L.2507 & L.3621,DC37 v. HHC, 57 OCB 16 (BCB 1996) [Decision No. B-16-96 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO and its affiliate LOCALS 2507 and 3621

DECISION NO. B-16-96

DOCKET NO. BCB-1723-95

Petitioner,

-and-

THE NEW YORK CITY EMERGENCY MEDICAL SERVICE OF THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

Respondent.

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INTERIM DECISION AND ORDER

On February 2, 1995, District Council 37, AFSCME, AFL-CIO and its affiliate Locals 2507 and 3621 ("Union") filed a verified improper practice petition against the New York City Emergency Medical Service ("EMS") of the New York City Health and Hospitals Corporation ("HHC"). The petition alleges that EMS violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] when it unilaterally promulgated EMS Operating Guide

[1] NYCCBL §12-306 provides, in relevant part, as follows:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(continued...)

No. 102-6 ("OG 102-6"), Command Memorandum No. 94-005 ("CM 94-005"), and a document entitled "CSU Urine Collection Procedure; Protocols and Forms," which establish new drug and alcohol testing policies and procedures for employees represented by the Union.[2]

By letter dated April 21, 1995, HHC informed the Office of Collective Bargaining ("OCB") that meetings were being held between itself and the Union concerning the issues raised by the petition and that it foresaw a resolution of the matter. Accordingly, HHC requested that the matter be held in abeyance pending the completion of these meetings. By letter dated June 16, 1995, the Union objected to HHC's request on the ground that, while the parties had met "to negotiate a mutually acceptable drug testing policy", they had failed to resolve the matter. On

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[1](...continued)

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 12-305 [formerly §1173-4.1] of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

[2] We are aware that EMS was merged into the Fire Department effective April 1, 1996. However, neither party has addressed the effect of the merger on the instant case.

the same day, the Union filed an amended verified improper practice petition. HHC filed a verified answer on August 10, 1995 and the Union filed a verified reply on October 10, 1995.

Background

On October 3, 1994, EMS promulgated OG 102-6 entitled "Chemical/Substance Testing", which became effective on October 9, 1994 and is applicable to "all members of the [Emergency Medical] Service." According to the Union, OG 102-6 was promulgated and implemented unilaterally.[3] The stated purpose of OG 102-6 is "to set forth policy and procedures regarding the testing of members of the Service suspected to be under the influence of intoxicating chemicals/substances, while on duty, and to set forth procedures for the recording and reporting of test results." If the test results are positive, OG 102-6 states, the EMS Director of Labor Relations is to ensure that the appropriate departmental charges are preferred against the employee.[4]

OG 102-6 mandates drug and alcohol testing whenever a "reasonable suspicion (as described in Policy Sections D and E)" exists that a member of the Service is under the influence of an

[3] The Union alleges that it did not "learn of" the existence of OG 102-6 until November of 1994.

[4] OG 102-6 also provides that "failure to [submit to testing when ordered] will result in the employee being relieved of duty without pay for failure to obey a direct order."

intoxicating chemical/substance. Policy Sections D and E provide:

> D. Testing for suspected chemical or substance use shall be performed when a reasonable suspicion exists; this suspicion may be based on, but not limited to, the following: slurred speech, alcohol on breath, glassy eyes, poor coordination, appearance, direct observation, irrational behavior or a triggering event such as a motor vehicle accident or other incident which suggests that the employee is not fit for duty or suggests that the employee is impaired and that the impairment may have an adverse effect on the employee's ability to safely and effectively discharge the employee's duties.
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> E. In all instances when a member of the Service is involved as an operator of an EMS vehicle in a single vehicle motor vehicle accident, or as an operator of an EMS vehicle in a multiple vehicle motor vehicle accident that results in serious personal injury or death or major damage to civilian or NYC EMS property, the member of the Service shall be tested for chemical/substance use.

According to the Union, prior to the promulgation of OG 102-6, EMS employees were subject to mandatory alcohol or drug testing only where reasonable suspicion existed, based upon specific criteria, that an employee was under the influence of alcohol or drugs while on duty. The Union alleges that this was so even after an employee had been involved in a motor vehicle accident; testing was ordered only where reasonable suspicion existed after the accident. OG 102-6 constitutes a unilateral change in conditions of employment, the Union asserts, because it mandates drug testing for employees involved in motor vehicle

accidents regardless of whether reasonable suspicion exists. HHC, on the other hand, alleges that "for several years" it has been the policy of EMS to order drug testing of employees who have been involved in motor vehicle accidents.

