

H.E. NO. 2001-18

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-H-98-106

FOP, NEWARK LODGE NO. 12,

Charging Party.

Appearances:

For the Respondent
JoAnne Watson, Corporation Counsel
(Ephraim T. Jerchow, Asst. Corp. Counsel)

For the Charging Party
Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 22, 1997 and October 12, 1999, Fraternal Order of Police, Newark Lodge No. 12, filed an unfair practice charge and amended charge against the City of Newark. The charge alleges that on or about August 29, 1997, the City unilaterally implemented a change in the drug-screening policy without first negotiating procedural aspects of that policy. It also alleges that the City advised the FOP that it is preparing a "complete revision" of the policy but has not negotiated "procedural aspects." The amended charge alleges that the City unilaterally implemented drug-testing for "legal, over-the-counter substances such as certain steroids." The City's actions allegedly violate

5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On June 30, 2000, a Complaint and Notice of Hearing issued.

On September 19, 2000, I conducted a hearing. The FOP moved to have the allegations in the Complaint admitted as true, pursuant to N.J.A.C. 19:14-3.1.2/ I granted the motion; all facts set forth in the Complaint were deemed true.^{3/}

The FOP called its president and an expert witness to testify in order to supplement the record. Post-hearing briefs were due by November 30, 2000. None were filed.

Based on the entire record, I make the following:

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- 1/ These provisions 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/ This code provision states: "...All allegations in the complaint, if no answer is filed, or any allegation not specifically denied or explained shall be deemed to be admitted to be true and shall be so found by the hearing examiner and the Commission, unless good cause to the contrary is shown....."
- 3/ Respondent attorney Mr. Jerchower formally requested an adjournment, explaining that he had not been assigned to represent the City in this matter; he had no familiarity with the facts, and was entering an appearance as a formality. The FOP opposed an adjournment. I denied the request. Mr. Jerchower left the proceeding.

FINDINGS OF FACT

1. Jack McEntee is a City of Newark police detective and has been FOP president since November 1992. He negotiates collective agreements, processes grievances and files unfair practice charges on behalf of "all police officers of the Newark Police Department", excluding superior officers, managerial executives and others (T23; CP-1).^{4/} The current collective agreement was signed on January 3, 2000, and extends from January 1, 1998 through December 31, 2002 (CP-1).

2. The FOP and the City negotiated a "drug testing policy", culminating in a Newark Police Director's memorandum, issued December 31, 1999 (T28-T29; CP-2). The purpose of the policy set forth in its "introduction", is

...to maintain a safe work environment for its employees, and a paramount duty to protect the public. The professional responsibilities and integrity of any law enforcement agency demand that its sworn employees refrain from the unlawful use, manufacture, possession, and distribution of controlled dangerous substances. The possession of unlawful drugs is a criminal offense subject to the punishment through State statute, but is a separate and far more dangerous wrong to perform safety-sensitive functions while under the influence of those substances.

....

The mission and characteristics of policing are unique and require extraordinary assurances of trustworthiness and integrity. Employees reasonably should expect effective inquiry into

^{4/} "T" refers to the transcript from the September 19 hearing; "CP" refers to Charging Party exhibits.

their physical fitness for such positions and cannot expect to keep from the Department personal information that bears directly on their fitness. Policing is a profession that is regulated pervasively to ensure safety, a goal dependant, in substantial part, on the health and fitness of its employees. Of particular importance here is that officers perform their assigned duties independently and are not subject to the kind of day-to-day scrutiny that is the norm in more traditional office environments, thereby making drug detection based on observation difficult, if not impossible. Indeed, employees subject to random urinalysis discharge duties fraught with such risks of injury to others that even a momentary lapse of attention could have disastrous consequences. Officers who are drug impaired could cause great human loss before any signs of impairment become noticeable to supervisors or others. Quite appropriately, the public should not have to bear the risk that those with impaired perception and judgment will remain in positions where they may need to employ deadly force. [CP-2]

Under the policy, sworn employees are subject:

...as a condition of continued employment, to random unannounced urinalysis,...and to urinalysis where reasonable articulable suspicion exists pursuant to General Order 89-2 and to provide for the prompt dismissal of any employee for whom illegal drug use has been confirmed.
[CP-2]

In particular, the memorandum defines a "controlled dangerous substance":

...[A]ll substances listed on Schedules I through V as they may be revised periodically (2/CFR 1301-1316), illicit drugs, drugs that are required to be distributed only by a medical practitioner's prescription or other authorization, and certain preparations for which distribution is documented through over-the-counter sales.
[CP-2]

"Drugs" is defined as:

