and AFGE, Local 2721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at p. 5 n.4, PERB Case No. 06-N-01 (2007).

The Union's argument that Proposition 13 is negotiable notwithstanding the management right to establish the tour of duty begins with the usage of "tour of duty" and related terms in the singular in subsection A and subsection B of section 1-617.08(a)(5).

> That provision references each agency individually, not collectively, and accordingly refers to "tour of duty" *in the singular for each agency*, and of a piece with the agency's "mission," its "budget," and its "organization." Thus, § 1-617.08(a) provides that "management" (singular) "shall retain the right . . . (5) [t]o determine [] (A) *the* mission of the agency" (singular), "its budget" (singular), "its organization" (singular) "the number of employees" (a single number) "and to establish *the* tour of duty" (singular).

(Mot. for Recons. 6.)

The Union contends that "the repeated references in subsection (a)(5) to 'the' tour of duty of an agency suggest that the Council contemplated adoption of a *single* 'tour of duty' by each agency- just as it contemplated adoption of a single mission, budget, and organization -- and confirms that the Council intended 'the tour of duty' to mean something other than the multiple work schedules or shifts with which most agencies operate." (Br. for Union 14-15.) What is a single tour of duty to be adopted by each agency? The Union proposes that it is "the agency's overall calendar of operations- the general periods during which it will need employees to work. . . ." (Br. for Union 19.) Proposal 13 does not affect the Agency's overall calendar of operations. (*Id.*) Thus, the Union maintains that "[n]one of the subjects addressed in the proposal constitute 'the establish[ment] of the tour of duty,' as that term is used in the management rights provision of the CMPA. . . ." (Mot. for Recons. 2.)

The foundation of the Union's argument is something that normally should be disregarded in statutory interpretation. The first canon of statutory interpretation enunciated in the D.C. Official Code provides, "Words importing the singular number shall be held to include

the plural, and vice versa, except where such construction would be unreasonable." D.C. Official Code § 45-602. The exception to this rule clearly does not apply to this case as a construction of "tour of duty" that includes the plural is reasonable whereas a construction of tour of duty that does not include the plural is unreasonable.

a. Construing tour of duty as used in § 1-617.08(a)(5(A) to include the plural is reasonable.

Construing the management right to establish the tour of duty to include the right to establish the tours of duty is reasonable because that construction allows the term to apply to the tours of duty of individual employees, a usage that is the ordinary—actually universal—usage. For example, the very phrase used in the statute, "establish the tour of duty," was used in the singular to refer to the tours of duty of a group of employees of an agency in *Social Security Administration Baltimore, Maryland and AFGE Council 220*, 58 F.L.R.A. 630 (2003). In that case, the Federal Labor Relations Authority ("FLRA") stated, "The Arbitrator's grant to these employees of 4 hours of administrative leave does not establish the tour of duty of these employees or change their regularly scheduled administrative workweek." *Id.* at 633.

Words that the legislature uses but does not define are to be given their ordinary, contemporary, and common meaning. *Wynn v. United States*, 80 A.3d 211, 218 (D.C. 2013); *W.H. v. D.W.*, 78 A.3d 327, 337 (D.C. 2013). The term tour of duty has a consistent meaning in the civilian public employee context. Everyone in the field—indeed including, as will be shown, the Union—uses tour of duty to refer to the tour of duty of an employee. The U.S. Office of Personnel Management has defined tour of duty to "mean[] the hours of a day (daily tour of duty) and the days of an administrative workweek (weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek." 5 C.F.R. §§ 550.103, 610.102. The FLRA has adopted this definition for purposes of 4 U.S.C. § 7106(b)(1), an analogous provision in the Federal Service Labor-Management Relations Statute. *U.S. Dep't of Justice Fed. Bureau of Prisons Mgt. & Specialty Training Center and AFGE Council Prison Locals C-33*, 56 F.L.R.A. 943, 945 (2000). Similarly, the Comptroller General defined "regular tour of duty during each administrative workweek," as used in the Annual and Sick Leave Act of 1951, to mean "a definite and certain time, day and hour of any day, during the workweek when the employee regularly will be required to perform duty." 31 Comp. Gen. 581, 584 (1952). The Department of Labor's definition of tour of duty for purposes of the Fair Labor Standards Act also focuses on the individual employee. 5 C.F.R. § 553.220(a).

