L.1182, CWA v. NYPD, 67 OCB 26 (BCB 2001) [Decision No. B-26-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

LOCAL 1182, COMMUNICATIONS WORKERS OF AMERICA,

Petitioner,

Decision No. B-26-2001
Docket No. BCB-2110-00

-and-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

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DECISION AND ORDER

On January 4, 2000, Local 1182, Communications Workers of America ("Union") filed a verified improper practice petition against the New York City Police Department ("NYPD"). The Union alleges that the NYPD unilaterally changed its drug testing procedure for Traffic Enforcement Agents when it tested samples of Samuel Jerome's fingernail shavings – a method that was not prescribed in the drug testing policy. Respondent asserts that Jerome's fingernails were tested because he had insufficient head or body hair. The Board grants the Union's improper practice petition because testing fingernail shavings constitutes a change in drug testing procedure, over which the parties have not bargained.

BACKGROUND

On October 7, 1988, the NYPD issued Patrol Guide Procedure No. 118-18, entitled "Administration of Drug Screening For Cause." On May 31, 1995, the NYPD issued Interim

Order 88, which revised the Patrol Guide and required that all employees tested "for cause" provide both urine and hair samples. The Department then issued Interim Order 60 on August 21, 1997, which superseded Interim Order 88 and which describes when and how urine and hair samples should be collected and retested.

On September 9,1999, Traffic Enforcement Agent Samuel Jerome was arrested for criminal possession of a controlled substance. He was taken to the NYPD Medical Division for a drug screening test, and, according to the NYPD, because he had insufficient head or body hair, samples of his fingernail shavings were taken in addition to urine samples. Both the urine and nail samples tested positive for cocaine. Jerome was suspended on September 9, 1999, administrative charges of possession of a controlled substance were served, and after a Step II hearing, he was terminated effective February 1, 2000.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union contends that the NYPD drug testing procedures provide for testing both urine and hair samples. In this case, the NYPD tested Jerome's fingernail shavings and disciplined him based on the result of that test. Testing Jerome's fingernails constitutes a unilateral change in the NYPD drug testing procedures, which the Board has found to be a mandatory subject of bargaining. Such a procedural change violates §§ 12-305, 12-306a (1) and (4), and 12-306c of the NYCCBL.

The Union further asserts that it was unaware that the NYPD had occasionally tested fingernail shavings in the past, and that the Union had never agreed to such procedures.

According to the Union, NYPD Chief of Personnel, Michael. A. Markman's contention, in his affidavit, that the NYPD drug testing procedure provides for testing fingernail shavings, is incorrect and is contradicted by the language of the testing procedure.

The Union also argues that the NYPD's actions violate the Board's decision in *Communications Workers of Am., Local 1182 v. New York City Police Dep't and The City of New York* ,[1] a case involving the same parties as in the present case. In that case, the Union alleged that the NYPD imposed a unilateral change in drug testing procedure, and the Board ordered the parties to bargain over the change. The Union contends that bargaining has not yet reached a conclusion and that the parties never discussed testing fingernails.

City's Position

The City contends that because Jerome had insufficient head or body hair, the NYPD's Medical Division took samples of fingernail shavings and urine as part of the drug screening test. NYPD Chief Markman explained in his affidavit that since May 1997, the NYPD has analyzed fingernail shavings on approximately ten occasions in which it was not feasible to obtain a hair sample. Markman stated that an employee whose sample tests positive for a prohibited substance is terminated when either sample is positive. Both Jerome's urine and fingernail samples tested positive for cocaine. Thus, even if Jerome's fingernail shavings tested negative, he would have been terminated based upon the positive urine test.

The City argues that the NYPD did not violate §12-306a(1) of the NYCCBL because the Union has not established that its actions were for the purpose of interfering with, discriminating

[1]Decision No. B-47-98.

against or frustrating Petitioner's rights to organize, form, or join a public employee organization. In addition, the City could not have violated § 12-306c of the NYCCBL because that provision of the statute merely provides a definition of good faith bargaining. The City denies that there has been a violation of §12-306a(4) but does not address this allegation specifically.

DISCUSSION

The question before the Board is whether the NYPD committed an improper practice when it tested Jerome's fingernail shavings as part of a drug test, a method not prescribed in the Patrol Guide or subsequent interim orders. This Board finds that testing fingernail shavings is a change in the drug testing procedure, a change over which the NYPD must bargain.

It is an improper practice under NYCCBL § 12-306a for a public employer or its agents:

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> ***
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> (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. . . .

Under § 12-307a, public employers have a duty to bargain on all matters concerning wages, hours and working conditions – 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 such matters. We have held that a unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith and, therefore, an improper practice.[2]

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[2] *Patrolmen's Benevolent Ass'n v. The City of New York and City of New York Police Dep't*, Decision No. B-4-99 at 10.