[A]ny substance (other than alcohol) that is capable of modifying or altering mental, physical or emotional behavioral functioning in humans, specifically including any psychoactive substances and including, but not limited to, controlled dangerous substances and their metabolites such as amphetamines, methamphetamine barbiturates, benzodiazepines, cocaine, hallucinogens, methadone, narcotics, opiates, propoxyphene, cannabinoids, methaqualone, phencyclidine, sedatives, and stimulants.
[CP-2]

The policy includes detailed and step-by-step descriptions of the "random testing process", the "notification process", "the specimen acquisition and monitoring process", including "specimen collection procedures", "submission and analysis of urine specimens", "drug test results" and "internal affairs responsibilities." Under the policy, the "fluorescence polarization immunoassay-therapeutic drugs test and thin layer chromatography" are "initial drug screening procedures." Confirmation is by "gas chromatography/mass spectrometry." Specimens are analyzed to detect "controlled dangerous substances" identified as amphetamines/methamphetamines, barbiturates, benzodiazepines, cocaine, cannabinoids, methadone, phencyclidine and opiates (CP-2).

3. On August 29, 1997, Police Director Joseph Santiago issued an "addendum to General Order 89-2, drug screening policy" ("reasonable suspicion" policy). The memorandum states that "effective September 1, 1997":

Whenever the words 'illegal drugs' or the phrase 'controlled dangerous substance' is used it shall now include non-prescription steroids.
[CP-4]

Added to the list of five enumerated "objective facts" and "rational inferences" upon which a "reasonable individualized suspicion" is based, were:

6. exhibits severe mood swings; and/or
7. exhibits rapid increase of muscle mass; and/or
8. develops premature balding in conjunction with #6 and 7; and/or
9. development of severe acne in conjunction with #6 and 7.

[CP-4]

In the "General Rules" section, this directive appears:

Any employee who is prescribed medication, including any type of steroid, or ingesting over the counter drugs, which impairs their ability to function effectively, shall inform their immediate supervisor of the nature of the illness or injury, along with the name and type of medication being taken and the physician prescribing the same.

[CP-4]

Added to "processing of urine specimen" (E.IXI.a.) section is this addendum:

When a steroid test is requested the samples will be sent by the State Medical Examiner's Toxicology Lab to an approved lab which conducts steroid testing and the results will be forwarded back to the State Lab to maintain the chain of custody.

[CP-4]

4. The FOP received the Police Director's addendum by interdepartmental mail and had neither notice of the changes to the drug policy nor the opportunity to negotiate over the "impact" of those changes (T31-T33).

5. On November 18, 1997, Santiago issued a Director's memorandum, slightly modifying his August 29 memorandum (CP-5).

6. Richard J. Flynn has been associate professor of Pharmacology and Physiology at New Jersey Medical School of the University of Medicine and Dentistry of New Jersey since 1977. In 1971, he received a doctoral degree in Pharmacology from New York University. He was a post-doctoral fellow in the department of Physiological Chemistry at the Roche Institute of Molecular Biology in Nutley, New Jersey. He has lectured extensively and co-authored numerous articles in established research science journals (T38-T39). Fact numbers 7-10 are drawn from Dr. Flynn's testimony.

7. Steroids are chemical structures, some of which are "natural constituents" of our bodies. For example, humans produce cortisol, which resists inflammations, and produce another steroid, which maintains homeostasis (T41). Females produce estrogen and males produce testosterone, two other steroidal compounds (T41). Drug companies produce them chemically because "they're useful, medicinally." There are hundreds of steroids and steroidal derivatives, some manufactured legally and others, illegally (T41-T42). Steroids may be prescribed and others may be purchased without a prescription. They may be ingested orally or injected, the latter lingering in the body for extended periods (T42).

Other steroids are incorporated in "organic medicines" and sold in health food stores. Some steroidal compounds are included in "nutrition products" and "dietary supplements" sold in supermarkets (T43-T45). Birth control pills and other oral contraceptives contain steroids (T47). Other steroids appear in creams, such as cortisones and psoriasis treatments (T60).

8. Anabolic steroids are derived from "androgens" or testosterone and ingesting them affect men differently than women (T48). Such steroids also effect asian males differently than caucasian males (T50). One of the anabolic steroids is "androsteindione", marketed over-the-counter, the purpose of which is to increase muscle mass of people in weight training; the body converts this steroid to testosterone (T46).

9. No single test discloses a surfeit of steroids in the body; initial screening tests are neither sensitive nor specific (T50). The testing procedures set forth in the City's policy are appropriate for screening illegal drugs; e.g., cocaine metabolites should not be present in urinalysis. The problem with using this test for steroids is that a "positive" reading for testosterone - for which this test is capable of detecting - "doesn't tell you a lot because all males have testosterone" (T51-T52). Confirmation by gas chromatography/mass spectrometry does not distinguish a normal variation in the amount of testosterone from an ingested steroid (T52). Androsteindione would not be detected by urinalysis because it is converted to testosterone when ingested. Detecting this anabolic steroid requires "extremely sophisticated" testing (T57).

