GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
District of Columbia Public Schools,	
Petitioner,	
and	PERB Case No. 91-N-01 Opinion No. 273
Teamsters Local Unions No. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO,	
Respondent.	

DECISION AND ORDER ON NEGOTIABILITY APPEAL

On January 17, 1991, District of Columbia Public Schools (DCPS) filed this appeal with the Public Employee Relations Board (Board) pursuant to Board Rule 532.1 [1]/ concerning the negotiability of certain non-compensation items proposed by the Teamsters Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (Teamsters) during the parties' negotiations for a successor collective bargaining agreement. Teamsters Locals 639 and 730, are the exclusive representatives for all employees of DCPS who are employed in the operating engineer unit, custodial worker unit, transportation and warehouse service unit, cafeteria worker unit and cafeteria manager unit. [2]/

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[1]/ Board Rule 532.1 provides an expedited procedure for the consideration of negotiability appeals in the event of a Board determination that an impasse exists in the parties' non-compensation negotiations.

[2]/ Although these employees represent five separate bargaining units, the Teamsters have negotiated with DCPS a master agreement covering all five units. Cf., Teamsters Local Unions No. 639 and 730 and D.C. Public Schools and AFSCME Council 20, Local 2093, AFL-CIO, 33 DCR 2384, Slip Op. No. 134, PERB Case No. 85-R-09 (1986).

By letter dated January 24, 1991, the Executive Director of the Board advised the Teamsters that in accordance with Board Rule 532.3 a response to the Negotiability Appeal might be filed by February 1, 1991. Following a grant of an extension of time, the Teamsters filed its Response (1) disputing the timeliness of DCPS' Negotiability Appeal, and (2) addressing the merits of DCPS' contentions. On February 21, 1991, DCPS filed a response addressing the Teamsters' contention that the Appeal was untimely.

Section 532.1 of the Board's Rules concerning negotiability appeal proceedings provides in relevant part the following:

> If the Board determines that an impasse has occurred regarding non-compensation matters, and an issue of negotiability exists at the time of such impasse determination, the negotiability issue must be withdrawn or a negotiability appeal filed with the Board within five (5) days of the Board's determination as to the existence of an impasse. Impasse proceedings shall not be suspended pending the Board's determination of a negotiability issue. (Emphasis added.)

By letter dated January 10, 1991, the parties were advised of the Board's determination that the parties were at impasse in their non-compensation negotiations. DCPS' Negotiability Appeal was filed January 17, 1991. The Teamsters do not contend that DCPS' appeal is untimely if measured from the January 10, 1991 letter, which DCPS relies on as the date the Board determined that an impasse had occurred. The Teamsters, however, contend that the Board's determination was made earlier.

The Teamsters correctly state that their impasse resolution request, filed on October 18, 1990, [3]/ was acknowledged by the Executive Director in a letter dated December 6, 1990. The Teamsters assert, however, that the timeliness of the appeal should be measured from some point in time between October 18, 1990 and the parties' receipt of a December 6, 1990 letter from the Board's Executive Director requesting that the parties state their preferences regarding an appropriate impasse proceeding. The Teamsters further assert that the intent of the Board's January 10, 1991 letter to the parties was "merely [to] direct the parties [to] submit their non-compensation issues to mediation[.]" (Union's Resp. at p.2) Thus, the Teamsters contend that under Board Rule 532.1, DCPS' January 17, 1991 Negotiability

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[3]/ The Teamsters' Impasse Resolution Request was docketed as PERB Case No. 91-I-01 and stated that an impasse existed with respect to compensation as well as non-compensation issues.

Appeal is untimely since it was filed approximately 3 months after the Teamsters' October 18, 1990 Impasse Resolution Request and more than one month after the impasse was acknowledged by the Board's Executive Director in her December 6, 1990 letter. These assertions, however, are based, in part, on the Teamsters' failure to distinguish between Board Rules governing compensation and non-compensation impasse procedures. Although the Teamsters' request for impasse resolution encompassed both compensation and non-compensation items, each is governed by different statutory and administrative provisions.

Impasse procedures and determinations concerning non-compensation matters are provided under D.C. Code Section 1-618.2(d) and Board Rule 527. Pursuant to these provisions, the determination of whether an impasse exists in non-compensation terms-and-conditions-of-employment negotiations is not only a function for the Board but is a function assigned exclusively to the Board. An acknowledgement by the Executive Director of the Teamsters' request for impasse resolution filed on October 18, 1990, was limited to the Executive Director's authority under D.C. Sec. 1-618.17 regarding compensation impasse proceedings. Although the December 6, 1990 correspondence addresses impasse resolution procedures concerning the non-compensation items in the Teamsters' impasse resolution request, the Board had not at that time acted on the Teamsters' request and the Teamsters' contention that the December 6, 1990 letter constituted the Board's determination of an impasse with respect to non-compensation items is clearly contradicted by the letter's notice to the parties that the Board may "order[] the parties to resume negotiations (over non-compensation items)[.]"