More than one employee can be assigned to the same tour of duty just as more than one employee can be assigned to the same shift. *See* 19 U.S.C. § 1451 ("Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular tours of duty at night or on Sundays or holidays. . . .") Thus, the CMPA gives management the right to determine "[t]he number, types, and grades of positions of employees assigned to an agency's . . . tour of duty. . . ." D.C. Official Code § 1-617.08(a)(5)(B). Similar provisions make assignment of employees to a tour of duty a permissive subject of bargaining in the federal civil service, 5 U.S.C. § 7106(b)(1), and in the foreign service. 22 U.S.C. § 4105(b)(1).

In Opinion No. 1445 at pages 19-20, the Board gave examples from its opinions and from the D.C. Official Code in which tour of duty is used in a context making unmistakable that the term referred to the tour of duty of an employee or employees.[1] The Motion for Reconsideration responds that the Board "relies on a diffuse jumble of PERB decisions" (Mot. for Recons. 2) and a "moribund provision." (Mot. for Recons. 4.) That response does not even rise to the level of a mere disagreement. It is mere name-calling. The Union is correct, however, in noting that the cited cases do not have a holding on the meaning of tour of duty. (Mot. for Recons. 4-5.) Nonetheless, the cited cases reflect the ordinary and common meaning of tour of duty with which the Council would have been familiar. Because the ordinary and common meaning is being sought, the Union's remark that in some of the cited opinions "the term was used colloquially by the parties" (Mot. for Recons. 4) does not diminish the significance of those cases.

The Union tries unsuccessfully to explain away D.C. Official Code section 1-612.01, which uses the plural "tours of duty" four times. The Union claims that the statute deals with all agencies under the mayor and "[t]hus, the use of the plural 'tours' to refer collectively to the calendars of all agencies, is appropriate." (Mot. for Recons. 6.) Two of the uses of "tours of duty" in section 1-612.01 belie that claim. First, section 1-612.01(b) provides that "tours of duty shall be established to provide, *with respect to each employee* in an organization" (emphasis added) that certain parameters involving advance scheduling, hours of the day, hours of the workweek, and payment of overtime are met. An agency would not be paid overtime or receive its calendar of operations in advance. Second, section 1-612.01(c) provides, "Special tours of duty, of not less than 40 hours, may be established to enable employees to take courses in nearby colleges, universities or other educational institutions. . . ." Employees, not agencies, are given special tours of duty because employees, not agencies, will take courses in nearby educational institutions.

To the examples already given may be added countless cases from the D.C. Court of Appeals,[2] regulations of the District of Columbia,[3] federal cases,[4] federal regulations,[5] and state

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[1] *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); *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); *D.C. Fire & Emergency Servs. Dep't and AFGE, Local 3721*, 51 D.C. Reg. 4158, Slip Op. No. 728 at pp. 2, 4 PERB Case No. 02-A-08 (2003); *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); D.C. Code §1-612.01(b); D.C. Code § 5-501.02(b)(1)(D), (F).

[2] *E.g., Barnes v. United States*, 614 A.2d 902, 908, 910 (D.C. 1992); *Robinson v. United States*, 506 A.2d 572, 573 (D.C. 1986); *Grant v. D.C. Dep't of Employment Servs.*, 490 A.2d 1115, 1118 (D.C. 1985); *Hickenbottom v. D.C. Unemployment Comp. Bd.*, 273 A.2d 475, 476 (D.C. 1971).

[3] *E.g.*, D.C. Mun. Regs. tit. 6-B §§ 1133, 1137, 1204.2, 1205.3, 1205.6, 1210.3, 1263, 1616; D.C. Mun. Regs. tit. 30 § 5891.

