

STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNCIL 81, AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES, AFL-CIO,	:	
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Charging Party,	:	
	:	
v.	:	<u>U.L.P. No. 95-01-111</u>
	:	
STATE OF DELAWARE, DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,	:	
	:	
Respondent.	:	

The State of Delaware, Department of Transportation, Division of Highways, (hereinafter "Employer" or "DOT") is a public employer within the meaning of §1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13, (1994), ("PERA").

Council 81, American Federation of State, County, and Municipal Employees, AFL-CIO ("Union") is the exclusive bargaining representative within the meaning of 19 Del.C. §1302(i). The Union represents the DOT Division of Highway Operations employees in New Castle, Kent and Sussex counties employed in the classifications listed in the collective bargaining agreement between the Employer and the Union, covering AFSCME Locals 879, 1036 and 1443.

The Employer and the Union were, at all times relevant to this proceeding, parties to a collective bargaining agreement which term extends three (3) years from its ratification date of April 18, 1994.

The Union filed an unfair labor practice charge against the Employer on January 23, 1995, charging conduct in violation of 19 Del.C. §1307(a)(5), which provides:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
  - (5) Refuse or fail to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an

appropriate bargaining unit, except with respect to a discretionary subject.

The Employer denied the allegations set forth in the charge and motioned the matter be deferred to the parties' contractual grievance and arbitration procedure. The request was denied and an evidentiary hearing was conducted on March 24, 1995.

The parties provided the Hearing Officer with post-hearing memoranda in support of their positions with the final filing received on May 24, 1995.

### **FACTS**

During the fall of 1994, the Department of Transportation assembled a committee comprised of non-bargaining unit management employees to draft a drug and alcohol testing program required by the Federal Highway Administration under the Omnibus Transportation Employee Testing Act and the rules promulgated thereunder ("OTETA"). The committee included DOT District Engineers, Division Directors, Human Resource Managers and legal counsel. Transcript, p. 50. In addition to mandating pre-employment, post-accident, reasonable suspicion, random, return to duty and follow-up testing and procedures for each, the policy also contained the following provisions, in relevant part:

#### **III. SPECIFIC PROVISIONS**

5. ... The act of refusing to submit to these drug or alcohol tests will be considered an act of employee gross insubordination and will lead to separate disciplinary action up to and possibly including dismissal.

#### **IX. POSITIVE TEST RESULTS**

##### **A. ALCOHOL MISUSE**

An employee who engages in prohibited alcohol conduct by testing between 0.02 and 0.039 in an evidentiary breath test will be removed from work without pay for 24 hours.

An employee who engages in prohibited alcohol conduct by testing 0.04 or greater, or who fails to meet testing requirements, must be immediately removed from work. Any such employee will be informed of the results and allowed to

make a statement for the record, and suspended without pay and immediately referred to the DelDOT SAP [*Substance Abuse Professional*]

Employees who have engaged in alcohol misuse by testing 0.04 or greater, or who fail to meet testing requirements, cannot return to work until they have been evaluated by a substance abuse professional (SAP) and have complied with all treatment plan requirements, and entered into a "last chance agreement" employment contract with DelDOT which will remain in effect during the entire period of Follow-up testing, but no longer than 60 months...

## B. DRUG VIOLATIONS

As with any alcohol misuse violation, if a positive drug test is reported by the department MRO [*Medical Review Officer*], or the employee fails to meet testing requirements, the employee must be immediately removed from work without pay ...

... A positive drug test is a violation of this policy. Any covered employee who does not pass, or who refuses to submit to drug testing, must be immediately removed from work. Any such employee will be informed of the results, be allowed to make a statement for the record, and be suspended without pay and immediately referred to DelDOT's SAP.

After failing to pass, or refusing to submit to, drug testing, an employee may not perform work unless and until:

1. The employee complies with all requirements of the department's EAP [*Employee Assistance Program*], especially complying with rehabilitation requirements established by the SAP.
2. The employee receives the recommendation of the SAP or MRO.
3. The employee agrees to enter into a Last Chance Agreement with DelDOT, and be subject to follow-up testing.

