

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNCIL 81, AMERICAN FEDERATION OF STATE, COUNTY,	:	
and MUNICIPAL EMPLOYEES, AFL-CIO,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>U.L.P. No. 96-07-188</u>
	:	
NEW CASTLE COUNTY,	:	
	:	
Respondent.	:	

New Castle County, Delaware, is a public employer within the meaning of §1302(n) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13, (1994).

Council 81, American Federation of State, County, and Municipal Employees, AFL-CIO ("Union") ¹ is an exclusive bargaining representative within the meaning of 19 Del.C. §1302(i). The Union represents County employees in the classifications listed in the collective bargaining agreement between the County and the Union, covering AFSCME Locals 459 and 1607. ² Included in these bargaining units are employees who are required to hold Commercial Drivers Licenses as a condition of employment ("CDL Drivers").

The Union filed an unfair labor practice charge against the Employer on July 30, 1996, 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.

¹ "Union" is used collectively to refer to AFSCME Council 81 and its locals which represent affected New Castle County employees, specifically, Local 459 and Local 1607

² Although Local 3109 was also listed as a Charging Party, the parties agreed that the bargaining unit represented by Local 3109 does not include any drivers who are required to hold a Commercial Driver's License. Therefore, this decision considers only the interaction between the County, Council 81 and Locals 459 and 1607.

The County denied the allegations set forth in the charge. An evidentiary hearing was conducted on October 3, 1996.

The parties provided the Hearing Officer with post-hearing memoranda in support of their positions which were received on March 18, 1997.

FACTS

The County and the Union were parties to collective bargaining agreements covering the bargaining units represented by AFSCME Locals 459 and 1607, which expired on March 31, 1994. Prior to the expiration of these agreements, the County and the Union entered into negotiations for successor agreements. On March 25, 1994, the County prepared a revised bargaining proposal, which it tendered to the Union, which included the following:

New Provision

Add provision for drug testing.

The parties do not dispute that a similar proposal was made by the County in the Local 1607 negotiations.

AFSCME Chief Negotiator, Vance Sulsky, testified that following the introduction of this proposal he requested the County to provide additional information concerning the proposed testing provisions and procedures. Further information was not provided at that time, and the County subsequently withdrew the proposal from both negotiations.

By memorandum dated December 13, 1994, County Personnel Director William Steele, provided copies of the "County's draft policy for the implementation of the federally mandated drug and alcohol testing of employees required to possess a Commercial Driver's License as a condition of employment" to the Presidents of Local 1607 and 459. The memo provided the implementation date would be January 1, 1995, and requested that any comments concerning the policy be returned to Mr. Steele by December 28, 1994. The Union acknowledges that it was aware that the County was required by the Federal Highway Administration to implement a drug and alcohol testing program for CDL drivers under the Omnibus Transportation Employee Testing Act.

The December, 1994, draft policy included, under its Miscellaneous provisions found at Section XI, subsection (3), the following:

3. Nothing in this policy shall prohibit the dismissal or other disciplinary action against an employee pursuant to any other policy, regulation, ordinance or law. This policy is intended to supplement and supplant, and [sic] such other policy, regulation, ordinance or law.

At that time the County's existing Discipline policy (NCC Personnel Policy No. 1.0) included a description of prohibited drug and alcohol related activities and proscribed dismissal as the appropriate discipline for a first offense.

A meeting was held to discuss the draft policy on December 21, 1994. County representatives at this meeting included: Personnel Director Steele; Eric Episcopo, Esq., County Attorney; Linda Anthony, Personnel Administrator; Patricia Kostner, County Insurance Administrator; and Wayne Phillips, Training and Safety Administrator. AFSCME representatives included: Michael Begatto, Executive Director, AFSCME Council 81; Dennis Parkstone, Local 459 President; and Anthony Camponelli, Local 1607 President. Neither the Union's Chief Negotiator, Vance Sulsky, nor its counsel attended this meeting. During this meeting the Union asked numerous questions concerning procedures for the proposed testing. Discipline under the policy was neither raised nor discussed.

On January 5, 1995, AFSCME Executive Director Begatto transmitted the following letter to Personnel Director Steele:

Dear Mr. Steele:

Per our telephone conversation today, we still have a few unanswered questions as they apply to the testing of employees required to have a commercial driver's license. As stated at our meeting of December 21st, we feel a few of the classifications could and should be eliminated. We are interested in how the employees are to be notified that he/she has been randomly selected; who will notify the employee; and how they will be transported to the test facility.

More important, we are interested in when the Supervisor Training will take place as well as the required notification of all affected employees. We are confident that none of the provisions of your Draft Policy will take place until we resolve these issues together.

