

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>IN RE: GRANVILLE R. MORRIS,</b>	)	
<b>Charging Party,</b>	)	
	)	
<b>v.</b>	)	<b><u>ULP No. 99-12-272</u></b>
	)	
<b>DELAWARE CORECTIONAL OFFICERS</b>	)	
<b>ASSOCIATION and STATE OF DELAWARE,</b>	)	
<b>DEPARTMENT OF CORRECTION,</b>	)	
<b>Respondents.</b>	)	

Charging Party, Granville Morris, (“Morris” or “Charging Party”), is a public employee within the meaning of Section 1302(m) of the Public Employment Relations Act, 19 Del.C. Ch.13 (1994) (“PERA” or “ACT”).

The State of Delaware, Department of Correction (“State” or “DOC”) is a public employer within the meaning of Section 1302(n) of the Act.

The Delaware Correctional Officers Association (“Association” or “DCOA”) is an employee organization within the meaning of Section 1302(h), of the Act and the exclusive bargaining representative of certain employees of DOC within the meaning of Section 1302(j) of the Act.

At all times relevant to this charge, the State and DCOA were parties to a collective bargaining agreement.

**BACKGROUND**

On January 27, 1999, Charging Party Morris was selected to participate in a random drug test pursuant to Article 45.3 of the collective bargaining agreement in effect between the State and DCOA. Following a positive test result for cocaine Morris was removed from work pursuant to Article 45.20 of the collective bargaining agreement.

On or about March 9, 1999, Morris was evaluated at Crossroads, an independent rehabilitation facility, where he was retested on approximately March 15, 1999, seven (7) weeks after the initial test. The test result was negative and Morris was reinstated on March 22, 1999, without being required to complete a rehabilitation program. Through his DCOA representative, Steven Glick, Morris filed several grievances protesting the positive test result and his removal from work. The grievances were consolidated and processed through the contractual grievance procedure. Based upon the Department's Step Two grievance answer, the DCOA Executive Board voted not to appeal the grievances to arbitration. Both the grievances and the Executive Board's vote were discussed at two (2) DCOA membership meetings held on June 20, 1999, at which time the membership voted not to proceed to arbitration.

At some point after his reinstatement, as a result of the positive test result and his removal from work between February 22 and March 22, 1999, Morris was denied the opportunity to bid for a lateral transfer.

On December 10, 1999, Morris filed this unfair labor practice complaint with the Public Employment Relations Board ("PERB") alleging conduct by the State in violation of Sections 1307(a)(1), (2), (3) (6) and by DCOA in violation of Sections 1307(b)(1), (2), (3) and (6), of the Act. The answers filed by DOC and the DCOA deny the allegations. Charging Party denies the new matter set forth in the answers.

On February 11, 2000, a finding of Probable Cause was issued by the PERB's Executive Director. Following the presentation of evidence by Charging Party during two (2) days of hearing on August 29 and October 4, 2000, DCOA and DOC independently moved to dismiss the complaint. Responsive briefs were filed by the parties on December 4, February 14 and February 21, 2000.

By letter dated April 2, 2001, Charging Party filed a request with the PERB to withdraw the complaint against the State. Charging Party's request was granted. Consequently, the following discussion and decision involve only the charges against DCOA.

### **APPLICABLE STATUTORY PROVISIONS**

19 Del.C. Section 1307, Unfair Labor Practices, provides, in relevant part:

(b) It is an unfair labor practice for a public employee or for an employee organization or its designated representative to do 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.

(2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee is an exclusive representative.

(3) Refuse or fail to comply with any provision of this chapter or with the rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

(6) Hinder or prevent, by threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment by any person, or interfere with the entrance to or egress from any place of employment.

### **ISSUE**

1. By failing to process Charging Party's grievances to arbitration, did DCOA engage in conduct in violation of 19 Del.C. Section 1307 (b)(1), (2), (3) and (6), as alleged

in the complaint?

2. By agreeing that the removal from work following a positive drug test is to be treated the same as a suspension for bidding purposes did DCOA engage in conduct in violation of 19 Del.C. Section 1307(b)(1), (2), (3) and (6), as alleged in the Complaint?

