I.R. NO. 89-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-89-321

FOP LODGE No. 12,

Charging Party.

SYNOPSIS

A Commission Designee temporarily restrains the City of Newark from unilaterally implementing a drug testing program among its police officers in an action brought by FOP Lodge No. 12. This action was taken after the contract between the parites had expired and while the parties were in interest arbitration for a new agreement. The FOP argued that the City had to negotiate procedures for the implementation of testing prior to implementation. The Commission Designee held the FOP had a substantial likelihood of success on this issue.

I.R. NO. 89-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-89-321

FOP LODGE No. 12,

Charging Party.

Appearances:

For the Respondent
Oliver W. Cato, Assistant Corporation Counsel

For the Charging Party
Markowitz & Richman, Esqs.
(Joel G. Scharff, of counsel)

INTERLOCUTORY DECISION

On April 26, 1989, FOP Lodge #12 ("Charging Party" or "FOP") filed an unfair practice charge alleging that on April 13, 1989, the City of Newark ("City"), by its Police Director Claude Coleman, disseminated a memorandum retroactively adopting a drug screening procedure without prior negotiations with the FOP, the exclusive representative of the police officers of the City.

The FOP alleges that the City's conduct constitutes a unilateral alteration in terms and conditions of employment and violates subsections 5.4(a) (1) and (5) of the New Jersey Employer-Employee Relations Act N.J.S.A., 34:13A-5.3 et seq.

("Act").[1/] The unfair practice charge was accompanied by a request for interim relief. An Order to Show Cause was executed and made returnable for May 8, 1989.

A hearing was held on May 18, 1989,[2/] at which time both parties had an opportunity to argue orally, present evidence and submit briefs.[3/]

The facts in this matter are not in dispute. The FOP and City are engaged in compulsory interest arbitration. The most recent contract between the parties expired on December 31, 1988.

On April 13, 1989, the City Police Department adopted a drug screening policy known as General Order No. 89-2 which is based upon the Attorney General's Law Enforcement Drug Screening Guidelines promulgated October 22, 1986. The policy applies to all uniformed and non-uniformed employees.[4/]

---

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ After an adjournment requested by the FOP.

3/ The City submitted a brief on May 24, 1989.

4/ Due to an outstanding restraint against the City arising out of other litigation, the City is not conducting drug screening among recruits.

The City notified the FOP of its intention to implement the policy in mid-March. It took the position however that it had no obligation to negotiate the rule implementation. It was only prepared to discuss it.

The City's objectives are the detection and arrest of law-breakers. It argues that the Police Department must prevent drug abusers from carrying guns, because "such employee who uses deadly force plainly discharges duties fraught with such risks of injury to others, that even a momentary lapse of attention can have disastrous consequences." The City further argues that the general order in question "serves compelling governmental interest by providing for the identification of law breakers among those entrusted to enforce those same laws".

For the purpose of this proceeding, the FOP does not challenge the City's right to implement a drug screening program as a method to verify a reasonable suspicion of drug abuse.

The FOP argues, however, that procedural aspects of the testing programs are mandatorily negotiable. The FOP asserts that the negotiation of procedures would not impinge upon the City's prerogative to use drug testing to investigate a reasonable suspicion of drug abuse. The FOP seeks negotiations for the purpose of protecting individual police officers who might be targeted for physical extraction. Such procedural safeguards include: confidentiality, verification of results through independent laboratories, use of a confirmatory test in the event of a positive initial result, safeguards in the chain of evidence, etc.

The FOP cites Memorandum 87-5 issued by the Office of the General Counsel of the National Labor Relations Board which states "test procedures [for drug screening], including the methods for assuming the security of the test sample and the accuracy of the test, are matter of vital concern to employees and their representatives" pg 2. Further, "in our view, any such obligatory tests which may reasonable lead to discipline, including discharge are plainly germaine to the employees working condition and therefore, are presumptively mandatory subjects of bargaining within the meaning of [the National Labor Relations Act]."5/

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for

---

5/ For a discussion of Drug Testing as a term and condition of employment where there is an issue of public safety, See International Brotherhood of Teamsters v. Southwest Airline, 842 F2d, 794 (5th Cir. 1988). Brotherhood of Locomotive Engineers v. Burlington R.R., 838 F2d 1102 (9th Cir. 1988); Brotherhood of Locomotive Engineers v. Burlington N.R.R., 838 F2d 1087 (9th Cir. 1988).

relief, the relative hardship to the parties in granting or denying the relief must be considered.6/

The question of whether drug testing is a term and condition of employment is not before me. The issue here is simply whether procedural safeguards, such as methods to insure the accuracy and confidentiality of drug testing, are negotiable.

The Commission and the Courts have consistently recognized procedures for the implementation of managerial prerogatives are negotiable. Cases which have distinguished between non-negotiable criteria and negotiable procedures attendant to personnel actions include: Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed, 91 N.J. 18 (1982); Local 195, IFPTE v. State, 88 N.J. 393 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981); Bd. of Ed. of the Borough of Fair Lawn v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554 (App. Div. 1980); Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 161 N.J.

---

6/ Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

Super. 75 (App. Div. 1978); In re Byram Twp. Bd. of Ed. and Byram Twp. Ed. Ass'n, 152 N.J. Super. 12 (App. Div. 1977); and Bd. of Ed. Tp. of N. Bergen v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976).

See also Elizabeth and Elizabeth Fire Officers, Local 2040 IAFF, 198 N.J. Super 382 (App. Div. 1985), where the right to require doctor's visits for sick leave verification did not bar negotiations over the cost of these visits and Montville Tp. Bd. of Ed., P.E.R.C. No. 86-118, 12 NJPER 372 (¶17143 1986) aff'd Dkt. No. A-4545-85T7 (3/23/87), cert den. 108 N.J. 208 (1987)

Here, negotiated procedures will not significantly interfere with the City's ability to test for drugs where a reasonable suspicion of drug abuse exists.

Moreover, the City's unilateral alteration of terms and conditions of employment occurred after the parties' collective negotiations agreement expired and during interest arbitration proceedings. This alteration therefore creates an impermissible chilling effect on the interest arbitration process, which can be remedied only through the granting of an interim restraint. Vineland PBA 266 and City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1980) enf. granted 7/15/81, Mot. No. M-3982-80, leave to app. den. 7/15/81, App. Div. Dkt. No. AM 1037-80T3. See Galloway Tp. Bd. of Ed. v. Galloway Ed. Assn., 78 N.J. 25 (1978). City of Newark and Newark PBA No. 3 et al., I.R. No. 89-10, 15 NJPER 81 (¶20033 1988), lv. to app. and stay den. AM-677-88T1F (12/29/88).

Accordingly, the City of Newark is hereby restrained from the implementation of General Order 89-2 or its drug screening policy until it negotiates in good faith with FOP Lodge No. 12 concerning procedures for the implementation of drug screening.

Edmund G. Gerber
Commission Designee

Dated: June 9, 1989
Trenton, New Jersey