Hoping to hear from you as soon as possible on these issues.

/s/ Michael A. Begatto

Executive Director, Council 81

cc: Dennis Parkstone, President, L.U. 459
Anthony Camponelli, President, L.U. 1607
Frances Lally, President, L.U. 3109
Vance Sulsky, Representative, Council 81
Perry Goldlust, Esq.

On May 15, 1995, the County convened a meeting with the Union to distribute NCC Personnel Policy No. 5.7, Drug and Alcohol Testing for Commercial Motor Vehicle Operators. This policy was also implemented and effective on May 15, 1995. The May 15, 1995, policy included Section XI, Consequences of a Positive Test, which had not been included in the December 1994 draft:

The discipline for any employee who tests positive for alcohol or drugs, pursuant to either a random or reasonable suspicion test in violation of this policy is set forth below:

Violation

Discipline

1. Positive test for alcohol or drugs

Suspension without pay up to 30 days after participation in a substance abuse program

2. Second offense

Termination

A second offense is an offense which occurs within five years of the date of a prior offense.

The County adopted revisions to the Article XI of May 15, 1995, policy on November 14, 1995:

Violation

Discipline

1. Positive test for alcohol or drugs

Employee will be suspended without pay pending the result of an evaluation by a SAP. If the employee is referred to a substance abuse program by the SAP, the employee may use sick time for the period spent in a program, either as an outpatient or inpatient.

2. Second offense

Termination

A second offense is an offense which occurs within five years of the date of a prior offense.

3. Nothing in this policy shall prohibit the dismissal or other disciplinary action against an employee pursuant to any other policy, regulation, ordinance or law. This policy is intended to supplement such other policy, regulation, ordinance or law. [modifications highlighted]

During the period between May 15, 1995 and the October 3, 1996, PERB hearing, a number of employees who hold CDL's were tested pursuant to NCC Personnel Policy 5.7. Where employees tested positive, disciplined was assessed in accordance with the policy, up to and including termination. Some of the disciplines are currently being appealed through the contractual grievance procedure.

The County and AFSCME Locals 459 and 1607 signed successor agreements on February 27, 1996, which terms extend through March 31, 1997.

On March 4, 1996, by Memorandum from County Personnel Director Steele to the Local Union Presidents of AFSCME Locals 459, 1607, and 3109, and the Fraternal Order of Police President, a copy of a draft "County-wide Drug and Alcohol Policy that will affect non-CDL, union and non-union employees" was distributed. The County announced it had scheduled a meeting in its Personnel Conference Room for Friday, March 15, 1996, for the purpose of "going over the policy" and entertaining comments. Due to scheduling conflicts, this meeting did not occur on March 15, 1996.

A meeting was convened between the County and AFSCME on March 18, 1996. Those attending the March 18, 1996, meeting included: County Personnel Director Steele, Assistant County Attorney Episcopo, AFSCME Executive Director Begatto, AFSCME Chief Negotiator Sulsky, and AFSCME Local Presidents. Following that meeting, AFSCME Chief Negotiator Sulsky issued the following letter to Eric Episcopo, Assistant County Attorney, on March 20, 1996:

Enclosed is a copy of the PERB decision on the negotiability of the Drug and Alcohol Policy of the State Department of Transportation. The decision of the Executive Director was appealed by the State. That appeal was denied and the decision of the Executive Director affirmed by the full board. As you can see, the underlying facts are very similar to the current situation in New Castle County.

Therefore, on behalf of Locals 459, 1607 and 3109, we are prepared to commence collective bargaining negotiations at the soonest mutually convenient date to attempt to reach agreement on the drug and alcohol testing procedures affecting employees who are required to have a Commercial Drivers License as well as employees who are not required to have one, along with any other related issues. We would suggest that negotiations for these three locals be joined to insure consistency and to expedite the process. In the meantime, the provisions of the Drug and Alcohol Policy, except those mandated by Federal Law should not be implemented.

If good-faith negotiations commence promptly, I see no reason why a mutually agreeable policy which insures a safe workplace while safeguarding the employees' rights

cannot be reached without undue delay. Please contact me at your earliest convenience to schedule meeting dates.

Assistant County Attorney Episcopo responded to AFSCME Chief Negotiator Sulsky on April 2, 1996:

Responsive to your letter of March 20, 1996, please be advised that since the parties are currently involved in litigation about and around the above, the County is not inclined to meet, discuss, or negotiate until such litigation is resolved.