Before returning to work, the employees must meet with the appropriate District Engineer who will verify that:

- the employee has received a written recommendation from the SAP to return to work; and
- the employee has passed a return-to-duty test; and
- the employee has signed a "last chance agreement."

All of the above requirements must be met before an employee can return to work...

If there is no evidence of on-the-job drug use, the employee will be offered an opportunity for rehabilitation (in accordance with this policy) by being referred to the EAP for assistance. If the employee refuses rehabilitation or does not successfully complete a DeIDOT-approved rehabilitation program, he/she will be dismissed from employment. Relapse or tendency for relapse will lead to employee dismissal.

#### X. CONSENT

Compliance with the DeIDOT ALCOHOL AND DRUG TESTING POLICY is a condition of employment, as is the completion of the related consent form. Applicants who refuse to sign the consent form will not be considered for employment. Employees who refuse to sign the consent form will be subject to discharge...

#### XI. CHANGES OR MODIFICATIONS

DeIDOT reserves the right to change the provisions of this policy and testing program in the future.

Included in the draft policy was a document entitled "Employee Consent Form" which text read:

I, \_\_\_\_\_, have received and understand the DeIDOT WORKPLACE DRUG AND ALCOHOL TESTING POLICY as derived from the Omnibus Transportation Employee Testing Act of 1991 and related federal and state laws as the U.S. DOT and FHWA rules and regulations.

I acknowledge that as a condition of my employment I am subject to such drug and alcohol testing. I further agree to fully comply with this policy and to submit to such testing in the situations outlined in the DeIDOT testing policy and the Omnibus Act, 49 CFR Part 40, and related rules and regulations as follows:

- 1) Pre-employment
- 2) Random testing
- 3) Reasonable suspicion
- 4) Post-accident testing
- 5) Return to duty and
- 6) Follow-up testing

I understand that if I refuse to be tested pursuant to this policy, I will be suspended without pay, pending administrative and disciplinary action. Any such refusal will be sufficient evidence, in and of itself, of policy violation. Any such refusal will also be an act of gross insubordination and I acknowledge that separate disciplinary action for that offense will be taken and may lead to my dismissal.

The Union first became aware of the Employer's intent to institute the drug and alcohol testing program through a telephone call in late November, 1994, in which a DOT representative scheduled an "informational meeting" for the following week to discuss the drafted policy. The Employer first met with the Union on December 2, 1994.<sup>1</sup> During this meeting, the Employer reviewed the policy with the Union. Through its Staff Representative, Patricia Bailey, the Union expressed concern regarding the requirement that employees sign a "last chance agreement."

A second meeting involving the Employer and the Union was held on or about December 9, 1994. During this meeting, the "last chance agreement" was again discussed and the Union questioned whether it should have been negotiated. The Department of Transportation Personnel Administrator, Abbey Fieirstein, responded that she would "check into it." Transcript at page 51.

Ms. Fieirstein testified that the Employer's purpose in holding the meetings of December 2 and 9, 1994, was "... specifically for the purpose of presenting information in reference to the policy to AFSCME." Transcript, p. 51. She further testified:

...the purpose of the meeting was not to sit down and negotiate with the Union but to seek their comments, to seek their recommendations, to answer any questions they had in reference to the policy ... Transcript, p. 52.

The Employer conducted informational meetings in each of the three (3) Districts in late December and early January in order to provide each affected employee with a copy of the policy and to answer questions. These meetings were conducted by District Engineers in conjunction with a representative of the medical testing contractor, MedLab. Employees were required to sign the Employee Consent Form and an Awareness Form at the close of these meetings. They were also advised, at that time, that refusal to sign the forms constituted insubordination and would subject the employee to discipline.

