

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

COUNCIL 81, AMERICAN FEDERATION OF STATE, :  
COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO :  
: Petitioner, :  
: v. : ULP No. 95-01-111A  
: STATE OF DELAWARE, DEPARTMENT OF :  
TRANSPORTATION, DIVISION OF HIGHWAYS :  
: Respondent. :

BACKGROUND

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" or "AFSCME") 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.

On January 23, 1995, the Union filed an unfair labor practice charge with the Public Employment Relations Board ("PERB") 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.

During the fall of 1994, the DOT assembled a committee comprised of non-bargaining unit and management employees to draft a drug and alcohol testing program, as required by the Federal Highway Administration under the Omnibus Transportation Employee Testing Act ("OTETA") and the rules promulgated thereunder. The DOT policy mandated pre-employment, post-accident, reasonable suspicion, random, return to duty and follow-up testing and procedures for each. It also contained a comprehensive section on discipline including a last chance agreement for employees testing positive. Employees were required to sign a consent form agreeing to abide by the policy, as a condition of employment.

The Employer reviewed the policy with Union representatives on December 2 and 9, 1994. DOT acknowledges that these meetings were informational only and not for the purpose of negotiation. At both meetings, the Union questioned the right of DOT to unilaterally require bargaining unit employees to sign the last chance agreement as a condition of employment. DOT agreed to "check into" the Union's concern but failed to do so.

DOT proceeded to hold informational meetings with the employees during late December, 1994 and January, 1995. At the conclusion of the meetings, employees were required to sign the consent form and an awareness form. The employees were also advised that failure to sign the forms would constitute insubordination, resulting in disciplinary action, up to and including dismissal.

## ISSUE

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

## DECISION

This complex case resulted in the Board considering a number of issues beyond just answering the question of whether, in the Board's judgment, a violation of 19 Del.C. §1307(a)(5) occurred. The Board was split on all but one (1) issue and, therefore, separation of the issues considered and their resolution is required.

### **Issue 1. Is the negotiation of discipline permissible under OTETA?**

The Board unanimously upholds the Executive Director's decision that negotiation of discipline is permissible under OTETA. OTETA regulations do not address the subject of discipline other than to require the removal of an employee testing positive from safety sensitive functions. In this regard, the Federal Department of Transportation states:

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)**

### **Issue 2. Did the Delaware Department of Transportation have independent authority under Delaware law to unilaterally make compliance with its testing procedures a condition of employment for organized employees?**

By a 2-1 vote, the Board upholds the Executive Director's findings and rules that DOT does not have the authority under Delaware Law to unilaterally make compliance with its testing procedures a condition of employment for organized employees.

Unlike the Public School Employment Relations Act (14 Del.C. Chapter 40, 1984, 1989), discipline is not a subject reserved to the inherent managerial discretion of the Employer under the Public Employment Relations Act (PERA, 19 Del.C. Chapter 13). Since not prohibited by

OTETA, the subject of discipline is a mandatory subject of bargaining if, under §1302(q) of the PERA, it qualifies as a "term and condition of employment," which is defined as:

...matters concerning or related to wages, salaries, hours, grievance procedures and working conditions.

In addressing this very issue, the General Counsel to the National Labor Relations Board has 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 preemptively mandatory subject of bargaining within the ambit of Section 8(d) of the Act. Memorandum of GC-87-5, NLRB General Counsel, "Guideline Memorandum Concerning Drug or Alcohol Testing of Employees" (9/8/87) at page 2. (emphasis added)

A minority of this Board does not agree with the above analysis. It is felt that the Executive Director, in ruling upon this question, should have applied a balancing test (adopted in Appoquinimink Education Association v. Board of Education, Del.PERB, U.L.P. No. 1-02-84A) to determine whether the impact of the disputed subject on the "terms and conditions" of the individual's employment are greater than upon the operation of the State's business.

### **Issue 3. Did the Union waive its right to negotiate the disciplinary portions of the Drug and Alcohol Testing Program?**

The PERB has previously held that an effective waiver of the statutory right to negotiate a mandatory subject of bargaining must be clear and unmistakable. Local 1590, IAFF, et.al., v. City of Wilmington, DelPERB, U.L.P. 89-09-041 (1990).

Here, the genesis of the Employer's waiver argument are Article 2, Management Rights, and Article 10, Work Rules, of the collective bargaining agreement.

In Metropolitan Edison Co. v. NLRB (460 US 693, 112 LRRM 3265 (1983), the United States Supreme Court held that general contractual provisions do not support an inference that parties' intended to waive a statutorily protected right unless that intent was specifically stated. The National Labor Relations Board has repeatedly held:

...generally worded management rights clauses or "zipper" clauses will not be construed as waivers of statutory bargaining rights. (emphasis added)

Waiver criteria were specifically applied to unilaterally implemented drug and alcohol testing cases in Memorandum GC 87-5 (1989), (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.

Furthermore, the Union cannot be considered to have waived its right to negotiate discipline resulting from a drug testing policy since, at the time the contractual language relied upon the Employer was agreed to, the Public Employment Relations Act establishing discipline as a mandatory subject of bargaining was not yet in effect.

Nor is the Employer's argument that the Union waived its right to negotiate as evidenced by the parties' bargaining history persuasive. Testimony by the Employer's chief negotiator confirmed that drug and alcohol testing was not discussed during the 1994 negotiations or at any negotiations prior thereto.

The record also confirms that the current collective bargaining agreement became effective in April, 1994, two (2) months after the requirements of OTETA were published in the Federal Register of February 1994.

**Issue 4. Is the matter a proper subject for deferral to the contractual grievance and arbitration procedure?**

The Board majority rules that the resolution of whether there has been a violation of the statutory duty to bargain cannot be decided by the grievance and arbitration procedure. Simply stated, the grievance procedure addresses only questions of contractual interpretation. This is not the basis for the Union's complaint.

The July 17, 1995 decision of the Executive Director is, accordingly, wholly affirmed.

IT IS SO ORDERED.

/s/Arthur A. Sloane  
ARTHUR A. SLOANE, Chair

/s/Henry E. Kressman  
HENRY E. KRESSMAN, Member

/s/John D. Daniello  
JOHN D. DANIELLO, Member

Date: September 25, 1995