On May 16, 2005, the State of Connecticut, Office of Policy & Management, Office of Labor Relations (the State) filed with the Connecticut State Board of Labor Relations (the Labor Board) a Petition for Declaratory Ruling seeking a ruling concerning whether certain proposals made by the Connecticut State Employees Association (the Union) are mandatory subjects of bargaining properly submitted for resolution in interest arbitration under the State Employee Relations Act (SERA or the Act).

After the preliminary administrative steps had been taken, the matter came before the Labor Board for a formal hearing on August 16, 2005. All parties appeared, were represented, and afforded a full opportunity to adduce evidence, examine and cross-examine witnesses, and make argument. Also on that date, the parties presented a partial
stipulation of facts and exhibits for the Labor Board’s consideration. Both parties filed post-hearing briefs, the last of which was received on September 16, 2005.

After the Union withdrew one of its four disputed proposals at issue in this petition, the State now requests the Labor Board to rule on the following questions:

1) Is the following Union proposal a mandatory subject of bargaining properly submitted to interest arbitration for resolution:

   Issue 9-B Add to Article 14.9, Grievance Procedure:

   An arbitrator may retain jurisdiction in any case in order to finalize a remedy.

2) Is the following Union proposal a mandatory subject of bargaining properly submitted to interest arbitration for resolution:

   Issue 26-A Add section to Article 28, Labor Management Committee:

   Effective thirty days following implementation of the agreement, a voluntary forty (40) hour work week will be an option in Alternate Work schedule programs. This option will not be exercised if there is a reemployment list for the classification series in which a request is made. The option would be eliminated in the event of layoff in the classification series. The State will not discriminate in promotions or other employment based decisions based upon participation or non-participation in the forty (40) hour work week option.

   Employees who select a forty (40) hour work week option will not accrue sick leave and vacation leave benefits based upon the forty (40) hour work week nor have their accruals adjusted to reflect the forty (40) hour work week.

3) Is the following Union proposal a mandatory subject of bargaining properly submitted to interest arbitration for resolution:

   New Memorandum of Understanding, “Merit Examinations”

   The State shall retain and make available for inspection a description of the process for ranking and evaluating candidates who complete a merit examination. The disclosure to be made pursuant to this provision shall not result in the release of any private information such as an employee’s social security number.

   On the basis of the entire record before us, we make the following findings of fact and we issue the following decision and declaratory ruling.
FINDINGS OF FACT

(Facts 1-11 are by stipulation of the parties).

1. The State of Connecticut Executive Branch (“State”) is an employer under the State Collective Bargaining Act (“the Act”).

2. The Connecticut State Employee Association (“CSEA” or “Union”) is the exclusive bargaining representative of the Engineering & Scientific (P-4) bargaining unit under the Act.

3. The petition involved certain proposals that were filed for interest arbitration and the actual language of the disputed proposals is an attachment to the petition. (Ex. 2).

4. There have been a series of collective bargaining agreements between the State and the CSEA covering the P-4 unit since 1977.

5. The 2001-2005 P-4 unit collective bargaining agreement between the State and the Union had an expiration date of June 30, 2005. (Ex. 3).

6. The negotiations for the successor agreement for the Engineering & Scientific (P-4) unit began in October 2004.

7. The Union declared impasse and the parties agreed upon the interest arbitrator and the first day of the interest arbitration hearing was held on May 11, 2005. The proposals in questions were included in the submission of unresolved issues to the interest arbitrator. (Ex. 4).

8. The Union has resolved or withdrawn some of the proposals that were covered by the petition (Issues 4, 6-A, 8-C, 38-B and 40), resulting in their removal from the petition. The State has withdrawn its one proposal covered by the petition (Issue 29), resulting in its removal from the petition.

9. The Union has modified some of the proposals covered by the petition (Issues 39-A and 44), which did not result in their removal from the petition.

10. The four proposals still in dispute are contained in Exhibit 5.

11. The negotiations for the 2001-2005 P-4 contract were resolved by an interest arbitration award of Arbitrator Robert Glasson, which was issued on August 6, 2001 and approved by the Legislature in March 2002. (Ex. 6).
12. The Union withdrew one of the four remaining issues involved in the petition, leaving three issues in dispute.