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<sup>1</sup> The document entitled "DELDOT Workplace Drug and Alcohol Testing Program", submitted as Joint Exhibit 2, is dated December 9, 1994, on its cover. It is unclear from the testimony whether the Union actually received this document at the first meeting on December 2, 1994. It is clear that substantive provisions of the program were discussed by the parties during the December 2 meeting.

Following the administrative suspension of an employee who refused to sign the Consent Agreement at the close of a District informational meeting,<sup>2</sup> an addendum was issued on or about January 13, 1995, to the Workplace Drug and Alcohol Testing Program which amended Article X:

X. Acknowledgment

Compliance with the DeIDOT ALCOHOL AND DRUG TESTING POLICY is a condition of employment, as is the completion of the related consent form for applicants. Applicants who refuse to sign the consent form will not be considered for employment. Employees who refuse to sign the consent form will be subject to disciplinary action up to and including dismissal... (emphasis added highlighting changes)

**ISSUE**

Did the Employer, Delaware Department of Transportation, violate 19 Del.C. §1307(a)(5) in implementing its Workplace Drug and Alcohol Testing Program, including disciplinary provisions, on January 1, 1995?

**POSITIONS**

Union:

The Union alleges that the dispute arises as a result of the State's unilateral implementation of its Workplace Drug and Alcohol Testing Program, which includes disciplinary procedures. It asserts the Employer was on notice that the Union believed portions of the policy, specifically those relating to the requirement that employees testing positive under the program sign a "last chance agreement" as a condition of continued employment, were negotiable under the PERA.

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<sup>2</sup> The issue involving employee Lightcap which was included in the charge and explored by the Union in the hearing is not addressed in this decision as the parties were able to effectively resolve the issues raised by his refusal to sign the Consent Agreement to their mutual satisfaction. It is the Hearing Officer's understanding that the Employer has suspended requiring employees to sign the Consent Agreement pending the resolution of this Charge.

The Union argues that discipline is a mandatory subject of bargaining under the PERA. It notes that the Employer does not dispute that it is a negotiable subject of bargaining which the parties have negotiated in the past. 29 Del.C. §5938(c) does not reserve the subject of discipline to merit system rules for state employees. It further argues that the PERA differs materially from the Public School Employment Relations Act (14 Del.C. Chapter 40) because "discipline" is no longer included as a subject reserved to the "inherent managerial policy" of the Employer at 19 Del.C. §1305. It concludes that discipline, specifically as it relates to the drug and alcohol testing program in question, is a term and condition of employment within the meaning of §1302(q) and is, therefore, mandatorily negotiable.

The Union also argues that by requiring individual employees to sign an "Employee Consent Form" by which the individual acknowledges his/her receipt and understanding of the policy and accedes to application of its provisions, including those involving discipline and last chance agreements, the Employer has interfered with the rights of employees under the Act. The policy states that failure to sign the consent form is an independent infraction subject to discipline "... up to and including dismissal."

Employer:

The Employer argues that this dispute involves a simple matter of DelDOT's compliance with OTETA which requires that employees who are required to hold a commercial drivers license undergo drug and alcohol testing as a condition of employment. DelDOT had no choice, it argues, but to develop the required statewide policy. It argues that DelDOT acted in good faith by affording the Union the opportunity for meaningful discussions of the policy commencing December 2, 1994, prior to its January 1, 1995 implementation.

The Employer argues that the Union clearly and unmistakably waived its right to negotiate the disciplinary procedures contained in the Workplace Drug and Alcohol Testing

Program, as evidenced by the parties' long bargaining history and express contractual provisions. The Management Rights, Work Rules, and Grievance and Arbitration sections of the parties' existing collective bargaining agreement clearly identifies discipline as a matter of inherent managerial policy which the Employer is not required to negotiate. It asserts that the Union has always sought to appeal work rules adopted by the Employer which it considers arbitrary, capricious or otherwise unjust through the contractual grievance and arbitration procedure.