[4] *E.g., United States v. Myers*, 320 U.S. 561, 569 (1944); *Hertz v. Woodbury County, Iowa*, 566 F.3d 775, 778-79 (8th Cir. 2009); *Curdy v. Dep't of Agric.*, 291 F.3d 1371, 1373 (Fed. Cir. 2002); *Swanks v. Washington Metro. Area Transit Auth.*, 179 F.3d 929, 936 n.8 (D.C. Cir. 1999); *Theiss v. Witt*, 100 F.3d 915, 917 (D.C. 1996); *Cutright v. United States*, 953 F.2d 619 (Fed. Cir. 1992).

[5] *E.g.*, 5 C.F.R. §§ 213.104(a)(2), 315.804(b), 531.403, 531.403, 531.405, 531.607, 532.504, 532.505(c), 550.143(b)(3); 7 C.F.R. § 354.1(a)(1), 9 C.F.R. §§ 97.1(a), 130.7(b), 149.8(a); 29 C.F.R. §§ 553.221(f), 553.225, 1615.605(f); 31 C.F.R. § 29.105(c)(3).

cases[6] that unambiguously speak of the tour of duty of an employee or employees and not the tour of duty of an agency or agencies.

The final example of the ordinary usage of the term is the very proposal the Union has placed at issue here. The Union's proposal is entitled "Tour of Duty." Proposal 13—section B of article 45, dated 9/26/12—appears in Exhibit 1 to the Appeal as follows:

> **Section B – Tour of Duty:**
>
> (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.) Proposal 13 may retain existing contract language (Br. for Union 11), but in so doing it reflects the understanding of the parties on the actual meaning of tour of duty. Nothing prevented the Union from changing the title of its proposal if it honestly believed that the proposal does not fall under the rubric of tour of duty.

In addition, construing tour of duty in section 1-617.08(a)(5)(A) to include the plural is reasonable because doing so makes the phrase consistent with associated words in the section. The section refers to an agency's mission (§1-617.08(a)(5)(A)), organizational unit, and work project (§1-617.08(a)(5)(B)). Although those are singular nouns, an agency will have more than one of all of them. It is possible, but unlikely, that an agency could have only one mission, but that cannot be said of the Department of Fire *and* Emergency Medical Services.

b. Construing tour of duty as used in § 1-617.08(a)(5(A) to exclude the plural is unreasonable.

The meaning of tour of duty that the Union devised so that an agency could be said to have only one is purely fictional. The Board has cited numerous examples of tour of duty being used in caselaw and positive law where the context unambiguously shows that the tour of duty being discussed is the tour of duty of an employee or employees. The Union has cited no authority from any jurisdiction suggesting that tour of duty can refer to an agency's hours rather than an employee's, and the Board has found none. On the contrary, the Board notes that the FLRA held that establishing employees' tours of duty is "distinguishable from the determination of an agency's office hours." *Nat'l Labor Relations Bd. Union Local 21 v. Nat'l Labor Relations Bd.*, 36 F.L.R.A. 853, 860 (1990).

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[6] *E.g., City of Laredo v. Buenrostro*, 357 S.W.3d 118, 123 (Tex. App. 2011); *S. Park Twp. Police Ass'n v. Pa. Labor Relations Bd.*, 789 A.2d 874, 876 (Pa. Commw. Ct. 2002); *Kelly v. Safir*, 747 N.E.2d 1280, 1283 (N.Y. 2001): *Amalgamated Transit Union, Div. 1300 v. Mass Transit Admin.*, 504 A.2d 1132 (Md. App. 1986); *Valan v. Cuyahoga Cnty. Sheriff*, 499 N.E.2d 377, 378 (Ohio App. 1985).