10. Dosage is the largest variable in assessing whether a non-prescription steroid effects one's job-related performance (T59). There is general scientific consensus that very high dosages of androgens over long periods of time have both physical and psychological effects. Physical effects include liver cancer and

immune suppression and psychological effects include increased aggression or rage (T66).

ANALYSIS

The FOP argued in opening remarks at the hearing that testing for "legal substances" was mandatorily negotiable and that even if it was determined to be a non-negotiable prerogative, the City failed to negotiate procedures for non-prescription steroid testing, thereby violating the Act. The FOP's amended charge specifies the type of substances ("legal, over-the-counter, such as steroids") which was alleged to have been the general unilateral "change in drug-screening policy" set forth in its initial filing.

Our Supreme Court has unanimously affirmed random testing of police officers for illegal drugs under Article 1, Paragraph 7 of the New Jersey Constitution.^{5/} N.J. Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531 (1997). Drug testing procedures addressing notification, chain of custody, confidentiality and accuracy are mandatorily negotiable. City of Newark and Fraternal Order of Police, Lodge No. 12, P.E.R.C. No. 91-5, 16 NJPER 435 (¶21186 1990), aff'd NJPER Supp.2d 257 (¶212 App. Div. 1991).

5/ This Paragraph states:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

Approvingly citing federal sector precedent, the Court found that the "special needs test" was an appropriate analytical tool for evaluating drug testing programs under our Constitution. N.J. Transit PBA Local 304 at 151 N.J. 556; Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). Suspicionless testing may be sustained after finding a special governmental need that would be jeopardized by adherence to the individualized reasonable suspicion standard. In Skinner, for example, random testing was adopted in response to evidence showing that on-the-job intoxication was a significant problem in the railroad industry. Random testing was permissible because the employees covered by the policy were "engaged in safety-sensitive tasks" and the purpose of the testing was to promote railway safety and not to prosecute employees for illegal drug use. If the employer shows its "special need", courts next "undertake a context-specific inquiry, examining closely the competing private and public interests...." N.J. Transit PBA Local 304 at 151 N.J. 548.

This case is before me as an unfair practice complaint, but part of its resolution turns on whether mandatory disclosure of "legal substances" and testing for non-prescription steroids are within the scope of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of

negotiations analysis for police officers and firefighters.^{6/} The Court wrote:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policy-making powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

No statute or regulation requires the City to demand that police officers disclose their prescription or over-the-counter medication. N.J. Transit PBA Local 304 recognized that a public employer has an interest in assuring that its police officers are not "drug impaired", which could cause "great human loss before any signs of impairment become noticeable to supervisors or others."

^{6/} The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category for negotiations.

Id. at 151 N.J. 559. The Court also wrote that urine collection intrudes on an employee's privacy and that "the subsequent chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests." Id. at 560. NJT's policy was found to protect employee privacy interests in part by,

...specifically listing the substances for which samples will be tested and by requiring FTA approval for additional testing (citation omitted). Any other analysis of urine specimens is expressly prohibited by federal regulation. Pursuant to federal mandate, New Jersey Transit cannot compel the employee to provide information about prescription medication or other medical conditions.
[151 N.J. 660]

The Court weighed the public need against the private intrusion and found that NJT's random testing of police officers for illegal drugs, including its methodology and limited application, accommodated the legitimate interest in employee privacy without unduly restricting the employer's opportunity to monitor and control drug use by its employees. This constitutional balancing test closely parallels the negotiability balancing test the Commission applies. See Borough of Hopatcong, P.E.R.C. No. 91-60, 17 NJPER 62, 63 (¶22028 1990).

Unlike the policy approved in N.J. Transit PBA Local 304, the City compels its police officers to disclose both prescription and non-prescription medications and any type of steroid which "impairs their ability to function effectively." Officers are compelled to disclose all their medications, at the risk of

incurring discipline for non-disclosure, even if they are unaware of any impairment or have been advised that the risk of impairment is small. The record demonstrates that except for high dosages of anabolic steroids, typical steroidal compounds are innocuous. The policy nevertheless compels disclosure or at least places the burden of non-disclosure on the officers. I find that the City's policy impermissibly intrudes upon officers' (even) reduced expectations of privacy and autonomy. Accordingly, I recommend that this portion of the "General Rules" section of the policy is mandatorily negotiable and that its unilateral inclusion in the drug screening policy violated the Act (see finding #3).

A governmental interest in health and safety is not speculative when a public employer is presented "objective facts" forming a reasonable suspicion that a police officer may be ingesting very high dosages of anabolic steroids or androgens over long periods of time. Such consumption may effect an officer's "fitness and probity." Consequently, I recommend that the City has a managerial prerogative to test officers for high dosages of anabolic steroids only when it has a reasonable suspicion of such ingestion. This provision of the drug screening policy does not violate the Act.