Finally, the Employer asserts that if the charge is not dismissed, the Hearing Officer should defer to the parties' contractual grievance and arbitration procedure in this matter, as the dispute involves a matter of contractual interpretation under the cited contractual provisions.

### **OPINION**

At issue in this matter is the Workplace Drug and Alcohol Testing Program adopted by DelDOT in response to the rules promulgated by the Federal Highway Administration under the Omnibus Transportation Employee Testing Act ("OTETA").<sup>3</sup> The stated purpose of OTETA and the rules promulgated thereunder is "... to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial vehicles." 49 CFR Subtitle B, Chapter III §382.101. The testing procedures were designed to deter drivers from having alcohol and controlled substances in their systems while "performing safety sensitive functions", as defined in §395.2 of the regulations. The coverage of the rules extends to all persons required to hold a commercial drivers' license. The Union and the Employer do not dispute the applicability of the federal requirements.

The federal regulations require employers of fifty (50) or more drivers on March 17, 1994, to implement drug and alcohol testing programs which complied with the federal standards by January 1, 1995. OTETA specifically mandates:

... privacy in collection techniques, incorporation of Department of Health and Human Services (DHSS) mandatory guidelines for drug testing and comparable

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<sup>3</sup> Joint Exhibit 1.

safeguards for alcohol testing, quantified confirmation of any positive screening results, collection of split samples of body fluid specimens, confidentiality of test results, and scientifically random selection of employees to be tested. ... Regulations prescribed under the Act must include provisions for the identification of, and opportunity for treatment for covered employees in need of assistance due to misuse of alcohol or illegal use of controlled substances.  
p. 7304.

The federal regulations require six types of drug and/or alcohol testing: pre-employment, post-accident, random, reasonable suspicion, return to duty and follow-up.

The federal regulations do not address discipline other than to require that the consequences for engaging in substance use related conduct shall be removal of the employee from the safety sensitive function. §382.501. §382.21 further requires that an employer may not permit a driver who refuses to submit to a test "to perform or continue to perform safety sensitive functions." In discussing the promulgated rules, the Federal DOT states at page 7332:

A few commenters stated that employers who remove an employee from a safety sensitive function should not be obligated to place that employee in another position or compensate that employee. All these rules require is removal from safety sensitive functions. We leave the specific conditions under which an employee is removed, such as whether or not the employee is paid or moved to another non-safety-sensitive position, to employer policies or collective bargaining. (emphasis added)

The federal mandates further require that employers advise employees of the provisions of adopted testing programs, including "... sufficient information about the safety sensitive functions performed by covered drivers to make clear what period of the work day the driver is required to be in compliance." §382.601

The limits of the regulations and the overlap of the testing procedures into areas subject to collective bargaining is explicitly recognized in the federal Department of Transportation report:

#### Other Requirements Imposed by Employers

The rules contemplate that many aspects of the employer/employee relationship with respect to these programs will be subject to collective bargaining. For example, who pays for assessment and evaluation is one area we explicitly do not

regulate. However, employers and employees are not free to bargain away any of the requirements of these rules. Whatever rights they may have to bargain collectively or otherwise agree on employer-employee relations, they cannot change or ignore Federal safety standards. (at page 7317)

The Employer is required to provide each driver with an explanation of the drug and alcohol testing program and a copy of the Employer's policies. The Employer must include information on any additional policies adopted with respect to the use and/or possession of drugs and/or alcohol, "... including any consequences for a driver found to have a specified alcohol concentration that are based on the Employer's authority independent of these rules. These additional policies must be clearly identified as based on the Employer's independent authority." (p. 7502, emphasis added).

Contrary to the State's argument, OTETA does not require that testing be a "condition of employment", i.e. that an employee can only continue his/her employment by complying with the program. The program adopted by DeIDOT, however, explicitly states that the compliance is a "condition of employment." Article X. Because it is not specifically addressed or required by the federal mandates, this condition could only be included under the DeIDOT policy under the "employer's independent authority." The issue therefore, becomes did the Employer have independent authority under Delaware law to unilaterally make compliance with its testing procedures a condition of employment for organized employees.