If the Council had wanted to make establishing the calendar of agency operations a management right, it would not have used the term tour of duty, which means something else. Moreover, it is unclear why the Council would have wanted to amend the CMPA to make establishing "the general periods during which [an agency] will need employees to work" (Br. for Union 19) a management right, particularly in the case of agencies such as the Respondent. As the Union states, the Department of Fire and Emergency Medical Services must "operate 24 hours a day, seven days a week, every day of the year." (Br. for Union 10.) That duty leaves nothing for management to establish in the way of a "calendar of operations" of when the Respondent will need employees to work. Further, if tour of duty as used in section 1-617.08(a)(5)(B) also excludes the plural, then there is no content to the management right to determine "[t]he number, types, and grades of positions of employees assigned to an agency's . . . tour of duty" because there would be one tour of duty for all. The Union's statutory analysis is a transparent effort to nullify the 2005 amendment that made establishing the tour of duty a management right. "An interpretation of the statute that nullifies some of its language is neither reasonable nor permissible." *Goba v. D.C. Dep't of Employment Servs.*, 960 A.2d 591, 594 (D.C. 2008).

In conclusion, the interpretation of tour of duty proposed by the Union in which the singular does not include the plural and in which the term refers to the calendar of operations of an agency is unreasonable. Conversely, an interpretation of tour of duty in which the singular includes the plural and in which the term refers to the hours of the day and the days of the week when an employee or employees regularly perform duty is reasonable and consistent with canons of statutory interpretation.

2. Management's Duty to Negotiate Hours pursuant to D.C. Official Code § 1-617.17(b)

The Union's second argument for its position that "tour of duty" does not include Proposal 13 is that "tour of duty" must be distinguished from "hours" and "workweek," terms also used in the CMPA. Section 1-617.17(b) makes "hours" a mandatory subject of collective bargaining concerning compensation. The Union argues:

> The "tour of duty" is *not* "hours," a term included within the list of subjects specifically made negotiable by § 1-617.17(b). Nor is it either "the basic workweek" or employees' "hours of work." This latter point is confirmed by the Council's use of all three terms – "tour of duty," "basic workweek," and "hours of work" – in a *different* provision of the CMPA, § 1-612.01(a)(2), and its distinction of each term from the other.

(Br. for Union 15.) Section 1-612.01(a)(2) gives the Board of Education and the Board of Trustees of the University of the District of Columbia a statutory right to establish "[t]he basic workweek, hours of work, and tour of duty for all employees. . . ." The Union argues that

"whatever an agency's 'tour of duty' may include, it denotes something distinctly different from the 'basic workweek' and employees' 'hours of work.'" (Br. for Union 18.)

The Union does not explain its assumption that the terms cannot overlap in this statutory scheme. The statute the Union relies on reveals that they do. Section 1-612.01(b) and (c) demonstrate that hours are a component of tour of duty. Subsection (b) requires that tours of duty be established so that "[t]he basic 40 hour workweek is scheduled on 5 days, Monday through Friday" with the same working hours in each day. Subsection (c) provides that "[s]pecial tours of duty, of not less than 40 hours, may be established. . . ."

From the premise that hours and tour of duty must denote something distinctly different, the Union then gives the terms meanings that are not just distinctly different but mutually exclusive. The Union does this by proposing an expansive, but inaccurate, definition of the hours of an employee and a fictitious definition of tour of duty that does not involve the employee.

With regard to hours, the Union asserts that there is "no basis to give the term 'hours,' as used in this provision of the CMPA, anything other than its ordinary meaning under labor law, which includes not only the quantity of hours but 'the particular hours of the day and the particular days of the week during which employees shall be required to work.'" (Mot. for Recons. 8) (quoting *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965)). In reality, what the Supreme Court defined in *Meat Cutters* was "wages, hours, and other terms and conditions of employment" (section 8(d) of the National Labor Relations Act) rather than just "hours." The Union concealed that fact by omitting without ellipses the second half of the quoted sentence in its Motion for Reconsideration (Mot. for Recons. 8) and by replacing "wages, hours, and other conditions of employment" with "[subjects]" in its original brief. (Br. for Union 16.) The Court actually said, "[W]e think that the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain." *Meat Cutters*, 381 U.S. at 691 (quoting National Labor Relations Act, § 8(d)).[7]