When the parties were subsequently directed by the January 10, 1991 letter to submit their dispute to impasse resolution, this action constituted notice to the parties of the Board's determination that an impasse existed with respect to the non-compensation items in dispute. Therefore, January 10, 1991 is the date from which the timeliness of an appeal under the expedited negotiability procedures of Board Rule 532.1 should be determined. Thus, under Board Rule 501.5, the negotiability appeal was timely filed by DCPS on January 17, 1991. [4]/

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[4]/ In relevant part, Board Rule 501.5 provides: "If a prescribed time period is less than eleven (11) days, Saturdays, Sundays, and the District of Columbia holidays shall be excluded from the computation". (Emphasis added.)

We now address separately the negotiability questions presented, that is, with respect to each proposal in dispute, [5]/ whether or not it is within the scope of collective bargaining under the Comprehensive Merit Personnel Act (CMPA).

Proposal No. 2:

ARTICLE VI. - SENIORITY, Section A

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 units established for this purpose are as follows:

Operating Engineer
Custodian Unit
Transportation and Warehouse Service Unit
Cafeteria Manager Unit
Cafeteria Worker Unit

This proposal, as quoted and as amended (see next page), is identical to Proposal No. 1 which we considered in Teamsters Local Union No. 639 and District of Columbia Public Schools, 38 DCR 1586, Slip Op. No. 263 at p.5, PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04 (1990) (hereinafter PERB Case Nos. 90-N-02, 03 and 04). The only distinction is the occupational units affected, and DCPS makes no argument that this distinction renders this proposal nonnegotiable. Rather DCPS' arguments are the same as those it raised with respect to Proposal No. 1 in PERB Case Nos. 90-N-02, 03 and 04. There we found the Teamsters' addition of a clause stating that the proposal "shall not be interpreted or applied in any way inconsistent with federal law and/or D.C. law"

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[5]/ Proposals Nos. 1, 5, 8 and 11 were withdrawn by the Teamsters. In view of this action, no issues with respect to these proposals are now before us.

cured any ambiguity the proposal may have had with respect to its negotiability (an ambiguity argued by DCPS). The Teamsters made an identical amendment to this proposal in its response to this Appeal. We therefore rule similarly that this proposal is negotiable for the reasons stated in PERB Case Nos. 90-N-02, 03 and 04.

Proposal No. 3:

ARTICLE XXXV - Promotions (Paragraphs 2 and 3)

Paragraph 2.

Promotions to Regular Wage Grade positions, up to and including Regular Wage Grade-6 positions, shall be on the basis of strict seniority. Any employee selected for a position solely on the basis of seniority shall serve a 90-day trial period prior to a final determination as to whether he should remain in the position or return to his former position. Any employee who is returned to his former position due to his failure to complete the trial period shall be eligible for promotion within a period of one year to the same type of position based solely upon his seniority. If at any time during the trial period, the employee's performance becomes unsatisfactory, appropriate action may be taken by the Board.

Paragraph 3.

In all cases of promotions to all other Regular Wage Grade and Food Service positions, the following factors shall be considered, and where factors (b) and (c) are relatively equal, factor (a) shall govern,

(a) length of continuous service;
(b) ability and
(c) fitness.

No employee will be hired to fill any position until all unit employees have a chance to bid on the vacant position. If no unit employee opts to bid on the vacant position, the Board may hire an employee from outside the occupational unit.

Paragraph 2 of this proposal provides in absolute terms that certain promotions "shall be on the basis of strict seniority." The absolute language of this provision, upon which the remainder of the proposal is based, removes this proposal from the realm of

otherwise negotiable procedures and/or impact and effect matters. The proposal, as written, directly contravenes management's right under D.C. Code Sec. 1-618.8(a)(2) "to promote" and therefore is nonnegotiable. In this regard, the Teamsters' willingness to supplement the 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" is not sufficient to make negotiable a proposal that unambiguously is inconsistent with D.C. law, i.e., CMPA.

With respect to paragraph 3, DCPS contends that the proposal is nonnegotiable because it violates the "mandate" of D.C. Code Sec. 1-608.1(a)(2) [6]/ requiring open competition for initial appointments to the Career Service (of which these employees' positions are a part).