I. Discipline under DeIDOT's Workplace Drug and Alcohol Testing Program is a mandatory subject of bargaining.

The Public Employment Relations Act went into effect on September 23, 1994, replacing the former 19 Del.C. Chapter 13, Right of Public Employees to Organize. The PERA obligates public employers and the exclusive bargaining representatives of certified bargaining units of employees to negotiate in good faith with respect to terms and conditions of employment. "Terms and conditions of employment" are defined at §1302(q) to mean "... matters concerning or related to wages, salaries, hours, grievance procedure and working conditions." To the extent

that the PERA mirrors the Public School Employment Relations Act (14 Del.C. Chapter 40 (1982)), the PERB has held that through the use of these phrases the General Assembly has intentionally created a "broad and encompassing scope of negotiability." Smyrna Educators Assn. v. Bd. of Education, Del.PERB, DS 89-10-046 (1990).<sup>4</sup>

The statute limits this broad scope of negotiability in two ways. The definition of terms and conditions of employment is followed by a qualifying phrase "... provided, however, that such term shall not include those matters determined by this Chapter or any other law of the State to be within the exclusive prerogative of the employer." Matters within the "exclusive prerogative" of the employer must be explicitly granted to or mandated by law and not simply by a general grant of authority. This phrase creates a category of illegal subjects of bargaining, so that contractual provisions which are inconsistent or contrary to law are invalid and unenforceable under §1313 of the PERA. Woodbridge Education Assn. v. Bd. of Education., Del.PERB, ULP 90-02-048 (1990).

It is clear that in adopting the PERA, the General Assembly intended to continue the limitation imposed on the right of State employees to bargain certain matters under the Merit Law. 29 Del.C. §5938(c) explicitly removes certain areas covered by the State Merit Law from the scope of collective bargaining. These provisions have survived the repeal of the predecessor Right of Public Employees to Organize, and continue to impact the scope of bargaining for State employers and employees under the PERA.<sup>5</sup> The parties to this dispute agree that the matters at issue here do not fall within the bargaining prohibitions of 29 Del.C. §5938(c).

There is no question in this case but that the Federal mandates concerning the types of drug and alcohol testing to be conducted, the employees who are subject to the testing, the extent of the testing procedures and the assistance to be offered to employees, among other things, are

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<sup>4</sup> Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982) and/or the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986) are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994). Local 1590 v. City of Wilmington, Del.PERB, ULP 89-05-037 (1989).

<sup>5</sup> Laborers' Local 1029 v. State, Del.Chan., 310 A.2d 664 (1973), aff'd Del. Supr., 314 A.2d 919 (1974).

binding upon DelDOT in creating its policy. OTETA expressly preempts any State law in the areas it specifically addresses. For this reason, the issue presented does not involve whether the testing, notification and follow-up procedures included in the DelDOT policy are negotiable under the PERA.

The Charge focuses on the provisions of the adopted policy which not mandated by OTETA. Specifically, the Union alleges that by failing to negotiate the disciplinary procedures, including "last chance agreements", the Employer has violated its duty to bargain in good faith.

The second limitation placed upon the scope of mandatorily negotiable subjects is created by §1305, which the Public Employment Relations Board ("PERB") has interpreted as creating "permissive" subjects of bargaining, i.e., those which are within the control of the Employer. Although the Employer may chose to negotiate on these matters it cannot be required to do so.