With regard to tour of duty, the Union invents a meaning that is not only distinctly different from hours and workweek but also, as discussed, distinctly different from the actual meaning of tour of duty and from any useful management prerogative. *See supra* pp. 5-9. The result of the Union's distinction between hours and tour of duty is that the duty to bargain over hours provided by section 1-617.17(b) reduces the management right to establish the tour of duty provided by section 1-617.08(a)(5)(A) to the meaningless function of establishing a calendar of operations. "[O]ne part of a statute must not be construed so as to render another part meaningless." *Matter of T.L.J.*, 413 A.2d 154, 158 (D.C. 1980).

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[7]The National Labor Relations Act, it should be added, is not analogous to the CMPA on the subject of management rights as it lacks a corresponding provision granting management rights. *AFGE, Local 1000 v. D.C. Dep't of Employment Servs.*, 60 D.C. Reg. 16455, Slip Op. No. 1434 at p. 4, PERB Case No. 13-U-07 (2013).

Section 1-617.17(b) can be harmonized with section 1-617.08(a)(5)(A) without rendering the management right meaningless or rendering tour of duty and hours of work "redundant." (Br. for Union 18-19.) Section 1-617.17 is entitled "Collective bargaining concerning compensation." It requires negotiation "with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours, and *any other compensation matters*." D.C. Official Code § 1-617.17(b) (emphasis added). Thus, a proposal regarding hours or any other subject matter listed in section 1-617.17(b) is negotiable to the extent it addresses or determines compensation. *Int'l Ass'n of Firefighters, Local 36 v. D.C. Fire & Emergency Med. Servs. Dep't*, 45 D.C. Reg. 8080, Slip Op. No. 505 at p. 4, PERB Case No. 97-N-01 (1997); *Teamsters Local No. 639 and D.C. Pub. Schs.*, 38 D.C. Reg. 6693, Slip Op. No. 263 at p. 12, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1990). The Board has recognized that the duty to negotiate hours in collective bargaining concerning compensation is subject to statutory exceptions:

> While, generally, "hours" has been statutorily prescribed as a compensation matter subject to negotiations, other provisions of the CMPA except from the duty to negotiate, certain aspects of both compensation and noncompensation terms and conditions of employment for certain personnel authorities. . . . This dichotomy under the CMPA --subjecting matters to the collective bargaining process and providing exceptions or reservations to those matters-- has been addressed by the Board more often under D.C. Code Sec. 1-618.8 [the present D.C. Official Code § 1-617.08] entitled "Management rights; matters subject to collective bargaining".

Teamsters Local Unions No. 639 and 730 v. D.C. Pub. Schs., 43 D.C. Reg. 3545, Slip Op. No. 377 at p. 6 n.5, PERB Case No. 94-N-02 (1994). *See also Washington Teachers' Union Local 6 v. D.C. Pub. Schs.*, 46 D.C. Reg. 8090, Slip Op. No. 450 at p. 17, PERB Case No. 95-N-01(1995) (holding a compensation matter subject to management rights under D.C. Code § 1-618.8(a)(3) (now D.C. Official Code § 1-617.08(a)(3))).

An exception to the duty to bargain over hours applies in the present case. As noted, the Council amended section 1-617.08(a)(5) in 2005 to add the management right to establish the tour of duty. D.C. Law 15-334 (Act 15-747), 52 D.C. Reg. 2012, 2013 (Mar. 4, 2005). This amendment was adopted after section 1-617.17(b). In adopting the amendment, the Council exempted the right to establish the tour of duty from the obligation of personnel authorities to negotiate the compensation matters set forth in section 1-617.17(b) and exempted that right from matters deemed negotiable pursuant to section 1-617.08(b).