Prior to the promulgation of OG 102-6, the Union asserts, the only written policy concerning alcohol or drug testing was EMS Administrative Guide Procedure No. 302-2 ("AG 302-2"), entitled "Chemical/Controlled Substance Use Testing". AG 302-2 applied to "all uniformed officers of the Service" and mandated that "testing for suspected chemical/substance use shall be performed when a supervisor has reasonable suspicion that the member is under the influence of a chemical/substance." With respect to "reasonable suspicion", AG 302-2 makes the following statements:

> A. When a member of the Service, of any rank, reasonably suspects that another member of the Service is under the influence of a chemical/substance, he/she shall immediately contact the Inspectional Service Unit. This belief may be based on, but is not limited to, any of the following conditions: slurred speech, alcohol on breath, glassy eyes, poor coordination, appearance, direct observation, or when irrational behavior is exhibited. Physical evidence, e.g. bottle, syringe, spoon, powder, etc, shall be seized, inventoried, and safeguarded by the first member on the scene.
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> B. Members of the Service shall be tested when reasonable suspicion exists after being involved in a [motor vehicle accident] (on-duty) that results in personal injury, death, major destruction of EMS property, etc.

AG 302-2 states that if the test results are positive, "in

consultation with EMS Labor Relations, charges shall be prepared."[5]

The Union alleges that several weeks after the promulgation of OG 102-6, on November 18, 1994, EMS unilaterally promulgated CM 94-005. CM 94-005 sets forth specimen collection, chain of custody, and transport procedures to be followed when conducting a drug/alcohol test and identifies the specific lab that will perform the test. According to HHC, CM 94-005 merely "restates and enhances the chain of custody procedure that EMS has followed in cases of substance use testing to meet federal standards, including the use of a federally approved laboratory to test the specimens."[6]

On December 7, 1994, the Union requested that HHC provide it with a copy of "EMS chemical/substance abuse testing procedures." In response, on December 15, 1994, the Union was provided with a "draft" document entitled "CSU Urine Collection Procedure; Protocols and Forms" which was dated December 14, 1994.[7] This document sets forth, inter alia, the minimum physical

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[5] AG 302-2 also provides that "if a member refuses to submit to [drug testing], he/she shall be immediately relieved from duty without pay for failure to obey a direct order (pending appropriate disciplinary action within 30 days)..."

[6] The Union alleges, upon information and belief, that there are no federal alcohol or drug testing regulations which apply to EMS or which require EMS to adopt the policies and procedures at issue in this case.

[7] As of August 10, 1995, the date of HHC's answer to the instant petition, these procedures remained in draft form.

requirements for a collection site, proper identification of the donor, ways to avoid adulteration or dilution of the specimen by the donor, and circumstances under which "direct observation collections" are required. While the draft procedures cover some of the same subjects addressed in CM 94-005, they contain far more detail. The Union alleges that these procedures were promulgated unilaterally; HHC alleges that they simply "enhance a procedure which had been followed by EMS in the collection of urine for testing in order to meet federally approved standards."[8]

The Union further alleges that "simultaneous with the implementation of OG 102-6," EMS unilaterally began to require employees arrested for drug or alcohol related offenses off duty to submit to drug testing. The Union asserts that this policy was never formally adopted in written form by HHC and has not been uniformly enforced. HHC maintains that this policy is not new.

By letter dated December 16, 1994, the Union notified Randy Levine, the Commissioner of the City's Office of Labor Relations, of its position that the promulgation of OG 102-6 constituted a unilateral change in working conditions and requested bargaining. Also in that letter, the Union requested that the City "cease and desist routine drug and substance use tests in instances of serious motor vehicle accidents, unless there exists a reasonable

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[8] See supra note 6.

suspicion of substance or drug use." By letter dated January 10, 1995, and addressed to Jane Roeder, an Assistant Commissioner at the City's Office of Labor Relations, the Union provided the City with a list of specific subjects it wished to discuss on the drug testing issue.[9]