DCPS contends that its right to hire to fill a vacant position would be violated by limiting it to those instances when "no unit employee opts to bid on the vacant position[.]" Notwithstanding the proposal's use of the word "hire" in the second and third sentences, the first sentence and Article XXXV's title, "Promotions," make it clear that the paragraph concerns promotions, not initial appointments. Moreover, when read in context, we find that the proposal would require only that DCPS, when

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[6]/ D.C. Code Sec. 1-608.1(a)(2) provides:

Section 1-608.1. Creation of Career Service

> (a) The Mayor shall issue rules and regulations governing employment, advancement and retention in the Career Service which shall include all persons appointed to positions in the District government, except persons appointed to positions in the Excepted, Executive or Educational Service. The Career Service shall also include, after January 1, 1980, all persons who are transferred into the Career Service pursuant to the provisions of subsection (c) of Section 1-602.4. The rules and regulations governing Career Service employees shall be indexed and cross referenced to the incumbent classification system and shall provide for the following:
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> * * * *
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> (2) Open competition for initial appointment to the Career Service;

filling a vacant position, consider it first as a promotional opportunity for all bargaining-unit employees who have bid on the position before considering outside applicants. We further find that the proposal does not restrict DCPS' right to fill a vacant position from outside the bargaining unit should it find that none of the bargaining unit employees possess those "factors" that are required of a successful candidate for the position. We, therefore, find that the proposal with the Teamsters' proffered amendment conforming the proposal to federal and D.C. law is negotiable.

Proposal No. 4:

ARTICLE XLIV - Split Shifts

There shall be no split shifts.

DCPS argues that "the practical effect of [this] proposal is an absolute ban on management's right to direct employees, to relieve employees of duties because of lack of work or other legitimate reasons, and to maintain the efficiency of government operations, as provided in D.C. Code Section 1-618.8(a)(1),(3) and (5)." The Teamsters counter that the proposal provides for basic work scheduling which the Board in PERB Case Nos. 90-N-02, 03 and 04 recognized at p.15 is distinguished as negotiable by a proviso from DCPS' prerogative to otherwise establish hours of work under D.C. Code Sec. 1-613.1(a)(2). While we there held that "basic work scheduling" is distinguishable from establishment of "hours of work," the language of this proposal does not provide for a proposed work schedule during established hours of work, but rather eliminates absolutely one manner in which hours of work may be established, i.e., "no split shifts." Such absolute language, by requiring the retention of employees in a duty status during periods when there may be no work available, would contravene management's right under D.C. Code Sec. 1-618.8 (a)(3) and (5) and therefore is nonnegotiable.

Proposal No. 6: [7]/

ARTICLE XLVII - Annual Leave - Cafeteria Worker Unit

ARTICLE XLVIII - Annual Leave - Cafeteria Manager Unit

In its appeal, DCPS contends that the proposal "in relevant

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[7]/ Proposal No. 6 consisting of the two articles noted above is appended to this decision.

part, provides that employees on vacation shall not be subject to call-back...[and] asserts that the proposals violate management's right to direct employees, pursuant to D.C. Code Section 1-618.8 (a)(1)." (Appeal at p. 10) DCPS further asserts that there is no statutory basis for the negotiation of leave since the management rights provisions are not under the same subchapter of the CMPA as the provisions that require collective bargaining over leave. D.C. Code Sec. 1-613.3(a)(5) provides that "leave for all employees included within recognized bargaining units shall be subject to collective bargaining and collective bargaining agreements shall take precedence over the provisions of this subchapter." (emphasis added) The subchapter in which the provision appears is entitled: "Hours of Work, Legal Holiday Leave." and is a subpart of Chapter 6, "Merit System" under Title I - "Administration." The Management Rights provisions, while appearing in the same Title and Chapter, are set forth in subchapter XVIII entitled "Labor-Management Relations."

Both our dissenting colleague and DCPS argue that since the management rights provisions are not a part of the same subchapter that explicitly places leave matters within the realm of collective bargaining, such bargaining is not required. This reasoning suggests that the District Council intended that there could be no meaning or effect ascribed to D.C. Code Sec. 1-613.3(a)(5), since to do so would contravene management's right set out elsewhere in the CMPA.

The majority cannot find any support for this proposition in the Statute or its legislative history. This Board has acknowledged on previous occasions that the CMPA incorporates a broad policy favoring collective bargaining, while carving out specified exceptions to the bargaining requirement that reserve to management certain responsibilities and prerogatives. [8]/ The majority does not dispute DCPS' right to direct its employees; however, in our view, this reserved right does not relieve DCPS of the obligation to bargain over leave issues. Obviously, DCPS is not compelled to agree to the proposals presented, nor may it be inferred from the relevant statutory provisions that agreement must be reached on anything. We are merely addressing the negotiability of the subject matter presented by the proposal in question, i.e., leave, and on this, we find that the proviso in D.C. Code Sec. 1-613.3(a)(5) is clear: "...leave for all

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[8]/ See, UDCFA/NEA and UDC, 29 DCR 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982); IAFF Local 36 and D.C. Fire Dept, 35 DCR 118, Slip Op. No. 167, PERB Case No. 87-N-01 (1987); Fraternal Order of Police/MPD Labor Committee and Metropolitan Police Dep't; 38 DCR 874, Slip Op. No. 261, PERB Case No. 90-N-05 (1990).

employees included within recognized collective bargaining units shall be subject to collective bargaining..." (emphasis added).