The tour of duty exception leaves intact the duty to bargain over any other aspect of hours that relates to compensation but not to tour of duty, such as a proposal providing for additional compensation when an employee's days off or the hours of his tour of duty are temporarily rescheduled to meet manpower requirements. In addition, a proposal that "establishes the hours for which overtime will be paid . . . is negotiable." *Int'l Ass'n of Firefighters, Local 36 and D.C.*

Fire & Emergency Med. Servs. Dep't, 45 D.C. Reg. 8080, Slip Op. No. 505 at p. 4, PERB Case No. 97-N-01 (1997).

Citing the foregoing case, Case No. 97-N-01, the Union implies in a footnote in its brief that the first part of Proposal 13, section B(1) of article 45, is a proposal establishing the hours for which overtime will be paid:

> As the PERB has previously noted, the language of Section B.1 is intended to establish the number of regular non-overtime hours members must work before they are entitled to overtime pay. The PERB has agreed that this is a negotiable matter. *Local 36 v. DCFEMS*, Opinion No. 505, 97-N-01 (1997) at p. 2 (1997). *See also Local 36 v. DCFEMS*, Opinion No. 515, 97-N-01 (1997) (on reconsideration), at p. 3 (1997) ("the subject(s) of a negotiability appeal, and the context in which its negotiability is appealed is determined by the petitioner, not the party declaring the matter nonnegotiable.") This previous ruling is dispositive of the issue.

(Br. for Union 12 n.5.) Case No. 97-N-01 cannot be dispositive because it was decided before the enactment of the Labor Relations and Collective Bargaining Amendment Act of 2004. Contrary to the Union's characterization of Case No. 97-N-01, the Board did not, and could not, opine at that time on what the language of Proposal 13 in the present case is "intended to establish." Rather, the Board noted what the Union expressly contended in that case: "IAFF contends that this provision establishes when a member is entitled to overtime pay, i.e., hours worked during a work week that exceed 42 hours." *Int'l Ass'n of Firefighters*, Slip Op. No. 505 at 2. Similarly, in the present case the Board accepted the Union's interpretation of Proposal 4 and held the proposal negotiable as so interpreted. Opinion No. 1445 at p. 12. In denying a motion for reconsideration filed in Case No. 97-N-01, the Board explained, "Our Decision does not ignore the Respondent's authority to establish basic hours of work for employees, rather, the Respondent's authority was simply not the issue of negotiability presented by the Petitioner's Appeal." *Int'l Ass'n of Firefighters, Local 36 and D.C. Fire & Emergency Med. Servs. Dep't*, 45 D.C. Reg. 4760, Slip Op. No. 515 at p. 2, PERB Case No. 97-N-01 (1997).

In contrast, the Union herein expressly raised the non-compensation issue of the Agency's authority to establish the hours in question: "[T]he Union's proposal to retain the current 24/72 work schedule is either expressly negotiable as a compensation matter under § 1-617.17(b), or, in the alternative, is not excepted from the scope of negotiations by 1-617.08(a)(5)(A), and is therefore negotiable as a non-compensation matter." (Br. for Union 22-23.) The Agency argued that the Union did not frame the issue as being an issue of when an employee is entitled to overtime, noting that the Appeal did not reference overtime, and further argued that the proposal should be treated as a proposal to establish hours of work. (Br. for Agency 11-12.) In the absence of a reference to overtime pay in the proposal or an explanation from the Union of how the proposal is confined to overtime pay, the Board concludes that Section B(1) cannot be given a construction limiting it to the determination of when a member is entitled to overtime pay.

3. Negotiability

Proposal 13 falls into the exception to the duty to bargain created by the management right to establish the tour of duty as construed herein. Proposal 13 establishes the hours of the day and the days of the week when members in the Fire Fighting Division would regularly be required to perform their duty. Section B(2) of article 45 sets the hours of the day and the days of the week as being a 24-hour day followed by three days off duty. Over a four-week period, this tour of duty averages to 42 hours a week because in three of the weeks two 24-hour days would fall and in one week only one 24-hour day would fall. Section B(2) precludes any other daily tour of duty (such as 12-hour days or 8-hour days) or weekly tour of duty (such as two or more consecutive days of work). Section B(1) precludes tours of duty that do not average 42 hours per week over a four-week period.