On January 10, 1995, February 24, 1995 and April 19, 1995, collective bargaining meetings between the Union and EMS were held. According to the Union, EMS representatives stated that the policy and procedure set forth in OG 102-6, as well as the related procedures set forth in CM 94-005 and the CSU Urine Collection Procedure, was not a mandatory subject of bargaining and refused to bargain. The Union asserts that HHC has insisted that the Union accept OG 102-6 "as is" and has refused "to provide the Union with relevant information that it has requested concerning the drug testing procedures, including laboratory chain of custody forms, laboratory certification, laboratory quality assurance protocols and testing procedures." HHC

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[9] The list included the following:

1. Privacy of individuals during drug/alcohol tests.
2. Chain of custody of urine samples.
3. Provision for split samples and independent testing.
4. Test results--cut off levels for action.
5. Positive test results--referral to Union program.
6. Will test results be provided to Union if employee consents?
7. Penalties for positive test results.
8. Is there an escort home when employee is relieved of duty following drug test?
9. Employee health service evaluation-- explanation of the evaluation.

maintains that it is willing to continue to meet with the Union and discuss the procedures in good faith.

The policies and procedures have remained in effect and employees involved in motor vehicle accidents have been tested. Employees who have been tested are "relieved of duty" pending receipt of the test results.[10] The consequences of a positive result depend, in part, upon the employee's length of service. Permanent and provisional employees with at least two years of service who test positive are given the opportunity to enter treatment and rehabilitation programs. According to HHC, they are given this opportunity without the implementation of disciplinary action. However, the Union alleges that disciplinary penalties have been imposed on employees who have tested positive.[11] Provisional employees with less than two years of service who test positive are summarily terminated; they are not given the opportunity to enter treatment and rehabilitation programs.[12] The Union maintains that summary termination of provisionals with less than two years of service

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[10] The Union alleges that this "relief from duty" or "administrative suspension" is without pay; the City alleges that it is with pay.

[11] The Union alleges that the penalties which have been imposed include "suspensions, imposition of probationary terms, requiring employees to submit to random drug testing for a one year period of time and to waive his/her contractual and civil service due process rights, as a condition of returning to work."

[12] The City denies this allegation and affirmatively states that "provisional employees with less than two years of employment do not have any hearing or appeal rights."

is "contrary to and in violation of an agency wide pre-existing past practice of affording [such employees] advance notice of disciplinary offenses, union representation and an informal hearing before a representative of EMS' Office of Labor Relations in which the employee has an opportunity to present mitigating facts to demonstrate that no disciplinary action is warranted." The Union further alleges that in some cases "EMS has coerced employees [who have tested positive] into resigning from their positions by threatening them with termination."

As a remedy, the Union requests that the Board order the reinstatement of all employees who have been coerced into resigning or who have been terminated as a result of drug testing, the rescission of any disciplinary action taken against employees as a result of drug testing, and the expungement of corresponding records from the employees' personnel files. The Union also requests that the Board order EMS to cease and desist from further implementation of OG 102-6 and the related procedures and to bargain in good faith with the Union over a new policy.

Positions of the Parties

Petitioner's Position

The Union argues that by unilaterally promulgating a "new drug testing trigger" in OG 102-6, i.e., involvement in a motor vehicle accident irrespective of reasonable suspicion, "newly

adopted criteria ... to discipline and terminated employees", "new disciplinary consequences for a positive test result", and "a new threshold definition of a positive test",[13] HHC violated §12-306a(4) of the NYCCBL. Citing decisions of the Public Employment Relations Board ("PERB"), the Union contends that "testing triggers, methodology, and choice of laboratory", "new criteria for discipline", and "disciplinary consequences" are all mandatory subjects of bargaining.

City Position

HHC argues that PERB has held that, in cases involving "safety-sensitive" positions, the decision to require drug/alcohol testing where reasonable suspicion of job impairment exists is a management prerogative, not a mandatory subject of bargaining. HHC asserts that because EMS provides pre-hospital care and emergency ambulance transportation to patients of the City's hospitals, EMS employees are in "safety-sensitive" positions. Furthermore, HHC contends, on-duty involvement in a vehicular accident provides the requisite reasonable suspicion.[14]

HHC argues that "there can be no reasonable claim of a refusal to bargain" in this case because HHC has agreed to meet with DC 37 to "discuss any changes in the procedures." This is

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[13] Neither OG 102-6, AG 302-2 nor the CSU Urine Collection Procedure specify what shall constitute a positive test result.