Member Squire dissents from the majority's ruling finding nonnegotiable paragraph 5 of both Articles XLVII and XLVIII, for the reasons set forth in her dissent in PERB Case Nos. 90-N-02, 03 and 04, Slip Op. at p. 29.

Proposal No. 7:

ARTICLE XXX - Loss or Damage

A. 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.

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

The above proposal, as submitted to DCPS, is identical to Proposal No. 6 in PERB Case Nos. 90-N-02, 03 and 04, Slip Op. at p.8, which a Board majority found to be nonnegotiable. The Teamsters, here, have amended the proposal by changing the first sentence's standard for charging employees with loss or damage from "gross negligence" to "negligence", conforming with what the previous majority found was the standard prescribed by D.C. Code Sec. 1-1216 for charging employees with loss or damage. It was precisely the Teamsters' attempt to change through negotiations what the majority found to be a statutorily established standard that was previously found nonnegotiable. DCPS raises no arguments not already considered by the Board in PERB Case Nos. 90-N-02, 03 and 04 regarding the negotiability of this proposal. The Teamsters' amendment therefore removes the only basis upon which we found this proposal nonnegotiable. This proposal, as amended, is negotiable.

Proposal No. 9

ARTICLE LXIX - Benefits

Effective October 1, 1990, the current Medical Insurance plan shall be discontinued and the Teamsters Plan shall replace it. The Board shall remit to the

Teamsters Health Trust $398.66 per month per employee for 12 month employees and $478.40 per month per employee for 10 month employees.

Effective June 1, 1991, the contributions shall be increased to $435.06 per month for 12 month employees and to $522.08 for 10 month employees.

Effective June 1, 1992, the contributions shall be increased to $474.93 per month for 12 month employees and to $569.92 for 10 month employees.

Effective June 1, 1993, the contributions shall be increased to $546.00 per month for 12 month employees and to $655.20 for 10 month employees.

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

Different dates and contribution figures notwithstanding, this benefits proposal, for all intents and purposes, is identical to Proposal No. 17 in PERB Case Nos. 90-N-02, 03 and 04, Slip Op. at p. 19 for which no determination of negotiability was made because the last paragraph was withdrawn by the Teamsters. The Teamsters, once again, have withdrawn this paragraph, the only paragraph upon which DCPS has based its declaration of nonnegotiability. In view of this action by the Teamsters, no issues regarding this proposal are now before us.

Proposal No. 10

ARTICLE XXXIII - Position Description and Classification

A. An employee shall be issued a copy of his position description upon assignment and when there is any change in the job description. In those instances where it is not administratively possible at the time on [sic] an assignment or change in job description, the employee shall receive his position description within thirty (30) work days.

B. Classification or reclassification of positions are a subject for the grievance and arbitration procedure contained in this Agreement.

DCPS contends that this proposal is nonnegotiable because D.C. Code Sec. 1-612.2(a) and (b) provide that, "the Mayor shall provide for the development of a classification system covering

all positions in the Career and Excepted Service." [9]/ DCPS asserts that "the Mayor is responsible for the evaluation of the classification system in accordance with applicable rules and regulations." (Negot. App. at p. 14.) DCPS contends that "[a]ccordingly, the Mayor has absolute authority to develop and administer the classification system" and therefore the proposal is nonnegotiable.

Section A of the proposal provides for procedures regarding employees' receipt of their position description upon assignment to the position or a change in job description. Section B would allow the adjudication of disputes regarding classification or reclassification contained in position descriptions under the parties' negotiated grievance and arbitration procedure. The plain meaning of the proposal does not attempt to establish, develop or evaluate employees' job "classification system." Moreover, Board precedent establishes that under the CMPA the procedures for implementing and the impact and effects of an exercise of a management decision are negotiable. See, Teamsters Local Union No. 639 and District of Columbia Public Schools, supra; Teamsters Local Unions No. 639 and 730 v. District of

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[9]/ D.C. Code Sec. 1-612.2(a) and (b) provide:

> Section 1-612.2. Establishment and maintenance of classification system for Career and Excepted Services employees.
>
> (a) In order to carry out the policies of Section 1-612.1, the Mayor shall provide for the development of a classification system covering all positions in the Career and the Excepted Services.
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> (b) The Mayor shall provide that all positions covered by this classification system are properly described in writing in accordance with the principal duties and responsibilities officially assigned to those positions and shall provide that all positions are properly evaluated by application of official classification standards, in accordance with accepted classification principles and techniques and in accordance with applicable rules and regulations. The Mayor shall provide for meaningful consultation with the Board of Governors of the School of Law, the District of Columbia Board of Education and the Board of Trustees of the University of the District of Columbia in the classification of positions of persons in the Career Service employed by the educational Boards.