### **DISCUSSION**

In support of his claim, Charging Party alleges the following: 1) Charging Party was not permitted to provide a list of medications he was taking at the time the random drug test was administered, as required by Article 45 of the collective bargaining agreement; 2) Charging Party's urine specimen was not tested twice, as required by Article 45 of the collective bargaining agreement; 3) Charging Party's chain of custody documents were lost; 4) DCOA officers misrepresented the facts during the afternoon union meeting on July 20, 1999; 5) There was undue delay in notifying Charging Party by telephone rather than in person of the positive test results; 6) DCOA's conduct constituted retaliation for Charging Party's activities while serving as a DCOA grievance representative; and 7) Charging Party was denied a transfer because DCOA improperly agreed with management that an employee's removal from the job following a positive drug test is the equivalent of a suspension which prohibits access to the bidding procedure for a two (2) year period. [1]

The common thread connecting each of the allegations is Charging Party's

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[1] Article 41.9. . . . suspensions will not be cited or used against an employee for evaluations, promotions or transfers after 2 years from the date of such action.

contention that by its conduct DCOA breached its duty of fair representation. [2] The duty of fair representation has not been extensively litigated before PERB. It is, however, the subject of numerous decisions issued by the National Labor Relations Board involving the private sector. In the absence of PERB precedent, the PERB will consider both private sector precedent from the NLRB, as well as decisions by similar administrative agencies in other public sector jurisdictions, when appropriate.

Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink School District, Del.PERB, ULP No. 1-3-84-3-2A (1984). [3]

The United States Supreme Court has adopted the doctrine of exclusivity of the certified bargaining representative. Vaca v. Sipes, 386 U.S. 171 (1967). As discussed by the PERB in Williams v. Norton and Collison, Del.PERB, ULP No. 85-10-006, I PERB 159 1985), the duty of fair representation long established in the private sector is based upon Section 9(a), of the National Labor Relations Act, which provides in relevant part:

Representatives designated or selected for purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. 9 U.S.C. §169, (Supp. 1981), National Labor Relations Act, Section 9(a).

The Delaware legislature incorporated both the doctrine of exclusivity and the duty of fair representation when drafting the Public Employment Relations Act. 19

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[2] The merits of Charging Party's individual grievances is reserved exclusively to the contractual grievance procedure and are not at issue here

[3] To the extent provisions of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1985, the Police and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1987) and the Public Employment Relations Act 19 Del. C. Chapter 13, (1994), are the same, decisions involving one statute serve as binding precedent for like provisions in the other two (2) statutes. AFSCME, District Council 81 v. State of Delaware, Department of Transportation, Division of Highways, Del.PERB, ULP No, 95-01-111, II PERB 1279 (1995).

Del.C. Section 1304, Employee Organization As Exclusive Representative, provides, in relevant part:

(a) The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate collective bargaining unit shall be the exclusive representative of all of the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. Where an exclusive representative has been certified, a

public employer shall not bargain in regard to matters covered by this chapter with any employee, group of employees or other employee organization.

The standard adopted by the NLRB for resolving alleged breaches of the duty of fair representation is necessarily broad. In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the United States Supreme Court concluded that, “a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.” Citing, inter alia, the decisions of the United States Supreme Court in Vaca v. Sipes and Ford Motor Co. v. Huffman, the PERB held:

. . . [I]n order to meet its statutory obligation to represent its members without discrimination an exclusive employee representative has a duty to act honestly, in good faith and in a non-arbitrary manner. These factors form the basis of every fair representation case and must, therefore, be evaluated on a case by case basis. Williams, (Supra.) at 167-68.

It is within this context that the specific conduct cited by Charging Party in support of his claim are properly considered.

1. Charging Party was not permitted to provide a list of medications he was taking at the time the random drug test was administered, as required by Article 45, of the collective bargaining agreement.