[14] For this proposition HHC cites Barretto v. City of New York, 555 N.Y.S.2d 382, 157 A.D.2d 116 (2d Dep't 1990).

so, HHC argues, despite the fact that "the drug testing policy has been in effect at EMS for years."

Discussion

Public employers and employee organizations have a statutory duty, under Section 12-307a. of the NYCCBL, to bargain on all matters concerning wages, hours and working conditions, i.e., mandatory subjects of bargaining. Section 12-306a.(4) of the NYCCBL makes it an improper practice for a public employer to refuse to bargain in good faith on matters within that framework. A similar prohibition against an employer's refusal to bargain with the certified bargaining representative can be found in §209-a.1(d) of the Taylor Law. It has been held, under both statutes, that a unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith, and, therefore, an improper practice under the applicable statute.[15]

The Union alleges in its petition that the promulgation of

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[15] Decision Nos. B-36-93; B-22-92; B-25-85; and B-6-82. See also: Village of Rockville Center, 18 PERB ¶3082 (1985); City of Batavia, 16 PERB ¶3092 (1983); and Board of Education, City of Buffalo, 6 PERB ¶3051 (1973).

HHC contends that there can be no claim of a refusal to bargain in this case because it has agreed to meet with DC 37 to negotiate. While this may be so, a willingness to bargain does not excuse a unilateral change in terms and conditions of employment. The duty to negotiate a mandatory subject includes the duty to negotiate until agreement is reached or the impasse procedures are exhausted, and to submit to the impasse procedures set forth in the statute; the City may not unilaterally implement a change in a mandatory subject of bargaining before bargaining on the subject has been exhausted. See, Decision No. B-63-91.

OG 102-6, CM 94-005, and the CSU Urine Collection Procedure, constitutes a unilateral change in terms and conditions of employment since these documents set forth a new testing trigger (i.e., testing after an accident regardless of reasonable suspicion), new testing procedures, and new disciplinary consequences. Thus, the issue presented by the Union's petition is not whether the decision to test is a mandatory subject of bargaining. Rather, the issue is whether the procedures used to implement that decision and the consequences of testing are mandatory subjects of bargaining.

In Nassau County Police Benevolent Association v. County of Nassau, 27 PERB ¶3054 (1994), the County unilaterally implemented, for the first time, drug testing procedures for police personnel. Pursuant to those procedures, officers were subject to drug testing only upon "reasonable suspicion" of drug abuse.[16] Officers who either tested positive or refused to

[16] The procedures defined reasonable suspicion as follows:

> Reasonable suspicion that a member is abusing drugs exists when objective facts and observations are brought to the attention of a Superior Officer and based upon the reliability and weight of such information he/she can reasonably infer or suspect that a member of the Department is abusing drugs. Reasonable suspicion must be supported by specific articulable facts which may include, but are not limited to: reports and observations of the member's drug related activities, i.e., purchase, sale or possession of drugs, associations with known drug dealers or users, observations of the member at known drug related locations, etc.; an otherwise unexplained change in the member's behavior or work performance; and observed impairment of the member's ability to perform his duties.

submit to testing were suspended and subjected to subsequent disciplinary action. In determining whether the County's implementation of its drug testing policy involved mandatory subjects of bargaining, PERB identified the employer and employee interests at issue:

> The County seeks to detect and prevent impairment of its police officers which can jeopardize safety and otherwise compromise the delivery of police services. The County also argues that the testing maintains and fosters the public's confidence in the police department. On the other hand, it is recognized in the ever-developing case law that drug testing by urine sampling is a demeaning and intrusive procedure, which triggers personal privacy issues of constitutional dimension. The outcome of those tests, accurate or not, can affect the employee's employment in several ways, and may affect the employee's reputation irrevocably.

PERB then balanced these interests and concluded that the procedures and disciplinary consequences associated with the drug testing policy were mandatorily bargainable:

> The County's interests relate only, or at least primarily, to the decision to subject employees to a drug test. They are not, however, so related to the implementation of that decision as to render the several separate implementation decisions equally nonmandatory in all respects. We cannot say that whatever managerial prerogatives may be associated, for example, with testing methodology, testing triggers (e.g., definition of reasonable suspicion), choice of laboratory, collection procedures, chain of custody, sample screening, conditions for retesting, reporting and recording of test results, due process protections, and disciplinary consequences, so outweigh the employees' collective and individual interests in these areas as to make them negotiable only at the County's option. We, therefore, find these procedures and consequences to be mandatorily negotiable.