Columbia Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990); American Fed. of State, County and Municipal Employees, Council 20, AFL-CIO v. D.C. General Hospital, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989); Int'l. Assoc. of Firefighters, Local 36 and D.C. 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, 29 DCR 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982). We find nothing in D.C. Code Sec. 1-612.2 that expressly removes these matters from the realm of collective bargaining. We therefore conclude that Proposal No. 10 is negotiable.

Proposal No. 12

> **ARTICLE III - New Equipment and/or Classifications**
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> Where new types of equipment, operations and/or classifications for which rates of pay are not established by this Agreement are put into use after ratification, within operations covered by this Agreement rates governing such equipment, operations, and/or classifications shall be subject to negotiations between the parties.
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> Rates agreed upon or awarded shall be effective as of the date equipment is put into use.

This proposal would provide a reopener in the collective bargaining agreement with respect to the negotiation of matters concerning new equipment, operations and/or classifications for which rates of pay are not established in the agreement. DCPS' only contention is that the proposal is not limited to those employees for whom the Teamsters are the exclusive representative, but rather extends to all employees "within operations." To the extent the proposal would extend to employees the Teamsters do not have the right to represent, DCPS asserts it is nonnegotiable.

In their response to the Negotiability Appeal, the Teamsters clarified that the proposal was intended to extend only to bargaining-unit employees and they modified the proposal by substituting for the phrase "within operations covered by this Agreement" the words "within operations performed by unit employees". As modified to clarify the proposal's coverage, the proposal eliminates DCPS' only objection. Finding no statutory basis for removing the matters in this proposal from collective bargaining, we conclude that it is negotiable.

Proposal No. 13

ARTICLE XXXIX - Hours of Work - Cafeteria Manager Unit

ARTICLE XLI - Hours of Work - Cafeteria Workers Unit

ARTICLE XLII - Former 8-Hour Cafeteria Workers

DCPS asserts that Proposal No. 13 is nonnegotiable because the proposed provisions would contravene DCPS' authority to issue rules and regulations establishing the basic workweek and/or hours of work under D.C. Code Sec. 1-613.1(a)(2). DCPS contends that this proposal, in effect, is akin to Proposal No. 13 in PERB Case Nos. 90-N-02, 03 and 04, Slip Op. at pp. 13 - 15, as to which we (1) acknowledged that "the establishment of the 'basic workweek' and 'hours of work' [are] matters reserved to management" and (2) held that "[p]roposing the hours of a 'normal workday' directly contravenes the Board of Education's right under Sec. 1-613.1(a)(2) to establish the hours of work." (Id. at 15.) The Teamsters correctly note, in response to the Appeal, the Board's long-standing rule that although the CMPA reserves to management the right to manage, "a right to negotiate nevertheless exists with respect to matters concerning the exercise of these management actions." PERB Case Nos. 90-N-02, 03 and 04, Slip Op. at p.2. We assess the numerous subsections of these proposed Articles one by one, mindful of these two countervailing interests.

We find that the following provisions are within the scope of collective bargaining:

Article XXXIX Section B/Article XLI Section A.

> Assignments to tours of duty are scheduled in advance over periods of not less than one (1) week;

The proposal provides for procedures that would govern the exercise of DCPS' right under D.C. Code Sec. 1-613.1(a)(2) to establish hours of work, and is therefore negotiable.

Article XXXIX Section C.

> The basic forty (40) hour workweek is scheduled on five (5) days, Monday through Friday when practicable, and the two (2) days outside the basic workweek are consecutive.

The proposal's use of the qualifier "when practicable" leaves to management's decision the structure of the basic

workweek; it merely requires management to conform to the structure described whenever feasible. It is negotiable.

Article XXXIX Section F/Article XLI Section D.

> The occurrence of holidays may not affect the designation of the basic workweek...

These proposed provisions have no effect on establishment of the basic workweek which would remain management's prerogative; they merely provide that holidays, established by statute, would have no effect on the basic workweek established by management. They are negotiable.

Article XXXIX Section G/Article XLI Section E,

> Breaks in working hours of more than one (1) hour may not be schedule[d] in a basic work day.

Article XXXIX, Section H/Article XLI Section F

> All employees shall be granted a meal period during a work shift.