Article 45.5, of the collective bargaining agreement provides:

Prior to the submissions of any urine samples, employees shall be required to submit a list of all medication, both prescribed by a physician or available over-the-counter (non-prescription) which they ingested during the prior 30 days. Within 48 hours of the test, employees will produce appropriate evidence of all listed prescription medications.

Alan Machtinger, the Director of Human Resources and Development for DOC, testified that the possibility of unnecessarily intruding into the personal health affairs of individual employees in cases where a test result is negative resulted in the decision to request a list of current medications only if an

employee's test result is positive. Medications taken by employees who test positive are required and reviewed by the Medical Review Officer ("MRO") before certifying a positive test result.

Charging Party was notified of his positive test result at 9:18 a.m. February 22, 1999. during a telephone conversation with Dr. Elam, the Medical Review Officer. According to the "MRO Checklist," provided to DOC by Dr. Elam, during that conversation Charging Party denied using cocaine but offered no explanation for the positive test result. (CP Ex. No. 9/DCOA Ex. No. 1) A list of medications taken by Charging Party was subsequently faxed to the MRO at approximately 5:15 p.m. on February 18, 1999. (CP Ex. No. 7)

After receiving the list the MRO contacted the grievant's personal physician, who confirmed that none of the medications he had prescribed for the Charging Party involved cocaine. Dr. Elam informed Ms. Durkee that except for TAC, a medication used to stop nosebleeds, no drug legally prescribed in the United States would result in a false positive for cocaine. After completing his review, the MRO declined to change the positive test result.

It is noted that the un rebutted assertions by Dr. Elam were included in the Step Two grievance answer to the Union dated April 7, 1999.

No credible evidence was been provided by the grievant to rebut the MRO's position. Stephen Glick, the DCOA grievance representative, testified that Charging Party claimed he could provide written documentation that medication he was taking at the time of the test could have resulted in a false positive result indicating the presence of cocaine. Although unclear as to the approximate date, Charging Party testified that he had, in fact, obtained such a list. He acknowledged, however, that he did not provided DCOA with the information nor was he willing or able to produce the information during the unfair labor practice hearing.

While constituting a technical violation of Article 45.5, the current practice of obtaining a list of medications only after a positive test result is premised upon a valid concern which is not prejudicial to the employees' interest. To the contrary, the practice protects the confidentiality of an employee's personal medical status and has no impact upon the validity of either the testing procedure or the result.

Although there is no evidence of prior agreement by the DCOA there is no evidence of a subsequent complaint. Considering the merits of the current practice, DCOA's failure to contest the change does not constitute a breach of the duty of fair representation.

2. Charging Party's urine specimen was not tested twice, as required by Article 45, of the collective bargaining agreement.

Article 45, provides, in relevant part:

45.4 Drug testing methods

A. Florescence Polarization Immunoassay (ADX) or Enzyme Multiplied Immunoassay (EMIT) is to be used for the initial drug screening procedures.

B. Gas Chromatography/Mass Spectrometry Testing shall be used to confirm all positive results of the initial drug screening procedures.

45.11 The urine sample to be tested must be tested no later than 72 hours after acquisition by the current State contractual testing laboratory.

45.16 If the test result is positive, the laboratory shall automatically conduct a confirmation test. The State shall assume the cost of these tests. The test to be used for the purpose of this article is set forth in Section 45.4B.

A report issued by the testing laboratory confirms that Charging Party's urine specimen was received on January 29, 1999. It was initially tested and found to be positive for cocaine. The specimen was again tested with a Gas Chromatography/Mass Spectrometry test which confirmed the positive result within the seventy-two (72) hour time period required by Article 45.11, of the Agreement.

Although Charging Party's testimony was, at times, inconsistent and unclear it is apparent there is confusion on his part concerning the contractual requirement to test his urine specimen a second time by gas chromatography and obtaining a second urine sample.

Furthermore, it is undisputed that management offered Charging Party the opportunity to have his original sample tested a third time, if he desired. After initially accepting, he declined to do so. Charging

Party's concern over the test result and the number of times his urine was tested could have been resolved had he agreed to have his sample retested when the offer was made.

