

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

WOODBIDGE EDUCATION ASSOCIATION, :
Charging Party, :
:
v. : U.L.P. No. 90-02-048
:
BOARD OF EDUCATION OF THE :
WOODBIDGE SCHOOL DISTRICT, :
Respondent. :

The Board of Education of the Woodbridge School District (hereinafter "District") is a public employer within the meaning of section 4002 (m) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (Supp. 1982, hereinafter "Act"). The Woodbridge Education Association (hereinafter "Association") is the exclusive bargaining representative of the public employer's certificated professional employees within the meaning of 14 Del.C. section 4002 (h).

The Woodbridge Education Association filed an unfair labor practice charge against the District on February 23, 1990. The complaint charges the District with refusing to bargain in good faith with the Association in violation of 14 Del.C. section 4007(a)(5) and of interfering with and restraining employees in the exercise of their

right to be represented by representatives of their choosing in violation of 14 Del.C. section 4007(a)(1). 1 There being no material dispute of the underlying facts, no hearing was required and the parties agreed to brief the legal issues. The final brief was received on July 9, 1990.

FACTS 2

The Woodbridge Education Association and the District are signatories to a collective bargaining agreement that was in effect until June 30, 1989. Since that time, the parties engaged in negotiations regarding a successor agreement, and continued to do so, without impasse, at the time this charge was filed.

On or about January 17, 1990, the Board adopted The Woodbridge Drug Free Workplace Policy. Sections (a) through (g) are identical to the State Drug Free Workplace Policy which State agencies were directed to implement by the Governor's Executive Memo of January 22, 1990. Section (h) of the Woodbridge policy, which requires the annual random testing of all school personnel, provides:

- (h) Each school year, random drug tests will be administered to all school personnel defined as:
1. School Board Members
 2. Administrators
 3. Teachers
 4. Title 19b Coaches
 5. Teacher Assistants
 6. Secretaries/Clerks
 7. Cafeteria Workers
 8. Custodians
 9. School Bus Drivers

1 (a) It is an unfair labor practice for a public school employer or its designated representative to any of the following:

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (5) Refuse to bargain collectively in good faith with the an employee representative which is the exclusive representative of employees in an appropriate unit.

2 As set forth in the pleadings and as agreed to by the parties.

A committee, selected by the School Board, made up of one member of each of the groups listed above, will recommend to the School Board the type of test to be administered, the frequency of the test, and the number of random tests to be taken in each group. Once the Board has adopted a testing program, it shall be reviewed by the above committee on a yearly basis. Recommendations as to improvements in the program shall be considered by the Board.

An individual who tests positive as to drug usage will be administered a second test before any action is taken by the Board. The second test will be referred to a second testing agency for verification. If the second test is positive, the employee will immediately be suspended and will be required to enroll in a drug abuse program before being permitted to continue his or her employment. Failure to enroll in said program will be grounds for immediate termination. Successful completion of said program will lead to immediate reinstatement. If an individual is selected to participate in the random drug testing program and refuses, said refusal shall be grounds for immediate termination.

An individual who, after completing a drug rehabilitation program, again tests positive shall be terminated. Individuals who have participated in a drug rehabilitation program as an employee of the Woodbridge School District will be tested each time random tests are administered by the District.

All new school personnel will submit to a drug test as a prerequisite to employment. The cost of the drug testing program will be born by the Woodbridge School District.

Woodbridge School District Drug-Free Workplace Requirements, Employee Notification (as approved by the School Board on January 17, 1990).

By letter dated January 11, 1990, the Association requested that the Board rescind the policy because it had not been collectively bargained and because it was constitutionally deficient. By letter dated January 31, 1990, the Board responded that, while it would make some minor corrections, it would not rescind the policy.

At a January 31, 1990, negotiation session the District Superintendent proposed that the issue of the random drug testing policy be included on the agenda of items being collectively bargained between the parties. The Association declined the offer, and the Board withdrew its proposal.

The Association again requested the rescission of the policy in a letter from its President to the Superintendent dated February 7, 1990. The Board again declined to rescind the policy and requested that the Association notify the Superintendent as to whom the representative to the committee (as set forth in section (h) of the policy) would be from each of the specified employee groups which WEA represented. The Association declined to name delegates to the committee.

ISSUE

1) Whether the District violated 14 Del.C. section 4007 (a)(5) when it unilaterally adopted the Woodbridge Drug-Free Workplace policy, which subjected public school employees to random drug testing, without prior bargaining?

2) Whether the District violated 14 Del.C. section 4007 (a)(1) by establishing a committee, the membership of which is mandated by the adopted policy, for the purpose of making recommendations to the Board of Education concerning the content and implementation of random drug testing?

3) Whether the Association violated 14 Del.C. section 4007 (b)(2) by declining the District's January 31, 1990 invitation to negotiate collectively concerning the drug testing policy?

PRIMARY POSITIONS OF THE PARTIES

Association:

The Association asserts that because the adopted drug policy includes random testing provisions, it is a mandatory subject of

bargaining and, therefore, cannot be unilaterally adopted by an employer without violating 14 Del.C. section 4007. In support of this position, a Guideline Memorandum Concerning Drug or Alcohol Testing issued by the General Counsel to the NLRB and several related cases decided by the NLRB are cited for the proposition that drug testing is a mandatory subject of bargaining because it directly affects terms and conditions of employment. The Association also cites public sector cases holding that, because drug testing is a condition of employment that can lead to discipline and discharge, it is a mandatory subject of bargaining rather than a matter of inherent managerial policy. The WEA argues that random drug testing falls within the definition of a "working condition" as established in Smyrna Educators' Assn. v. Bd. of Education (Del.PERB, D.S. No. 89-10-046 (1/25/90)).

The Association asserts, in the alternative, that even if the balancing test established by the PERB in Appoquinimink Ed. Assn. v. Bd. of Education (Del.PERB, U.L.P. No. 1-3-84-3-2A (8/14/84)) is determined to be applicable, the "direct impact" of the drug policy on the individual teacher would clearly outweigh "the probable effect on the school system as a whole". The Association argues that the District has failed to establish a significant impact on the school system as a whole because it has offered only vague generalities in support of its adoption of a policy which includes drug testing.

The Association avers that the District offered to negotiate the issue of the random drug testing policy only after the policy had been unilaterally adopted. The WEA declined to participate in after-the-fact discussions to avoid any hint of tacit approval of the allegedly illegal actions by the Board.

Finally, the Association disputes the District's reliance on the federal Drug-Free Workplace Act as the basis for its unilateral adoption of this policy. The Association asserts that the application of the federal Act is limited to those employees who are directly engaged in performance of work pursuant to a federal grant.

District:

The District maintains that the Woodbridge Drug-Free Workplace Policy, as adopted, is not a mandatory subject of bargaining. It argues that the policy does not fall within the ambit of wages, salaries, hours or grievance procedures, nor does it constitute a "working condition" as this term was defined in the predecessor to the current statute. 3 The District contends that 14 Del.C. section 4005 provides that matters of inherent managerial policy, such as those concerning discipline and the selection and direction of personnel, are reserved to the exclusive authority of the employer and are, therefore, not mandatorily negotiable. The District also cites in part 14 Del.C. section 1049, Policy Making, which provides that local school boards shall "...prescribe rules and regulations for the conduct and management of the schools". Finally, on this point, the District concludes that because the subject of the policy is statutorily reserved to the exclusive prerogative of the employer, to which no duty to bargain attaches, the Association's charge is without merit and the

3 Under the Professional Negotiations and Relations Act (repealed and replaced by the Public School Employment Relations Act of 1982), the term "working conditions" was defined as "...physical conditions of the facilities in the school district such as, but not limited to heat, lighting, sanitation and food processing". 14 Del.C. section 4001(6), repealed 1982.

PERB, therefore, lacks jurisdiction over this matter.

Secondly, the District argues that the Association's charge is premature and not ripe for consideration because section (h) of the policy requires the creation of a committee to recommend to the Board the specific content of the actual testing program. The District argues that until the committee is appointed and its recommendations made, the Board cannot implement random testing; therefore, the issue is not ripe for decision until such time as its impact upon employees can be fully determined and presents a real threat to employees.

Thirdly, the District asserts that the Association has failed to exhaust the administrative remedies available to it by: 1) declining to send representatives to the committee which the policy created to discuss the details of the testing procedure; and 2) by declining to negotiate the drug-testing policy during the course of negotiations for a collective bargaining agreement. The District charges that the Association's refusal to accept the Board's invitation to negotiate constitutes a violation of 14 Del.C. 4007 (b)(2). 4

Finally, the District argues that the Public Employment Relations Board does not have jurisdiction to rule on the constitutional issue raised in this case. The District acknowledges that the Association has not requested such a ruling by this Board.

4 14 Del.C. section 4007(b): It is an unfair labor practice for a public school employee or for an employee organization or its designated representative to do any of the following: ... (2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.

OPINION

At issue is the drug policy adopted by the Woodbridge Board of Education. The Association has charged that because the adopted policy includes random testing provisions, the District's unilateral adoption of the policy violates the employer's duty to bargain in good faith with the exclusive representative of its bargaining unit employees. There is a critical distinction between a policy against drug usage and the methodology by which it is determined whether that rule has been broken. Because it is not in issue, this decision will not address the question of whether the outcome would be different did the policy not include the random testing provisions. Further, the fact that other districts have adopted a similar policy much of which mirrors the State Drug-Free Workplace Policy is considered to be irrelevant. This decision turns solely on the facts existing in the Woodbridge School District and the specific content of the Woodbridge Drug-Free Workplace Policy, as adopted.

I. DOES THE POLICY, WHICH SUBJECTS EMPLOYEES TO RANDOM TESTING,
CONSTITUTE A MANDATORY SUBJECT OF BARGAINING?

A public school employer and the exclusive representative of a certified bargaining unit are mutually obligated to confer and negotiate in good faith with respect to terms and conditions of employment, i.e., matters concerning or related to wages, salaries, hours, grievance procedures and working conditions. 14 Del.C. sections 4002 (e) and (p). Consistent with the Delaware Supreme Court's decision in Colonial School Board v. Colonial Affiliate (449 A.2d 243 (1982)), the Public Employment Relations Board has determined that when

the Public School Employment Relations Act was passed in 1982, the General Assembly intentionally created a broad and encompassing scope of negotiability, similar to that authorized in 1965 for all other public employees. Smyrna Educators' Assn. v. Bd. of Education, Del.PERB, D.S. No. 89-10-046 (1/25/90). The legislature clearly intended that all matters concerning or related to the specified terms and conditions of employment be mandatorily negotiable. Appoquinimink Education Assn. v. Bd. of Education, Del.PERB, U.L.P. No. 1-3-84-3-2A (8/14/84).

The Act does, however, limit this broad scope of negotiability in two ways. First, matters determined by this Act or any other law of the State to be within the exclusive prerogative of the public school employer shall not be included as mandatorily bargainable terms or conditions of employment. 14 Del.C. section 4002(p). If statutorily prohibited subjects are bargained and the resulting contractual terms are inconsistent with explicit statutory limitations or are otherwise contrary to law, such contractual terms would be invalid and unenforceable under 14 Del.C. section 4013. These provisions of the Act create a category of illegal subjects of bargaining. Second, 14 Del.C. section 4005, School employer rights, creates a category of subjects which are designated as matters of inherent managerial policy and constitute permissive subjects of bargaining. An employer is not required to bargain with respect to matters of inherent managerial policy, but neither is the employer statutorily prohibited from bargaining such matters. These include, among other things, discipline and the selection and direction of personnel.

It is within this framework of mandatory, illegal and permissive

subjects of bargaining that the facts of this case must now be considered. It is alleged that the District failed to bargain in good faith by unilaterally adopting its Drug-Free Workplace Policy. An employer's duty to bargain in good faith attaches only to mandatory subjects of bargaining. The PERB is expressly authorized to rule on questions relating to whether a matter in dispute is within this scope of required bargaining. 14 Del.C. section 4006 (h)(4). In determining whether a matter constitutes a mandatory subject of bargaining, the following analysis must be undertaken:

- 1) Is the subject matter expressly reserved to the exclusive prerogative of the public school employer by the PSERA or any other law?

If an explicit and definitive statutory prohibition exists, the subject constitutes an illegal subject of bargaining. Appoquinimink (Supra., p. 10). Absent such a prohibition, the analysis continues:

- 2) Does the subject matter fall within the statutory definition of "terms and conditions of employment"?
- 3) Does the subject involve a matter of inherent managerial policy as defined under Employer Rights at section 4005?

If the answer to either question #2 or #3 above is yes, the subject matter is mandatory or permissive, respectively. If both questions #2 and #3 can be answered affirmatively, the balancing test adopted by the PERB in Appoquinimink (Supra.) must be applied, as follows:

- 4) Does the impact of the matter on the school system as a whole clearly outweigh the direct impact on the individual teacher?

Depending upon the balancing of the relative impacts, the subject

matter in question is either permissive or mandatory.

The District argues that 14 Del.C. section 1049, authorizing the School Board to adopt policy with respect to the conduct and management of the schools, coupled with the section 4005 reservation of inherent managerial policy, places the subject of the drug policy within the District's exclusive prerogative. The PERB previously discussed section 1049 in its Appoquinimink decision (Supra.) where it determined that general grants of authority are not sufficient to remove an issue from the legal scope of bargaining. The District errs in equating exclusive prerogatives with inherent managerial policies. The former are illegal subjects of bargaining while the latter are permissive. Because the District cites no provisions of the PSERA nor any other State law which explicitly and definitively remove this subject from the scope of legal negotiations, the subject of a drug policy, which includes random testing does not constitute an illegal subject of bargaining. 5 Smyrna (Supra., p. 13).

Consideration of whether the policy constitutes a term and condition of employment requires defining the term "working conditions", which is included within the section 4002(p) definition of "terms and conditions of employment". In Smyrna Eduators' Assn. (Supra., p. 13), the Board found :

While broader in scope than "physical working conditions"

(the term used in the Professional Negotiations and Relations

5 The scope of PERB jurisdiction is limited to question involving the interpretation and application of the statutes it is charged with administering. Therefore, the issue of the constitutionality of a drug policy which includes random drug testing is not considered in reaching this decision and is proper subject matter for another forum.

Act of 1969), the term "working conditions" is somewhat narrower than a "condition of employment". A working condition is one which relates generally to the job itself, i.e., to circumstances involving the performance of the responsibilities for which one is compensated or the opportunity and qualifications necessary to perform work required of those employees who are members of the certified appropriate bargaining unit. [emphasis added]

In upholding the Executive Director's decision below, the full Board defined a "de facto" working condition as a condition which an employee could avoid only by quitting his or her job. Smyrna Educators' Assn. v. Bd. of Education, Del.PERB Decision on Appeal, A.D.S. No. 89-10-036 (6/11/90) at p. 525. Clearly, the random testing provisions of the adopted policy create a condition of work; i.e., employees must "prove" their drug-free qualifications annually through submission to a random test. An employee could avoid this "working condition" only through resignation of his or her position. Because of its impact upon the individual employee, this provision clearly qualifies as a "working condition".

It must also be determined whether the policy also touches upon the inherent managerial policy of the District. Section 4005 provides:

A public school 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 programs or functions of the public school employer, its standards of services, overall budget, utilization of technology, the organizational

structure, curriculum, discipline and the selection and direction of personnel.

The adopted policy includes the standards for discipline for violating the policy and establishes submission to a drug test shall be a prerequisite for employment. At the least, discipline and the selection of personnel are clearly impacted by this policy; consequently, it can be reasonably concluded that the policy impacts the inherent managerial policy of the employer.

Having concluded that the policy impacts not only terms and conditions of employment but also areas of the employer's policy-making discretion, the Appoquinimink balancing test must be applied in order to determine whether the subject constitutes a mandatory or permissive subject of bargaining:

If its probable effect on the school system as a whole clearly outweighs the direct impact on the interests of the teachers, it is to be excluded as a mandatory subject of bargaining; otherwise, it shall be included within the statutory definition of terms and conditions of employment and mandatorily bargainable. Appoquinimink, (Supra.) at p. 16.

Ultimate control of the educational process in Delaware rests with the State Board of Education. Morris v. Bd. of Education, D.Del, 401 F.Supp. 188 (1975). The function of local school districts, as governed by their local boards of education and subject to the provisions of Title 14 and the rules and regulations of the State Board of Education, are enumerated at 14 Del.C. section 1049, which provides, in relevant part:

(1) Determine the educational policies of the reorganized school district and prescribe rules and regulations for the conduct and management of the schools;

(2) Enforce the provisions of this title relating to school attendance;

(3) Grade and standardize all the public schools under its jurisdiction and may establish kindergartens and playgrounds and such other types of schools, as in its judgment will promote the educational interests of the reorganized school district;

(4) Adopt courses of study;

(5) Select, purchase, and distribute free of charge such textbooks and other materials of instruction, stationery, furniture, equipment, apparatus and supplies as are necessary to the work of the schools;

(6) Provide forms on which regular school employees shall make such reports as may be required by the school board;

(7) Make all reports required by the State Superintendent of Public Instruction, at such time, upon such items and in such form as may be prescribed by the State Superintendent;

(8) Appoint personnel.

The parties stipulate that there exists no known drug problems among the District's staff. Indeed the District characterizes its motivation for adoption of the random testing provisions as follows:

... the Board viewed random testing as a way to send school children a clear message that drugs and school do not mix. Random testing of athletes has become a fact of life, but teachers are the greatest role models

in the world, and we don't expect the same of them.

Paragraph 8 of Respondent's Answer to the Charge.

While honorable in its intent, this policy which includes random drug testing of school employees is neither motivated by nor does it materially impact the nature or scope of the basic function of the local school system as a whole. Focusing upon the impact of the random testing provisions of the policy on the individual employee, however, yields a marked contrast. Once an individual is required, as a condition of his or her continued employment, to submit to a physical test on a random basis, where issues such as the methods for assuring the security of the test samples and the accuracy of the test are critical material interests of the tested individual, the impact upon that individual is immediately evident and significant. For this reason, the adopted policy is found to directly impact upon individual employees to a more significant extent than upon the operation of the local school system as a whole. It is, therefore, a mandatory subject of bargaining.

II. DID THE DISTRICT VIOLATE 14 DEL.C. SECTION 4007(a)(1) BY
ESTABLISHING A COMMITTEE FOR THE PURPOSE OF MAKING RECOMMENDATIONS
CONCERNING THE CONTENT AND IMPLEMENTATION OF RANDOM DRUG TESTING?

As part of its adopted policy, the Board established a committee consisting of one member from each group of employees covered by the random testing provisions. The purpose of this committee is to recommend to the School Board "...the type of test to be administered, the frequency of the test, and the number of random tests to be taken in each group". The Association charges that the District has

interfered with the rights of the employees to act through representatives of their choosing in violation of 14 Del.C. section 4007(a)(1) by mandating the composition of this committee. The District, on the other hand, argues that the Association has failed to exhaust the administrative remedies available to it by not appointing representatives to participate in this committee.

The Act explicitly provides that its policies are best effectuated by granting the right of employees to bargaining through representatives of their choosing and obligating boards of education to enter into negotiations with respect to terms and conditions of employment with such representatives. Indian River Education Assn. v. Bd. of Education, Del.PERB, D.S. No. 89-03-035 (7/28/89) at p. 8.

Having concluded that the adopted policy is a mandatory subject of bargaining, the District may not place restrictions upon the number or the content of the Association's bargaining team, nor may it legally constitute an ad hoc committee for the purposes of establishing terms and conditions of employment affecting bargaining unit members. Accordingly, by unilaterally establishing and insisting upon the participation of a bargaining unit representative on an ad hoc committee created for the purpose of making recommendations regarding the random drug testing policy, the District violated the right of bargaining unit employees to be represented by their exclusive bargaining representative for the purpose of establishing terms and conditions of employment.

III. DID EITHER THE DISTRICT OR THE ASSOCIATION REFUSE TO BARGAIN
IN GOOD FAITH IN VIOLATION OF ITS OBLIGATIONS UNDER THE PSERA?

There remains the question of whether the District has refused to negotiate in good faith by unilaterally adopting the Woodbridge Drug-Free Workplace Policy, in violation of 14 Del.C. section 4007 (a)(5), and, conversely, whether the Association has likewise refused to negotiate in good faith in violation of 14 Del.C. section 4007 (b)(2) by rejecting the District's January 31 offer to negotiate the issue. The evidence presented by the parties is general in nature and several questions, therefore, remain unanswered. The adopted policy is dated January 17, 1990, yet the stipulated facts provide that the Association first requested rescission of the policy on January 11, 1990. Unresolved is whether the Association had constructive notice of the District's intention to adopt such a policy and whether such notice was adequate to create an opportunity for bargaining. Further, the stipulated facts fail to provide sufficient information concerning the contents of the District's January 31 negotiation proposal. What constitutes good faith bargaining can only be determined from a review of the totality of conduct of the parties on a case by case basis. Smyrna Educators' Assn. v. Bd. of Education, Del.PERB, U.L.P. 87-08-015 (10/26/87). Without further evidence as to the actual sequence of events and the contents of the parties' communications, it would be imprudent to rule upon the issue of whether either party refused to negotiate in good faith.

CONCLUSIONS OF LAW

1. The Woodbridge Education Association is an employee organization within the meaning of section 4002(g) of the Public School Employment Relations Act.

2. The Woodbridge Education Association is the exclusive bargaining representative of the the school district's certificated professional employees within the meaning of section 4002(j) of the Act.

3. The Board of Education of the Woodbridge School District is a public school employer within the meaning of section 4002(m) of the Act.

4. The Woodbridge Drug-Free Workplace Policy, as adopted by the Board of Education on January 17, 1990, is a mandatory subject of bargaining.

5. By establishing an ad hoc committee whose membership was mandated by the adopted policy and whose purpose it was to make recommendations on random drug testing, the District interfered with the rights of bargaining unit employees to be represented by representatives of their own choosing with respect to the establishment of terms and conditions of employment, in violation of 14 Del.C. section 4007 (a)(1).

6. Upon the record established by the parties, the Hearing Officer finds insufficient evidence to sustain the charge that the Woodbridge Board of Education has refused to bargain in good faith or likewise violated 14 Del.C. section 4007 (a)(5).

7. Upon the record established by the parties, the Hearing Officer finds insufficient evidence to sustain the charge that the Woodbridge Education Association has refused to bargain in good faith or likewise violated 14 Del.C. section 4007 (b)(2).

WHEREFORE, THE PARTIES ARE HEREBY ORDERED TO TAKE THE FOLLOWING

AFFIRMATIVE ACTIONS:

1. The Woodbridge Board of Education is ordered to rescind the Drug-Free Workplace Policy as adopted on January 17, 1990.

2. The Board of Education is ordered to cease and desist from insisting upon the creation of a committee as defined in section (h) of the above policy for the purposes of making recommendations on the content and implementation of a random drug testing program affecting its certificated professional employees.

3. The Woodbridge Board of Education and the Woodbridge Education Association are ordered to engage in good faith collective bargaining on the drug policy which subjects public school employees to random drug testing.

IT IS SO ORDERED.

D. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD

Principal Assistant/Hearing Officer

Delaware PERB

C. Charles D. Long, Jr.

CHARLES D. LONG, JR.

Executive Director

Delaware PERB

DATED: August 8, 1990