13. Certain other proposals made by the Union and not in dispute in this proceeding would, if adopted by the interest arbitrator, allow the Union to pursue a denial of a request for a voluntary forty hour work week (Issue 26A) to the Labor/Management Committee. If the Union remained dissatisfied with the decision of that committee, it could then appeal the issue to the Office of Labor Relations. If the Union remained dissatisfied with the decision of the Office of Labor Relations, it could then appeal the issue through the contractual grievance arbitration procedure. (Ex. 12).

14. The Union submitted the following offer of proof as to the intent of Proposal 39-A (Ex. 16):

The Union proposal that seeks that the State disclose the process for ranking candidates is a proposal that seeks disclosure of the ranking of the candidates pursuant to the examination process and further disclosure of the process an Agency may use after the candidates are ranked.

This secondary process may include criteria used by the Agency to select from the list of qualified candidates, interview notes if the candidates are interviewed, and any other standards employed in making a selection from the list.

DISCUSSION

In this case, the State has asked us to rule on whether three proposals made by the Union are mandatory subjects of bargaining properly submitted to interest arbitration for resolution of the issues. The State argues that these three proposals are nonmandatory subjects of bargaining and, therefore, cannot be submitted to interest arbitration. The Union argues all three proposals are mandatory subjects of bargaining, and, therefore, are properly submitted to interest arbitration for resolution.

Section 5-278(g) (1) of the Act states:

Nonmandatory subjects of bargaining shall not be subject to the impasse procedures of section 5-276a. In the case of higher education teaching faculty, the arbitrator shall not make a decision involving academic policy unless it affects the wages, hours or conditions of employment of such faculty. Any arbitration award issued on such matters shall be unenforceable.

In determining whether an issue is a mandatory subject of bargaining, one concerning hours, wages, or other conditions of employment, this Board has long employed a balancing test. See West Hartford Education Association v. DeCourcy, 162 Conn. 566 (1972); Town of East Hartford, Decision No. 1279 (1975); State of Connecticut, Decision No. 2663 (1988); Connecticut State Employees Association (P-3B Unit), Decision No. 2804-A (1991); Board of Trustees for Community Technical
Colleges, Decision No. 2901-A (1992). In the matter of Connecticut State Employees Association (P-3B Unit), the Labor Board reiterated its rationale in determining whether an issue was a mandatory subject of bargaining as follows:

As Decourcy recognizes there is an area of overlap between what have traditionally been thought managerial functions and what concerns conditions of employment for the employees. In drawing the line within that area between those items that must be bargained over and those which the employer may act on without bargaining, a balance must be struck. Town of East Haven, State Bd. Of Labor Relations, Decision No. 1279 (1975). And in striking it the tribunal should consider, we believe, the directness and the depth of the item’s impingement on conditions of employment, on the one hand, and, on the other hand, the extent of the employer’s need for unilateral action without negotiation in order to serve or preserve an important policy decision committed by law to the employer’s discretion.

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Apart from the Decourcy/East Haven balancing test, we have recognized that in certain circumstances a subject may be removed from the realm of mandatory bargaining by other statutory requirements.

As such, this Board will individually examine each of the issues in contention in order to determine whether such issues are mandatory subjects of bargaining and therefore properly subject to resolution through interest arbitration proceedings.

Issue 9B

The Union proposal, if adopted, would allow a grievance arbitrator to retain jurisdiction in order to finalize a remedy awarded by that arbitrator. The Union argues that bargaining over that portion of the grievance procedure which defines the role and authority of the arbitrator is clearly a mandatory subject of bargaining. The State asserts the Union is attempting to modify the statutory standards governing arbitration awards and judicial review of such awards as enunciated in Connecticut General Statute Section 52-418, and, therefore, the proposal is nonmandatory.

Connecticut General Statute Section 52-418 states:

(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other
action which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. (emphasis added)

In *State v. AFSCME, Council 4, Local 1565*, 49 Conn. App. 33 (1998), the Connecticut Appellate Court held that where an arbitrator ruled a grievant was not terminated for just cause in violation of the collective bargaining agreement and ordered the following remedy: “The grievant shall be reinstated to a position at Niantic [Correctional Center] or another facility agreeable to the grievant and to the union. Jurisdiction shall be retained [for] sixty days to resolve any issues related to remedy.”, the arbitrator did not render a mutual, final and definite award in violation of § 52-418(a)(4). The Court held that “because the award does not specify an exact location for placement, it is indefinite.” *Id.* The Court further held that because the arbitrator retained jurisdiction for sixty days, “this portion of the award did not conform to the submission, which required that the arbitrator provide a specific remedy upon a finding that the grievant was terminated without just cause.” *Id.*