A public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include but are not limited to such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall budget, utilization of technology, its organizational structure and staffing levels, and the selection and direction of personnel. 19 Del.C. §1305

This provision under the PERA differs materially from the similar provisions of the Public School Employment Relations Act in that "discipline" has been deleted from the list of "matters of inherent managerial policy." Under recognized rules of statutory construction, the omission of "discipline" evidences the intent of the General Assembly to no longer include "discipline" under the PERA as a permissive subject of bargaining. Therefore, matters concerning or related to discipline are a condition of employment and may not be unilaterally altered by either party without negotiation at least to the point of impasse. <sup>6</sup>

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<sup>6</sup> There is no need in this case to define or apply the balancing test in order to determine negotiability. The balancing test is necessary only where the matter in question can reasonably be considered to fall both within "terms and conditions of employment" and the "inherent managerial policy" of the employer. Because discipline is not included within the permissive subjects of §1305, it is a mandatory subject of bargaining.

In further support of this conclusion, in determining drug and alcohol testing programs, including their disciplinary procedures to be mandatory subjects of bargaining, the General Counsel to the National Labor Relations Board concluded:

... In many drug testing programs, employees who refuse to submit to a test may be subject to discipline, including discharge, while employees who submit to the test and have positive results may be suspended and/or required to participate in rehabilitation programs, forced to accept a change in job duties, or subjected to discipline up to and including discharge. Thus mandatory drug testing literally is a "condition of employment." It is a "fitness-for-duty" type requirement that may ultimately affect employment status. In our view, any such obligatory tests, which may reasonably lead to discipline, including discharge, are plainly germane to the employees' working conditions and, therefore, are presumptively mandatory subject of bargaining within the ambit of Section 8(d) of the Act. Memorandum GC-87-5, NLRB General Counsel, "Guideline Memorandum Concerning Drug or Alcohol Testing of Employees" (9/8/87) at page 2.

## II. The Union did not waive its right to negotiate the disciplinary portions of the Drug and Alcohol Testing Program

An effective waiver of the statutory right to negotiate a mandatory subject of bargaining must be clear and unmistakable. Such waiver may be evidenced by express contractual provisions, the parties' bargaining history or a combination of the two. Local 1590, IAFF, et al., v. City of Wilmington, Del.PERB., ULP 89-09-041 (1990).

The Employer argues that the Union has clearly waived its right to negotiate discipline as evidenced by the contractual provisions included in the parties' existing agreement. The Employer specifically cites the following provisions:

### Article 2 - Management Rights

#### Section 2.

Except as limited by the specific terms of this Agreement, it is recognized that areas of responsibility are reserved to the Employer. These areas include, but are not limited to, the right to manage and direct the work force; to hire, promote, transfer and assign employees, to discipline and discharge employees for just cause; to determine the size and composition of the work force; to determine the work to be performed; to determine the location and type of operations and the methods, processes and type of materials employed.

## Article 10 - Work Rules

### Section 1.

The Employer may establish necessary work rules and regulations, and agrees to give reasonable notice, of not less than 5 days, exclusive of emergency situations, of work rule changes to the Union. Where the Union alleges that the work rule or regulation change is arbitrary and capricious, it may resort to the grievance procedure including arbitration if the subject is negotiable under Delaware law. If the subject is not negotiable under Delaware law, the Union may resort to the grievance procedure including the State Personnel Commission.

In Metropolitan Edison Co. v. NLRB (460 US 693 (112 LRRM 3265)(1983)), the Supreme Court stated that general contractual provisions would not support an inference that parties' intended to waive a statutorily protected right unless that intent was explicitly stated. The National Labor Relations Board ("NLRB") has repeatedly held that "generally worded management rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights." Johnson-Bateman Co., NLRB, 295 NLRB 26 (131 LRRM 1393)(1989).<sup>7</sup>

Waiver criteria were specifically applied to unilaterally implemented drug and alcohol testing cases in Memorandum GC 87-5 (Supra.):

... in the absence of clear bargaining history to the contrary, broad management rights clauses giving an employer the right "to issue, enforce and change Company rules", or to "make and apply rules and regulations for production, discipline, efficiency and safety," or requiring employees to observe the employer's existing rules and regulations, do not, standing alone, constitute a waiver of the union's right to bargain over drug testing. And, as previously observed, drug testing is not a "rule or regulation" but is a unique and distinctive means of enforcing rules regarding drug use.