ISSUE

Did the Employer, New Castle County, violate 19 DeL.C. §1307(a)(5) in implementing NCC Personnel Policy No. 5.7, Drug and Alcohol Testing for Commercial Motor Vehicle Operators, without bargaining over the disciplinary provisions contained therein?

POSITIONS OF THE PARTIES

Union:

The Union argues that the decision of the PERB in Council 81 v. State of Delaware, Dept. of Transportation, Div. of Highways (DPERB, ULP 95-01-111 (7/95) is binding on these parties and requires a finding that the County violated its duty to bargain in good faith. The Union asserts that during the period of December, 1994, through May 15, 1995, no negotiations were conducted with the Union concerning discipline under the CDL drug and alcohol testing policy. It maintains that despite repeated attempts by the Union, the County has refused to meet, discuss and/or negotiate the issue of discipline under this policy.

The Union argues that Council 81 is the exclusive bargaining representative of all New Castle County bargaining units represented by AFSCME locals. AFSCME is represented in its negotiations with the County by its Chief Negotiator, Vance Sulsky. It asserts that the Local Unions, through their local officers, do not have authority to negotiate with the County nor can the County enter into agreements with the Local officers without the approval of Council 81. It further asserts that the terms of

any collective bargaining agreements between these parties cannot be altered without ratification by the membership of the Locals.

County:

The County argues this charge should be dismissed because the parties did, in fact, negotiate concerning the disciplinary provisions of the CDL Drug and Alcohol Testing Policy. It asserts the County clearly provided the Union with adequate notice that the County intended to implement the CDL testing policy in conformance with federal mandates, and that such policy would include a disciplinary component. It argues that numerous discussion, including a number of meetings, did occur between the County and AFSCME during the period after distribution of the draft policy on December 12, 1994, through the adoption date of May 15, 1995.

The County asserts that the changes which were made in the disciplinary section of the policy evidence the County's consideration of the Union's concerns. It argues that the December, 1994, draft policy included a "one-strike" discipline requirement (i.e., termination of employment immediately upon a positive test result). The Union had requested a "three strike" policy. As a result of discussions with the Union, the adopted policy includes a "two-strike" discipline requirement (i.e., first offense results in a suspension, pending termination, and a second offense results in immediate termination). It asserts the November, 1995, revisions to the disciplinary procedures also resulted from discussions with the Union concerning issues raised by its Local Presidents.

The County denies the Union claim that it agreed to postpone implementation of the policy pending resolution by PERB of the DelDOT case and notes that the Union has presented no documentable evidence of this alleged agreement. It further notes that the policy has been implemented since May, 1995, and that discipline has been meted out in accord with its provisions.

Finally, the County points out that AFSCME, on behalf of Locals 459 and 1607, signed successor agreements on February 27, 1996, without objection to the policy. If it is determined that the parties did

not, in fact, negotiate the discipline section of this policy, the County argues that the Union clearly waived its right to do so fourteen months after the effective date of the policy.

OPINION

There is no dispute as to the holding by this Board in Council 81 v. State of Delaware, Dept. of Transportation, Div. of Highways (DPERB, ULP 95-01-111 (7/95) (“DelDOT decision”) or the subsequent affirmation by the full PERB of the Hearing Officer’s decision that:

... [M]atters concerning or related to discipline are a condition of employment and may not be unilaterally altered by either party without negotiation at least until the point of impasse. [@ p. 1271]

Because the State unilaterally adopted disciplinary provisions which were to apply to employees who were tested under the drug and alcohol testing policies mandated by the federal government without first negotiating with the Union, the State was found to have violated its duty to bargain in good faith in violation of 19 Del.C. §1307(a)(5).

Disciplinary procedures are mandatorily negotiable under the Public Employment Relations Act and the holding in the DelDOT case is applicable to these parties.

The factual circumstances underlying this case and the DelDOT case are, however, distinctive. At the time the State introduced its final policy in the DelDOT case, the parties had a binding collective bargaining agreement in effect which predated the effective date of the Public Employment Relations Act. Under the predecessor to the PERA, there was neither an express statutory obligation for the parties to negotiate discipline nor an administrative process by which to resolve scope of bargaining issues. In the DelDOT decision, PERB rejected the State’s argument that the Union had waived its right to negotiate discipline because the duty to bargain discipline did not exist during the negotiations of the collective bargaining agreement. Further, drug and alcohol testing was not raised or discussed by the parties during the course of those negotiations.