Turning to the unilateral changes alleged by the Union in the case before us, we will address the testing trigger first.

As PERB stated in Nassau County, "testing triggers (e.g., definition of reasonable suspicion)" are a mandatory subject of bargaining. Accordingly, a unilateral change of testing triggers constitutes a refusal to bargain in good faith. In the instant case, a factual dispute exists as to whether the testing trigger set forth in OG 102-6 constitutes a change. The Union maintains that it does because it mandates testing for employees involved in motor vehicle accidents regardless of whether reasonable suspicion exists. HHC, on the other hand, alleges that "for several years" it "has ordered testing of employees of EMS who have been involved in motor vehicle accidents." This question of fact can only be resolved after an evidentiary hearing on the matter.

Addressing the Union's contention that CM 94-005 and the CSU Urine Collection Procedure constitute a unilateral change in terms and conditions of employment because they set forth new testing procedures, we note that, pursuant to Nassau County, testing methodology, choice of laboratory, collection procedures, chain of custody, sample screening, conditions for retesting, and reporting and recording of test results are all mandatory subjects of bargaining. For this reason, a unilateral change in these areas constitutes an improper practice. However, given HHC's allegation that CM 94-005 and the CSU Urine Collection Procedure merely restate existing policy and given that the Union has not presented any evidence of prior written policies

concerning testing procedures, there exists a question of fact as to whether there has been a change in testing procedures. This question of fact can only be resolved after an evidentiary hearing on the matter.

As for the Union's claim that the promulgation of OG 102-6, CM 94-005, and the CSU Urine Collection Procedure, constitutes a unilateral change in terms and conditions of employment because they establish new disciplinary consequences, we note that PERB held in Nassau County that due process protections and disciplinary consequences are mandatory subjects of bargaining. However, on the record before us, we cannot determine how and to what extent, if any, the disciplinary consequences and due process protections have been changed. For example, while the City alleges that permanent and provisional employees with at least two years of service who test positive are given the opportunity to enter treatment and rehabilitation programs without the implementation of disciplinary action, the Union maintains that such employees have in fact been disciplined. There is no evidence in the record concerning whether either of these consequences constitutes a change in prior policy. While the Union maintains that summary termination of provisionals with less than two years of service who test positive is contrary to past practice, it has offered no evidence to support this allegation. Similarly, the Union has offered no evidence to support its allegation that EMS has coerced employees who have

tested positive into resigning and, in any event, has not alleged that this practice constitutes a changed disciplinary consequence. Finally, there is a dispute as to whether employees are suspended with or without pay pending the results of a drug test and whether, in either case, the policy represents a change. These questions of fact can only be resolved after an evidentiary hearing.

The Union alleges that, around the time that OG 102-6 was implemented, EMS unilaterally implemented yet another new testing trigger, i.e., an arrest for drug or alcohol related offenses off duty. HHC denies that this policy is new and the Union has submitted no evidence to support its allegation. As is the case with several of the issues discussed supra, in the absence of an evidentiary hearing, it is impossible for us to decide whether this policy constitutes a change.

In summary, we direct that an evidentiary hearing be held before a Trial Examiner to establish a factual record from which we may determine whether there has been a change in drug testing triggers and/or procedures, whether there has been a change in the disciplinary consequences of a positive result and due process protections, whether there has been a change in the policy of suspending employees with or without pay pending test results, and whether the policy of testing employees arrested for drug or alcohol related offenses off duty is new.

INTERIM ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DIRECTED, that an evidentiary hearing be held before a Trial Examiner to establish a factual record from which we may determine whether there has been a change in the disciplinary consequences of a positive result and due process protections, whether there has been a change in drug testing triggers, whether there has been a change in drug testing procedures, whether there has been a change in the policy of suspending employees with or without pay pending test results, and whether the policy of testing employees arrested for drug or alcohol related offenses off duty is new.

DATED: New York, New York
May 21, 1996

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Jerome E. Joseph
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER