STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

In Re:

SEAFORD SCHOOL DISTRICT :

DRUG AND ALCOHOL POLICY : D.S. No. 93-04-083

BACKGROUND

The Seaford School District (hereinafter "District") is a public school employer within the meaning of §4002(n) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1983) (hereinafter "PSERA").

The Seaford Education Association is an employee organization within the meaning of §4002(h) of the PSERA representing public school employees within the meaning of §4002(m) of the PSERA.

The essential facts of this matter are not disputed and may be summarized as follows: In 1988, the federal government implemented the Drug-Free Workplace Act, 41 U.S.C. section 701, et seq. The Act required recipients of federal grant moneys, including public school districts, to adopt a drug-free workplace policy. Pursuant to the Act, the Seaford School Board adopted the following policy on March 26, 1990:

> Drug Free Workplace
>
> The Seaford Board of Education believes that illegal drugs have no place in the work environment. Furthermore, Congress passed the Drug-Free Workplace Act of 1988, requiring the certification by federal grantees of a drug-free workplace, and the Seaford Board of Education supports that Act. For these reasons, regulations on a drug-free workplace requirements for Seaford School District employees will be developed.

Regulations for implementing the policy were adopted on July 1, 1990, and distributed to and signed by all District employees.

In April, 1992, the Delaware Department of Public Instruction advised the District that because the policy did not specifically reference alcohol it was not in compliance with the federal law thus jeopardizing the District's continued receipt of federal funds.

On June 22, 1992, the School Board approved a revised policy, which provides:

> The Seaford School District Board of Education believes that illegal drugs and/or alcohol have no place in the work environment. Furthermore, Congress passed the drug-free workplace Act of 1988, requiring the certification by federal grantees of a drug-free workplace, and the Seaford Board of Education supports that Act. For these reasons, this policy advises that the use, possession or distribution of drugs and/or alcohol by a Seaford School District employee during scheduled working hours, or while an employee is responsible for any District student, is prohibited and subject to disciplinary action.

The revised policy statement and the implementing regulations were again distributed to all District employees for signature. All employees signed, as requested, except for the Association's President and Grievance Chairperson who refused to do so claiming the regulations constituted a mandatory subject of bargaining requiring negotiation with the designated employee representative.

By letter dated November 20, 1992, District Superintendent, Dr. Russell Knorr, requested the Public Employment Relations Board (hereinafter "PERB" or "Board") to issue a declaratory statement determining whether the Drug-Free Workplace Policy and regulation constituted a mandatory subject of bargaining.

Between November, 1992, and February, 1993, the parties met to discuss and attempt to reach agreement concerning various provisions in the Drug-Free Policy regulations. [1] As indicated in a letter authored by the Association's President, Sharon Brittingham, dated February 26, 1993, the parties successfully resolved their differences and reached agreement concerning the content of the regulations. In

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[1] The Policy is the generally worded statement of the District's position concerning the use and/or abuse of illegal drugs and alcohol. The Regulations are the detailed procedures for implementing the policy.

her February 26th letter, Ms. Brittingham requested that the revised policy be incorporated into the existing collective bargaining agreement. (Employer Exhibit #20)

The District was unwilling to do so for essentially two reasons: (1) It considered the development and implementation of the policy and the regulations to be an inherent managerial policy which it is not required to bargain; and, (2) the revised policy and/or regulations did not result from true collective bargaining.

On March 2, 1993, Dr. Knorr renewed the District's request that the PERB issue a declaratory statement to determine the bargaining status of the policy and regulation. Following an informal conference on July 9, 1993, the parties filed simultaneous answering briefs.

ISSUES

Although the parties were free to address other issues, those identified by the PERB Executive Director were:

1. Does the impact of the drug policy adopted by the District on June 2, 1990, and revised on June 22, 1992, to include alcohol, constitute a mandatory subject of bargaining under the Public School Employment Relations Act?

2. If so, must the Regulations to which the parties have agreed become part of the existing collective bargaining agreement?

PRINCIPAL POSITIONS OF THE PARTIES

The District argues that the Policy is not a working condition under the Act and therefore, is not a term and condition about which it required to bargain. It argues that the development of a viable drug/alcohol policy including the regulations for implementing the policy constitutes an inherent managerial policy which §4005, School Employer Rights, exempts from the duty to bargain.

Assuming, arguendo, that the policy impacts both terms and conditions of employment and matters of inherent managerial policy, the District maintains that applying the balancing test adopted by the Board in Appoquinimink Education Assn. v. Bd. of Education (Del.PERB, ULP No. 1-3-84-3-2A (8/14/84)) would render the same result. It maintains the impact of that policy upon the operation of the school district as whole is far greater than upon an individual teacher and, therefore, no duty to bargain attaches.

Lastly, the District argues that assuming, arguendo, the policy/regulations constitute a mandatory subject of bargaining, it should not be included within the existing bargaining agreement for the reason that it did not result from negotiations between the District and the Association.

The Association, on the other hand, distinguishes the policy statement adopted by the District from the regulations promulgated for enforcement. While not contesting the District's authority to unilaterally adopt a drug/alcohol policy, the Association argues that the decision to subject current employees to drug-testing based upon reasonable cause, the procedures to be followed in the event an employee is tested and the resulting consequences, if any, constitute mandatory subjects of bargaining.

The Association argues that because the policy resulted from negotiations between authorized representatives of the Association and the District Superintendent, Dr. Russell Knorr, it must be incorporated into the existing collective bargaining agreement.

OPINION

Issue #1: The PERB holds that the adoption by the public school district of a drug/alcohol policy is a matter of inherent managerial policy reserved to the exclusive authority of the Employer.

For reasons which need not be restated here, the PERB has previously determined that reliance upon random testing to implement a drug policy constitutes a term and condition of employment which is a mandatory subject of bargaining. Woodbridge Education Assn. v. Bd. of Education, Del.PERB, ULP No. 90-02-048 (1990).

Testing based upon probable or reasonable cause, however, is not the same as random testing. The District's authority to adopt a drug/alcohol policy is meaningless if it has no effective method for implementing the policy. Therefore, a necessary consequence of the employer's authority to adopt a drug/alcohol policy is the authority to enforce the policy, in this case, through testing based upon reasonable cause or suspicion.

Application of the Appoquinimink balancing test would not change the result. The right to test based upon reasonable cause has no significant impact upon the terms and conditions of the individual employee. On the other hand, absent the right to test based upon reasonable cause, the District has no effective method for implementing a policy not only required for federal funding but also one that will safeguard the learning environment and contribute to the overall safety and well-being of the students and employees. Considering these circumstances, the right to test based upon reasonable cause impacts upon the operation of the school system as a whole to a greater degree than upon the terms and conditions of the individual employee.

Only when reasonable suspicion of prohibited drug or alcohol use is established does the impact upon the terms and conditions of the individual employee become substantially greater than upon the operation of the District, as a whole. The right to continued employment might very well be at stake. For this reason, regulations implementing a testing requirement based upon reasonable cause are a mandatory subject of bargaining which an employer is required to collectively bargain with the designated employee representative.

The requirement to bargain the impact of testing based upon reasonable cause neither unreasonably limits the employer's right to require testing based upon reasonable cause nor interferes with the effective and efficient operation of the District as a whole.

Included in the bargaining requirement are those areas which impact the terms and conditions of the individual employee such as what constitutes reasonable cause, the testing procedure(s) to be utilized, the chain of custody, the consequences of a positive test result and confidentiality considerations.

Somewhat more difficult when determining the areas properly included within the concept of impact bargaining is the assessment of discipline. The balancing test adopted in Appoquinimink (Supra.) applies only where a disputed subject impacts upon both inherent managerial policy and terms and conditions of employment. Section 4005 of the Act expressly identifies discipline to be a matter of inherent managerial policy about which a public school employer is not required to bargain. The PERB has no authority to conclude otherwise.

Issue #2: The District argues that the regulations agreed to by the parties are not required to be placed into the existing collective bargaining agreement because the meetings between the parties constituted informal discussions rather than formal negotiations. (Emphasis added). It maintains that it entered into the discussions pursuant to section 3.8, Communications, of the collective bargaining agreement, which provides for a liaison between the Administration and the Association for the purpose of preventing and solving problems.

The critical factor in determining whether good faith bargaining occurred is not how one party or the other subjectively considered or characterized their effort but what, in fact, occurred in arriving at the final regulations acceptable to each.

Section 4002(e) of the Act defines "collective bargaining" as the performance of the obligation of the parties "confer and negotiate in good faith in respect to terms

and conditions of employment, and to execute a written contract incorporating any agreements reached".

After several preliminary discussions the District Superintendent wrote to the Association President on November 12, 1992. The memo entitled Meeting to Discuss Concerns Relating to Drug-Free Workplace Policy and Regulation provided, in part:

> This memorandum is to confirm a meeting on Wednesday, 18 November, at 1:00 p.m. in my office to discuss your concerns regarding the Seaford Board of Education's Drug-Free Workplace policy and regulation. All principals involved have indicated that the respective staff members from their buildings may be excused from inservice activities to attend this meeting.

On December 18, 1992, the District Superintendent sent to each member of the committee representing the Association a memo which, among other things not relevant to this issue, provides:

> Please review the attached draft of a revised regulation "Drug-Free Workplace". The revisions are my attempt to respond to concerns of SEA members which I received orally or in writing at a meeting... Please review. I would appreciate any comments and suggestions and will try to respond to any questions... Nonetheless, please know that, whether or not the policy and regulation is negotiable, I am endeavoring through a problem-solving process to address your concerns.

Thereafter another meeting was held between the Association's representatives and Dr. Knorr on January 5, 1993. On January 13, 1993, Dr. Knorr sent a memo to the Association's representatives which provides, in relevant part:

> A revised draft intended to be representative of the 5 January meeting is attached ... I will be seeking advice from the Administrative Council with respect to "c" under "Violations and Penalties" on page 7 of 8 and on the issue of whether or not to require a signature ... I checked on the question regarding the phrase "criminal drug statute" and learned that phrase seems to have certain legal status or understanding as it relates to any federal, state or local law, or State Board regulation that pertains to "controlled substances", "drug paraphernalia", "look-alike substances", "trafficking", and "alcohol". Consequently, I am inclined to retain it.

Further minor modification was made to the regulations in early February, 1993. The confirmation of agreement is set forth in Ms. Brittingham's letter of February 26, 1993.

The record clearly establishes that the parties conferred and negotiated in good faith with an intent to reach agreement. The only purpose in meeting and the sole content of their discussions involved a joint effort to reach agreement concerning the content of the regulations in question. The substance of their discussions was straightforward. Unlike most collective bargaining negotiations, the parties' efforts were confined to one subject. Concerns were identified and suggestions were solicited and discussed. As evidenced by Dr. Knorr's memo dated January 13, 1993, questions raised were appropriately addressed and answered. The parties accomplished their mission when agreement was reached.

Their effort underscores the underlying public policy embodied in the Act at §4001 of the Act:

> It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between reorganized public school districts and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public school system. (emphasis added).

The District has offered no reason why it would be prejudiced or disadvantaged by incorporating the agreed upon policy into the existing collective bargaining agreement or that creating a second independent contract is preferable. The former, however, is the result consistent with the literal language of §4002(e) of the Act.

The thorough and comprehensive research conducted by the parties is evidenced by the quality of their supporting briefs. The numerous cases cited were reviewed and considered and provided valuable guidance in reaching this decision.

CONCLUSIONS OF LAW

1. The adoption of a drug/alcohol policy constitutes an inherent managerial policy within the meaning of §4005 of the Act about which the public school employer is not required to bargain with the designated employee representative.

2. The decision to implement a testing requirement based upon reasonable cause or suspicion constitutes an inherent managerial policy within the meaning of §4005 of the Act about which the public school employer is not required to bargain with the designated employee representative.

3. The extent of discipline resulting from violation of the drug/alcohol policy constitutes an inherent managerial policy within the meaning of §4005 of the Act about which the public school employer is not required to bargain with the designated employee representative.

4. The impact of a testing requirement based upon reasonable suspicion or suspicion including, but not necessarily limited to, notification, the testing procedure(s) to be utilized, the chain of custody and confidentiality considerations constitute terms and conditions of employment within the meaning of §4002(r) of the Act which are mandatory subjects of bargaining.

5. The revised drug/alcohol policy in the Seaford School District is the result of collective bargaining between the District and the designated employee representative within the meaning of §4002(e) of the Act. Consequently, the written agreed upon regulations must be signed by the parties and incorporated into the existing collective bargaining agreement.

Dated: September 1, 1993

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