In *Communications Workers of America,*[3] the City unilaterally promulgated an Order changing the procedure for retesting hair samples that produce positive drug test results. The Board stated that the procedures and consequences associated with management's decision to implement a drug testing policy are mandatorily bargainable because they relate to terms and conditions of employment. The Board concluded that changing the method for retesting hair samples is a procedure related to drug testing and is, thus, a mandatory subject of bargaining.

PERB has also held that drug testing procedures are bargainable. In *Nassau County Police Benevolent Ass'n*, the County had unilaterally implemented drug testing procedures for police employees. PERB stated that the procedures and disciplinary consequences associated with the drug testing policy are mandatorily bargainable.[4] Similarly, in *United Pub. Serv. Employees Union, Local 424*,[5] the Administrative Law Judge held that the County's decision to unilaterally implement a drug and alcohol testing procedure violated the Taylor Law because implementing the procedure is a mandatory subject of bargaining.

This Board finds that the NYPD committed an improper practice when it implemented a new drug testing procedure without engaging in collective bargaining. Interim Order 60 explains in great detail the procedures for testing employees for illegal substances. It provides the method for collecting the hair and urine samples, the number of hair and urine samples that must be collected, the procedure for maintaining the hair and urine samples, and the method by which

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[3] Decision No. B-47-98 at 6-7.

[4] 27 PERB ¶ 3054 at 3120 (1994).

[5] 30 PERB ¶ 4627 at 4780 (1997).

positive hair and urine samples are retested. The City does not identify any written policy that discusses testing fingernails or any substance other than an individual's hair and urine. We therefore find that the testing of fingernail shavings is a new drug testing procedure over which the City did not bargain.

While the City explains that the NYPD collected Jerome's fingernail shavings because he had "insufficient head or body hair," the written policy does not provide for testing an alternative substance. Although Chief Markman stated in his affidavit that since the issuance of Interim Order 88 in 1995, the drug testing policy provided for the collection of fingernail shavings in instances where hair samples could not be tested, there is no mention of fingernail samples in Interim Order 88 or in any of the related Orders.[6] Therefore, we find that the City violated § 12-306a (1) and (4) of the NYCCBL when it tested Jerome's fingernail shavings.[7] Accordingly, the Union's improper practice petition is granted.

The Union requests that the Board order the NYPD to dismiss all disciplinary charges against Jerome. Interim Order 60 provides, "Positive test results, which indicate illegal or illicit

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[6] Chief Markman's affidavit identifies ten instances when the NYPD tested fingernail shavings. We note that of these individuals, only one was in the Union's bargaining unit and that there is no evidence that the Union was aware that the individual was tested in this manner.

[7] When an employer violates NYCCBL § 12-306a(4), it also violates § 12-306a(1), because the refusal to bargain with the union necessarily results in interference with employees' rights. *See Unif. Fire Officers Ass'n, Local 854, IAFF, AFL-CIO and Unif. Firefighters Ass'n of Greater New York v. The City of New York,* Decision No. B-17-2001 at 7; *Dist. Council 37, AFSCME, AFL-CIO v. New York City Human Res. Admin. and City of New York,* Decision No. B-36-2000 at 13.

The Union also alleges a violation of § 12-306c of the NYCCBL. Because this provision defines the nature of good faith bargaining and we find that no bargaining has taken place on this issue, we cannot find a § 12-306c violation.

drug use, will result in Department Charges and Specifications and suspension." Since Jerome's urine sample tested positive – a procedure prescribed by the policy – we will not order that Jerome's disciplinary charges be dismissed nor that he be reinstated to his former position. Furthermore, the Union requests that the Board order the NYPD to reinstate other employees affected by the change. The Union has made no allegations that any other individuals were affected by the change in policy. Therefore, based on the record before us, we cannot grant such request.

ORDER

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

ORDERED, that the improper practice petition filed by Local 1182, Communications Workers of America, be, and the same hereby is granted; and it is further

ORDERED, that the New York City Police Department cease and desist from implementing new drug testing procedures until such time as the parties negotiate such changes; and it is further

ORDERED, that the New York City Police Department post the attached notice for no less that thirty days at all locations used by the NYPD for written communications with unit employees.

Dated: June 14, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS

MEMBER

GABRIELLE SEMEL
MEMBER

CHARLES G. MOERDLER
MEMBER

I DISSENT EUGENE MITTELMAN
MEMBER

I DISSENT RICHARD A.WILSKER
MEMBER

NOTICE
TO
ALL TRAFFIC ENFORCEMENT AGENTS
PURSUANT TO
THE DECISION AND ORDER OF THE

BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY
COLLECTIVE BARGAINING LAW

We hereby notify:

All Traffic Enforcement Agents that the New York City Police Department committed an improper practice when it modified its drug testing procedures without negotiating with Local 1182, Communications Workers of America.

It is hereby:

ORDERED, that the New York City Police Department cease and desist from testing employees' fingernail shavings when conducting "for cause"drug tests until such time as the parties negotiate the modification of drug testing procedures.

New York City Police Department
(Department)

Dated: _____ (Posted By) (Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.