The contractual language cited by the Employer as constituting a clear and unmistakable waiver does not explicitly mention discipline in cases involving drug and alcohol testing. Further, at the time that the cited contractual language was agreed upon, the Public Employment Relations Act establishing discipline as a mandatory subject of bargaining was not in effect.

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<sup>7</sup> The Public Employment Relations Board has often repeated throughout its eleven years of case law under the Public School Employment Relations Act and the Police Officers and Firefighters Employment Relations Act that decisions rendered under federal labor statutes, as well as those from other public sector jurisdictions, are often useful in providing guidance and background for decisions of this PERB. This decision extends this premise to cases arising under the Public Employment Relations Act.

There is no basis for concluding the Union intended to prospectively forfeit its legal rights conferred by a statute not yet passed.

The Employer further argues that the Union waived its right to negotiate as evidenced by the parties' bargaining history. The Employer's witness, Thomas LoFaro, Deputy Director for Labor Relations for the State of Delaware, testified that he had personally been involved in negotiations of the current agreement and its immediate predecessor. Contrary to the Employer's argument, he testified that as the Chief Negotiator for the Employer in the 1994 negotiations, drug and alcohol testing had not been discussed during these nor prior negotiations.

The record also confirms that while the federal mandates requiring the implementation of the drug and alcohol testing program at the state level were issued in the Federal Register on February 15, 1994, the current agreement between the parties was not ratified until April 18, 1994. The record contains no evidence that the Employer provided notice to the Union during the course of the on-going collective bargaining negotiations that it was required to implement a program, or that the Union waived its right to bargain through inaction.

For the reasons stated above, it is determined that the Union did not waive its statutory right either contractually or through the parties' bargaining history to negotiate the disciplinary procedures adopted under the DelDOT Workplace Drug and Alcohol Testing Program.

III. The issue presented is not proper subject matter for deferral to the parties' contractual grievance and arbitration procedures.

The State argues that the proper forum for resolution of the dispute involving the propriety of the adopted disciplinary policies under the drug and alcohol testing program is the parties' contractual grievance and arbitration procedures. It asserts that the Hearing Officer should defer this matter to that procedure for resolution, citing City of Wilmington v. Local 1590, IAFF (Del.Supr., 385 A.2d 720 (1986)).

The PERB has held that its jurisdiction in an unfair labor practice proceeding is neither controlled by nor dependent upon whether the disputed action or matter may or does constitute a

violation of an existing collective bargaining agreement. Seaford Ed. Assn. v. Bd. of Education, Del.PERB, ULP 87-08-018 (1988). In defining this distinction, the PERB stated:

... The issue here is not whether the action of the District violates section 15.2 of the labor agreement. Such a determination is proper subject matter only for the negotiated grievance procedure for which the unfair labor practice forum is not a substitute. An unfair labor practice, on the other hand, is statutory in origin and raises a question of statutory interpretation to be resolved by the PERB. It is, therefore, not controlling in an unfair labor practice that the disputed action may or does, in fact, constitute a violation of an existing collective bargaining agreement. While the PERB has no jurisdiction to resolve grievances by interpreting contractual language, it may be required to interpret such language in order to resolve an unfair labor practice matter properly before it.

Where the matter in dispute in an unfair labor practice proceeding centers squarely on the interpretation of a contractual provision, the PERB has deferred to the parties' contractual grievance and arbitration provisions. In FOP Lodge No. 1 v. City of Wilmington (Supra.), an unfair labor practice proceeding was stayed pending exhaustion of the parties' contractual grievance procedure where it was alleged that the employer's violation of its duty to bargain a mandatory subject of bargaining in good faith was evidenced by its breach of specific provisions of the collective bargaining agreement. In that case, the specific contractual language was not clear and unambiguous on its face, and the resolution of the charge was solely dependent upon the intent behind the parties' agreement. The adoption of a limited, discretionary deferral policy in that case was supported by the parties' long standing and well established collective bargaining relationship, the employer's stated willingness to submit the matter to arbitration in accord with the provisions of the agreement, and the fact that any decision in that matter would turn on an interpretation of the specific contractual language in question. Red Clay Ed. Assn. v. Bd. of Ed., Del. PERB, ULP 90-08-052 (1991).