The FOP did not rebut the City's enumerated criteria for finding reasonable suspicion (see finding no. 3). Although no facts show that the selected criteria demonstrate a reasonable suspicion of anabolic steroid ingestion in fact, I find that the listed criteria is a reasonable exercise of that managerial prerogative.

The facts do not suggest that the City includes non-prescription steroids in mandatory random testing for illegal drugs. If the City does so test, I find that that testing is mandatorily negotiable. The City did not participate in this case at any juncture and no evidence suggests that a unilateral decision to randomly test officers for non-prescription steroids was adduced from even one fact. The only fact on this record weighing in favor of a speculative or hypothetical governmental interest is that "very high dosages" of androgens "over long periods of time" have deleterious physical and psychological effects. Similar effects are probably traceable to very high dosages of other non-prescription drugs taken over long periods of time. The evidence on this record indicates that steroid ingestion from vitamins, supplements, and creams pose no danger. I cannot conclude that the City's attenuated interest in innocuous steroid ingestion prevails over the City officers' (reduced) expectation of privacy in their surrendered urine samples. Any subsequent chemical analyses of the samples to obtain data on non-prescription steroids would be a "further invasion" of the officers' privacy interests, which cannot be justified on this record.

Finally, the record shows that the City unlawfully refused to negotiate over non-prescription steroid testing procedures, including methodology, laboratories, collection procedures and even consequences to employees. City of Newark and Fraternal Order of Police, Lodge No. 12. Professor Flynn's testimony demonstrates that

non-prescription steroids should not be a mere "add on" to the list of illegal drugs. The testing procedures collectively negotiated before the City's unilateral action cannot detect this "natural constituent" of our bodies; nor can it measure normal variations among tested individuals or delineate innocuous steroid ingestion.

RECOMMENDATION

I recommend that the City of Newark violated 5.4a(5) and derivatively a(1) of the Act by failing to negotiate a provision of the drug screening policy requiring officers to disclose prescription and non-prescription medications and any type of steroids which "impairs their ability to function effectively."

I also recommend that the City violated 5.4a(5) and derivatively a(1) of the Act by failing to negotiate drug screening procedures for detecting anabolic steroid ingestion. The procedures include notification, chain of custody, confidentiality, methodology and accuracy.

Finally, I recommend that the City did not violate the Act by unilaterally implementing reasonable suspicion testing of officers for anabolic steroid ingestion.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the City of Newark cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with FOP, Newark

Lodge No. 12, concerning a provision of the drug screening policy requiring officers to disclose prescription and non-prescription medications and any type of steroid which "impairs their ability to function effectively"; and by refusing to negotiate drug testing procedures, pursuant to reasonable suspicion testing for anabolic steroids.

2. Refusing to negotiate in good faith with FOP, Newark Lodge No. 12, concerning terms and conditions of employment, including a provision of the drug screening policy for detecting anabolic steroid ingestion. The procedures include notification, chain of custody, confidentiality, methodology and accuracy.

B. That the City take the following affirmative action:

1. Rescind the provision of the drug screening policy requiring officers to disclose prescription and non-prescription medications and any type of steroid.

2. Negotiate in good faith over the substantive decision to require officers to disclose prescription and non-prescription medications and any type of steroid which "impairs their ability to function effectively."

3. Negotiate in good faith over procedures for testing non-prescription steroids, pursuant to the City's policy to test officers for steroid ingestion upon reasonable suspicion.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the

Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

Jonathon Roth
Hearing Examiner

DATED: April 4, 2001
Trenton, New Jersey

!!@GH0!!!@BT0!!!/120!!!@LN20!

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with FOP, Newark Lodge No. 12, concerning a provision of the drug screening policy requiring officers to disclose prescription and non-prescription medications and any type of steroid which "impairs their ability to function effectively"; and by refusing to negotiate drug testing procedures, pursuant to reasonable suspicion testing for anabolic steroids.

WE WILL NOT refuse to negotiate in good faith with FOP, Newark Lodge No. 12, concerning terms and conditions of employment, particularly regarding the drug screening policy procedures for detecting anabolic steroid ingestion. The procedures include notification, chain of custody, confidentiality, methodology and accuracy.

WE WILL rescind the provision of the drug screening policy requiring officers to disclose prescription and non-prescription medications and any type of steroid.

WE WILL negotiate in good faith over the substantive decision to require officers to disclose prescription and non-prescription medications and any type of steroid which "impairs their ability to function effectively."

WE WILL negotiate in good faith over procedures for testing non-prescription steroids, pursuant to the City's policy to test officers for steroid ingestion upon reasonable suspicion.