3. Charging Party's chain of custody documents were lost.

Charging Party testified that after being advised by Karen Bartnik, the drug testing contractor's ("Concentra") representative, that the chain of custody for his specimen could not be located, he faxed his copy of the chain of custody report to her. (CP Ex. No. 10) By letter to Karen Bartnik dated March 23, 1999, Janet Durkee requested, inter alia: "When Mr. Morris first contacted Concentra regarding his test results, why was there difficulty tracing his chain of custody form?" Ms. Bartnik explained in a letter dated March 26, 1999, that the problem involved an inability to fax the chain of custody to the MRO rather than with the location of the document, itself. (DOC Ex. No. 1) This information was also contained in the Step Two grievance answer provided to the Union.

4. DCOA officers misrepresented the facts during the afternoon meeting on July 20, 1999.

Based upon the available information, including the Step Two grievance answer, the DCOA Executive Board voted not to appeal Charging Party's grievances to arbitration. The position of the Executive Board was communicated to the DCOA membership during the union meetings on the afternoon and evening of July 20, 1999.

Charging Party was unable to attend the afternoon meeting because he was working, Union Vice President, Richard Senuto, chaired that meeting. The transcript of that meeting, insofar as it reflects the discussion of Charging Party's grievances, is set forth below, in its entirety:

Senuto: This is a case, actually its 99-034-005, 006, 007, 008, (they're all put into one). It's a little complicated because Glick's not here, but basically he's contesting the drug testing. He went in and the Company that does the drug testing took a sample. He couldn't produce the medication at the time that he was taking because the, the sample evidently was positive. And there was a question as to the sample itself. There was some question as to the container . . .

Unknown Female: Chain of custody?

Senuto: Yeah, chain of custody. I guess they found it and it was frozen. They resampled it and found out a second time that it was contaminated with cocaine. He's saying that he doesn't use cocaine or drugs of any sort and . . . that he's requesting to be given back pay for all the days he was suspended and that all references to the incident be removed from his personnel and working files.

There was a lot more follow-up on this, because I talked to him about this. And a lot of it deals with chain of custody, it deals with some procrastinating on the testing format, as far as the Company giving information back to the individual. He did go to his own Doctor and I don't have my notes with me, so I'm not sure what his personal doctor found. But that was awhile after the original test. But the two tests did come up positive.

Unknown Female: Two of them?

[Unintelligible - Many voices at the same time]

Senuto: Well actually they tested it the first time, they froze it and retested it. It came back positive twice.

Unknown Male: You said he was taking some kind of medication. Did he ever produce the medication? Or proof that he was taking medication?

Senuto: No.

Unknown Male: So he had no proof that the medication tested positive?

Senuto: That's correct. Basically that's what it is.

Many Voices:

Senuto: Alright. One at a time. Please raise your hands. Mr. Carter?

Unknown: Do you need a chair there?

Senuto: O.K. I'm sorry. Mr. Carter.

Carter: Who did you say was the officer?

Senuto: Granville Morris from Gander Hill. Granville Morris. Is there any other discussion or a motion? Go ahead. I'm sorry. Mr. Fritz.

Fritz: His complaint is . . . what's his complaint?

Senuto: His complaint is that . . . what he's requesting is that he be given back pay for all days he was suspended and that all references to the incident be removed from his personnel and working file.

Unknown Male: On what grounds?

Senuto: Ah, he says he questions various sections of Article 45 which deals with drug testing and suggests that proper procedures were not followed by the laboratory as well as the Medical Review Officer. Because of these discrepancies all references to the incident should be removed from his file and he should be paid for all lost wages. A question from the floor: Mr. Min?

Min: If he can't produce what medication or a copy of a prescription - If he can't get that from his doctor, then he's blowing smoke.

[Many Voices]

Senuto: One at a time, please.

Min: If he can't produce the prescription or get it from his doctor of what he was on at the time, then he's blowing smoke up everybody's butt and he just doesn't want to, you know, admit to what he's done, that's all.

Senuto: Mr. Carter.

Carter: Is this an arbitration case?