The situation presented in the present case is markedly different. At all time relevant to this dispute, the County and AFSCME were actively engaged in on-going negotiations for successors to the agreements which expired on March 31, 1994. During the course of these negotiation, as early as March 25, 1994, the County proposed negotiation of drug and alcohol testing . In December, 1994, Local 459 and Local 1607 Presidents received a copy of the County's draft policy for drug and alcohol testing of employees required to hold Commercial Driver's Licenses. A meeting to discuss the proposed policy was convened by the County, which was attended by the Executive Director of AFSCME, on December 21, 1994. Although the specific recollections of the parties are vague, both the County Personnel Director and the Executive Director of AFSCME testified that various meetings were held between Union representatives and County Personnel representatives concerning the CDL policy, including discussion of its disciplinary requirements.

The County's CDL Drug and Alcohol Testing Policy was implemented on May 15, 1995. It included a "two strike" disciplinary consequence for positive test results. Representatives of the Union met with County representatives on that date to discuss the adopted policy. As of that date, the Union was on notice that the policy had been adopted and was being implemented by the County. Subsequent to the May 15, 1995, adoption date, the County provided training concerning the requirements and impact of this policy to affected employees county-wide, and to their supervisors and managers. It is also undisputed that since May 15, 1995, employees have been tested, disciplined and terminated pursuant to this policy. The record contains no evidence explaining why the Union failed to object or formally request to negotiate this issue during the on-going negotiations of the successor agreements.

The testimony and documentary evidence establish that from the time of the initial discussion of the draft policy on December 21, 1994, the Union chose to address this policy outside of the on-going negotiations. Its Chief Negotiator did not attend the December 21, 1994, meeting. The January 5, 1995, follow-up letter from the Union, requesting further information was authored by AFSCME's Executive Director, and directs the County Personnel Director to respond to him. The Executive Director testified he personally met with the County Personnel Director on the CDL drug and alcohol testing issues, at

which time he advised the Personnel Director that AFSCME was pursuing a related unfair labor practice charge before the PERB concerning implementation of disciplinary procedures under the drug and alcohol testing procedures for CDL drivers adopted by the State.

Also relevant is the timing of the instant dispute relative to the DelDOT case. AFSCME was the moving party in the DelDOT dispute and was, therefore, familiar with the issues involved in the litigation. The DelDOT charge was filed on January 23, 1995 shortly after the discussions between the County and AFSCME of the December 1994 draft policy. The adoption of disciplinary procedures was the central issue in the DelDOT case. At the time of the May 15, 1995, adoption of the County policy, the evidentiary hearing in the DelDOT case had concluded approximately two months prior, on March 23, 1995. The filing of legal memorandum in support of the respective positions of the parties was nearly complete, with AFSCME's final post hearing brief due to be filed on May 24, 1995. The Hearing Officer's decision was issued on July 17, 1995, and affirmed by the full PERB on September 25, 1995, approximately four months after the promulgation of the CDL policy. As of that date, these parties were still involved in on-going negotiations concerning successor collective bargaining agreements. Despite this factual setting, the Union chose not to bring the issue of discipline in the CDL policy to the negotiations table, nor did it pursue its statutory remedies by filing an unfair labor practice charge.

The Public Employment Relations Board concluded in 1984 that alleged violations of the duty to bargain in good faith are best resolved based upon an examination of the totality of the conduct of the parties. Seaford Education Association v. Bd. of Education, Del.PERB, ULP 9310-092 (1984). Here the County provided a draft policy, met with Union representatives to receive comment on that policy, met with Union representatives between December, 1994, and May, 1995, concerning the proposed policy, and ultimately adopted the policy. By its actions, the County clearly placed the Union on notice that it intended to include discipline as part of the CDL drug and alcohol testing policy. It is significant in that the discipline which was included in the policy adopted May 15, 1995, was less severe than originally proposed. This fact, when viewed in the context of the testimony of representatives of both sides that meetings and conversations between the County and AFSCME's Executive Director and Local Presidents

occurred during this period of time, supports a conclusion that the County did in fact receive and consider the input of the Union in drafting its adopted policy. During this time, for whatever reason, the Union chose not to pursue this matter in its on-going negotiations with the County for the successor agreements. For the Union to allege fourteen months after the implementation of a policy that it constitutes a unilateral change in a mandatory subject of bargaining, flies in the face of the intent of the statute to provide for the timely resolution of disputes.

Based on the unique factual circumstances presented in this case and for the reasons stated herein, I conclude the County did not violate its duty to bargain in good faith in adopting disciplinary provisions within the Commercial Motor Vehicle Operators Drug and Alcohol Testing Policy, NCC Personnel Policy No. 5.7. Therefore, the charge is hereby dismissed with prejudice.

IT IS SO ORDERED.

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

Dated: 9 April 1997