Article XLI Section G

> Six (6) hour workers receive a fifteen (15) minute break.

These proposed sections address work scheduling issues. Work scheduling encompasses not only when work is scheduled to be performed but also when it is scheduled not to be performed, e.g., breaks, during an established workday or workweek. The provisions neither determine the number of hours nor which hours during the day shall constitute employees' hours of work. They are negotiable.

Article XXXIXI Section I/Article XLI Section H.

> The Board has the right to require from every employee effective utilization of his services;

These provisions do not determine hours of work or the basic workweek; they merely acknowledge or observe a right not barred by statute of which the exclusion or inclusion in a collective bargaining agreement is negotiable. Cf., PERB Case No. 90-N-02, 03 and 04, Slip Op. at 4 (Proposal No. 3).

Article XXXIX Section J/Article XLI I.

> Employees shall work such overtime as may be requested, except in cases of personal emergency. Overtime shall be distributed by seniority. Overtime requirements shall be determined by the Board. Employees shall be notified of such overtime requirements prior to the end of his regular tour of duty except in cases of emergency.

Read in context, this proposal provides only for an accommodation to employees assigned overtime in the event of a personal emergency. Should a personal emergency conflict with the assignment of overtime, an accommodation would be made for affected employees by resorting to seniority to make the assignment of overtime. The remainder of the proposal provides procedural accommodations with respect to the assignment of overtime under ordinary circumstances. It is negotiable.

Article XXXIX Section K/Article XLI Section J.

> Any employee who is regularly scheduled to report for work and who presents himself for work as scheduled shall be guaranteed eight (8) hours of work. If work in the employee's job is not available, he may be assigned related work. If related work is not available, the employee shall be excused from duty and paid, at his regular rate for eight (8) hours work.

We find these provisions to be negotiable for the same reasons we hereafter find Proposal No. 14 negotiable.

Article XXXIX Section L/Article XLI Section K.

> Work schedules for all employees at a work site shall be posted on the work[]site bulletin board at all times.

These proposed provisions are merely procedural accommodations for employees that would be applicable to management's decision establishing hours of work. (See Article XXXIX Section B/Article XLI Section A.) They are negotiable.

Article XXXIX Section M/Article XLI Section L.

> Any employee who is not scheduled to report for work and is called in and presents

> himself shall be guaranteed a minimum of two (2) hours pay at the rate of time and one-half (1-1/2).

These provisions do not establish hours of work but rather compensation. Compensation is clearly negotiable (see D.C. Code Secs. 1-602.6, 1-618.6, and 1-618.17).

Article XLII.

> All current employees who had previously been classified as an eight (8) hour worker shall be afforded the opportunity to work seven (7) hour shifts.

As we found with Article XXXIX Section C, this article under Proposal No. 13, does not require an action within management's prerogative, i.e., assigning workers. It provides only that DCPS afford such employees the opportunity to work seven (7)-hour shifts if such an opportunity arises. It is negotiable.

We find the following proposals to be outside the scope of collective bargaining:

Article XXXIX Sec. A

> The basic work week for each employee shall be forty (40) hours.

This proposal would establish employees' basic workweek at 40 hours. Such absolute and unyielding language would contravene DCPS' prerogative under D.C. Code Sec. 1-613.1(a)(2) to establish the basic workweek under rules and regulations issued by its Board. This proposal is nonnegotiable.

Article XXXIX Sec. D/Article XLI Sec. B.

> The working hours in each day in the basic work week are the same.

DCPS' authority under Sec. 1-613.1(a)(2) to establish the basic workweek applies equally to establishing employees' hours of work. Although the proposal does not establish which hours or the number of hours that would constitute working hours each day of the basic workweek, it would interfere with DCPS' authority by requiring a single determination of employees' daily hours of work that must apply to every workday in a basic workweek. Therefore it is nonnegotiable.

Article XXXIX Sec. E/Article XLI Sec. C.

> The basic nonovertime workday may not exceed eight (8) hours.

Having found that Article XXXIX Sec. A barred by DCPS' authority to establish the basic workweek, we find, similarly, this proposed provision would restrict DCPS' authority to establish the basic hours of employees' workday. The focus of D.C. Code Sec. 1-613.1(a)(2) is upon establishing employees' basic hours of work. We find no significant distinction between the workday and the proposed "basic nonovertime workday." It is nonnegotiable.

Article XLI Preface.

> The basic work day for employees in the following classifications will be seven (7) hours a day, five (5) days per week:
>
> Cook I
> Cook II
> Baker I
> Baker II
> Food Service Worker Leader
>
> The basic work day for employees in the following classifications shall be either six (6) hours or four (4) hours a day five (5) days a week:
>
> Food Service Worker

For the reasons stated above with respect to Article XXXIX Sec. E/Article XLI, Sec. C, we find this proposal contravenes DCPS' authority to establish employees' hours of work. It is therefore nonnegotiable.