Senuto: Yes it is, Sir.

Carter: What did the Warden do?

Senuto: The Board, the grievance committee voted not

to go to arbitration. One more question, yes sir?

Unknown Male: If I'm understanding what you just read, he's not contesting the fact that he was positive for cocaine. He's contesting the chain of custody.

Senuto: He's contesting . . . he's contesting the chain of custody. He's contesting the proper procedures were not followed by the laboratory, as well as the Medical Review Officer. And because of these discrepancies, all reference to then above-mentioned should be removed from his file.

Unknown Male: I make a motion not to take it to arbitration.

Senuto: A motion's been made not to take it to arbitration. [Many Voices] Hang on, one at a time.

Do we have anymore discussion on this?

Unknown Voice: No.

Senuto: O.K. The motion was made and seconded by Theresa. All those in favor not to take it to arbitration. All those opposed. So be it.

Although DCOA grievance representative Glick was not present at the afternoon meeting, Union Vice President Senuto stated that Charging Party was contesting his positive drug test result. Although Vice President Senuto incorrectly stated that Charging Party was unable to produce the medications he was taking at the time of the drug test, his misstatement was not prejudicial to Charging Party's interest. As previously discussed, the list of the medications was faxed to the MRO and considered by him prior to his certifying the positive test result.

The chain of custody concern raised at the afternoon meeting was resolved to the Union's satisfaction in the Step Two grievance answer.

Based upon the presentation and discussion at the meeting there is no basis for concluding that the representatives of DCOA breached the duty of fair representation.

5. There was undue delay in notifying Charging Party by telephone rather than in person of the test results. In the absence of any evidence that DCOA was responsible for or participated in the notification process, the twenty-two (22) day period before he was informed of the positive test result and the communication by telephone rather than in person has no bearing upon the resolution of this matter.

6. DCOA's conduct constituted retaliation for activities of Charging Party 's activities while serving as a DCOA grievance representative. Having failed to establish improper conduct by DCOA officials this allegation has no bearing upon the resolution of this matter.

7. Charging Party was denied a transfer because DCOA improperly agreed with management that an employee's removal from the job following a positive drug test is the equivalent of a suspension which prohibits the employee's access to the bidding procedure for a two (2) year period.

On April 7, 1999, the Director of Human Resources and Development, issued the following memorandum to the Bureau Chiefs, Wardens and Section Administrators with DCOA Employees:

A question has arisen regarding bid rights of employees who test positive for tests.

Article 32.2 of the DCOA Contractual Agreement precludes employees with suspensions of greater than 4 days from bidding on transfers between institutions. Article 33.3 includes identical language precluding bidding on transfers between institutions. Article 45.20 requires that employees who refuse a drug test or test positive will be removed from the workplace without pay.

In spite of the fact that Article 45.20 uses the term "removed" rather than "suspended", it seems clear that employees who violate Article 45.20 should be precluded from bidding for the two years specified in Article 41.9. In most cases, the 45.20 violation is more serious than the typical five day suspension.

The DCOA Executive Board has informed me that they concur with this interpretation of the above articles. Therefore, if you receive a grievance from an affected employee relative to this issue, please forward the grievance

to me.

Regardless of whether or not the memorandum resulted from the grievant's situation is irrelevant. The agreement between DOC and DCOA memorialized in the memorandum applies not only to the grievant but also to all bargaining unit employees and represents a reasonable exercise of judgement by both management and DCOA representatives.

### **DECISION**

Consistent with the foregoing discussion, it is determined that:

1. By failing to process Charging Party's grievances to arbitration, DCOA did not engage in conduct in violation of 19 Del.C. Section 1307(b)(1), (2), (3) and (6), as alleged in the Complaint.
2. By agreeing that the removal from work following a positive drug test is to be treated the same as a suspension for bidding purposes DCOA did not engage in conduct in violation of 19 Del.C. Section 1307(b)(1), (2), (3) and (6), as alleged in the Complaint.

April 26,2001  
(Date)

/s/Charles D. Long  
Charles D. Long,  
Executive Director