The instant case does not turn on the interpretation of a specific contractual term. What is at issue here is not a matter of contractual interpretation but rather whether the Employer has met its obligation to negotiate a mandatory subject of bargaining. Grieving the adopted disciplinary provisions, and specifically the requirement that any employee who tests positive

under the program sign a “last chance agreement”, under Article 10.1 of the existing agreement would result in a determination as to whether these adopted provisions are “arbitrary or capricious.” A determination as to whether a condition of employment is “reasonable” is very different from and much more limited than a determination that an adopted condition of employment has been properly negotiated under the PERA. An arbitrator is limited by his/her authority under the terms of the parties’ agreement and is without authority to order the parties’ to negotiate provisions of the agreement. Consistent with the holding of the National Labor Relations Board in Hi-Tech Cable Corp. and Electrical Workers, IBEW Local 1510 (NLRB, 309 NLRB 2, 142 LRRM 1339 (1992), to defer this issue to the grievance procedure under the Management Rights and Work Rules provisions of that agreement, would not afford the Union and the employees the full bargaining rights guaranteed under the PERA. Furthermore, the grievance procedure can only be invoked after the Employer has decided to implement the rule and it is limited to the issue of reasonableness. That is no substitute for the right of the employees through their exclusive representative to full good faith bargaining of a condition of employment.

For these reasons, the Employer’s motion to defer this matter is denied.

### **CONCLUSIONS OF LAW**

1. The State of Delaware, Department of Transportation, is a public employer within the meaning of §1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994).
2. Council 81, American Federation of State, County, and Municipal Employees, AFL-CIO, is an employee organization within the meaning of 19 Del.C. §1302(h).
3. Council 81, American Federation of State, County, and Municipal Employees, AFL-CIO, is an exclusive bargaining representative within the meaning of 19 Del.C. §1302(i) representing the DOT Division of Highway Operations employees in New Castle, Kent and

Sussex counties employed in the classifications listed in the parties' collective bargaining agreement in AFSCME Locals 879, 1036 and 1443.

4. Consistent with the foregoing findings and opinion, it is determined that the Employer's conduct in unilaterally implementing a drug and alcohol testing program including disciplinary procedures as a condition of employment constitutes a violation of §1307(a)(5) as alleged.

WHEREFORE, THE EMPLOYER IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

1. The State of Delaware, Department of Transportation is ordered to cease and desist from engaging in conduct in dereliction of its duty to collectively bargain in good faith with the exclusive bargaining representative of its employees.

2. The Employer is hereby ordered to suspend implementation of all provisions of the DelDOT Workplace Drug and Alcohol Testing Program which are not mandated by OTETA and the rules promulgated thereunder, and to bargain with the Union with respect to all mandatory subjects of bargaining which the Employer unilaterally included within the policy, including discipline.

3. Within ten (10) calendar days from the date of receipt of this decision, post a copy of the Notice of Determination in all buildings and places where notices of general interest affecting DelDOT employees are normally posted. These notices shall remain posted for a period of thirty (30) days.

4. Notify the Public Employment Relations Board within thirty (30) calendar days from the date of this Order of the steps taken to comply with the Order.

**IT IS SO ORDERED.**

/s/Deborah L. Murray-Sheppard  
DEBORAH L. MURRAY-SHEPPARD  
Principal Assistant/Hearing Officer  
Delaware Public Employment Relations Bd.

/s/Charles D. Long, Jr.  
CHARLES D. LONG, JR  
Executive Director  
Delaware Public Employment Relations Bd.

DATED: July 17, 1995