While the State argues the Union’s proposal would be an “end run” around the requirements of § 52-418(a)(4), we do not believe this to be the case. First, “grievance procedures are mandatory subjects of bargaining.” *Board of Trustees for the Connecticut State University System*, Decision No. 3859 (2002). Next, it is black letter law that arbitration is “a creature of contract.” *Town of Stratford v. International Association of Firefighters, AFL-CIO, Local 998*, 248 Conn. 108, 121 (1999). In furtherance of this concept, the Connecticut Supreme Court found:

> By including an arbitration clause in their contract, the parties bargain for a decision maker that is not constrained by formalistic rules governing courtroom proceedings and dictating judicial results. Rather, the arbitrator is governed by the terms of the parties’ contract – in this case, the collective bargaining agreement. It is also that agreement that sets limits on the arbitrator’s authority. In negotiating the agreement, the parties are free to bargain for whatever terms they choose, …”

*Town of Stratford*, 248 Conn. at 121.

It is important to note that in *State v. AFSCME, Council 4, Local 1565*, 49 Conn. App. 33 (1998), no language was included in the contract allowing the arbitrator to retain jurisdiction. Because arbitration is a creature of contract, the parties are free to negotiate the terms that will govern the arbitrator’s conduct. Where the parties’ negotiate a contractual provision (through agreement or by invoking impasse procedures) to allow an arbitrator to retain jurisdiction in order to finalize the remedy ordered in an arbitration award, this language would change the scope of authority granted to an arbitrator. The proposal submitted by the Union would not contravene the provisions of § 52-418 (a) (4). Rather, it would further define the arbitrator’s powers and the scope of the parties’
submission per the collective bargaining agreement. The proposal is a mandatory subject of bargaining.

**Issue 26A**

The Union proposal, if adopted, would allow employees the option of requesting a forty hour work week. Currently, the collective bargaining agreement dictates a standard thirty-five hour work week for bargaining unit members. Additionally, if certain other union proposals were adopted, the Union would have the ability to grieve and arbitrate any denial of such a request. The Union argues that because this proposal concerns hours of work, it is a mandatory subject of bargaining. The State asserts the Union is attempting to force the employer to provide overtime and, therefore, the proposal is nonmandatory.

We do not fully understand the State’s assertion that adoption of this proposal would lead to overtime (as that term is traditionally understood). The Union is not proposing a work week greater than forty hours. Rather, the Union is requesting employees be allowed another alternative work schedule option. Although this bargaining unit currently, by collective bargaining agreement, works a thirty-five hour workweek, the Union clearly has a right to negotiate over hours of work. Thus, if the Union were to have proposed an increase in the standard work week from thirty-five hours to forty hours for all bargaining unit members, this would clearly be a mandatory subject of bargaining.\(^1\)

We are now faced with the question of whether allowing the employee to voluntarily select such an option and possibly pursue any denial of that request through arbitration somehow transforms this subject from mandatory to nonmandatory. In making this determination, we must balance “the directness and depth of the item’s impingement on conditions of employment, on the one hand, and on the other hand, the extent of the employer’s need for unilateral action without negotiation in order to serve or preserve an important policy decision committed by law to the employer’s discretion.”\(^{\text{internal citations omitted}}\)

We are troubled by the content of this proposal. Allowing individual employees the choice of working thirty-five or forty hours a week certainly impacts management’s ability to run its operation. However, when we balance this factor against the Union’s ability to negotiate over an issue as fundamental as hours of work, we conclude this proposal is a mandatory subject of bargaining. This conclusion is further supported by our prior decisions. In *Connecticut State Employees Association (P-3B Unit)*, Decision No. 2804-A (1991), we found a proposal which allowed the Union to arbitrate employee requests for reduction of work hours to be a mandatory subject of bargaining. This is an analogous case. There is no fundamental difference between allowing employees to request a reduction in hours or an

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\(^1\) We note this is not a case where the Union is attempting to increase the number of work hours above forty in order to derive payment at time and one half for all hours worked in accordance with this proposal. If such were the case, our analysis and conclusions would be affected.
increase in work hours up to forty hours. Here, we must simply determine whether the Union’s proposal is a mandatory subject of bargaining. We find that it is.