Proposal No. 14:

> **ARTICLE XXXII: - Inclement Weather Work**
>
> Section 1.
>
> Any full-time employee who is scheduled to report for work and who presents himself for work as scheduled shall be assigned to at least eight (8) hours of work. Employees who are scheduled for less than eight (8) hours will be assigned to work their regular schedule. If weather conditions do

not permit the employee to perform his/her regularly scheduled duties and there is no other work available in line with his/her normal duty, the employee shall be given the option to perform other work or be paid at his/her regular rate for a minimum of four (4) hours and released from duty at his/her election on annual leave or leave without pay. Employees working on snow detail or who are required to shovel snow shall be assigned in the following order:

1. Volunteers
2. Employees less than 40 years of age
3. In the inverse order of seniority

Any employee designated as an essential employee by the Superintendent will be paid the applicable straight time rate for the hours they work while the system is closed. These employee will receive compensatory time for the time they worked while the system was closed. Any non-essential employee who works a full shift during a late opening or early closing day will receive one (1) hours pay in addition to their regular pay.

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.

DCPS contends that the first sentence of Section 1 of this proposal requires management, in making decisions regarding the assignment of work, to assign employees 8 hours of work. DCPS argues that such a requirement violates management's right under D.C. Code Sec. 1-618.8(a)(1),(2) and (3) to direct employees, assign employees, and relieve employees of duty for lack of work or other legitimate reasons, and D.C. Code Sec. 1-613.1, to determine the hours of work for employees. We disagree. Section 1, read in context, provides that employees who report for work

as scheduled are ensured the hours which management has assigned and are compensated. If an employee is not scheduled to work, he or she would not come within the coverage of this proposal. Thus, management's right to establish employees' hours of work is unaffected by the proposal. Section 1 provides no more than procedures for exercising management decisions. As we held with respect to Proposal No. 10, such matters are negotiable.

In its response to DCPS' Negotiability Appeal, the Teamsters amended Section 2 of this proposal to substitute "Superintendent of Schools" for "District Government." An identical amendment was made to an identical proposal in PERB Case Nos. 90-N-02, 03 and 04, Slip Op. at p. 8. Here, as there, the change obviates DCPS' only objection to the proposal, and we once again find that the basis for DCPS' contention of nonnegotiability -- that the reliance upon "District Government" in the proposal infringed upon its personnel authority -- has been eliminated. Therefore, for the reasons stated in PERB Case Nos. 90-N-02, 03 and 04, Slip Op. at p.9, we find the proposal negotiable.

Proposal No. 15

ARTICLE XXV: - Discipline and Discharge [10]/

This proposal is identical to Proposal No. 19 in PERB Case Nos. 90-N-02, 03 and 04, Slip Op. at p. 20, which we found to be negotiable. DCPS raises no arguments not previously considered nor are there any new factors with respect to the negotiability of the matters contained in this proposal that warrant non-adherence to our previous determination. We therefore find this proposal to be negotiable for the reasons stated in PERB Case Nos. 90-N-02, 03 and 04.

Proposal No. 16:

ARTICLE LXIV: - Drug Testing Requirements, Consequences of a Positive Test [11]/

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[10]/ This proposal is appended to this decision.

[11]/ This is the only provision in the Teamsters' drug-testing proposal that DCPS has challenged as nonnegotiable.

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 subjected 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.

* * * *

This section of the Teamsters' Drug-Testing-Requirements Proposal, "Consequences of a Positive Test," is identical to a section of a drug testing proposal in PERB Case Nos. 90-N-02, 03 and 04 where we found all but the next-to-the-last-paragraph to be negotiable. For the reasons there stated we make the same finding here: that this corresponding one paragraph is not negotiable.

Proposal No. 17:

ARTICLE XXXVI: - Work Force Changes

C. Transfers

* * * *

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.

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.

Sections C and D, concerning Transfers and Details, respectively, are identical to proposal Nos. 9 and 10, respectively, in PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04, Slip Op. discussed there at pp.11-12. There, we found paragraph 4 (the only paragraph of Section C in issue herein) of Proposal No. 9 to be nonnegotiable. With respect to Proposal No. 10 we found the first and last sentence to be negotiable and the second sentence to be nonnegotiable. For the reasons stated there, we reach the same conclusions here with respect to the corresponding provisions of proposed Sections C and D of Article XXXVI.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following proposals are within the scope of collective bargaining:

a. Article VI. - Seniority, Section A.

b. Article XXXV. - Promotions, Paragraph 3.

c. Article XLVII. - Annual Leave -Cafeteria Worker Unit.
Article XLVIII. - Annual Leave -Cafeteria Manager Unit.

d. Article XXX. - Loss or Damage, Sections A. and B.

e. Article XXXIII. - Position Description and Classification, Sections A. and B.

f. Article III. - New Equipment and/or Classifications.

g. Article XXXIX. - Hours of Work -Cafeteria Manager Unit, Sections B., C., F., G., H., I., J., K., L., and M.