The Union argues that its proposal cannot be regarded as establishing a tour of duty because it does not specify the starting and ending time of shifts:

> [T]he term "tour of duty" as used *in the very decisions PERB cites* involves only the *starting and ending times* of shifts – not the total number of hours in a "basic workweek," or the length or frequency of shifts worked by employees, either individually or collectively. Nothing in the Union's proposed Article 45, Section B specifies the starting and ending times of shifts; and, if as PERB suggests, that is what "tour of duty" means, the Union's proposal is obviously negotiable.

(Mot. for Recons. 5.) Actually, in two of the cases cited in Opinion No. 1445 tour of duty is used without reference to the starting and ending time of shifts. One of the cases quotes a collective bargaining agreement providing, "Emergency Ambulance Bureau personnel shall work twelve (12) hour shifts as their normal scheduled daily tour of duty. . . ." *D.C. Fire & Emergency Servs. Dep't and AFGE, Local 3721*, 51 D.C. Reg. 4158, Slip Op. No. 728 at p. 2 n.5, PERB Case No. 02-A-08 (2003). Another case involved "MPD's decision to temporarily alter the tour of duty of all sworn staff members of the Department's Training division, by changing their hours of work on Fridays." *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 Union characterizes that case as involving "alteration of precise hours to be worked on Fridays." (Mot. for Recons. 5.) The adjective "precise" is the Union's interposition. It is not supported by anything in the opinion.

As those cases reflect, it is not necessary to specify a starting and ending time to specify a tour of duty. The FLRA has discussed tours of duty whose terms are very much like Proposal 13's and whose terms do not specify starting and ending times. Those tours of duty include "tours of duty consisting of 24 hours on duty and 48 hours off duty," *AFGE Local 1770 and U.S. Department of the Army Headquarters, XVIII Airborne Corps*, 48 F.L.R.A. 117, 117-18 (1983), a "biweekly tour of duty of 90 hours, consisting of five 18-hour days of Monday, Wednesday,

and Friday of one week and Tuesday and Thursday of the other week," *AFGE Local 1815 and U.S. Department of the Army, Army Aviation Center Fort Rucker, Alabama*, 56 F.L.R.A. 992, 992 (2000), and a "tour of duty of 53 hours in a 7-day work period, 212 hours in a 28-day work period, or the same ratio of tour of duty to work periods for any period between 7 and 28 days." *U.S. Dep't of the Navy Naval Air Station Corpus Christi, Tex. and Nat'l Fed'n of Fed. Employees Local 797*, 36 F.L.R.A. 935, 938-39 (1990). In addition, the FLRA held an eight-hour day as well as five calendar days of eight hours each to be tours of duty. *U.S. Dep't of Justice Fed. Bureau of Prisons Mgt. & Specialty Training Center and AFGE Council Prison Locals C-33*, 56 F.L.R.A. 943, 945 (2000); *Gen. Servs. Admin. and Journeyman Pipefitters & Apprentices Local No. 602*, 42 F.L.R.A. 121, 128 (1991) (respectively). Similarly, 24 hours on duty followed by 72 hours off duty, averaging 42 hours a week across four weeks is, as the title of the Union's proposal announces, also a tour of duty.

Therefore, Proposal 13 infringes upon the management right to establish the tour of duty provided by section 1-617.08(a)(5)(A). As result, it is not negotiable as a compensation matter pursuant to section 1-617.17(b), nor is it negotiable as a non-compensation matter pursuant to section 1-617.08(b) because it is, in the words of that section, a matter "proscribed by this subchapter."

In light of the above, we find that the Motion for Reconsideration has failed to provide a basis for reversal of the Board's order in Opinion No. 1445. Therefore, we deny the Petitioner's Motion for Reconsideration.

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

May 7, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 13-N -04 was transmitted via File & ServeXpress to the following parties on this the 7th day of May 2014.

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