**New Memorandum of Understanding, Merit Exams**

The Union proposal, if adopted, would mandate the State retain and make available for inspection a description of the process for ranking and evaluation of candidates who complete a merit exam. The Union also asserts that the intent of this proposal includes the “disclosure of the process an Agency may use after candidates are ranked. This secondary process may include criteria used by the Agency to select from the list of qualified candidates, interview notes if the candidates are interviewed, and any other standards employed in making a selection from the list.” The State argues that this proposal involves a nonmandatory subject of bargaining expressly exempt from SERA by Section 5-272 (d) of the Act.

Section 5-272 (d) of the Act states:

> Nothing herein shall diminish the authority and power of the Employees’ Review Board, the Department of Administrative Services or any state agency established by statute, charter or special act to establish, conduct and grade merit examinations and to rate candidates in order of their relative excellence from which appointments or promotions may be made to positions in the competitive division of the classified service of the state served by the Department of Administrative Services. The establishment, conduct and grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the appointments from such lists shall not be subject to collective bargaining.

While the Union maintains they are simply seeking information relevant to the collective bargaining process, we find this argument to mask the real nature of the proposal. Section 5-272 (d) of the Act expressly exempts “the establishment, conduct and grading of merit examinations, the rating of candidates and the establishment of lists from such examinations” from the collective bargaining process. No matter what spin the Union attempts to place on its proposal, it is clear that this is an attempt to obtain information about a subject over which the Union cannot demand bargaining. The plain language of the statute exempts this area of the employer/employee relationship from collective bargaining. See *State of Connecticut*, Decision No. 2155 (1982); *State of Connecticut, Dept. of Public Safety*, Decision No. 3673 (1999) (the State does not violate its duty to furnish relevant information where the information sought implicates Section 5-272(d) of the Act). Any right to collective bargaining in this area, including the right to obtain information, must be derived from the Legislature in the manner of a statutory change. This proposal is not a mandatory subject of bargaining.

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2 Were we serving as the interest arbitrator in this matter, we would, in light of the statutory criteria for selecting last best offers, find this proposal to be both disturbing and untenable. However, that is not our role.
Based on the above, the Labor Board issues the following Declaratory Ruling.

1) Is the following Union proposal a mandatory subject of bargaining properly submitted to interest arbitration for resolution:

   **Issue 9-B**  Add to Article 14.9, Grievance Procedure:

   An arbitrator may retain jurisdiction in any case in order to finalize a remedy.

   **Ruling**

   Yes, this proposal is a mandatory subject of bargaining and is subject to the impasse procedures of § 5-276a.

2) Is the following Union proposal a mandatory subject of bargaining properly submitted to interest arbitration for resolution:

   **Issue 26-A**  Add section to Article 28, Labor Management Committee:

   Effective thirty days following implementation of the agreement, a voluntary forty (40) hour work week will be an option in Alternate Work schedule programs. This option will not be exercised if there is a reemployment list for the classification series in which a request is made. The option would be eliminated in the event of layoff in the classification series. The State will not discriminate in promotions or other employment based decisions based upon participation or non-participation in the forty (40) hour work week option.

   Employees who select a forty (40) hour work week option will not accrue sick leave and vacation leave benefits based upon the forty (40) hour work week nor have their accruals adjusted to reflect the forty (40) hour work week.

   **Ruling**

   Yes, this proposal is a mandatory subject of bargaining and is subject to the impasse procedures of § 5-276a.

3) Is the following Union proposal a mandatory subject of bargaining properly submitted to interest arbitration for resolution:

   New Memorandum of Understanding, “Merit Examinations”

   The State shall retain and make available for inspection a description of the process for ranking and evaluating candidates who complete a merit examination. The disclosure to be made pursuant to this provision shall not result in the release of any private information such as an employee’s social security number.
Ruling

No, this proposal is not a mandatory subject of bargaining and therefore is not subject to the impasse procedures of § 5-276a.
CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 27th day of October, 2005 to the following:

Attorney Ellen M. Carter
OPM RRR and Facsimile
450 Capitol Avenue, MS#53OLR
Hartford, CT 06106-1308

Attorney Robert J. Krzys
500 Main Street RRR and Facsimile
East Hartford, CT 06118-1034

Robert Curtis, Director of Labor Relations
Office of Policy, Management, and Labor Relations
450 Capitol Avenue
MS#53OLR
Hartford, CT 06106-1308

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Jaye Bailey, General Counsel
CONNECTICUT STATE BOARD OF LABOR RELATIONS