Article XLI. - Hours of Work - Cafeteria Workers Unit, Sections A., D., E., F., G., H., I., J., K. and L.

Article XLII. - Hours of Work - Former 8-Hour Workers.

h. Article XXXII. - Inclement Weather Work, Sections 1 and 2.

i. Article XXV. - Discipline and Discharge.

j. Article LXIV. - Drug Testing Requirements, Consequences of a Positive Test (Except for the next-to-last paragraph.)

k. Article XXXVI. - Work Force Changes, Section D (the first and last sentences)

2. The following proposals are not within the scope of collective bargaining:

a) Article XXXV. - Promotions, Paragraph 2.

b) Article XLIV. - Split Shifts.

c) Article XXXIX. - Hours of Work -Cafeteria Manager Unit, Sections A, D, and E.

Article XLI. - Hours of Work -Cafeteria Worker Unit, Preface, Sections B and C.

d) Article LXIV. - Drug Testing Requirements, Consequences of a Positive Test, next to the last paragraph.

e) Article XXXVI. - Work Force Changes, Section C, paragraph 4, Section D, second sentence

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

May 10, 1991

APPENDIX

Proposal No. 6:

ARTICLE XLVII. ANNUAL LEAVE - CAFETERIA WORKER UNIT

Paragraph 1.

Every full time employee shall be eligible for paid annual leave after ninety (90) days of service with the School System. All employees shall start to earn annual leave as of their date of hire at the rate of:

A. Less than three (3) years of service, thirteen (13) days per year;

B. Three (3) years service, but less than fifteen (15) years of service, twenty (20) days per year;

C. Fifteen (15) or more years service twenty-six (26) days per year.

Employees may accumulate annual leave for later use up to a maximum of thirty (30) days. The minimum amount of leave which may be charged such an employee is one (1) hour. Leave may be used as the employee chooses.

Part time employees in the Cafeteria Worker Unit with regular pre-scheduled tours of duty will be credited annual leave at the rate of one (1) hour for each twenty (20) work hours per pay period.

Paragraph 2.

Application for annual leave shall be submitted by the employee on a form provided by the Board to his immediate supervisor. The request must be approved or disapproved as soon as possible.

Paragraph 3.

The rate of annual leave pay shall be the employee's regular straight time rate of pay.

Paragraph 4.

Each supervisor shall develop and post a vacation schedule as early as possible in the leave year. Every effort will be made to grant employees leave during the time requested. All conflicts will be resolved by the application of seniority. Applications for vacations shall be submitted two months in advance of the beginning date of the vacation.

Paragraph 5.

Employees on vacation shall not be subject to call-back.

ARTICLE XLVIII. ANNUAL LEAVE - CAFETERIA MANAGER UNIT

Paragraph 1.

Every full time employee shall be eligible for paid annual leave for ninety (90) days of service with the School System. All employees shall start to earn annual leave as of their date of hire at the rate of:

A. Less than three (3) years of service, thirteen (13) days per year;
B. Three (3) years of service, but less than fifteen (15) years of service, twenty (20) days per year;
B. Fifteen (15) or more years service twenty-six (26) days per year.

Employees may accumulate annual leave for later use up to a maximum of thirty (30) days. The minimum amount of leave which may be charged such an employee is one (1) hour. Leave may be used as the employee chooses.

Part time employees in the Cafeteria Manager Unit with regular, pre-scheduled tours of duty will be credited annual leave at the rate of one (1) hour for each twenty (20) work hours per pay period.

Paragraph 2.

Application for annual leave shall be submitted by the employee on a form provided by the Board to his immediate supervisor. The request must be approved or disapproved as soon as possible.

Paragraph 3.

The rate of annual leave pay shall be the employee's regular straight time rate of pay.

Paragraph 4.

Each supervisor shall develop and post a vacation schedule as early as possible in the leave year. Every effort will be made to grant employees leave during the time requested. All conflicts will be resolved by the application of seniority. Applications for vacations shall be submitted two months in advance of the beginning date of the vacation.

Paragraph 5.

Employees on vacation shall not be subject to call-back.

Proposal No. 15:

ARTICLE XXV. - DISCIPLINE AND DISCHARGE

A. Disciplinary 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. Willful 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 right to reply in writing, or in person, to all charges and to refurnish any statements in support of his 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.